The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7

Robert H. Lande,* John M. Newman** & Rebecca Kelly Slaughter***

Section 7 of the Clayton Act prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." Over the course of more than a century, enforcers have litigated hundreds of cases under this provision. Yet the overwhelming majority of judicial decisions, formal agency guidance, speeches by prominent enforcers, and scholarly articles have focused exclusively on the first clause of the statute. Half of the key language in a core anti-monopoly law has gone almost entirely overlooked.

This Article fills that void. A rigorous textualist analysis reveals that section 7's second prong bars all mergers that may move a market appreciably towards monopoly. Both case law and the statute's legislative history align with our textualist findings.

Unlike the first prong, the second contains no quantum-of-harm requirement or effect-on-competition requirement. As a result, the second prong imposes a distinct and powerful prohibition. We identify a number of factual settings in which this statutory bar has unique force, offers analytical advantages, or both. We also evaluate the federal antitrust agencies' 2023 Merger Guidelines and conclude that, unlike previous versions, they embody and reflect the underlying law in this area.

The second half of Clayton Act section 7 is not only good law but also rests on good policy. Together, the statute's two prongs impose a sliding-scale framework that promises to reduce costly errors. Monopolized markets can harm a wide variety of stakeholders, from consumers and small businesses to workers, farmers, and other suppliers. With section 7's long-

* Venable Professor of Law, Emeritus, University of Baltimore School of Law.

** Professor of Law, University of Miami School of Law. Some research was conducted, and portions of this Article drafted, while the author was serving as Deputy Director of the U.S. Federal Trade Commission's Bureau of Competition. Any views expressed herein draw solely upon public information and do not necessarily reflect the views of the Bureau or the Commission.

*** Commissioner, U.S. Federal Trade Commission. The views expressed in this Article are her own; they do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. The authors would like to thank Peter Carstensen, Gregory Day, Nick Grimmer, Herbert Hovenkamp, and Robert Robinson for extremely helpful comments; Cherie Correlli and Joshua Rodriguez for excellent research assistance; and Ricardo Woolery, Caroline Holland, Oscar Rodas-Falla, and Evan Mantler for their assistance.

dormant second half finally activated, this foundational statute may yet live up to its full potential.

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Introduction

Section 7 of the Clayton Act is a cornerstone of modern antitrust law. Its text prohibits mergers and acquisitions whose effect may be "substantially to lessen competition, or to tend to create a monopoly."[1] In recent years, federal antitrust enforcers have pursued more cases under this statutory provision than any other.[2] Hundreds of actions involving household-name corporations—from Ford Motor Company and U.S. Steel to Meta and Microsoft[3]—have been litigated throughout more than a century of section 7 jurisprudence. Scholars working in a variety of disciplines have churned out thousands upon thousands of pages analyzing its scope and content.[4]

Yet only a small handful of judicial opinions, and not a single scholarly article, have focused on the second half of the statute: the bar on mergers that may "tend to create a monopoly." Instead, case law,[5] agency guidelines,[6]

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1. 15 U.S.C. § 18.

2. During fiscal year 2019, for example, the U.S. Department of Justice (DOJ) Antitrust Division initiated seventy-two investigations of potential Clayton Act section 7 violations and only sixty-two investigations of all other potential statutory violations combined. U.S. DEP'T OF JUST., ANTITRUST DIV., WORKLOAD STATISTICS 1 (2019).

3. Ford Motor Co. v. United States, 405 U.S. 562 (1972); United States v. Columbia Steel Co., 334 U.S. 495 (1948) (U.S. Steel); FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892 (N.D. Cal. 2023); Demartini v. Microsoft Corp., 662 F. Supp. 3d 1055 (N.D. Cal. 2023).

