AGENCY DRAW: HOW SERIOUS QUESTIONS IN MERGER REVIEW COULD LEAD TO ENHANCED MERGER ENFORCEMENT

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INTRODUCTION

Suppose for a moment that two major players in the beer industry propose to merge. Also suppose two similarly situated firms in the liquor industry agree to merge on substantially similar terms. The mergers have the same impact on their respective industries and on consumers. Due to the somewhat opaque division of industry between the merger's reviewing agencies, the Federal Trade Commission ("FTC") reviews the liquor merger, while the Antitrust Division of the Department of Justice ("DOJ") reviews the beer merger. While the FTC succeeds in blocking the liquor merger, the DOJ fails in its efforts to block the beer merger.

As odd as that outcome may seem, the recent decisions in *FTC v. Whole Foods Market, Inc.*[1] and *FTC v. CCC Holdings Inc.*[2] establish a real possibility that "agency draw," as described in the example, may be a reality in antitrust merger review. *Whole Foods* and *CCC Holdings* establish a new preliminary injunction test for the FTC—and only for the FTC.[3] This new "serious questions" test is more deferential to the FTC than the DOJ's traditional preliminary injunction test is to the DOJ. However, the courts cannot apply the same deferential test to the DOJ for procedural reasons.

The obvious question is whether this divergence should be rectified, and where. The majority of discourse has assumed the divergence in tests and has advocated that the FTC use the same test the DOJ currently uses. This Comment seeks to define how the serious questions test is different from the historical test for preliminary injunctions and to defend the test as an opportunity to improve merger review by increasing enforcement.

Part I explores key legislation affecting mergers, how the agencies operate in challenging mergers, and the preliminary injunction test prior to *Whole Foods*. Part II explores *Whole Foods* and *CCC Holdings*, including

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[1] 548 F.3d 1028 (D.C. Cir. 2008).

[2] 605 F. Supp. 2d 26 (D.D.C. 2009).

[3] More accurately stated, these two cases reestablish an old test in a new way. *See infra* Part II.C.

how these cases depart from the traditional application of the serious questions test for the FTC and how the standards for the DOJ and the FTC may differ in operation. Part III looks at the costs and problems with divergent models and asks whether it is beneficial to converge at a single standard. Assuming that convergence is beneficial, Part IV questions whether the agencies currently underenforce mergers based on structural arguments and empirical evidence. Part V combines these three premises to suggest that, if the standards are to converge, it is beneficial for consumers to choose the standard under which the marginal merger is more likely to be challenged. This Comment suggests that the superior standard for increased merger enforcement is the serious questions standard and that this standard should be adopted by both agencies. If both agencies cannot move to this standard, however, then agency draw is preferable to a world where both agencies return to the traditional likelihood of success standard in preliminary injunctions.

I. BACKGROUND

The U.S. antitrust system has been described as a "historical accident" because of how it evolved from a common law system to a dual-agency system.[4] Only from this "accident" could a system develop in which two agencies with overlapping jurisdiction in one area of law apply two different substantive laws. Many commentators have argued that if the U.S. antitrust system was going to be redesigned, the new structure would look nothing like the current system.[5] Yet, because the two-agency system is not likely to change, a brief understanding of how the major antitrust laws developed on top of previous law is useful in understanding the agency draw issue that this Comment confronts.[6]

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[4] Agencies review mergers based on expertise developed over time in an industry. There does not appear to be a specific pattern of how the agencies divided industries, especially when similar industries, such as liquor and beer, are reviewed by different agencies. Largely, it results from a "historical accident" stemming from Congress creating the FTC. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Rewriting History: Antitrust Not As We Know It . . . Yet, Remarks Before the ABA Antitrust Section 2010 Spring Meeting 2 (Apr. 23, 2010), *available at* http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf.

[5] *Id.* at 1-2; *see also, e.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 129 (2007) [hereinafter AMC REPORT] (stating that "a single agency generally would be a superior institutional structure"), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1075 (2010).

[6] AMC REPORT, *supra* note 5, at 129-30 ("Although concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits. Furthermore, there is no consensus as to which agency would preferably retain antitrust enforcement authority." (footnotes omitted)).

A. *A History of Key Antitrust Legislation*

Both the DOJ and the FTC are authorized to review mergers and halt anticompetitive mergers with preliminary and permanent injunctions. The laws guiding antitrust enforcement, however, were piled onto the previous antitrust laws and the common law, creating differences in how the two agencies litigate injunctions.

The roots of antitrust prosecution lie in English common law actions, which displayed a strong preference for competition in markets and refused to acknowledge parliamentary supported monopolies.[7] The United States inherited England's antitrust tradition, and private parties prosecuted early antitrust violations.[8] A series of private, high-profile litigation losses in the post-Reconstruction era, however, soon prompted Congress to adopt a more formal set of rules to guide antitrust enforcement.[9]

The Sherman Act codified the common law on antitrust and anticompetitive practices and vested the DOJ with the power to enforce civil and criminal violations of the Sherman Act.[10] Judge Robert Bork explained that the Sherman Act's primary motivation was to promote consumer welfare.[11] His use of "consumer welfare," however, was intended to apply not only to consumer considerations, but also to overall economic efficiency.[12] Judge Bork argued that preserving economic efficiency would lead to greater benefits for consumers via pass-through efficiencies and lower prices.[13] In contrast, other scholars have found evidence in the Congressional Record for different goals, such as the protection of small businesses or the promotion of competition.[14] While scholars attribute significant weight to a multitude of goals underlying the American antitrust system, the judicial system has focused on protecting Judge Bork's view of consumer welfare.[15]

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7 ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 12-13 (5th ed. 2004).

8 *Id.* at 13.

9 *Id.* at 18-22.

10 21 CONG. REC. 2456 (1889) ("[The Sherman Act] does not announce a new principle of law, but applies old and well recognized principles of common law . . . ."). For a more complete history of American antitrust law, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 15-50 (Free Press 1993) (1978), or RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 59-62 (Oxford Univ. Press rev. ed. 1996).

11 BORK, *supra* note 10, at 51.

12 Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox* 17-18 (Ariz. Legal Studies Discussion Paper No. 10-07, 2010) (quoting BORK, *supra* note 10, at x) (internal quotation marks omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226.

13 BORK, *supra* note 10, at 51.

14 GELLHORN ET AL., *supra* note 7, at 24.

15 *See id. See generally* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (adopting explicitly that the primary goal of antitrust law, in the eyes of the judiciary, is Bork's view of consumer welfare).

Section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony."[16] Section 2 focuses on unilateral conduct, such as the monopoly power of a firm to price discriminate.[17] By specifically addressing attempts to monopolize, this language allows the DOJ to prosecute mergers.[18]

The Sherman Act laid the groundwork for federal antitrust enforcement by codifying the common law and empowering the DOJ to prosecute violations. Yet numerous holes remained in antitrust enforcement, and Congress found the Sherman Act insufficient.[19]

In 1914, Congress decided that the most appropriate way to strengthen the Sherman Act was to create a new law with clearer descriptions of what constitutes antitrust violations.[20] In enacting the Clayton Act, Congress provided the first of its two solutions.[21] The Clayton Act provided more specific definitions of antitrust violations than the Sherman Act. Section 7 of the Clayton Act illegalized corporate mergers among competing companies (horizontal mergers) when those mergers substantially lessened competition.[22]

After the Clayton Act was passed, Congress enacted the Federal Trade Commission Act ("FTC Act") in 1914 to create a consumer protection agency.[23] Congress had two main goals in creating the FTC Act.[24] The first goal was to ensure greater fidelity to the congressional competition policy preferences in antitrust enforcement.[25] In creating the FTC, Congress formed a stand-alone agency that would not have to rely on either the Judicial or Executive branches for support.[26] Indeed, Judge Posner went so far as to find that:

> [O]ne of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the

16 15 U.S.C. § 2 (2006).
17 GELLHORN ET AL., *supra* note 7, at 26.
18 *Id.*
19 *Id.* at 27.
20 *Id.* at 34-36.
21 *Id.* at 35.
22 *See* 15 U.S.C. § 18 (2006).
23 GELLHORN ET AL., *supra* note 7, at 35-36 (internal quotation marks omitted).
24 *Id.* at 37.
25 *Id.*
26 *Id.*

> leading role in enforcing the Clayton Act, which passed at the same time as the statute creating the Commission.[27]

The second—and arguably the more important—long-term goal of the FTC Act was to improve the development and implementation of antitrust policy and practices.[28] Congress chose to accomplish this by creating concurrent jurisdiction between the FTC and the DOJ in enforcing the Clayton Act and giving exclusive jurisdiction to the FTC to enforce the anticompetitive practices outlined in the FTC Act.[29] Congress granted the FTC the ability to adjudicate certain matters using internal administrative courts.[30] Known as "Part III" proceedings, these trials are conducted in front of administrative law judges ("ALJs"), but in a manner similar to a district court proceeding, and are appealable to federal courts.[31]

Originally, the FTC Act did not authorize the FTC to seek a preliminary injunction prior to starting an administrative trial.[32] As a result, parties finalized mergers before Part III proceedings were completed.[33] By consummating the merger, parties limited the FTC's ability to achieve adequate relief.[34] In 1973, Congress sought to rectify the problem through Section 408(f) of the Trans-Alaska Pipeline Authorization Act.[35] Section 408(f) amended Section 13(b) of the FTC Act, allowing the FTC to seek preliminary injunctions in federal district court, while maintaining actions for permanent injunction in Part III proceedings.[36]

B. *Agency Procedures for Challenging Mergers*

In creating the body of modern antitrust law, Congress piled statute on top of statute.[37] With the creation of the FTC, Congress divided civil anti-

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27 William Blumenthal, Gen. Counsel, Fed. Trade Comm'n, Observations on Federal Antitrust Enforcement Institutions, Comments to the Antitrust Modernization Commission 8 (Nov. 3, 2005) (quoting Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)) (internal quotation marks omitted), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Blumenthal_Statement.pdf.

28 GELLHORN ET AL., *supra* note 7, at 37.

29 *Id.* at 37-38.

30 15 U.S.C. § 45(b)–(c) (1914).

31 *See* AMC REPORT, *supra* note 5, at 129.

32 *See* GELLHORN ET AL., *supra* note 7, at 38.

33 *See* AMC REPORT, *supra* note 5, at 155.

34 *See id.* at 47.

35 Kyle Andeer, *Another Look at Process: Is There Really a Difference Between Merger Litigation at the Agencies?*, GLOBAL COMPETITION POL'Y, Apr. 2009, at 3, *available at* https://www.competitionpolicyinternational.com/another-look-at-processis-there-really-a-difference-between-merger-litigation-at-the-agencies (subscription required).

36 15 U.S.C. § 53(b) (2006).

37 *See* Rosch, *supra* note 4, at 2-3.

trust jurisdiction between the FTC and the DOJ. As a result, the agencies enforce merger law through slightly different procedures. The following subsections detail the differences in DOJ and FTC merger challenges.

1. DOJ Enforcement Actions

The DOJ contests a merger through Section 7 of the Clayton Act by first bringing a motion for a preliminary injunction.[38] In order to receive a preliminary injunction, the DOJ must satisfy a "fundamental four-part preliminary injunction standard," consisting of (1) the likelihood of ultimate success, (2) irreparable injury caused by the merger, (3) harm to the merging companies if a preliminary injunction is issued, and (4) the public interest.[39] Courts generally look first to the likelihood of success of obtaining a permanent injunction as a threshold issue, and then attempt to balance the equities.[40]

If the DOJ obtains a preliminary injunction, it then pursues a permanent injunction in the district court.[41] At trial, the DOJ attempts to show, upon a preponderance of evidence, that the merger is substantially likely to cause anticompetitive harm in the market and thus violate the Clayton Act.[42] But Rule 65 of the Federal Rules of Civil Procedure complicates the DOJ injunctive action process. Rule 65(a)(2) allows courts to "advance the trial on the merits and consolidate it with the [preliminary] hearing."[43] Because of the pressure in favor of a full trial on the merits, the DOJ generally acquiesces to combining the motion for preliminary relief with a full trial.[44] In so doing, the DOJ negotiates with the merging parties for a more permissive timeline than that normally afforded for a preliminary injunction, but for a timeline that is still expedited relative to a full trial schedule.[45] The

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38 *See* United States v. Gillette Co., 828 F. Supp 78, 78, 81 (D.D.C. 1993).

39 *Id.* at 80; *see also* 15 U.S.C. § 26 ("[Courts shall grant a preliminary injunction] when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .").

40 United States v. UPM-Kymmene Oyj, No. 03 C 2528, 2003 WL 21781902, at *12 (N.D. Ill. Jul. 25, 2003) ("[The DOJ must] meet the threshold burden of establishing (1) some likelihood of prevailing on the merits; and (2) that in the absence of the injunction, [it] will suffer irreparable harm for which there is no adequate remedy at law. If these requirements are met, [the Court] must apply a sliding scale analysis by balancing the harms to the parties and the public interest. . . . In balancing the harms, [the court] must also take into account the Government's likelihood of success." (second alteration in original) (quoting AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999)) (internal quotation marks omitted)).

41 *See Gillette*, 828 F. Supp at 81.

42 *Id.*

43 FED. R. CIV. P. 65(a)(2).

44 AMC REPORT, *supra* note 5, at 130. *See generally* United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C. 2001).

45 *See* Andeer, *supra* note 35, at 6-7.

DOJ then engages in a single trial, deciding both the preliminary and permanent injunction.[46]

2. FTC Enforcement Actions

In writing the FTC Act, Congress provided the FTC with a different route to enjoin a merger, hoping this new route would advance antitrust laws through experimenting with different theories and litigation approaches than the DOJ.[47]

a. *Preliminary Injunctions*

When the FTC challenges a merger, it generally does so under Section 13(b) of the FTC Act.[48] The Commission first seeks a preliminary injunction in district court.[49] Under Section 13(b) of the FTC Act, a court grants a preliminary injunction when, "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[50] The court applies a sliding scale approach, balancing the private and public equities in favor of the merger against the public equities against the merger and the Commission's likelihood of success.[51] Courts have repeatedly stated "that the standard under 13(b) is different than that under the Rules of Civil Procedure."[52]

b. *Permanent Injunctions*

The federal district courts have frequently stressed that they are not empowered to determine the merits of a merger.[53] The FTC therefore does not return to a district court for a decision on the merits;[54] instead, it pursues the permanent injunction through a Part III proceeding.[55] An ALJ is empo-

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46 *See id.*

47 GELLHORN ET AL., *supra* note 7, at 38-39.

48 *See* FTC v. Whole Foods Mkt., Inc. (*Whole Foods II*), 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring).