4. A recent Westlaw search for "'Clayton Act' & 'Section 7'" yielded 10,000+ "Secondary Sources" results.

5. *See, e.g.*, United States v. Jetblue Airways Corp., No. 23-10511-WGY, 2024 WL 162876, at *22 (D. Mass., Jan. 16, 2024) ("Section 7 of the Clayton Act prohibits mergers and acquisitions 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition.'" (quoting selectively from 15 U.S.C. § 18)); United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 28 (D.D.C. 2022) ("Those protestations are beside the point because the Clayton Act prohibits mergers that may substantially lessen competition 'in *any* line of commerce or in *any* activity affecting commerce.'" (quoting selectively from 15 U.S.C. § 18)); *In re* AMR Corp., 625 B.R. 215, 268 (Bankr. S.D.N.Y. 2021) ("Plaintiffs . . . fail to carry their ultimate burden to show that the effect of the Merger has been to substantially lessen competition."). Even Judge Posner ignored the "tend to create a monopoly" clause and its incipiency mandate in *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282 (7th Cir. 1990): "A transaction violates section 1 of the Sherman Act if it restrains trade; it violates the Clayton Act if its effect may be substantially to lessen competition. But both statutory formulas require, and have received, judicial interpretation; and the interpretations have, after three quarters of a century, converged."

6. *E.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES § 2, at 3 (2020) [hereinafter 2020 VERTICAL MERGER GUIDELINES] (identifying "the central question" as "whether a vertical merger may substantially lessen competition").

speeches by prominent enforcers,[7] and journal articles[8] have overwhelmingly focused only on section 7's first prong. For example, a survey of all federal enforcement actions litigated during the ten-year span between 2010 and 2020 yields twenty-six judicial opinions that rest on the statute's first prong—and zero that rest on the second.[9] Given the central role section 7 has played throughout antitrust history, this gap in adjudication, enforcement, and scholarly analysis is puzzling. It might have been simply a historical accident.[10] But regardless of the reason, some of the most important language in a core anti-monopoly statute has gone almost entirely overlooked.

Recent years have witnessed growing bipartisan concern over concentration levels and monopoly power in the U.S. economy. Policymakers, think tanks, legal scholars, and economists have put forward a range of proposals aimed at tackling what is widely viewed as an especially acute societal problem.[11] A new anti-monopoly movement has emerged,

7. William J. Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Origins of the Species: The 100 Year Evolution of the Clayton Act (Dec. 4, 2014) ("[T]he Act banned these practices where their effect 'may be to substantially lessen competition.'" (quoting 15 U.S.C. §§ 13, 14, 18)); Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n, The Forward-Looking Nature of Merger Analysis (Feb. 6, 2014) ("The central question of merger review . . . is whether the elimination of . . . direct competition is likely substantially to lessen competition."); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Litigating Merger Challenges: Lessons Learned (June 2, 2008) (identifying "the ultimate question under Section 7 of the Clayton Act" as "whether the transaction is likely to substantially lessen competition").

8. *See, e.g.*, Thomas O. Barnett, *Substantial Lessening of Competition—The Section 7 Standard*, 2005 COLUM. BUS. L. REV. 293, 293 (2005) (omitting any reference to the second prong). Perhaps illustrating just how widespread this phenomenon has been, one of the present authors has published a soft version of this type of statement. *See* John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 71 (2016) ("In merger cases brought under Clayton Act § 7, courts focus on whether a transaction will 'lessen competition' . . . ." (quoting 15 U.S.C. § 18)).

9. The opinions all perfunctorily recited the full statute, but then ignored the second clause in their analysis. Westlaw search, Feb. 8, 2024 (adv: TI("united states" or "federal trade commission") & ("clayton act" & "section 7")). Our survey included only final decisions and excluded consent decrees and cases disposed of on non-substantive grounds. One opinion, *FTC v. Lundbeck, Inc.*, Nos. 08–6379, 08–6381, 2010 WL 3810015, at *22 (D. Minn. Aug. 31, 2010), *aff'd* 650 F.3d 1236 (8th Cir. 2011), was silent as to statutory justification. We also searched every one of the seventeen federal merger opinions we found that discussed efficiencies. This also yielded no "tend to create a monopoly" cases. *See* Appendix at 53, https://texaslawreview.org/lande-newman-slaughter-appendix/ [https://perma.cc/G3FZ-T7RW].

10. *See infra* notes 72–77 and accompanying text.