49 *See id.*

50 15 U.S.C. § 53(b) (2006).

51 FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 35 (D.D.C. 2009); FTC v. Elders Grain, Inc., 868 F.2d 901, 903 (7th Cir. 1989).

52 Leon B. Greenfield, FTC v. Whole Foods*: Is Agency Draw Destiny?*, GLOBAL COMPETITION POL'Y, Sept. 2008, at 3.

53 *See Whole Foods II*, 548 F.3d at 1034.

54 *See* 16 C.F.R. § 3.1 (2000).

55 AMC REPORT, *supra* note 5, at 129; John D. Carroll, *The Widening Gap Between FTC, DOJ Merger Review*, LAW360, Jan. 21, 2009, at 3, *available at*

wered to enjoin the transaction if she deems the merger anticompetitive or to deny the FTC's efforts if she determines the merger will not likely be anticompetitive.[56]

Because the FTC must seek preliminary and permanent injunctions in separate venues, it cannot combine a preliminary injunction proceeding with a permanent injunction proceeding.[57] The FTC normally seeks a preliminary injunction before an administrative trial on the merits, but it is not bound to do so.[58] Without a preliminary injunction, the merging parties may consummate the merger, creating the unsavory prospect of the administrative court having to "unscramble the eggs."[59] Alternatively, even if the merging parties win the preliminary injunction, the FTC may still pursue adjudication in the administrative setting.[60]

C. *The History of the Serious Questions Test for Preliminary Injunctions*

Not only do the procedural paths to preliminary injunctions differ based on the odd growth of antitrust law in the United States, but the words used to describe the preliminary injunction test under Section 7 of the Clayton Act and Section 13(b) of the FTC Act also differ. Under the standard preliminary injunction test, which is used in the Clayton Act, the DOJ must show a "likelihood of success," and separately show that the equities are in their favor.[61] The FTC must balance the equities, however, and if the equities are strong enough, show that it has raised questions so "serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough

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http://www.ropesgray.com/files/Publication/43de8657-b949-462f-b65b-5bb95df54886/Presentation/PublicationAttachment/856e8253-c10b-4f96-a8ab-66b3960c5923/RopesGray_Article_WideningGap.pdf.

56 AMC REPORT, *supra* note 5, at 129. *But see* Carroll, *supra* note 55, at 4 ("[P]ractitioners have expressed doubt as to whether it makes sense for an FTC Commissioner (who may have been involved in the decision whether to bring the action) should serve as the Administrative Law Judge in a trial on the merits.").

57 *See* Greenfield, *supra* note 52, at 3.

58 Justin J. Hakala, The Case for Different Preliminary Injunction Standards in Merger Challenges, 6, 7-8 (Jan. 15, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328586.

59 *See* AMC REPORT, *supra* note 5, at 47 (internal quotation marks omitted).

60 FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976) ("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."); Carroll, *supra* note 55, at 2 ("It may also pursue Part III proceedings even when the district court denies the preliminary injunction, but it does so rarely.").

61 15 U.S.C. § 26 (2006) ("[Courts shall grant a preliminary injunction] when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .").

investigation."[62] This difference in language is also somewhat the result of historical accident. The test for preliminary injunctions varies across circuits, and the serious questions test was considered a compliment to the normal preliminary injunction standard.[63]

The first use of the "serious, substantial, difficult and doubtful" language was in an action between two private parties in 1953.[64] In *Hamilton Watch Co. v. Benrus Watch Co.*,[65] Hamilton sued a competitor, Benrus, after Benrus purchased a large block of Hamilton stock.[66] Hamilton won a preliminary injunction in the district court to prevent Benrus from exercising voting control over Hamilton, and Benrus appealed to the Second Circuit.[67] There, the Second Circuit applied the serious questions test, saying:

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.[68]

The language of the test—and its subsequent application in the Second Circuit—suggests that the serious questions test is an easier substitution for the likelihood of success required for normal preliminary injunctions.[69] The moving party must first show irreparable harm, and it must then show that the equities are clearly in its favor.[70] Only after these elements are demonstrated will the court apply the deferential serious questions test.[71] If the equities do *not* tip "decidedly toward the [moving] party" on a sliding scale analysis, the party may still succeed by showing it is likely to succeed in a full trial.[72] That the moving party is still able to show a likelihood of

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62 FTC v. Whole Foods Mkt., Inc. (*Whole Foods II*), 548 F.3d 1028, 1035 (D.C. Cir. 2008) (alteration in original).

63 Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 507-09 (2003).

64 Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

65 206 F.2d 738 (2d Cir. 1953).

66 *Id.* at 739.

67 *Id.*

68 *Id.* at 740. The *Hamilton Watch* Court pieced together the serious questions language from seven cases, as well as numerous cases that those seven cases cited. *See id.* at 740 n.2.

69 The Second Circuit is the only court that uses this test for a preliminary injunction in all such cases—not merely antitrust cases—and applies the serious questions test in conjunction with a strong showing of equity in favor of the injunction. William Patry, *Can the 2d Circuit's Injunction Standard Last?*, THE PATRY COPYRIGHT BLOG (July 10, 2006, 10:36 AM), http://williampatry.blogspot.com/2006/07/can-2d-circuits-injunction-standard.html.

70 *See* Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279, 279 n.3, 283 (1987); *see also* Patry, *supra* note 69.

71 *See* Silberman, *supra* note 70; *see also* Patry, *supra* note 69.

72 Silberman, *supra* note 70, at 283.

success without the equities decidedly in its favor suggests that the serious questions standard falls somewhere below the likelihood of success standard.

The FTC first applied this test in *FTC v. Lancaster Colony Corp.*,[73] nearly twenty-five years after *Hamilton Watch* and just four years after the FTC was empowered by Section 13(b) of the FTC Act to obtain preliminary injunctions.[74] Congress had relieved the agencies from the need to show irreparable harm.[75] Therefore, if the FTC could show that the equities strongly favored the government—there is often a presumption that they do—the FTC need merely raise "serious and substantial questions."[76] The court noted that it was not empowered to hear the merits and that it therefore only needed to view the contentions of the parties *on paper*.[77] As it did in *Hamilton Watch*, the court weighed the equities; also finding that there was a likelihood of success, however, the court ruled in favor of the FTC.[78]

The D.C. Circuit adopted the serious questions test in antitrust preliminary injunctions in *FTC v. Beatrice Foods Co.*,[79] despite the court's use of the four-part equity test for preliminary injunctions in other cases.[80] In *Beatrice Foods*, the court applied the serious questions test explicitly as the likelihood of success but found for the merging companies, stating that "[i]n applying this standard at this stage of the proceeding we are also required to consider the inroads that the appellees' extensive showing has made on the proof submitted by the Commission."[81] The court gave deference to the FTC's arguments regarding the market structure and concentration, but found Beatrice Foods's rebuttals convincing.[82]

By the time *FTC v. H.J. Heinz Co.*[83] was decided, numerous cases quoted the serious questions test, and it was accepted as the legal test in the D.C. Circuit.[84] The *Heinz* court applied the serious questions test in place of the traditional test, similar to the *Beatrice Foods* court.[85] The court noted that Heinz presented strong arguments against the assertions of the post-merger market power and concentration, but it concluded that Heinz was not able to overcome the deference the court determined was due to the

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73 434 F. Supp 1088 (S.D.N.Y. 1977).
74 *Id.* at 1088, 1090-91.
75 15 U.S.C. § 53(b) (2006).
76 *Lancaster Colony*, 434 F. Supp. at 1090-91.
77 *See id.* at 1096.
78 *Id.* at 1091-97.
79 587 F.2d 1225 (D.C. Cir. 1978).
80 *Id.* at 1229.
81 *Id.*
82 *Id.*
83 246 F.3d 708 (D.C. Cir. 2001).
84 *Id.* at 715.
85 *Id.* at 714-15.

FTC under the serious questions standard.[86] The court concluded that the "weighing of the equities favors the FTC. . . . Our conclusion with respect to the equities necessarily lightens the burden on the FTC to show likelihood of success on the merits, a burden which the FTC has met here."[87]

D. *Preliminary Injunction Standard Prior to* Whole Foods

Prior to the changes brought about by *Whole Foods* and *CCC Holdings*, the FTC and the DOJ maintained that the standards for preliminary injunctions were substantively the same despite their different articulations.[88] Both agencies needed to show an anticompetitive result of a merger, establishing some likelihood of success on the merits.[89] The agencies also needed to show that the equities favored the government's position.[90] Yet the agencies often struggled to meet these criteria.[91]

William Blumenthal, General Counsel for the FTC, attempted to explain that the two agencies must achieve the same standard for a preliminary injunction.[92] On November 3, 2005, Blumenthal addressed the Antitrust Modernization Commission ("AMC") on the possibility of two standards[93]:

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86 *Id.* at 727.

87 *Id.*

88 Blumenthal, *supra* note 27, at 4-5; Carroll, *supra* note 55, at 2 ("Until recently, the agencies' differences with respect to merger review were mostly procedural and were unlikely to result in diverging outcomes."). The DOJ still maintains on its website that the standards for preliminary injunctions are or should be equal. Peter J. Love & Ryan C. Thomas, FTC v. CCC Holdings*: Message Received*, GLOBAL COMPETITION POL'Y, Apr. 2009, at 9, *available at* https://www.competitionpolicyinternational.com/emftc-v-ccc-holdingsem-message-received (subscription required) (citing U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, Ch. IV.B.2.b (2008) ("In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division should argue that the authority of the Department of Justice to seek preliminary relief under Section 15 of the Clayton Act (15 U.S.C. § 25) should be interpreted in a manner consistent with 15 U.S.C. § 53(b).")).

89 *See* AMC REPORT, *supra* note 5, at 47.

90 Blumenthal, *supra* note 27, at 5.

91 From 2004 to 2007, the Agencies lost four straight mergers. John B. Kirkwood & Richard O. Zerbe, Jr., *The Path to Profitability: Reinvigorating the Neglected Phase of Merger Analysis*, 17 GEO. MASON L. REV. 39, 60 n.105 (2009). Between *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002), and *CCC Holdings* in 2009, the FTC did not win a preliminary injunction at the district court level. *See* Love & Thomas, *supra* note 88, at 7.

92 *See* Blumenthal, *supra* note 27, at 4-6.

93 Congress created the Antitrust Modernization Commission ("AMC") in 2004 to conduct a comprehensive review of American antitrust law, "determine whether it should be modernized," and report to Congress on what measures could or should be considered to improve antitrust law execution. *See* AMC REPORT, *supra* note 5, at i-x.

> Despite occasional minor differences in wording, courts entertaining injunction cases involving either DOJ or the FTC have applied a "public interest" test, rather than the "traditional equity test" for preliminary injunctions. For the FTC, Congress adopted this "public interest" standard through its enactment of § 13(b) in 1973, finding "that the traditional standard was not 'appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.'" This public interest standard was not new to § 13(b), however. Rather, this legislation represented a codification of the approach that courts had come to use in cases where a government agency was seeking interim relief while acting to enforce a federal statute.[94]

Blumenthal stated his belief that the standards were not "meaningfully different."[95] He acknowledged that the standards were articulated differently, but he argued that they reached the same substantive result.[96] Blumenthal concluded that any differences in preliminary injunction results were more likely attributed to case facts rather than to which agency brought the case.[97]

Blumenthal's comments were in response to the argument that the tests for preliminary injunctions were different based on the agency that brought the case. While some commentators noted this possibility, critics were more concerned with the effects of procedural differences between the FTC and the DOJ.[98] The DOJ's ability to combine actions into a single hearing means that most DOJ challenges receive a full trial on the merits, while the FTC challenges do not.[99] As a result, critics asserted that merging parties had different procedural rights based on which agency reviewed the merger.[100] *Whole Foods* and *CCC Holdings* represented a shift in this discourse because of the peculiarity of the *Whole Foods* opinion and its subsequent application by *CCC Holdings*. Commentators began to discuss not only whether party rights differed in relation to a full adjudication by agency, but also whether the tests for preliminary injunctions differed by agency.[101]

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94 Blumenthal, *supra* note 27, at 4-5 (citations omitted).

95 *Id*. at 5.

96 Blumenthal also cited instances where courts would discuss language traditionally applied to the other agency. *Id.*

97 *Id*. at 6.

98 *See* Carroll, *supra* note 55, at 2.

99 AMC REPORT, *supra* note 5, at 138.

100 *See* AMC REPORT, *supra* note 5, at 129-31, 138-41; Carroll, *supra* note 55, at 1-2.

101 *See generally* Andeer, *supra* note 35; Carroll, *supra* note 55; Greenfield, *supra* note 52; Love & Thomas, *supra* note 88.

II. *WHOLE FOODS* AND *CCC HOLDINGS* CREATE A NEW PRELIMINARY INJUNCTION STANDARD FOR THE FTC

A. Whole Foods

In 2007, the FTC reviewed a proposed merger between Whole Foods and Wild Oats.[102] The FTC opposed the merger, arguing that the two grocery stores were leaders in the "premium, natural and organic supermarkets" ("PNOS") market and that a merger would have substantial anticompetitive effects on consumers in this market.[103] The merging parties countered, arguing that the PNOS market was too narrow and that the two stores competed with all grocery stores, regardless of organic offerings.[104] Whole Foods claimed that the merger would not substantially affect the consumers of the larger grocery market because Whole Foods would not be able to increase the price of its goods without driving away customers.[105]

1. The District Court's Decision

The district court held in favor of Whole Foods.[106] The court recited the traditional elements of a preliminary injunction, stating that it would grant the injunction after "weighing the equities and considering the Commission's likelihood of ultimate success [and deciding that] such action would be in the public interest."[107] The court discussed that some deference should be paid to the government agency because the FTC need only "show that [the FTC] is 'likely' to succeed in showing under Section 7 of the Clayton Act that the proposed merger 'may substantially lessen competition' or 'tend to create a monopoly.'"[108]

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102 FTC v. Whole Foods Mkt., Inc. (*Whole Foods I*), 502 F. Supp. 2d 1, 11 (D.D.C. 2007); *see also* Press Release, Fed. Trade Comm'n, FTC Seeks to Block Whole Foods Market's Acquisition of Wild Oats Markets (June 5, 2007), *available at* http://www.ftc.gov/opa/2007/06/wholefoods.shtm.

103 FTC v. Whole Foods Mkt., Inc. (*Whole Foods II*), 548 F.3d 1028, 1032-33 (D.C. Cir. 2008).

104 *Whole Foods I*, 502 F. Supp. 2d at 15.

105 *Whole Foods II*, 548 F.3d at 1033. The small but significant non-transitory increase in price ("SSNIP") test is a test used by the agencies to determine if the potential merged firm in the new, post-merger market could impose a price increase on consumers. *Whole Foods I*, 502 F. Supp. 2d at 15-16. This test is also discussed as a "Hypothetical Monopolist Test" by the U.S. Merger Guidelines. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.12 (rev. 1997) [hereinafter MERGER GUIDELINES], *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

106 *Whole Foods I*, 502 F. Supp. 2d at 49-50.

107 *Id.* at 5 (quoting 15 U.S.C. § 53(b) (2006)) (internal quotation marks omitted).

108 *Id.* at 6 (quoting 15 U.S.C. § 18).

The district court then discussed the definition of "the Commission's likelihood of ultimate success."[109] The court said:

> To meet its burden to establish its likelihood of success on the merits, the FTC may raise questions "going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[110]

The court noted that the FTC must show it is likely that antitrust laws will be broken if the merger is consummated, but it does not have to prove that the merger will certainly violate those laws.[111]

The district court found that the FTC did not have any likelihood of success in stopping the Whole Foods and Wild Oats merger.[112] Judge Friedman concluded that the FTC would not be able to prove the proposed PNOS market existed outside of a general grocery store market.[113] Without that PNOS market, the court determined that Whole Foods and Wild Oats competed with all grocery stores and that their merger would not lead to substantially less competition.[114] As a result, Whole Foods would not be able to impose a small but significant non-transitory increase in price ("SSNIP") on consumer prices as a result of the merger.[115] Because the court concluded that the FTC did not have any chance of success on the merits, the court did not proceed to balance the equities of the merger.[116] Presumably, with zero likelihood of success, no showing of equities would satisfy the balancing test from previous Section 13(b) cases.[117] As a result of this decision, Whole Foods and Wild Oats were able to complete the merger and to begin closing various stores.[118]

2. The D.C. Circuit's Plurality Opinion

The FTC appealed its loss to the D.C. Circuit. At the appellate level, the three-judge panel split in its decision, with two judges finding in favor of the FTC but providing separate opinions in doing so. Judge Brown

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109 *Id.* at 5 (quoting 15 U.S.C. § 53(b)).

110 *Id.* at 6 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001)).

111 *Id.* at 5-6.

112 *Whole Foods I*, 502 F. Supp. 2d at 1, 49-50.

113 *Id.*

114 *Id.* at 36.

115 *Id.* at 34-35.

116 Presumably, if the FTC could not prove the PNOS market, it would be unnecessary to reach a finding on the equities because there was no likelihood of success on the merits to balance with.

117 For a discussion of the importance of balancing, see *infra* Part II.C.

118 David Pettit, Comment, *Submarkets and Supermarkets:* FTC v. Whole Foods Market *and the Resurrection of* Brown Shoe, 16 GEO. MASON L. REV. 971, 985 (2009).

agreed with the district court that the serious questions test was the appropriate test for likelihood of success under Section 13(b).[119] Judge Brown then "analyzed in some detail the standard for an injunction under Section 13(b)."[120] Judge Brown said that Congress "recognized the traditional four-part equity standard for obtaining an injunction was 'not appropriate for the implementation of a Federal statute by an independent regulatory agency.'"[121] She stated that when the FTC meets this standard, "the FTC creates a presumption in favor of a preliminary injunction."[122]

After noting that the serious questions test was the appropriate test, Judge Brown stated that the "the merging parties may rebut that presumption [of serious questions], requiring the FTC to demonstrate a greater likelihood of success, by showing equities weighing in favor of the merger."[123] In doing so, Judge Brown laid out a framework under which the court should first determine whether the FTC has raised serious questions regarding the proposed merger and then ascertain whether the equities favor the merging parties or the FTC.[124] Should the merging parties show equities in their favor, the court will show less deference to the FTC and require a stronger showing that the merger is likely to be anticompetitive.[125]

In applying this standard, Judge Brown differed from the district court. She said that the FTC was not required to prove their market definition in order to present serious questions.[126] Failure to prove market definition in the district court could not be dispositive on preliminary injunctions[127] because a prima facie case relying on the Herfindahl-Hirschman Index ("HHI") and market definition "does not exhaust the possible ways to prove a § 7 violation on the merits, much less the ways to demonstrate a likelihood of success on the merits in a preliminary proceeding."[128] She did not hold that the FTC had in fact proved the market, but rather that the agency had presented enough evidence to meet the minimum threshold of the serious questions test.[129] Even using highly contested evidence, the FTC had made a strong enough case to require the district court to apply a sliding

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119 *See* FTC v. Whole Foods Mkt., Inc. (*Whole Foods II*), 548 F.3d 1028, 1035 (D.C. Cir. 2008).

120 Greenfield, *supra* note 52, at 5.

121 *Whole Foods II*, 548 F.3d at 1035 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001)).

122 Greenfield, *supra* note 52, at 6 (citing *Whole Foods II*, 548 F.3d at 1035).

123 *Whole Foods II*, 548 F.3d at 1035.

124 *See id.*

125 *Id.*

126 *Id.* at 1041.

127 *See id.* at 1036.

128 *Id.* (internal citation omitted). The HHI is an economic model used to predict whether the post-merger market is likely to be anticompetitive. *See* Albert O. Hirschman, *The Paternity of an Index*, 54 AM. ECON. R. 761, 761-62 (1964).

129 *Whole Foods II*, 548 F.3d at 1036.

scale balancing test.[130] Judge Brown remanded because the district court did not apply a sliding scale to the equities.[131]

In concurrence, Judge Tatel agreed with Judge Brown's standard of serious questions.[132] By applying the serious questions standard, however, Judges Brown and Tatel determined that proof of the market definition did not need to be conclusive for the court to defer to the FTC's determination that the merger should receive a full adjudication.[133] Although Judge Tatel agreed with the "substantial questions" test relied on by Judge Brown, she disagreed that the district court was required to reconsider the serious questions test rather than only being required to evaluate the equities.[134] Judge Tatel concluded that "Whole Foods has a great deal of evidence on its side, evidence that may ultimately convince the Commission that no separate market exists," but she nevertheless found that the FTC had presented enough evidence to show the "requisite likelihood of success by raising serious and substantial questions about the merger's legality."[135]

In dissent, Judge Kavanaugh took exception to the standard set forth by Judges Brown and Tatel.[136] Judge Kavanaugh claimed that "the opinions of Judge Brown and Judge Tatel both dilute the standard for preliminary injunction relief in antitrust merger cases, such that the FTC apparently need not establish a 'likelihood of success on the merits.'"[137] Judge Kavanaugh continued: "The law does not allow the FTC to just snap its fingers and temporarily block a merger. Even at the preliminary injunction stage, the relevant statutory text and precedents expressly require that the FTC show a 'likelihood of success on the merits.'"[138]

Judge Kavanaugh did not believe the FTC had to fully prove its case, but he did believe the agency had to show enough evidence for the court to conclude it was reasonable that the merged entity could impose a SSNIP.[139] To make this showing, the FTC would have to show the existence of the PNOS market.[140] Judge Kavanaugh concluded that "the FTC did not come

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130 *Id.* at 1035-36.

131 *Id.* at 1035.

132 *Id.* at 1042 (Tatel, J., concurring) ("In this circuit, 'the standard for likelihood of success on the merits is met if the FTC has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'" (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001))).

133 *Id.* at 1035-37 (majority opinion) ("FTC will be entitled to a presumption against the merger on the merits . . . .").

134 *See Whole Foods II*, 548 F.3d at 1043 (Tatel, J., concurring).

135 *Id.* at 1049.

136 *See id.* at 1051-52 (Kavanaugh, J., dissenting).

137 *Id.* at 1059 (quoting *Heinz*, 246 F.3d at 714).

138 *Id.* at 1052 (quoting *Heinz*, 246 F.3d at 714).

139 *Id.*

140 *Whole Foods II*, 548 F.3d at 1054-55 ("So the dividing line between 'organic' and conventional supermarkets has blurred.").

close to presenting that kind of evidence in this case."[141] In doing so, he "emphasized . . . that the FTC had committed a 'basic antitrust mistake' by confusing product differentiation in competition for supermarket patronage with separate product markets."[142]

Judge Kavanaugh also claimed that the majority's reliance on *FTC v. H.J. Heinz Co.* was misplaced, stating that "*Heinz* did not hold that this gloss was the proper meaning of 15 U.S.C. § 53(b) in FTC preliminary injunction merger cases."[143] Judge Kavanaugh further articulated that this standard leaves too much deference to the FTC.[144]

3. En Banc Review and Remand

After the appellate court delivered the original opinions, Whole Foods petitioned for an en banc rehearing.[145] On remand, the FTC and Whole Foods each submitted briefs regarding their interpretations of the D.C. Circuit's opinion and whether it would be necessary to analyze both the equities and likelihood of success together or to review just the equities of the proposed merger alone.[146] Judge Friedman, in analyzing the arguments on each side, determined that the D.C. Circuit judges intended for their respective opinions to hold that the FTC had demonstrated a likelihood of success on the merits by presenting serious questions and that the district court only needed to determine the balance of the equities.[147] Judge Friedman stated:

> The only fair reading of the opinions of Judges Brown and Tatel, who together constitute the majority of the three-judge panel, is that the issue of success on the merits has been resolved fully by the court of appeals. Therefore, the sole task before this Court is to weigh the equities. Judge Brown's reference to a "sliding scale" with respect to how merging parties may in some cases rebut the "presumption" that the FTC "usually" is entitled to an injunction block-

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141 *Id.* at 1052.

142 Greenfield, *supra* note 52, at 9.

143 *Whole Foods II*, 548 F.3d at 1060 (Kavanaugh, J., dissenting).

144 *Id.* at 1063; *see also* Thom Lambert, *The D.C. Circuit Re-Disappoints in Whole Foods: An Analysis of the Amended Opinions*, TRUTH ON THE MARKET (Dec. 4, 2008), http://truthonthemarket.com/2008/12/04/the-dc-circuit-re-disappoints-in-whole-foods-an-analysis-of-the-amended-opinions (calling the court's standard "toothless").

145 FTC v. Whole Foods Mkt., Inc., No. 07-5276, at 1 (D.C. Cir. Nov. 21. 2008), http://www.ftc.gov/os/adjpro/d9324/12192008attachmenttodissenting.pdf.

146 FTC v. Whole Foods Mkt., Inc. (*Whole Foods III*), 592 F. Supp. 2d 107, 109 (D.D.C. 2009).

147 *Id.* ("This Court agrees with the FTC. While Judges Brown and Tatel may have expressed themselves in different words, all three judges on the panel agreed with this Court that the case turns almost entirely on the proper definition of the relevant product market. And, as the centerpiece of their respective opinions, Judges Brown and Tatel each expressly disagreed with this Court's conclusion that 'there is no substantial likelihood that the FTC can prove its asserted product market and thus no likelihood that it can prove that the proposed merger may substantially lessen competition or tend to create a monopoly.'" (citations omitted) (quoting FTC v. Whole Foods Mkt., Inc. (*Whole Foods I*), 502 F. Supp. 2d 1, 49-50 (D.D.C. 2007))).

> ing a merger, is too thin a reed to support the suggestion that this Court should revisit an issue the court of appeals already has decided.[148]

The court did not proceed to weigh the equities, however, because before the next hearing could occur, the parties settled the merger out of court. Given Judge Friedman's determination in the previous hearing, it is likely that only a minimum showing that the equities favored the FTC would have sufficed to grant the FTC a preliminary injunction.

B. CCC Holdings

The first merger case tried after *Whole Foods* was *FTC v. CCC Holdings*.[149] *CCC Holdings* involved the merger of CCC Holdings and Mitchell, two of the three producers of estimatics and TLV software.[150] The FTC opposed the merger because it was "likely to lead to reduced competition, higher prices, and less innovation."[151] Specifically, the FTC claimed that "'no court has ever approved a merger to duopoly' under these circumstances."[152] CCC Holdings responded to these challenges by contending that market specific dynamics would prevent collusion between the two remaining companies and that new companies would enter into the market to provide new competition.[153]

In deciding *CCC Holdings*, Judge Collyer focused on Judge Brown's opinion in *Whole Foods* and her use of the serious questions test in place of likelihood of success.[154] Her opinion demonstrated that "lower courts really should apply 'serious questions' as the [preliminary injunction] standard."[155] Judge Collyer noted that a merger to duopoly alone was not enough to grant the FTC an injunction, as the FTC had requested.[156] And while structural presumptions were not conclusive, they played an important role in the determination of the case.[157]

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148 *Id.* at 110 (citation omitted).

149 FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009). This was the first case in the D.C. Circuit, as well as the first merger case in general, after *Whole Foods* was decided. *See* Love & Thomas, *supra* note 88, at 2-3.

150 *CCC Holdings*, 605 F. Supp. 2d at 30.

151 Plaintiff FTC's Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1-2, FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009) (No. 1:08-CV-02043-RMC), *available at* http://www.ftc.gov/os/caselist/0810155/090107cccmemo.pdf.

152 *Id.* at 2 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 717 (D.C. Cir. 2001)).

153 *CCC Holdings*, 605 F. Supp. 2d at 56-57.

154 *Id.* at 30.

155 Love & Thomas, *supra* note 88, at 2.

156 *CCC Holdings*, 605 F. Supp. 2d at 46.