11. *See, e.g.*, MAJORITY STAFF OF THE SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 318 (Comm. Print 2022) [hereinafter INVESTIGATION OF COMPETITION IN DIGITAL MARKETS] (proposing federal legislative reforms); KARA FREDERICK, THE HERITAGE FOUND., COMBATING BIG TECH'S TOTALITARIANISM: A ROAD MAP 25 (2022), https://www.heritage.org/sites/default/files/2022-02/BG3678.pdf [https://perma.cc/3YVX-ECHJ] (proposing state legislative reforms and litigation); Joseph E. Stiglitz, *Towards a Broader View of Competition Policy*, *in* COMPETITION POLICY FOR

bringing with it new voices and new ideas.[12] These proposals often include overhauling existing antitrust statutes and/or enacting new legislation to fill perceived gaps in the statutory toolkit.[13] But all the while, the second half of section 7 continued to go unnoticed by most stakeholders.

Of late, however, federal antitrust authorities have begun to show some interest in this long-forgotten law. A lecture in early 2022 by FTC Commissioner Slaughter explored the possibility of reviving it.[14] Later that year, the U.S. DOJ Antitrust Division invoked section 7's second prong in a challenge to UnitedHealth Group's acquisition of Change Healthcare.[15] And the agencies' jointly issued 2023 Merger Guidelines mention the second prong more than thirty times, giving it a distinct force that this Article demonstrates is appropriate.[16] Yet courts have continued to focus on the statute's first prong.[17] The *UnitedHealth* decision, for example, posited that "the text of Section 7 is concerned only with mergers that '*substantially* . . . lessen competition,'"[18] omitting the second prong entirely despite the Antitrust Division's express reliance on it in briefing the case.[19]

This Article fills a decades-old shortage in antitrust commentary and analysis. Congress imbued this statutory clause with enormous potential. The Clayton Act's ban on mergers that may "tend to create a monopoly" is a distinct prohibition with a unique and powerful scope and force. As the

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THE NEW ERA: INSIGHTS FROM THE BRICS COUNTRIES 19 (Tembinkosi Bonakele, Eleanor Fox & Liberty Mncube eds., 2017) (proposing both antitrust reforms and public options); Sanjukta Paul, *Charting the Reform Path*, 120 MICH. L. REV. 1265, 1280 (2022) (suggesting that there is a multiplicity of new intellectual foundations on which reforms can rest); John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1553, 1559–60 (2019) (proposing a range of judicial, administrative, and legislative reforms).

12. *See* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1657–58, 1663–65, 1671–72, 1675–76 (2020) (collecting critiques of the Chicago School and proposing a reconceptualization of the goals of antitrust); John M. Newman, *Reactionary Antitrust*, CONCURRENCES REV., Nov. 2019, at 66, 72 ("New paths forward may be clearing. New voices have emerged.").

13. *See, e.g.*, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 11, at 320, 331 (proposing legislative reforms).

14. Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Storming the Concentration Castle: Antitrust Lessons from the Princess Bride, Greg Lastowka Memorial Lecture 9 (Mar. 31, 2022), https://www.ftc.gov/news-events/news/speeches/remarks-commissioner-rebecca-kelly-slaughter-storming-concentration-castle-antitrust-lessons [https://perma.cc/5T4R-JEVZ].

15. Proposed Findings of Fact & Conclusions of Law at 182, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022) (No. 1:22-cv-0481-CJN).

16. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES *passim* (2023) [hereinafter 2023 GUIDELINES].

17. *See, e.g.*, FTC v. Cmty. Health Sys., Inc., No. 5:24-CV-00028-KDB-SCR, 2024 WL 2854690, at *1 (W.D.N.C. June 5, 2024) ("Antitrust law, specifically the Clayton Act, serves the important public interest of promoting fair and robust markets by prohibiting horizontal mergers that may substantially lessen competition.").

18. *UnitedHealth Grp.*, 630 F. Supp. 3d at 133 (quoting 15 U.S.C. § 18) (omission in original).

19. Proposed Findings of Fact & Conclusions of Law, *supra* note 15, at 182.

Article explains, this forgotten half of section 7 prohibits all mergers or acquisitions that pose a reasonable probability of moving the combined firm appreciably in the direction of having monopoly power.