157 Love & Thomas, *supra* note 88, at 4.

Judge Collyer concluded that "the 'Defendants' arguments [might] ultimately win the day,' but under Section 13(b), [she] needed only to determine that 'the FTC has raised questions that are so serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation.'"[158] In her opinion, Judge Collyer confirmed that the standard agreed to by Judges Brown and Tatel should govern merger cases in the D.C. Circuit and that the FTC would not be required to prove the merits of its case in a preliminary injunction proceeding.[159] Judge Collyer considered and rejected CCC Holdings's arguments that competitive market dynamics would make it nearly impossible for the remaining firms to collude.[160] The result of the convergence of competing factors was "hesitation" on the part of Judge Collyer.[161] But Judge Collyer had to determine only whether the FTC had raised enough questions to justify a full trial, not whether the FTC's arguments were likely to succeed in an administrative trial.[162] As a result, Judge Collyer found for the FTC and further established the serious questions standard as being some quantum below the "likelihood of success" standard.

Furthermore, Judge Collyer did not balance the equities against the serious questions standard presented.[163] As the historical standard suggests, the equities should be weighed on a sliding scale against the *serious questions* presented by the parties.[164] Although Judge Collyer correctly weighed the balance of the equities presented by the merging parties against the equities presented by the FTC, she did not then compare this balance to the standard of success. In doing so, Judge Collyer confirmed the path blazed in *Whole Foods*: the FTC need only show that it is probable the FTC can demonstrate in an administrative trial that the merger may lessen competition and then separately prove that the equities favor the FTC by some degree.[165]

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158 *Id.* at 5 (first alteration in original) (quoting *CCC Holdings*, 605 F. Supp. 2d at 30).

159 *See* Andeer, *supra* note 35, at 6 ("Judge Collyer was no rubber stamp. The court fully and thoughtfully addressed the defendants' rebuttal arguments in a lengthy opinion.").

160 *CCC Holdings*, 605 F. Supp. 2d at 67.

161 Love & Thomas, *supra* note 88, at 4.

162 *CCC Holdings*, 605 F. Supp. 2d at 67.

163 Despite Judge Collyer's recitation of the weighing of the equities with the likelihood of success on a sliding scale, she does not do so. *See CCC Holdings*, 605 F. Supp. 2d at 35. Judge Collyer weighs the equities presented by the merging parties against the equities presented by the FTC, but she does not subsequently weigh the net equities against the likelihood of success on a sliding scale. *Id.* at 75-77.

164 *See supra* Part I.C..

165 *CCC Holdings*, 605 F. Supp. 2d at 36 n.11.

C. *How the New Standard Diverges from the Old Application*

Despite the frequent use of the "substantial questions" language in pre-*Whole Foods* merger cases,[166] courts have appeared to apply the likelihood of success standard under the guise of the serious questions test, regardless of the equities.[167] The agencies believed that the courts were deciding merger cases on a basis closer to the merits than the serious questions standard would suggest.[168] *Whole Foods*'s application of the serious questions standard breaks from previous cases by providing more deference to the agency position.

Not only does *Whole Foods* declare that the serious questions standard must be a lower bar for the agencies than likelihood of success, but it also presumes that a determination on the serious questions test can be made before the equities are considered. When the court of appeals reversed the district court, it applied the test that would normally have been invoked only *after* the equities were weighed and found to be in the FTC's favor.[169] By making a decision on the "substantial questions" presented, the court severed the traditional requirement that the equities "tip[] decidedly" in favor of the moving party. [170] By the language of the opinion, when the lower court returned to weigh the equities, the court of appeals had already decided that, at a minimum, the serious questions test of the preliminary injunction analysis was met.[171] The court of appeals required Whole Foods to show that the equities were in its favor in order to elevate the burden on the FTC.[172] By only providing for a rehearing on the equities, the court of appeals dispensed with the traditional requirement that the FTC prove that the equities tipped in their favor before applying the serious questions test.[173]

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166 *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001); FTC v. Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725 (D.N.M. 2007); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C. 2004).

167 *See Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725; *Arch Coal*, 329 F. Supp. 2d at 116.

168 Blumenthal, *supra* note 27, at 6-8; Carroll, *supra* note 55, at 2 ("[F]ederal district courts have typically held merits hearings or trials regardless of whether the action was brought by the DOJ or FTC.").

169 *See* Silberman, *supra* note 70, at 279 n.3, 283; *see also* Patry, *supra* note 69.

170 Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953); *see also* FTC v. Whole Foods Mkt., Inc. (*Whole Foods I*), 502 F. Supp. 2d 1, 49-50 (D.D.C. 2007) ("[B]ecause the FTC has not demonstrated a likelihood of success on the merits, the Court need not consider the equities and the public interest . . . .").

171 FTC v. Whole Foods Mkt., Inc. (*Whole Foods II*), 548 F.3d 1028, 1041 (D.C. Cir. 2008).

172 FTC v. Whole Foods Mkt., Inc. (*Whole Foods III*), 592 F. Supp. 2d 107, 110 n.2 (D.D.C. 2009).

173 *Id.* ("The only fair reading of the opinions of Judges Brown and Tatel, who together constitute the majority of the three-judge panel, is that the issue of success on the merits has been resolved fully by the court of appeals. Therefore, the sole task before this Court is to weigh the equities. Judge Brown's reference to a 'sliding scale' with respect to how merging parties may in some cases rebut the 'presumption' that the FTC 'usually' is entitled to an injunction blocking a merger is too thin a reed to support the

CCC Holdings confirmed both the serious questions test's application in *Whole Foods* and the severability of weighing the equities.[174] *CCC Holdings*, however, seems to have fixed some of the problems created in the *Whole Foods* decision. In *CCC Holdings*, Judge Collyer weighed the equities of the case before making her final determination.[175] Judge Collyer weighed a significant amount of evidence, and some have argued that the case approached a full evidentiary hearing.[176] With this evidence, Judge Collyer balanced the equities and the seriousness of the questions presented by the FTC before granting the injunction.[177]

One key distinction remains between *CCC Holdings* and *Hamilton Watch* in their respective applications of the serious questions test. As *CCC Holdings* affirmed, the application of the serious questions test is no longer dependent upon a showing of equities in the FTC's favor. While the FTC still needs to raise serious questions, the courts, by separating the tests, removed the sliding scale analysis inherent in *Hamilton Watch*.

While the serious questions test is the measure for likelihood of success, "*Heinz* clearly did not settle the question of how low a threshold the 'serious questions' standard really set for the FTC."[178] The facts of *CCC Holdings* suggest that "this standard sets a relatively low bar for the FTC to obtain a preliminary injunction."[179] The FTC presented a prima facie case of merger to duopoly, accompanied by an expected HHI in excess of the allowed Merger Guidelines.[180] The FTC succeeded on a coordinated effects argument based "predominantly on structural presumptions" of the mer-

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suggestion that this Court should revisit an issue the court of appeals already has decided." (quoting *Whole Foods II*, 548 F.3d at 1035)).

174 *CCC Holdings*, 605 F. Supp. 2d 26, 36 n.11 (D.D.C. 2009) ("[P]recedents irrefutably teach that in [the merger] context 'likelihood of success on the merits' has a less substantial meaning than in other preliminary injunction cases. *Heinz* not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law.").

175 *Id.* at 75-77.

176 Love & Thomas, *supra* note 88, at 7-8. Judge Collyer followed the mandate from *Whole Foods* that courts should not simply "rubber stamp" the FTC's determination. Andeer, *supra* note 35, at 6.

177 *CCC Holdings*, 605 F. Supp. 2d at 75-77.

178 Love & Thomas, *supra* note 88, at 7.

179 *Id.* at 2.

180 *CCC Holdings*, 605 F. Supp. 2d at 37-38, 44-46. The Merger Guidelines are the rules that govern each agency in reviewing and challenging mergers reported under the Hart-Scott-Rodino Act. MERGER GUIDELINES, *supra* note 105, § 0 ("These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission (the 'Agency') concerning horizontal acquisitions and mergers ('mergers') subject to section 7 of the Clayton Act, to section 1 of the Sherman Act, or to section 5 of the FTC Act. They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers. By stating its policy as simply and clearly as possible, the Agency hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area." (footnotes omitted)).

ger.[181] Although CCC Holdings presented "strong argument[s]" in rebutting the FTC, the FTC's "strong prima facie case" won the day.[182]

It seems that the serious questions test has been met when the FTC makes a strong argument of structural presumptions of the post-market merger.[183] This poses a potentially significant change for the FTC because prior to *CCC Holdings*, the FTC had not won a preliminary injunction for a merger case in the district court in over seven years.[184] But the facts of *CCC Holdings* were not particularly unique.[185] The FTC has challenged a number of "merger to duopoly" cases over the last twenty years, relying mostly on structural presumptions and coordinated effects claims.[186] Introducing a lower merger standard may allow the FTC to succeed with these types of arguments where they had previously failed.

Regarding the weighing of the equities, many within the FTC have argued that the courts have focused in the recent past on one of the private equities of merging parties.[187] "In part, this trend may have reflected an appreciation by district court judges that, as a practical matter, a [preliminary injunction] often is a final decision rather than preliminary relief for merger cases."[188] Because it is expensive to hold together a merger in the face of an adverse judgment while waiting for a full trial, parties normally abandon the merger.[189] Courts consider this equity in favor of the merging parties, but they are instructed by Congress that this equity alone cannot rebut the FTC's public equities.[190] A practical solution for courts facing this dilemma was to hold the FTC to a standard approaching a full adjudication on the merits.[191] Courts have moved away from this decision "on the papers," instead holding full evidentiary hearings with expert witnesses and reams of evidence.[192]

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181 Love & Thomas, *supra* note 88, at 3.

182 *CCC Holdings*, 605 F. Supp. 2d at 46, 67 (emphasis omitted).

183 Love & Thomas, *supra* note 88, at 2.

184 *See id.* at 7.

185 *Id.* at 3.

186 *See id.* (internal quotation marks omitted).

187 *E.g.*, AMC REPORT, *supra* note 5, at 142; Carroll, *supra* note 55, at 2 ("[N]o pre-closing mergers have gone to trial in Part III proceedings since 13(b) was enacted in 1973.").

188 Love & Thomas, *supra* note 88, at 7.

189 *See* AMC REPORT, *supra* note 5, at 148 n.62; Love & Thomas, *supra* note 88, at 7.

190 *See* Love & Thomas, *supra* note 88, at 3.

191 *See* Andeer, *supra* note 35, at 2-3 ("Some urge the FTC to treat the preliminary injunction hearing in federal court as a de facto hearing on the merits. This not only ignores the Congressional intent behind the FTC but it is not at all clear that expedited proceedings on the merits before lay judges is the best model to decide merger challenges."); Blumenthal, *supra* note 27, at 6-8.

192 William Baer & Deborah Feinstein, *Changing Emphasis: How* Whole Foods *Advances the FTC's Efforts to Transform Merger Litigation*, GLOBAL COMPETITION POL'Y, Sept. 2008, at 13, *available at* https://www.competitionpolicyinternational.com/changing-emphasis-how-emwhole-foodsem-advances-the-ftcs-efforts-to-transform-merger-litigation (subscription required); *see also* Carroll, *supra*

The serious questions language may limit a court's ability to hold the FTC to this higher standard. According to *CCC Holdings*, the FTC merely needs to make structural presumptions regarding the merger to meet the serious questions standard.[193] Frequently, the FTC will be able to achieve these presumptions using HHI scores.[194] The HHI predicts market concentration after the merger and compares it to market concentration before the merger.[195] If HHI scores increase above certain thresholds discussed in the Merger Guidelines, the potential merger is likely to create anticompetitive effects.[196] Both the FTC and the DOJ rely significantly on HHI evidence in merger cases.[197]

HHI models require an accurate description of the market for the model to be most effective.[198] Yet *Whole Foods* expressly rejected the notion that the FTC was required to show a settled market at this time to reach the threshold set by the serious questions test.[199] Because the market in *CCC Holdings* was largely uncontested, it remains to be seen if and how courts will weigh these economic models in future cases. What seems clear is that the HHI, as a tool, may significantly help the FTC in showing the anticompetitive effects necessary to achieve a preliminary injunction.[200]

D. *The New Standard Creates Agency Draw Because the DOJ Does Not Have the Benefit of the Serious Questions Test*

While it may have been of no comfort to CCC Holdings or Mitchell, who abandoned the transaction after the adverse ruling, *CCC Holdings* was a close case.[201] The merging parties rebutted many of the FTC's arguments for why the merger would be anticompetitive.[202] However, *CCC Holdings*

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note 55, at 3 ("[T]he FTC argues that discovery should be limited and that no live testimony should be required for the district court to make a decision in the FTC's favor [on preliminary injunctions].").

193 Andeer, *supra* note 35, at 5-6.

194 MERGER GUIDELINES, *supra* note 105, § 1.51.

195 Stephen A. Rhoades, *The Herfindahl-Hirschman Index*, 79 FED. RES. BULL. 188, 188 (1993); *see also* Hirschman, *supra* note 128, at 761.

196 FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 37-38 (D.D.C. 2009) (discussing MERGER GUIDELINES, *supra*, note 105, § 1.51).

197 *See* J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 583-84 (2009).

198 The Merger Guidelines require the agencies to first prove market definition and, once the market is defined, to then calculate HHI scores based on that product market. MERGER GUIDELINES, *supra* note 105, § 1; *see also* Kai Hüschelrath, *Detection of Anticompetitive Horizontal Mergers*, 5 J. COMPETITION L. & ECON. 683, 688-689 (2009).

199 FTC v. Whole Foods Mkt., Inc. (*Whole Foods II*), 548 F.3d 1028, 1036 (D.C. Cir. 2008); *see also id.* ("Nor does the FTC necessarily need to settle on a market definition at this preliminary stage.").

200 *See* Hüschelrath, *supra* note 198, at 688-90.

201 Love & Thomas, *supra* note 88, at 2-5.

202 *Id.* at 4-5.

does not mark a significant divergence from previous litigation.[203] The request for a preliminary injunction was "consistent with past agency challenges alleging that a merger would result in an unlawful duopoly, such as *Heinz*, *Swedish Match*, *Cardinal Health*, and *Staples*."[204] A merger to duopoly will almost certainly create a high HHI that is significantly above what is considered anticompetitive by the Merger Guidelines. A high HHI establishes a prima facie showing "that the proposed merger would lead to 'undue concentration in the market for a particular product in a particular geographic area.'"[205] Furthermore, "[s]uch a showing creates a 'presumption that the merger will substantially lessen competition.'"[206] The interplay of structure and equities suggests that the serious questions standard will allow the FTC to successfully combat more mergers than before.

Assuming that the serious questions standard does create a lower standard than required to demonstrate a likelihood of success, does this create a diverging standard from the DOJ? In effect, it does.[207] Procedures for the FTC and the DOJ in proving a preliminary injunction are slightly different.[208] The DOJ must satisfy a traditional four-part test.[209] The FTC, on the other hand, must show that the preliminary injunction is in the public interest by demonstrating that the equities weigh against the merger and that there is a likelihood of success by the FTC.[210] Congress, in passing the FTC Act, specifically intended to hold the Commission to a different standard:

> The intent is to maintain the statutory or "public interest" standard which is now applicable, and not to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of hardships favors the petitioner . . . . [That standard] is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measures the propriety and need for injunctive relief.[211]

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203 *Id.* at 3.

204 *Id.*

205 FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 36 (D.D.C. 2009) (quoting United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990)).

206 *Id.* (quoting *Baker Hughes*, 908 F.2d at 982).

207 *See* Carroll, *supra* note 55, at 3 ("[T]he D.C. Circuit's decision in the Whole Foods case, although not squarely addressing the standard the FTC must meet, suggests that the FTC's burden is lower than the DOJ's burden."). Throughout this Comment, it is assumed that the DOJ and the FTC started at the same preliminary injunction standard and that the DOJ's standard has not changed as a result of the FTC's litigation success. The FTC Act provided the basis for the FTC's success, but the DOJ is unable to avail itself of the same legal arguments because the DOJ is not empowered to enforce the FTC Act. *See supra* Part I.B.

208 *See supra* Part I.B.

209 *See supra* Part I.B.1.

210 *See supra* Part I.B.2.

211 Andeer, *supra* note 35, at 4 (alteration in original) (quoting H.R. REP. NO. 93-624, at 31 (1971) (Conf. Rep.)).

Although worded differently, the public interest standard contains many of the same elements as the traditional standard. Congress freed both the DOJ and the FTC from showing irreparable harm. Both the DOJ and the FTC must show that the equities are in their favor—the DOJ through an explicit consideration of both the equities for and against the merger and the FTC through a balancing test.[212]

The differing language in the likelihood of success test and the serious questions test represents the greatest divergence between the DOJ and the FTC. The standard contained in the FTC's serious questions test is some quantum less rigorous than the comparable DOJ likelihood of success test. How much deference the FTC will receive when making a showing to the court is not completely clear, but it seems likely that there will be areas in which the FTC will succeed when it could not before, as well as areas in which the DOJ will still not be able to succeed.

III. PROBLEMS WITH AGENCY DRAW SUGGEST THAT CONVERGENCE AT ONE STANDARD MAY BE NECESSARY

The serious questions test, as applied in the D.C. Circuit, will make challenging mergers easier for the FTC than for the DOJ.[213] As a result, the FTC will likely achieve victory in merger cases where the DOJ would not.[214] This result is akin to two different merger laws in antitrust—one enforced by the FTC and another enforced by the DOJ.[215] Merging parties may face two different prospective outcomes for the same merger depending solely on which agency chooses to review or challenge the merger.[216] This possibility is called "agency draw" because the agency that chooses to review the merger may be outcome determinative.[217] Agency draw creates additional costs and problems for merging parties that did not exist prior to the *Whole Foods* decision.[218]

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212 *See supra* Part I.B.

213 *See supra* Part II.D.

214 *See* Greenfield, *supra* note 52, at 10-13.

215 *See id.*

216 *See id.* at 2-4.

217 *See id.* at 1.

218 Although not a cost of agency draw, the legislative history of 13(b) also suggests that the current FTC approach is not in accord with the intention of 13(b). For a comprehensive analysis of the legislative history of 13(b), as well as the argument that the legislative history requires resolving the agency draw problem by returning the FTC to the traditional equities test, see Paul T. Denis & Craig G. Falls, *Likelihood of Success Is Still Part of the Law, Even for the FTC Under Section 13(b)*, GLOBAL COMPETITION POL'Y, Apr. 2009, at 5-9, *available at* https://www.competitionpolicyinternational.com/likelihood-of-success-is-still-part-of-the-law-even-under-13b (subscription required).

A. *Unfairness*

Concern over agency draw has led commentators to point out that a system of laws should not subject different parties to different laws for the same culpable act: a questionable merger. This creates a fairness issue.[219] The question has been posed: "Why should the standards by which a court reviews a merger in a given industry turn on which agency happens to review mergers in that industry?"[220]

Commentators argue that two agencies employing different standards in the same area of substantive law is unfair to merging parties.[221] In response to *CCC Holdings*, one commentator stated: "It is difficult to come up with any policy justifications for having real or perceived differential enforcement between the agencies."[222] Others have argued that mixed results based on agency draw are unfair to the merging parties and "undermine confidence in the United States and elsewhere in the rationality of our dual federal merger enforcement regime."[223] These commentators allude to the substantive fairness issues created by agency draw.[224]

Agency draw may become more pronounced in light of the history of how the agencies divide mergers.[225] This system is known as the clearance process.[226] The FTC and the DOJ must choose which agency will review the merger based on the merging firms' industry.[227] Generally, one agency will have more expertise in that industry than the other.[228] In that situation, the less experienced agency will concede the merger, and the other agency will proceed with its review.[229] Occasionally, agency expertise is divided, especially when firms from two different industries merge.[230] These cases

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219 *See* Carroll, *supra* note 55, at 1-2; Greenfield, *supra* note 52, at 10-13; Love & Thomas, *supra* note 88, at 8-11.

220 Greenfield, *supra* note 52, at 11.

221 *See id.* at 10-13.

222 Love & Thomas, *supra* note 88, at 10.

223 Greenfield, *supra* note 52, at 11; *see also* AMC REPORT, *supra* note 5, at 142.

224 Greenfield, *supra* note 52, at 11-13; *see also* Love & Thomas, *supra* note 88, at 10.

225 The clearance process has always lacked transparency and has been described as an "odd duck" in antitrust practice. John M. Nannes, Assistant Att'y Gen., U.S. Dep't Justice, Statements on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission 1 (Nov. 3, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Nannes_Statement.pdf.

226 AMC REPORT, *supra* note 5, at 132; Aruna Viswanatha, *Justice or FTC. Which Agency Will Review Comcast-NBC Deal?*, MAIN JUSTICE (Dec. 9, 2009, 3:34 PM), http://www.mainjustice.com/2009/12/09/justice-or-ftc-which-agency-will-review-comcast-deal.

227 AMC REPORT, *supra* note 5, at 132; Viswanatha, *supra* note 226.

228 Viswanatha, *supra* note 226 ("Some merger reviews are easy to divvy up. Airlines and agriculture go to the Justice Department for example, while pharmaceuticals and grocery stories [sic] go to the FTC.").

229 AMC REPORT, *supra* note 5, at 132.

230 Nannes, *supra* note 225, at 2; *see* Viswanatha, *supra* note 226.

require negotiations between the agencies until one agency receives the go-ahead from the other.[231]

The clearance process based on industry expertise may exacerbate the unfairness of agency draw. Areas of expertise have developed over time—characterized as the gathering of "'credit' on the 'expertise meter.'"[232] As a result, the allocation of expertise is not systematic, but rather it is evolutionary.[233] The historical gathering of expertise over time does not appear systematic, and closely related industries may be reviewed by different agencies.[234] For example, the DOJ generally reviews the beer industry, and the FTC typically reviews the liquor industry.[235] Agency draw may be exacerbated under this evolutionary process because the lower standard of review is not systematically enforced, but rather it is enforced based only on which industries had the luck—or bad luck—of falling under the FTC's purview.

B. *Uncertainty*

Another significant cost created by agency draw is merging party uncertainty.[236] While a majority of industries is generally clearly divided,[237] the clearance process is by no means automatic, especially with large mergers.[238] This process creates uncertainty already, and it seems clear that substantively different standards increase the negative effect of uncertainty on the parties.[239] Prior to *Whole Foods*, the uncertainty surrounding the clearance process threatened deals because it did "not give clients the thirty-day comfort that they want[ed based on Hart-Scott-Rodino timing]" and also created financing problems.[240]

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231 Nannes, *supra* note 225, at 2.

232 *Id*.

233 *See id*. at 2-3.

234 *See id*.

235 Viswanatha, *supra* note 226.

236 *See* Sokol, *supra* note 5, at 1079 ("Delay can be fatal to a deal because it creates uncertainty. . . . By undermining business planning, different substantive standards pose a threat to the antitrust system.").

237 *See* Carroll, *supra* note 55, at 1-2 ("In some instances, for example, acquisitions solely involving in [sic] the pharmaceutical industry (FTC) or the steel industry (DOJ), jurisdiction is clear. For acquisitions in other industries, such as defense industry, in which both agencies have experience, it can be difficult to predict which agency will handle the review of a merger.").

238 AMC REPORT, *supra* note 5, at 130 ("In some instances—most frequently high-profile mergers between large companies—the agencies take a lengthy time, sometimes exceeding thirty days, to decide which agency will conduct the investigation of the merger.").

239 This is similar to the difference between state and federal antitrust laws, which impose uncertainty and can threaten mergers. *See* AMC REPORT, *supra* note 5, at 185 ("Some have criticized such divergences as undermining a consistent, coherent federal antitrust policy and creating uncertainty and unjustified antitrust risks for businesses.").

240 Sokol, *supra* note 5, at 1133.

By setting the legal standard that the parties are subject to based on the uncertainty of the clearance process, agency draw adds another, complicated step to the risk analysis planning for a deal. With agency draw, litigators must now determine how likely each agency is to review the proposed merger, as well as how likely the parties are to succeed at trial under each standard. This reduced certainty should affect the overall value of the deal and could mean some deals will not be completed.[241] Whether this result is beneficial to consumers is unclear, except to demonstrate that additional costs are imposed on businesses.

C. *Problems Can Be Solved by Convergence, but Where Should Merger Law Converge?*

As a result of agency draw—and the inherent unfairness and uncertainty it creates—commentators have called for a reconciliation of the divergent standards.[242] Even before the *Whole Foods* decision, individuals and organizations called for changes to the merger review process.[243] The Antitrust Modernization Commission, a commission created to study antitrust law in the United States, recommended that Congress prohibit the FTC from using Section 13(b) to enforce permanent injunctions to combat perceived procedural differences that lead to agency draw.[244] With the *Whole Foods* and *CCC Holdings* decisions, the call for a closer review of agency draw has continued.

Presumably, costs that are created by divergence could be eliminated by converging to a single standard again. The additional unfairness and uncertainty, in addition to that which already existed, would cease if the two agencies agreed to litigate under the same substantive standard. Noting that convergence eliminates those costs, however, does not answer the question of where the agencies could converge. In this sense, three "regimes" exist. The first is a return to pre-*Whole Foods* principles, where both the FTC and the DOJ litigate under what is essentially the traditional, four-

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241 *See id.* ("On the margins, a number of practitioners mentioned that [clearance uncertainty] creates problems for financing some deals.").

242 Carroll, *supra* note 55, at 4-5; Greenfield, *supra* note 52, at 12; Love & Thomas, *supra* note 88, at 10-11.

243 Prior to *Whole Foods*, commentators like the AMC focused on the procedural differences between the agencies. *See supra* text accompanying notes 98-101. Because the FTC litigates the merits in front of an administrative judge, the parties reviewed by the FTC are unable to condense the two actions into one. *See supra* Part I.B.2.b. When the DOJ litigates a case, however, a district court judge hears both preliminary and permanent actions. *See supra* Part I.B.1. Under FED. R. CIV. P. 65(a)(2), a district court judge has the capability to condense both actions into a single case and deliver a single verdict on the merits. *See* AMC REPORT, *supra* note 5, at 138, 142 n.64; Love & Thomas, *supra* note 88, at 9-10.

244 AMC REPORT, *supra* note 5, at 14, 131-32.

part preliminary injunction standard. The second regime consists of the agencies that adopt the public interest standard and serious questions analysis. In this scenario, Congress would need to pass a law that opens the public interest standard enunciated under Section 13(b) of the FTC Act to the DOJ. Courts could then apply the pre-existing case law to this standard. The final "regime" is maintaining agency draw, and it will be revisited in the final Part of this comment.

IV. THE AGENCIES UNDERENFORCE MERGER LAW

The premise that agencies currently underenforce merger law is based on two forms of arguments. The first argument is structural, proposing that the antitrust system is designed to allow anticompetitive conduct to pass review in an effort not to stymie potential pro-competitive conduct. The second argument is empirical in nature, relying on three types of data to suggest that the agencies underenforce mergers. These arguments support the proposition that the agencies allow parties to consummate mergers despite their anticompetitive effects, thereby underenforcing merger law.

A. *The Structural Argument*

The structural argument says that the current merger design systematically underenforces mergers. In a 2008 article, Lawrence Frankel argues that the merger review system is designed to allow more false negatives (i.e., "failures to identify and condemn mergers that are anticompetitive") than false positives (i.e., "erroneous condemnations of procompetitive mergers").[245] First, when an agency determines that a merger is not anticompetitive, that determination is non-reviewable.[246] Second, "agency determination that a merger is anticompetitive is subject to nondeferential review by a general-jurisdiction court, which has less information, less expertise, and fewer resources than the agency" and is more likely to underen-

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245 Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 159. Frankel's argument assumes that false negatives are worse than false positives. Some have claimed that false positives are worse than false negatives because the efficiencies that would be created by a pro-competitive merger are lost; however, the counterargument—one that Frankel ultimately accepts—is that false negatives hurt consumer welfare by increasing prices to consumers, thereby injuring true consumer welfare. This counterargument is discussed by Steven Salop. *See* Steven C. Salop, Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard 1 (Nov. 4, 2005) (unpublished manuscript), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/exclus_conduct_pdf/051104_Salop_Mergers.pdf.