Part I begins with a brief history of Clayton Act section 7's prohibition on mergers that may "tend to create a monopoly." Throughout more than a century, and despite eliminating a third statutory prong as part of a substantive overhaul in 1950, Congress has retained the statute's prohibition on mergers that may "tend to create a monopoly."[20]

In Part II, we undertake a foundational study of the "tend to create a monopoly" prong. This study begins, as it must, with the statutory text. A careful textualist analysis reveals that section 7's second prong creates a distinct prohibition,[21] entails a probabilistic analysis,[22] and imposes an incipiency standard.[23] The relevant cases that do exist generally confirm these findings, though some courts have strayed from the statutory text—understandably, given the near-total lack of relevant guidance and commentary until now.[24] Moreover, section 7's legislative history independently supports the findings yielded by textualist analysis.[25]

Part III identifies the unique scope of section 7's prohibition on mergers that may tend to create a monopoly. Unlike the statute's first prong, the second half contains no "substantially" quantum-of-harm requirement. Any appreciable tendency is sufficient for liability.[26] The second prong also identifies "monopoly" as an undesirable end state, without normatively qualifying that term.[27] This makes especially clear that efficiencies claims are irrelevant to second-prong liability analysis.[28] And although mergers that may tend to create a monopoly often harm competition, a negative effect on "competition" is not required for a second-prong violation.[29] At the same time, however, the tendency must be in the direction of monopoly, a requirement that serves as a built-in limiting principle.[30]

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20. *See infra* Part I.

21. *See infra* section II(A)(1).

22. *See infra* section II(A)(2).

23. *See infra* section II(A)(3).

24. For example, courts occasionally omit the requisite probabilistic qualifier. *See, e.g.*, HTC Sweden AB v. Innovatech Prods. & Equip. Co., No. 3:07-CV-232, 2008 WL 4510710, at *14 (E.D. Tenn. Sept. 30, 2008) ("To properly allege a violation of § 7 of the Clayton Act, a party must claim that . . . the effect of the merger is to substantially lessen competition or tend to create a monopoly.").

25. *See infra* subpart II(C).

26. *See infra* subpart III(A).

27. *See infra* subpart III(B).

28. *See infra* section III(B)(1).

29. *See infra* section III(B)(2).

30. *See infra* section III(B)(3).

Part IV explains that section 7's second half is not only good law, but also good policy. Although section 7's forgotten half has remained almost entirely dormant for decades, conditions are ripe for its revival. Enforcing section 7's second prong is sound as a matter of not just textualism, but also good-government principles. A democratically elected Congress enacted all of section 7, not just its first prong. And giving effect to all of the words in the statute would help equip modern antitrust law to meet the challenges posed by the modern economy.[31] False negatives in merger review can cause enormous societal harms.[32] With an activated second prong in place, the statute can impose a more robust, sliding-scale approach that will reduce the harmful effects of mistaken inaction.[33]

Part V turns to applications. It first identifies a number of scenarios and examples in which the "tend to create a monopoly" prong may impose a distinct prohibition, offer analytical advantages, or both.[34] For example, defendants in recent years have increasingly relied on "litigating the fix" strategies, arguing that even self-imposed partial fixes can insulate transactions from liability so long as the unremedied harms are not substantial.[35] Because section 7's second prong does not include a "substantial[]" requirement, it can help adjudicators avoid costly false negatives where defendants seek to litigate a self-imposed partial fix for a merger that may tend to create a monopoly.[36]

Part V turns next to the merger guidelines periodically issued by federal antitrust agencies.[37] These documents play an important educative role, helping to explain to various stakeholders, including courts, how the U.S. DOJ and FTC conduct their merger analyses. The 2023 Merger Guidelines contain a large number of references to section 7's second prong.[38] Part V tests these Guidelines against the textualist findings reported in Part II. As Part V explains, the 2023 Merger Guidelines optimally embody and reflect the essence of the "may . . . tend to create a monopoly" clause. Part V concludes by responding to a set of anticipated questions and objections.[39]

Congress meant for the Clayton Act to stand as a bulwark against a rising tide of corporate concentration and prevent the formation of incipient

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31. *See infra* Part IV.

32. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 911a (5th ed. 2024) ("No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized.").

33. *See infra* notes 280–284 and accompanying text.

34. *See infra* subpart V(A).

35. Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix*,*"* 85 ANTITRUST L.J. 619, 620–21 (2024).

36. *See infra* notes 304–308 and accompanying text.

37. *See infra* subpart V(B).

38. *See generally* 2023 GUIDELINES, *supra* note 16.

39. *See infra* subpart V(C).

monopoly power.[40] Mergers and acquisitions that may tend to create a monopoly pose one of the most significant threats to open, competitive markets—and, by extension, to our modern political economy.[41] Consumers, workers, suppliers, and start-ups alike all benefit when competition is able to flourish.[42] With its long-dormant second half finally activated, the Act may yet live up to its full potential.

I. The Forgotten Half of Section 7

The linchpin of U.S. anti-monopoly merger control is section 7 of the Clayton Act. Although the Sherman Act of 1890 already prohibited some harmful mergers, Congress quickly came to view it as insufficient standing alone.[43] Particularly dissatisfying were U.S. Supreme Court decisions creating a "rule of reason" analysis that Congress viewed as overly defendant friendly.[44] Instead of replacing the general prohibitions of the Sherman Act, however, Congress chose to supplement them.[45] The Clayton Act targets specific types of conduct: price discrimination and kickbacks in section 2,[46] exclusive dealing and negative tying in section 3,[47] interlocking directorates in section 8,[48] and—most relevantly for present purposes—mergers and acquisitions in section 7.[49] As codified in 1914, section 7 provided:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making

40. *E.g.*, Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1333 (7th Cir. 1981) ("The wave of post-World War II mergers touched off an alarm about a rising tide of economic concentration. This alarm produced the 1950 amendment to Clayton Act § 7 which is the version of § 7 that exists today.").

41. *See* AREEDA & HOVENKAMP, *supra* note 32, ¶ 911a ("No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized.").

42. *E.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources . . . while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.").

43. *See infra* subpart II(C).

44. *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 13 (2003) (describing Congress's and other stakeholders' disapproval of the "rule of reason" when it was announced).

45. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922).

46. 15 U.S.C. § 13.

47. 15 U.S.C. § 14.

48. 15 U.S.C. § 19.

49. 15 U.S.C. § 18.

> the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[50]

By introducing an incipiency standard not present in the Sherman Act, Congress sought to improve enforcers' ability to arrest monopoly power before it took hold.[51] But the new statute carried with it some shortcomings and loopholes of its own.[52] Perhaps unsurprisingly, in the decades following the original passage of the Clayton Act, the United States underwent an unprecedented merger wave rather than a slowdown of corporate consolidation.[53]

A steady drumbeat of calls to strengthen the Clayton Act persisted,[54] culminating in the passage of the 1950 Celler–Kefauver Antimerger Act amendments.[55] The amended section 7 differs from the original in multiple ways: Congress closed the asset-acquisition loophole, made clear that the statute applies to non-horizontal mergers, and removed the "may . . . restrain such commerce" prong.[56] But it preserved the prohibitions on mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[57] Today, the core paragraph of section 7 reads:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part

50. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18).

51. *See* United States v. E.I. du Pont de Nemours & Co., 353 US 586, 589 (1957) (explaining that "[s]ection 7 is designed to arrest in its incipiency" monopolization or actions taken by corporations that appear reasonably likely to result in monopoly); Comment, *"Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 YALE L.J. 1627, 1628 (1959) ("Section 7 of the act was specifically directed at the evils of competitor acquisition.").

52. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 313 (1962) ("The Act did not, by its explicit terms, or as construed by this Court, bar the acquisition by one corporation of the *assets* of another. Nor did it appear to preclude the acquisition of stock in any corporation other than a direct competitor.").

53. *See id.* at 315 & n.27 (discussing a 1948 FTC study on corporate mergers and their significant effects on the American economy).

54. *See id.* at 314 (recounting congressional and FTC dissatisfaction with the original Act and efforts to reform the Act); TEMP. NAT'L ECON. COMM., FINAL REPORT AND RECOMMENDATIONS, S. DOC. NO. 77-35, at 38–40 (1941) (calling for an amendment placing prohibitions on the acquisition of stock by competing companies).

55. Celler-Kefauver Anti-Merger Act of 1950, Pub. L. No. 81–899, 64 Stat. 1125.

56. *Compare* 15 U.S.C. § 18 (omitting that language), *with* Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (containing that language).