246 Frankel, *supra* note 245, at 171-73.

force mergers by overturning correct agency determinations.[247] The first premise is a product of the two-agency system and unlikely to change.[248] Frankel's second premise is squarely implicated by a change in the test for a preliminary injunction.

Frankel argues that a non-deferential judiciary may protect against false positives, but in doing so will create false negatives out of anticompetitive mergers.[249] Frankel bases this belief on three aspects of judicial review: "the nature of the reviewing body, the standard of review, and the burden of proof."[250] Federal judges serve as the reviewing body and "typically have little or no economic training or experience with antitrust matters," a problem that is compounded by "limited time and resources."[251] The agencies, however, spend significant time, money and manpower investigating and analyzing potentially anticompetitive mergers.[252] Frankel continues as follows:

> [W]hereas a federal judge has little or no economics or antitrust expertise, the reviewing agency has substantial expertise including lawyers and economists who have spent virtually their entire careers analyzing mergers. And whereas a federal court's time and resources are severely limited, the reviewing agency will typically have had a sizable staff that spent months analyzing the particular transaction. Finally, the information considered by the agency will be much more extensive than that presented during the course of a trial.[253]

This leads Frankel to the conclusion that the courts will "almost inevitably . . . erroneously change some true positives to false negatives. . . . [I]t is logical to think that, absent a deferential standard of review, a court will do a worse job than the initial agency in accurately identifying anticompetitive mergers."[254]

This conclusion may be especially true in a time where the "economic analysis of mergers ha[s] come of age."[255] Relying on complicated prin-

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247 *Id.* at 160; *see also* Andeer, *supra* note 35, at 3 ("In proposing the new agency to the House of Representatives, President Wilson expressed skepticism that federal district courts were equipped 'to adjust the remedy to the wrong in a way that will meet all the circumstances of the case.'" (quoting H.R. DOC. NO. 63-625, at 5 (1914))).

248 *See supra* Part I.A-B.

249 Frankel, *supra* note 245, at 173 ("[T]he forum and standard for review serve to enhance the chances that false positives will be reversed and, indeed, may result in a significant number of true positives being turned into false negatives.").

250 *Id.*

251 *Id.*

252 *Id.* at 174.

253 *Id.* (footnotes omitted).

254 *Id.* at 174-75.

255 Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, 53 J. L. & ECON. (forthcoming 2010) (manuscript at 2) (quoting RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001)) (internal quotation marks omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888.

ciples and econometric analysis, merger analysis is more complex than ever before.[256] As a result, "modern critiques of important antitrust decisions frequently amount to a claim that the judge misunderstood or misapplied the relevant economics, failed to recognize the critical economic issue, or relied on the opinions and analysis of the wrong expert."[257] This is especially true in mergers, where the analysis is based on predicting future effects of a potential merger, not on evaluating conduct which has already occurred.[258] It is one reason why some countries rely on a specialized panel of judges for antitrust cases.[259]

Professors Michael Baye and Joshua Wright performed an empirical study that suggests most judges are not equipped to handle complex antitrust cases.[260] Baye and Wright analyze a series of "simple" and "complex" antitrust cases to view the appeal rate in each group as proxies for the correctness of the decision.[261] They find that "complex" antitrust cases are 10 percent more likely to be appealed, suggesting a likely error in the judge's analysis.[262] They conclude as follows:

> While one may reasonably dispute whether the relationship between economic complexity and appeals identified here is strong evidence of a divergence between the technical demands of contemporary antitrust analysis and the technical economic skills of "generalist judges" on the federal bench, it is clear that economic complexity does impact the modern antitrust litigation landscape.[263]

Because agencies are not self-interested in the same way that private parties are—and because agencies act in a quasi-judicial role when determining whether or not to challenge a merger—it is reasonable to conclude, as Frankel suggests, that judges are likely to turn true positives into false negatives.

Frankel's standard of review argument suggests that antitrust agencies do not receive the same deference that other similar agencies receive.[264] He states that "it is important to provide an independent judicial check on agency determinations . . . while at the same time preserving the advantages

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256 *Id.* (manuscript at 1).

257 *Id.* (manuscript at 3).

258 *See id.* (manuscript at 2).

259 *See* Sokol, *supra* note 5, at 1068-69 (discussing Chile's use of the Tribunal de Defensa de la Libre Competencia).

260 Baye & Wright, *supra* note 255 (manuscript at 1-6).

261 *Id.* (manuscript at 5-6) (internal quotation marks omitted). Baye and Wright assume that parties choosing to bear the costs of appeal have a better understanding of the merits of their case and the likelihood of reversible error than the judge who decided the case. *See id.* (manuscript at 6). By appealing a case, they manifest that understanding. *Id.*

262 *Id.* (manuscript at 22).

263 *Id.*

264 Frankel, *supra* note 245, at 175-76.

that inure from having decisions made by a specialized agency."[265] For most agencies that conduct their own trials, this check is provided by the Administrative Procedure Act ("APA").[266] The APA requires an extremely deferential standard of review for agency decisions once the agency has provided a full adjudication on the merits in the agency's court.[267] While preliminary injunctions in district courts have not received the same rigor as an agency adjudication, Frankel argues that the agencies' determination to litigate deserves deference.[268] As a result, it will be easier for agencies to reach the burden of persuasion.[269] In the merger context, Frankel posits that a more deferential standard is beneficial because imperfect information and uncertainty about the future make it difficult for a challenging agency to ever reach the burden of persuasion in a preliminary injunction setting.[270] Recognizing this problem, Congress provided the FTC with the public interest standard enunciated in Section 13(b) of the FTC Act.[271]

B. *The Empirical Argument*

The empirical argument is presented through three different types of studies. First, enforcement data is the number of mergers challenged compared to the total number of filed mergers. Second, case studies describe the effect of particular mergers on consumers by analyzing price outputs, stocks, or other similar indicia. Third, practitioner surveys evaluate how individuals perceive enforcement actions in given periods. This Section will survey some of the important data in each area, but it relies most heavily on the conclusions from the enforcement data and case studies.

1. Enforcement Data

In 2007, Professors Jonathan Baker and Carl Shapiro presented a paper arguing that the agencies—the DOJ in particular—underenforce merger

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265 *Id.* at 175.

266 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-83, 701-06, 801-08, 3105, 3344, 6362, 7562 (2000)). For background discussion of the APA, see Darren H. Weiss, *X Misses the Spot:* Fernandez v. Keisler *and the (Mis)Appropriation of* Brand X *by the Board of Immigration Appeals*, 17 GEO. MASON L. REV. 889, 893-95 (2010).

267 Frankel states that the Act provides for courts to review under the standard of "whether the action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 175 (quoting 5 U.S.C. § 706(2)(A) (2006)).

268 *See id.*

269 *See id.* at 180.

270 *Id.* at 178-80.

271 *See* 15 U.S.C. § 53(b)(2).

law.[272] Their study "had an immediate impact . . . among antitrust practitioners," and "[m]ore than any other work, . . . has shaped antitrust discourse in the United States since 2007."[273] Their work was based partly on a study by FTC Commissioner Thomas Leary, which was intended to show the continuity of merger enforcement over time.[274] Baker and Shapiro, however, drew very different conclusions from the enforcement data available to them.

Since their study, various individuals have commented on or criticized Baker and Shapiro's findings, especially their reliance on the "pendulum" theory of antitrust merger enforcement.[275] While the underlying theory behind the data is open to dispute, the data itself suggests that the agencies have underenforced merger law.[276]

a. *Baker and Shapiro's 2007 Study*

Baker and Shapiro begin by tracing the history of merger enforcement from the 1960s (where "the Government always wins"[277]), through the 1974 decision *United States v. General Dynamics Corp.*[278], to the loosening of structural presumptions during the 1980s and 1990s.[279] The history concludes in the late 2000s, quoting various newspaper articles suggesting that President George W. Bush ("Bush II") had returned enforcement levels to the lowest since President Reagan's permissive attitude of the 1980s.[280]

Against this backdrop, Baker and Shapiro present their statistics on enforcement data. The data was originally collected by Commissioner Thomas Leary, showing, as a percentage, the number of enforcement actions compared to the number of mergers filed with the agencies.[281] An

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272 Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 235 (Robert Pitofsky ed., 2008).

273 Sokol, *supra* note 5, at 1110.

274 Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 107 (2002).

275 *See* William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL'Y INT'L 129, 134-35 (2009); Sokol, *supra* note 5, at 1104-05 & n.345. The pendulum theory says that the degree of merger enforcement swings from too strict (1960s), to too permissive (1980s), and back to just right (late 1990s). It will continue to swing with changing political parties in the White House.

276 1982 is the first year of data available in the survey and aligns with President Reagan's first term in presidency. Baker & Shapiro, *supra* note 272, at 244.

277 *Id.* at 237 (quoting United States v. Vons Grocery, Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting)) (internal quotation marks omitted).

278 415 U.S. 486 (1974).

279 Baker & Shapiro, *supra* note 272, at 236-44.

280 *Id.* at 244-45.

281 *Id.* at 244.

enforcement action consists of "court cases, consent settlements, and transactions abandoned or restructured prior to filing a complaint as a result of an announced challenge."[282] Baker and Shapiro supplement Leary's data with their own, which they collected after Leary's study and presentation were complete.[283]

	Leary's Table Supplemented with Baker and Shapiro's Statistics						
	Reagan 1982-85	Reagan 1986-89	Bush 1990-93	Clinton 1994-97	Clinton 1998-2000	Bush II 2002-05	Bush II 2006-07
FTC	1	0.7	1.5	1.1	0.7	0.8	0.6
DOJ	0.8	0.4	0.8	0.9	1.1	0.4	0.4
Total	1.8	1.1	2.3	2	1.8	1.2	1

Leary, whose data covered the tenure of President Reagan through President Clinton, used the enforcement percentages to support his conclusion that merger enforcement at the agencies was consistent from presidential term to term and that "merger policy has been characterized more by continuity over time than wild swings."[284] Leary's interpretation of this table suggests that while there is variation term to term, the agencies enforced merger law at roughly comparable rates between the presumed lax enforcement period of President Reagan and the presumed strict period of President Clinton.

Baker and Shapiro had a different interpretation. Their analysis focused on the deviations from the mean, not the enforcement percentage from any given period. Their reasoning for doing so is that the "mix of deals presented to the agencies, in terms of the severity of antitrust issues they raise, is endogenous."[285] First, agency actions in future cases are based on previous successes or failures in court.[286] A series of failures may make the agencies more conservative in their enforcement actions.[287] On the private side, private antitrust lawyers closely observe the agency decision-making process.[288] These attorneys are likely able to easily identify mergers that will clearly pose problems,[289] mergers that will certainly not inspire a

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282 *Id.* at 245.

283 At the time that Baker and Shapiro gathered these numbers, only two years of data for George W. Bush's second term was available, so they had to extrapolate the final two years of his presidency to develop comparable data for a second term. *Id.* at 246.

284 *Id.* at 244.

285 Baker & Shapiro, *supra* note 272, at 245.

286 *See* Sokol, *supra* note 5, at 1128.

287 *Id.*

288 *See* Baker & Shapiro, *supra* note 272, at 245-46.

289 For example, a merger between Coke and Pepsi. *See* Sokol, *supra* note 5, at 1104.

challenge,[290] and those mergers that are "'judgment calls' close to the line, regardless of where the line is drawn."[291]

According to Baker and Shapiro's theory, approximately the same number of mergers should be challenged each year given a consistent merger enforcement policy.[292] These mergers are the "judgment calls" that private antitrust attorneys recognize are "close to the line" but, in the eyes of the agency, just far enough beyond the line to challenge.[293] On the other side of the line are the marginal mergers (i.e., the mergers that are close to the line), but the agency decides not to challenge these mergers.[294]

Given that roughly the same number of mergers will be challenged year to year in a given policy, significant deviations in the percentage of filings challenged during that period suggest that the agencies have acted unexpectedly or pursuant to a different merger policy.[295] Once this information has been processed by private attorneys, those attorneys are able to adjust their analysis and advise their clients on the likelihood of challenge from the agencies. The historical rate of challenge should return. Under Baker and Shapiro's analysis then, it is the "deviation of the merger enforcement rate from the average" that is the important statistic.[296]

Baker and Shapiro use Leary's average calculated enforcement actions of 0.9 percent to conclude that there exists a "strikingly low merger enforcement rate" in both the Reagan and Bush II administrations.[297] Their interpretation is that the agencies in these periods "surprised the antitrust bar with their lack of interest in challenging mergers."[298] Baker and Shapiro also note that:

> [T]he strikingly high merger enforcement rate, 1.5 percent during the George H. W. Bush administration (1990-1993), suggests that the FTC under Chairman Steiger surprised the antitrust community with its willingness to challenge deals. . . . Under this interpretation, moreover, the decline in enforcement rate that followed during the Clinton Administration does not mean that the FTC under Chairman Pitofsky was less enforcement-minded than it was under his predecessor; it simply means that the Pitofsky Commission did not surprise the antitrust bar with its approach to merger review.[299]

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290 Such as a merger between small firms in a perfectly competitive market—a common economics example being two wheat producers merging in a world of 100,000 wheat producers.

291 Baker & Shapiro, *supra* note 272, at 245.

292 *See id.*

293 *Id.* (internal quotation marks omitted).

294 Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST, Summer 2008, at 29, 31.

295 Baker & Shapiro, *supra* note 272, at 245.

296 *Id.* at 245.

297 *Id.*

298 *Id.*

299 *Id.* at 245 n.78.

Based on Leary's average statistic, Baker and Shapiro conclude that "these figures [indicate] that merger enforcement during the [Bush II] administration has been surprising low, particularly at the Antitrust Division."[300] They calculate that the two agencies would have needed twenty-four more mergers in order to bring their number in line with the historical average.[301] As a result, Baker and Shapiro conclude that the agencies, particularly the DOJ, underenforce horizontal merger law.[302]

b. *Challenges to Baker and Shapiro: Differences Between Agencies*

Baker and Shapiro's data provides strong support that the agencies underenforce horizontal mergers, especially in the Bush II administration.[303] However, one problem with using an average statistic is that a single average for both agencies may hide differences between agencies.[304] The decision to challenge mergers at each agency differs by agency and by merger shop.[305] Some merger shops may be more aggressive than others or have a higher propensity to litigate.[306] One agency may also be less transparent.[307] Instead, perhaps it would be more accurate to calculate merger averages based on each agency individually, rather than with the agencies combined. Although this method still groups merger shops into agencies as a whole, it may present a more accurate picture than a simple average would. Averaging the percentages along agency lines reveals a slight difference between the agencies. The FTC's average is slightly higher than the DOJ's—1 percent for the FTC and 0.8 percent for the DOJ.