57. 15 U.S.C. § 18. In 1980, the word "person" replaced the word "corporation." Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, sec. 6(a)(1), § 7, 94 Stat. 1154, 1157–58. In 1984 and 1995, the language of the last paragraph of section 7 was updated to account for the elimination of the Civil Aeronautics Board and the Interstate Commerce Commission, respectively. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, sec. 9(l)–(m), § 7, 98 Stat. 1703, 1708; ICC Termination Act of 1995, Pub. L. No. 104-88, sec. 318, § 7, 109 Stat. 803, 949. Finally, in 1996, Congress repealed the statutory exception for transactions reviewed by the Federal Communications Commission. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(b)(3), § 7, 110 Stat. 56, 143.

> of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[58]

Thus, the Clayton Act has, for more than a century, prohibited mergers that may "tend to create a monopoly." Even so, from the very outset, the overwhelming majority of public analysis and discourse has focused exclusively on the term "substantially to lessen competition." Enforcers have brought, and judges have decided, hundreds of cases under section 7.[59] Commentators have published hundreds of scholarly works discussing section 7.[60] Yet there has been a near-total lack of discussion of mergers that may "tend to create a monopoly."[61]

In a few cases analyzing the pre-1950 Act, courts did grapple to some extent with section 7's "tend to create a monopoly" language. These cases identify some useful principles.[62] But far more often, judicial opinions have not discussed the statute's second prong at all. For example, the seminal *Brown Shoe*[63] decision contained the Supreme Court's first in-depth evaluation of the 1950 amendments to section 7. Despite offering a lengthy treatment of the legislative record, the Court's actual analysis turned entirely on whether the challenged acquisition may have substantially lessened competition.[64] A year later, in *Philadelphia National Bank*,[65] the Court framed "[t]he statutory test" as "whether the effect of the merger 'may be substantially to lessen competition' 'in any line of commerce in any section of the country.'"[66]

Some opinions selectively quote section 7 so as to omit the second prong altogether, even from basic explications of the governing law. In *H.J. Heinz*,[67] for example, the D.C. Circuit wrote that "Congress has empowered the FTC, *inter alia*, to weed out those mergers whose effect 'may be

58. 15 U.S.C. § 18.

59. A Westlaw search for "clayton act section 7" in the "All Federal" database using the filter "Content type: Cases" yielded 955 case results as of January 2024.

60. A Westlaw search for "clayton act section 7" in the "All Federal" database using the filter "Content type: Secondary Sources" yielded 1,449 total results, with 529 of those classified as "Law Reviews & Journals."

61. *See infra* notes 72–75 and accompanying text.

62. For a discussion of these cases, see *infra* notes 150–164 and accompanying text.

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

64. *Id.* at 334.

65. United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

66. *Id.* at 355 (quoting 15 U.S.C. § 18).

67. FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001).

substantially to lessen competition' from those that enhance competition."[68] The Seventh Circuit has similarly begun a discussion of the applicable legal standards by editing out the second half of the statute.[69] Neither opinion mentioned "tend to create a monopoly" at all. All told, federal antitrust agencies litigated a total of twenty-seven cases to final resolution under Clayton Act section 7 during the 2010s.[70] None were decided under section 7's second prong.[71]

A voluminous scholarly literature focuses on Clayton Act section 7—but here again, the overwhelming majority of sources focus exclusively on the statute's first prong.[72] Regardless of authorial experience or ideology, legal scholarship on section 7 commonly omits or edits out the "tend to create a monopoly" prohibition.[73] Some contributions do at least mention the second-prong language,[74] and a few sources devote a paragraph here, or a footnote there, to it.[75] But we could not locate a single piece of legal or economic scholarship that focused in any depth on the statute's second prong.

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68. *Id.* at 713.