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300 *Id.* at 246.

301 Baker & Shapiro, *supra* note 272, at 246-47.

302 *Id.* at 246.

303 For a study with similar results, see John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, 22 ANTITRUST, Summer 2008, at 43, 43-45 (finding that the DOJ was less likely to enforce mergers during Bush II's first term than the DOJ during Clinton's presidency, but that the FTC showed less difference in enforcement levels).

304 *See* Sokol, *supra* note 5, at 1112 (stating that "[w]hen certain industries are 'hotter' than others, the number of cases that an agency sees could be a function of which industry the agency investigates, as well as the amount of resources the agency has to more fully investigate transactions based upon deal flow"). Sokol points out potential limitations of Baker and Shapiro's empirical analysis and qualitative surveys, some of which are addressed in the subsequent sections of this Comment. *Id.*

305 *Id.*

306 *See id.*

307 *Id.* at 1114-15.

	Deviation from Mean Based on Agency-Specific Average						
	Reagan 1982-85	Reagan 1986-89	Bush I 1990-93	Clinton 1994-97	Clinton 1998-2000	Bush II 2002-05	Bush II 2006-07
FTC Difference	0.0	-0.3	0.5	0.1	-0.3	-0.2	-0.4
DOJ Difference	0.0	-0.4	0.0	0.1	0.3	-0.4	-0.4
Total Difference	0.0	-0.7	0.5	0.2	0.0	-0.6	-0.8

Looking at this table and comparing the raw numbers created by Leary, Baker, and Shapiro to the agency means calculated above, it is clear that the trends are similar. Though the degree varies slightly, this change (based on the statistics available) neither suggests that agency differences are significant nor materially changes the analysis.

c. *Challenges to Baker and Shapiro: Data Concerns*

Although FTC Commissioner William E. Kovacic compliments Baker and Shapiro's study for the questions it poses and for the discussion of enforcement agency policy,[308] he does not find great significance to their data.[309] Kovacic notes that "[c]alculations based on activity levels require extraordinary care in determining whether observed activity levels across periods are genuinely comparable."[310] He said this was so because "[r]elatively small adjustments to account for various factors can change the results materially."[311] Kovacic's assertions are designed to undermine the reliability of Baker and Shapiro's data.

Indeed, Baker and Shapiro admit that in calculating their data, they encountered some difficulties because the Hart-Scott-Rodino reporting threshold for mergers increased.[312] If Kovacic is correct, the statistics before and after may not be an "apples to apples" comparison.

Instead, Kovacic suggests that the agencies have gradually tightened their requirements to challenge a merger.[313] He says:

> This narrowing has been largely continuous rather than sharply discontinuous. Using a rough structural measure, the threshold at which the federal agencies could be counted on to apply strict scrutiny and to be most likely to challenge involved a reduction of the number of significant competitors in the following manner: 1960s (12 to 11), 1970s (9 to 8), 1980s (6 to 5), 1990s (4 to 3), 2000s (4 to 3). These thresholds can be derived from parsing the cases which the government agencies chose to litigate. It is reasonable to debate whether a 4 to 3

308 Kovacic, *supra* note 275, at 139.

309 *Id.*

310 *Id.* at 140.

311 *Id.*

312 Baker & Shapiro, *supra* note 272, at 246.

313 Kovacic, *supra* note 275, at 143-44.

> deal had a better chance of getting through in this decade than it did in the 1990s. The main point is that the perimeter the federal agencies have been defending has shrunken substantially over the decades. This is a function of the agencies' own reassessments of policy and of interpretations of merger law in the lower federal courts.[314]

It is unclear how Kovacic's theory reconciles the enforcement patterns seen in the data, and Kovacic does not provide an alternative explanation. His analysis, however, exposes the difficulty with empirical data of this nature. Given the two plausible, different interpretations, data alone cannot answer the question of whether a given level of enforcement underenforces or overenforces mergers compared to the optimal level of enforcement. Kovacic suggests that something more is needed to provide color to this question.[315]

2. Case Studies

Kovacic suggests that analyzing case studies over time in conjunction with enforcement data could provide significant insight on the effectiveness of merger policy. It also exposes a fundamental flaw with relying solely on enforcement data. The deviation from the mean represents how many more or less mergers were challenged than expected. While the size of the statistic is likely correlated to the degree the line shifts, it is not a measure that indicates how much change the agencies' policy underwent.[316]

There is an additional step missing to conclude that the agencies are underenforcing or overenforcing mergers—namely, whether or not the marginal merger is harmful to consumers.[317] If the merger does not harm consumers, then the agencies have drawn the line at the correct threshold. Litigation in that scenario is based on human error in evaluating the nature of the merger. If, however, the marginal merger hurts consumers, then it is likely that the agency is underenforcing mergers.

While Baker and Shapiro rely mostly on enforcement and survey data, they also draw attention to a recent case study to support their conclusion of merger underenforcement.[318] Baker and Shapiro also analyze the recent

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314 *Id.*

315 *Id.* at 139-40.

316 If the mean is based on averaging all the years for which data has been collected, then a historical average alone is meaningless as a tool to identify underenforcement or overenforcement unless the historical mean itself is an optimal level of enforcement. Simply averaging enforcement rates from all the available years will always produce a zero-sum game over the course of the data set. If the mean is based on the "ideal" years of enforcement, some outside measure is still necessary to prove that those years were "ideal." In the case of Baker and Shapiro, they apply Leary's historical mean to the Bush II era without updating the mean to include Bush II's merger enforcement data. They do not give an explanation on whether or not they felt it was appropriate to update that historical standard with new data.

317 *See* Baker & Shapiro, *supra* note 294, at 29.

318 Baker & Shapiro, *supra* note 272, at 248-50.

Whirlpool/Maytag merger to suggest that the risk undertaken by the DOJ in allowing this merger is consistent with their theory that the Bush II administration underenforced merger laws.

In general, the case studies like the one presented by Baker and Shapiro deal with marginal mergers (i.e. mergers that are close to the "line" where the agency will challenge the merger, but does not cross it).[319] These mergers are usually good indicia of the effectiveness of merger policy, as they are an ex post review of the agency's decision not to prosecute.[320] If the mergers tend to show that the effect of the merger is anticompetitive or harmful to consumers, it is likely that the agencies are not enforcing overall at the optimal level.[321] Likewise, mergers that do not show anticompetitive effects (i.e., either no price change or a decrease in price) could evidence that the agencies are either at the optimal level of enforcement or possibly overenforcing merger law.[322]

a. *Kovacic's Response to Baker and Shapiro*

While Kovacic may not have provided an alternative explanation for the variations in the data presented by Baker and Shapiro, he does provide case study evidence to suggest that the "just right" period of merger enforcement under Clinton was still "too-cold."[323] First, Kovacic argues that looking at the Whirlpool/Maytag merger alone, as Baker and Shapiro do, does not paint a full picture.[324] While they may provide "informative tools" in analyzing agency success, case studies taken individually can be misleading.[325] This misstep is compounded when there is a potential bias problem with the individuals conducting the study. Kovacic points out that Shapiro was a consultant for the DOJ during the Whirlpool/Maytag merger and that his views could be influenced by his prior position and experience.[326] Kovacic states that "[i]t takes extraordinary self-discipline for a first-person

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319 *See* Orley C. Ashenfelter, Daniel Hosken & Matthew Weinberg, *Generating Evidence to Guide Merger Enforcement* 4-5 (Nat'l Bureau of Econ. Res., Working Paper No. 14798, Mar. 2009), *available at* http://www.nber.org/papers/w14798.

320 *But see id.* at 5 ("Thus the results of these studies should be interpreted as measuring the effectiveness of specific (non) enforcement decisions and not as the average price effect caused by a consummated merger."). For the purposes of this Comment, however, the concern is precisely—though not completely—with those marginal mergers that the agencies choose not to challenge. Presumably, either these mergers are the next in line should the agencies have expanded ability to challenge mergers or they would be challenged if the agencies were more likely to succeed in court.

321 *See id.*

322 *See id.* (explaining that existing merger studies only take place in four industries with publicly available pricing data and that prices are only observed for a short time following the merger).

323 Kovacic, *supra* note 275, at 138.

324 *Id.* at 141.

325 *Id.*

326 *Id.*

narrator to avoid the temptation to skew the narration in ways that, at least to some degree, underscore the apparent reasonableness of the narrator's views."[327] Kovacic concludes that the value placed on a single study, especially one where there could be a potential for bias, is limited.[328]

Rather, Kovacic argues that a better method is to analyze these case studies in a group over time.[329] While Kovacic himself does not offer a comprehensive series of case studies, he points out some case studies from the mid-1990s—the so-called "just-right" period of merger enforcement.[330] Kovacic points out a series of decisions to not challenge mergers in the airline and petroleum industries during the Clinton administration.[331] He argues that each of these approvals posed at least as much risk for anticompetitive outcomes as the Whirlpool/Maytag merger.[332] He then discusses a Government Accountability Office study, which found that in an eight-merger study from the Clinton administration, six mergers produced higher prices for consumers.[333] Kovacic concludes that the "just right" period of merger challenges may not have been just right and that it should be included as "part of the story" of agency effectiveness.[334]

b. *Weinberg's Survey*

Professor Matthew Weinberg's 2007 article surveys various studies conducted between 1988 and 2005, examining both the competitive and anti-competitive effects of mergers that were allowed to close.[335] Each of the mergers in the studies Weinberg reviews included mergers that raised enough red flags to warrant close consideration.[336]

Weinberg's data provides mixed results.[337] Most of the studies found short-term decreases in consumer welfare, displayed through a price increase on goods or a stock price increase.[338] These studies looked at mergers consummated in 1980 and 1999 and included mergers in the airline, gaso-

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327 *Id.*

328 *See id.*

329 Kovacic, *supra* note 275, at 141.

330 *Id.* at 141-43.

331 *Id.*

332 *Id.* at 142.

333 *Id.*

334 *Id.* at 141-43.

335 Matthew Weinberg, *The Price Effects of Horizontal Mergers*, 4 J. COMPETITION L. & ECON. 433 (2008). Many of Weinberg's findings are reprinted in his working paper with Orley Ashenfelter and Daniel Hosken, *supra* note 319.

336 *See* Weinberg, *supra* note 335, at 434-35.

337 *Id.* at 433, 446.

338 *Id.* at 435, 439-42. Specifically, eleven of fourteen studies found increases in consumer prices during the time period right before or right after the merger was completed. *Id.* at 442.

line and piping, banking, printing, and various consumer product markets.[339] In the studies that found anticompetitive effects, the results ranged from roughly 2 percent to over 20 percent higher prices for consumers.[340] Many of the mergers with the greatest anticompetitive effects occurred during the Reagan and Bush I administrations, while the mergers in the consumer products and medical publication markets during the Clinton administration tended to have smaller price increases associated with the mergers.[341]

However, some studies have found that long-term efficiencies improved consumer welfare, but only a few studies had the data required to conduct long-term analysis.[342] In these studies, prices rose in the initial period after the merger but fell relative to their rivals in the long run.[343] These studies concluded that it was possible that the efficiencies gained in the mergers kept prices lower in the long term than rival companies.[344]

Overall, Weinberg found that mergers tend to cause price increases affecting consumer welfare in both the merging companies and in rivals.[345] Generally, these mergers negatively affect consumer welfare.[346] He concluded that "the majority of the mergers passed do not result in price increases, but the most direct evidence available on the price effects of mergers suggests that a stronger anti-merger policy on the margin would better protect consumer welfare."[347]

Weinberg notes that the majority of studies he reviewed "do not constitute a random sample of U.S. mergers."[348] Weinberg's caution that these mergers are not indicative of all mergers helps rather than hurts the argument at hand. The mergers Weinberg surveys are handpicked because of the competitive concerns they created, but they were not challenged by the agencies.[349] They are the next in line, and presumably would be challenged

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339 *Id*. at 439-42.

340 *Id*.

341 *See id.* For example, Ashenfelter and Hosken, who in 2008 reprinted their article viewing a series of consumer product mergers that occurred between 1997 and 1999, found between 3 and 7 percent increases in consumer costs. Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Selected Mergers Case Studies* 10, 35 (Nat'l Bureau of Econ. Research, Working Paper No. 13859, Mar. 2008), *available at* http://www.nber.org/papers/w13859 ("[I]t was necessary to restrict our attention to mergers that occurred between 1997 and 1999.").

342 Weinberg, *supra* note 335, at 442-43.

343 In some cases, prices fell, while in others, they did not rise as quickly as their competitors' prices. *Id*. at 443.

344 *Id*.

345 *Id*. at 446.

346 *See* Weinberg, *supra* note 335, at 434 ("These findings suggest that stricter merger enforcement is necessary for fulfilling the objective of protecting consumer surplus.").

347 *Id*. at 446.

348 *Id*.

349 *E.g.*, Ashenfelter & Hoskin, *supra* note 341, at 10 ("Our goal was to identify mergers that posed a significant risk of anticompetitive harm (so there was a reasonable probability of observing a post-

if the agencies had more resources or were able to draw the line at a different location. The data from Baker and Shapiro, combined with Weinberg's survey of marginal mergers, is by no means conclusive, but suggests that the agencies have historically underenforced mergers, perhaps even under "stronger" enforcement regimes than that of President Clinton.

3. Survey Data on Practitioner Perceptions

Surveys of practitioners are helpful to understand practitioner perception of enforcement changes over time. But like empirical data and case studies, survey data is also significantly limited. However, survey data is a useful tool to help explore previous levels of activity and add context to empirical results.[350]

a. *Baker and Shapiro's 2007 Study*

In an attempt to confirm their results,[351] Baker and Shapiro conducted a qualitative study of interviews among top antitrust practitioners in the Washington, D.C., area.[352] The survey was designed to compare merger policy perceptions in March 2007 (well into Bush II's presidency) with perceptions of merger policy ten years prior (towards the end of Clinton's presidency).[353] In addition, 85 percent of the survey respondents had worked at one of the agencies.[354]

Baker and Shapiro report that "respondents consistently told us that in reviewing horizontal mergers, both the Antitrust Division and the FTC are more receptive to arguments made by the merging firms today."[355] Overall, the qualitative survey reported that the agencies are less likely to challenge mergers and that they are more willing to "accept weaker remedies" and issue "fewer second requests" than ten years prior.[356] Furthermore, between

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merger price increase) but where the risk was not large enough to cause the antitrust agencies to block or substantially modify the transaction.").

350 *See* William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 909 (2009) ("Even if one accepts a case-related activity as the chief index of an agency's worth, there must be shared understanding about past experience. There cannot be an informative conversation about the significance of activity levels if there is no agreement about what those levels have been. In baseball terms, there at least must be common agreement on whether a pitch was thrown before moving to a consideration about whether the pitch was a ball or a strike.").

351 Baker & Shapiro, *supra* note 272, at 247.

352 *Id.*

353 *Id.*

354 *Id.*

355 *Id.*

356 *Id.*

the DOJ and the FTC, the DOJ appears to be more permissive regarding horizontal mergers than the FTC.[357] These results are in line with the enforcement data that suggests a permissive, significant shift during Bush II's regime, especially with respect to the DOJ.

b. *Sokol's Survey*

Responding to the survey conducted by Baker and Shapiro, Professor D. Daniel Sokol recently published his own article, which included a section on the proper enforcement level of merger law.[358] Sokol devised and conducted his own survey, attempting to account for what he considered to be some of the shortfalls in Baker and Shapiro's survey. Sokol conducted his quantitative[359] and qualitative studies approximately one year after Baker and Shapiro conducted their study, so there was little difference in the relative periods of comparison.[360]

Sokol rejected Baker and Shapiro's reliance on antitrust practitioners in Washington, D.C., as a proxy audience and instead conducted both qualitative and quantitative surveys to measure practitioner perceptions of the agencies with a sample of practitioners from a wide range of cities and states. Sokol commented that focusing on top antitrust practitioners in Washington, D.C., opens up the survey results to bias from such a small group.[361] Although surveys often use "D.C. Elites" as a proxy for early adopters of political opinions because this group tends to be more informed about current political developments, it is unclear if that presumption applies in this context or how much more informed this group is in relation to the rest of the antitrust population.[362]

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357 Baker & Shapiro, *supra* note 272, at 247-48.

358 Sokol, *supra* note 5, at 1100-01. Sokol's study took place in the broader context of commenting on the need for greater discussion surrounding comparative institutional design as a tool to improve antitrust. *Id.* at 1057.

359 *See id.* at 1120-26 (explaining the study's quantitative results). Sokol then developed a qualitative survey to further explore the results of his quantitative survey. *Id.* at 1127. For Sokol's explanation of his quantitative results, see *id.* at 1121-26.

360 *Id.* at 1119.

361 While Baker and Shapiro do not defend their poll on this ground, interviewing "D.C. Elites" is not an uncommon practice in political polling. In theory, D.C. Elites are more informed than the general population and are ahead of the curve in perception of politically related events. If, therefore, D.C. Antitrust Elites are more informed than the general antitrust lawyer, their perceptions may more accurately reflect changes over time in antitrust enforcement. It is unclear, however, whether or not this is true in application in this setting, where it can be assumed that all practitioners are likely well-read and current on antitrust issues in general.

362 *See, e.g.*, Andy Barr, *Poll: D.C. Elites Rate Congress Higher*, POLITICO (Aug. 15, 2005, 10:39 PM), http://www.politico.com/news/stories/0810/41036.html. At this point, I must call out my own potential for bias. Prior to attending law school, I worked for Penn, Schoen & Berland Associates, a

Sokol's qualitative study provides interesting support for and disagreement with Baker and Shapiro's research. Generally, Sokol's results contrast with Baker and Shapiro's finding of a "'sharply higher' rate of success" in DOJ mergers.[363] Only three of the thirty-four qualitative respondents agreed that the differences between Bush II and Clinton were significant, although slightly less than half did report some differences in enforcement.[364] This would generally support the idea that on the margins, there could be some difference, but it could not support the significant difference that Baker and Shapiro suggest.[365] In greater contrast to Baker and Shapiro, Sokol noted that "respondents did not have firsthand experience of reduced enforcement in mergers under the Bush FTC."[366] However, in responding to this line of questioning, most respondents found that there was a difference in agency enforcement between the agencies and that it was harder to get deals through the FTC than through the DOJ.[367] This, according to the practitioners Sokol interviewed, was due to the different institutional structures between the DOJ and the FTC, rather than any particular propensity to litigate.[368]

Sokol's surveys provide interesting results to juxtapose against the conclusions of Baker and Shapiro. It is unclear that either study can confirm or reject the hypothesis advanced by Baker and Shapiro, but both studies provide significant color into how antitrust practitioners perceive the changes over time.

4. Empirical Conclusion

As mentioned in the Introduction, the ultimate question of underenforcement is empirical in nature. As Part IV has demonstrated, the results are not conclusive. But taking the evidence as a whole, such results suggest that mergers are underenforced in the U.S. While the degree of underenforcement may fluctuate in connection with the agency or presidency, the data suggests overall that the marginal merger is harmful to consumers because it raises prices. Assuming that neutral enforcement is preferred to

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political polling and market research firm that was responsible for the study at issue in the Politico article. I was in no way associated with the particular study at issue.

363 Sokol, *supra* note 5, at 1128.

364 *Id.*

365 Sokol acknowledges that Baker and Shapiro discuss that a change at the margins may be all that is necessary. *Id.* at 1119 n.451.

366 *Id.* at 1129.

367 *Id.* at 1128-29.

368 *Id.* at 1128.

underenforcement or overenforcement,[369] this result suggests that the agencies should pursue greater enforcement.

V. IF AGENCIES CANNOT CONVERGE AT THE SERIOUS QUESTIONS TEST, AGENCY DRAW MAY BE PREFERABLE TO CONVERGENCE AT AN OLD STANDARD

The previous three Parts have established that there is a divergence in preliminary injunction standards between the FTC and the DOJ and that divergence creates unfairness and uncertainty in the merger review process. Furthermore, there are structural and empirical arguments that the agencies underenforce mergers. The corollary to this statement is that merger enforcement should be increased. This premise, if accepted, should help guide the determination at which preliminary injunction standard the agencies should converge.

If the original use of the serious questions standard was an equal alternative to the likelihood of success, then it can be assumed that all previous merger litigation utilized the likelihood of success standard.[370] The serious questions standard, as applied in *Whole Foods*, presents the change to a more permissive standard. It is logical to conclude that if the new serious questions standard is likely to increase enforcement, then the agencies should converge at the new standard and abandon the historical likelihood of success standard.

A. *The Serious Questions Test Is Preferable to Likelihood of Success*

1. The Standard Addresses Structural Deficiency

The serious questions test corrects the alleged structural bias favoring underenforcement in the antitrust merger system. The structural argument suggests that because judges lack the expertise of the reviewing agency, the judges should apply a standard that sets low thresholds for the agencies.[371] Parties may still rebut the agencies' evidence, requiring a greater showing of likelihood of success or equities. But in a close case, reliance on the

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369 This assumption is not without question. *See* Frankel, *supra* note 245, at 195-99 (discussing Judge Easterbrook's views on false positives and false negatives). As Frankel points out, however, this reasoning may not apply to mergers in the same way that it applies to other areas of antitrust. *Id.* at 198 ("[B]ecause a false negative with respect to Section 7 creates the possibility of anticompetitive conduct that cannot be effectively reached by other antitrust legal provisions, false negatives may be particularly damaging.").

370 *See supra* Part I.D.

371 *See supra* Part IV.A.

agencies would reduce systematic underenforcement and create a more even system.

This determination is similar to the standard of review mandated by the APA.[372] The APA mandates an extremely permissive standard of review for agency adjudications. The serious questions standard represents a more difficult agency bar than that which the APA mandates, which is appropriate because the agencies are not conducting a full adjudication prior to entering court. However, the serious questions standard offers the government agencies deference from the standard that private parties must reach and is consistent with the Congressional declaration of agency expertise.[373]

2. The Standard Toughens Merger Enforcement Rates from the Inside-Out

Furthermore, the more permissive serious questions standard also addresses underlying arguments surrounding the empirical evidence. Specifically, Baker and Shapiro suggest that the merger enforcement rates are endogenous.[374] Sokol's qualitative study also suggests that agencies are "gun shy" after litigation losses.[375] By providing a more deferential standard for success, agencies are more likely to win at trial and therefore more likely to challenge the marginal merger. Assuming that Weinberg's conclusion is accurate—namely, that the marginal merger hurts consumer welfare to some degree—this standard should be viewed as a tool used by the agency to enforce merger laws. Therefore, a conservative merger policy combined with an easier enforcement standard may provide the optimal balance of merger enforcement.

3. The Standard Gives Both Agencies Deference Because Both Agencies Are Experts

It is also important to remember that Congress made a policy decision to give the FTC a deferential public interest standard when it modified Section 13(b) of the FTC Act.[376] In doing so, Congress declared that courts should defer to the agency that Congress was declaring an expert in antitrust.[377] However, in terms of antitrust, both the DOJ and the FTC have

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372 *See supra* Part IV.A.

373 Private parties must still reach the traditional four-part test.

374 Baker & Shapiro, *supra* note 272, at 245.

375 Sokol, *supra* note 5, at 1128 ("A number of practitioners believed that *Oracle/Peoplesoft* chilled the DOJ's appetite to challenge mergers.").

376 *See* 15 U.S.C. § 53(b) (2006) (providing the FTC with a public interest standard).

377 *See* Rosch, *supra* note 4, at 6.

similar expert capabilities and capacities.[378] If both agencies are experts, then it seems appropriate that both agencies should get a deferential standard of review.[379]

Congress has taken the same steps with many other agencies, such as the SEC and the FCC.[380] Congress transferred full rulemaking and adjudicatory power to these agencies,[381] something that the odd evolution of antitrust did not allow. These agencies are able to adjudicate their own cases, which are appealable to federal court, similar to the FTC's Part III proceedings.[382] The agency determinations in these appeals are based on the arbitrary and capricious standard set forth by the APA.[383] Although the serious questions test does not reach the same permissive depth as the APA,[384] it seems consistent with the deference that Congress generally shows to agencies in providing a less rigorous test for the expert agencies to overcome in federal courts.

B. *Agency Draw Is Preferable to Convergence at an Old Standard*

If Congress does not act immediately—or at all—one last question remains: Do the costs created by agency draw outweigh the benefits from agency draw?[385] In other words, do the costs created by the uncertainty and unfairness of agency draw outweigh the increased consumer welfare achieved in FTC merger enforcement actions?[386] Like so many other questions in this Comment, the best answer would be empirical. However, data on this topic is not likely to exist in the United States.[387]

One reason to suggest that agency draw may be preferable is that the costs of agency draw may be overstated. The vast majority of mergers quickly pass through the clearance process without agencies jostling for position, suggesting that the additional risk imposed by agency draw would affect very few deals. A formal clearance process, like the one proposed in 2002 by FTC Chairman Timothy J. Muris and Assistant Attorney General for Antitrust Charles A. James, and a procedure to assign unclear mergers

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378 *See id.* at 6-7.

379 *Id.*

380 *Id.* at 2-3.

381 *Id.*

382 *See, e.g.*, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC.GOV (last modified Oct. 20, 2010), http://www.sec.gov/about/whatwedo.shtml (discussing the process of SEC administrative adjudication).

383 *See supra* Part IV.A.

384 Nor should it, as the court in this situation is still the final arbiter.

385 *See supra* Part III.A-B.

386 *See supra* Part V.A.

387 Perhaps a study could be designed based on international differences in enforcement standards. Such a study, however, would likely pose significant hurdles.

prior to the review would solve any uncertainty problems based on clear industry allocations.[388] Adopting such a process is not without its own costs, but it could save costs on other levels as well.[389]

Lastly, it is tempting to suggest that the costs of agency draw are borne by merging companies and that the benefits of increased merger enforcement generally accrue to consumers by not having to pay higher prices after a merger. If this is accurate, then the reliance on true consumer welfare may influence the policymakers to prefer agency draw for the time being. While agencies will accidentally prosecute pro-competitive or competitive-neutral mergers, merging parties structuring a merger are generally in the best position, relative to consumers and the agencies, to mitigate uncertainty and the potential for litigation. For this reason, placing uncertainty costs on the merging parties is consistent with placing risk on the least cost avoider, those who are in the best position ex ante to minimize the likelihood of review.

CONCLUSION

Whole Foods is an example of what Congress hoped to accomplish in developing the FTC. There was a goal to allow agencies to experiment in order to improve antitrust law.[390] Experimentation requires different outcomes to be effective. Once these differences are recognized, they may be evaluated, and the best choice may be adopted.

This Comment has identified exactly that situation. It has suggested that *Whole Foods* created divergent standards in preliminary injunction standards in merger challenges. There are policy reasons that suggest a need for converging these standards to avoid the unfairness and uncertainty associated with agency draw. Furthermore, structural and empirical evidence suggests that the agencies underenforce mergers and that increasing merger enforcement could improve consumer welfare. The serious questions standard from *Whole Foods*, because it should tend to increase enforcement in the face of underenforcement and reasonable assumptions that the agencies should prevail when they challenge mergers, is thus preferable to the likelihood of success standard that the DOJ must prove. Because the DOJ does not litigate under Section 13(b) of the FTC Act, an affirmative action from Congress is necessary to converge at the serious questions standard.

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388 Press Release, Fed. Trade Comm'n, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearance.shtm.

389 *See* Sokol, *supra* note 5, at 1133 ("Some respondents confided they were glad that clearance was not solved in 2002 . . . because the clearance deal would have meant a loss in their client-billable matters.").

390 *See* GELLHORN ET AL., *supra* note 7, at 37-39.