69. *See* FTC v. Advoc. Health Care Network, 841 F.3d 460, 467 (7th Cir. 2016) ("Section 7 of the Clayton Act makes it unlawful to 'acquire . . . the assets of another person . . . where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition . . . .'" (alteration in original)). The FTC's federal-court complaint did not refer to the statute's second prong, but its opening brief, proposed conclusions of law, and the trial court's opinion all included the second-prong language at least once. Brief and Required Short Appendix of Appellants at 27, *Advoc. Health Care Network*, 841 F.3d 460 (No. 16-2492); Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 55, FTC v. Advoc. Health Care Network, 2016 WL 4063481 (N.D. Ill. 2016) (No. 1:15-cv-11473); FTC v. Advoc. Health Care Network, No. 1:15-cv-11473, 2016 WL 3387163, at *2 (N.D. Ill. 2016).

70. *See supra* note 9.

71. All of the cases perfunctorily recited both halves of the statute but then ignored the second half. *See supra* note 9. In addition, we located seventeen lower court merger cases that discussed efficiencies. None were decided under the 'may . . . tend to create a monopoly" clause. *See* Appendix at 53, https://texaslawreview.org/lande-newman-slaughter-appendix/ [https://perma.cc/G3FZ-T7RW].

72. *See supra* notes 4, 8 and accompanying text.

73. *See, e.g.*, John M. Yun, *Antitrust Has Forgotten Its Coase*, 23 NEV. L.J. 367, 370 n.12 (2023) ("Specifically, the Clayton Act prohibits mergers whose effect 'may be substantially to lessen competition.'"); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 255 (2020) ("Clayton Act § 7 prohibits stock acquisitions that may substantially lessen competition."); Rachel Brandenburger, Logan Breed & Falk Schöning, *Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?*, ANTITRUST, Spring 2017, at 28 ("Clayton Act Section 7 . . . prohibits all transactions that may tend to substantially lessen competition in a relevant market[] . . . .").

74. *See, e.g.*, Chinmayi Sharma, *Concentrated Digital Markets, Restrictive APIs, and the Fight for Internet Interoperability*, 50 U. MEM. L. REV. 441, 462 (2019) (quoting both prongs).

75. The most extensive of these is Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960). Bok offers a short example using the second prong in a lengthy paragraph, arguing that the statutory language is somewhat imprecise and artificial. *Id.* at 254. In a footnote, he argues that "tend to create a monopoly" could prohibit mergers because of the trend they are a part of rather than because of their effect, and that "monopoly" might mean either a big firm (regardless of market share) or an oligopoly. *Id.* at 311 n.260. But that is all.

We can only speculate as to why the vast majority of courts, litigants, and commentators alike have overlooked the Clayton Act's "tend to create a monopoly" language. It may simply be historical accident. The leading Supreme Court decisions applying the post-1950 law were all "substantially lessen competition" cases that did not analyze the "tend to create a monopoly" language.[76] Perhaps the earliest cases brought under the post-1950 version of section 7 focused on the first prong because the defendants' market shares just happened to be well below monopoly levels. Perhaps especially active merger enforcement throughout the 1950s and '60s had a deterrent effect on dominant firms' acquisition strategies, lessening the need for the second prong. Or maybe more active anti-monopoly efforts yielded less concentrated corporate power in general and, therefore, fewer mergers that may have tended to create monopolies. And then after this initial period, perhaps path dependence and habit set in.

Then too, early case law interpreting the Celler–Kefauver amendments to section 7 was relatively enforcement-friendly.[77] Why should plaintiffs test the relatively untried second half of section 7 when the Supreme Court was favorably interpreting the first half? With courts in general more willing to find antitrust violations,[78] perhaps plaintiffs, especially those who were more risk averse, perceived less need for alternative or additional statutory tools. And again, path dependence and habit could explain the subsequent lack of second-prong litigation and scholarship, even as courts grew more hostile to antitrust plaintiffs.

Whatever the reason, one thing is clear: The antitrust enterprise almost entirely neglected the "tend to create a monopoly" prong for several decades.

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76. *E.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486, 494, 497 (1974); FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966); United States v. Phila. Nat'l Bank, 374 U.S. 321, 355 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 323, 339, 345 (1962).

77. Opponents of active merger enforcement often decry this entire period by quoting Justice Stewart's famous quip in *Von's Grocery*: "The sole consistency that I can find is that in litigation under § 7, the Government always wins." 384 U.S. at 301 (Stewart, J., dissenting). But government plaintiffs not infrequently lost merger challenges during the mid-1960s. *See, e.g.*, United States v. Penn-Olin Chem. Co., 246 F. Supp. 917, 934 (D. Del. 1965) (dismissing the Government's complaint for failure to show that the merger dissuaded a potential competitor from entering the market), *aff'd*, 389 U.S. 308 (1967); United States v. Penick & Ford, Ltd., 242 F. Supp. 518, 526 (D.N.J. 1965) (denying the motion for a preliminary injunction for failing to show a reasonable probability of success on the merits); United States v. Nat'l Steel Corp., 251 F. Supp. 693, 702 (S.D. Tex. 1965) (finding, after trial, that there is "no reasonable probability" that the merging entities violated section 7); United States v. Crocker-Anglo Nat'l Bank, 223 F. Supp. 849, 861 (N.D. Cal. 1963) (denying the motion for preliminary injunction because the Government failed to make a prima facie case); United States v. Lever Bros. Co., 216 F. Supp. 887, 901 (S.D.N.Y. 1963) (dismissing the Government's complaint for railing to establish a substantial probability of anticompetitive effects); United States v. Gimbel Bros., Inc., 202 F. Supp. 779, 781 (E.D. Wis. 1962) (denying the Government's motion for a preliminary injunction).

78. *See* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 533 (2019) (referring to this as antitrust law's "Inhospitality Era" for defendants).

We have endeavored to fill that gap. As our research reveals, the statutory text, structure, and history all require that the statute's second prong be given independent meaning. The discussion that follows lays the foundations for revival, active enforcement, and accurate adjudication under the forgotten half of section 7.

II. Understanding "May . . . Tend to Create a Monopoly": Foundations

Despite the near-total lack of case law and commentary on section 7's second prong, the slate is not entirely blank. The statutory text—the mandatory starting point—turns out to be fairly simple, clear, and straightforward. The following discussion begins by applying widely accepted textualist techniques to identify foundational principles for analyzing mergers that may tend to create a monopoly.[79] It then collects and assesses what little case law does exist.[80] Although few in number, the reported decisions do contain useful confirmations of and expansions upon our textualist findings. The discussion closes with a survey of the voluminous legislative history surrounding both the initial passage of the Clayton Act and the extensive 1950 amendments to section 7.[81] Here again, we find considerable support for the foundational principles that our textualist analysis identifies.

A. *Textualist Analysis*

Textualism has become a widely used form of statutory interpretation.[82] As Justice Kagan once put it, the entire U.S. Supreme Court has become "generally, fairly textualist."[83] In 2012, Justice Scalia and lexicographer

79. *See infra* subpart II(A).

80. *See infra* subpart II(B).

81. *See infra* subpart II(C).

82. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President."). For an excellent explanation of various types of textualism, citations to much of the literature on the subject, and an empirical analysis of how often each Justice uses textualism, see generally Anita S. Krishnakumar, *Textualism in Practice*, 74 DUKE L.J. 573 (2024).

83. Ryan Lovelace, *Elena Kagan: The Supreme Court Is a 'Textualist Court' that Reasons More Like Scalia than Breyer*, WASH. EXAM'R (Oct. 16, 2017, 11:04 PM), https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer [https://perma.cc/KTL7-AEKZ]. More recently, Justice Kagan criticized the current majority for not employing textualism when its results would conflict with their ideological preferences. *See* W. Va. v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.").

Bryan Garner published a lengthy book explaining textualism,[84] and there is today a substantial literature on the subject.[85] Nevertheless, basic textualist analysis is fairly straightforward.[86]

Textualism posits that decisionmakers should interpret only the express words and phrases in the relevant statute.[87] Each word and phrase should be given its fair, plain, and ordinary meaning.[88] To ascertain this meaning, textualism relies heavily upon the definitions contained in reliable and "authoritative"[89] dictionaries of the period in which the statute was enacted.[90] These definitions can be supplemented by analyzing usage of the statutory terms in legal treatises and cases that were contemporary to the law's enactment.[91] To a textualist, legislative materials like House and Senate reports do not alter the plain meaning of a statute's text.[92]

Textualism does not attempt to discern what Congress "intended to do" other than by examining the words and phrases in statutes.[93] A textualist

84. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

85. *See* Krishnakumar, *supra* note 82, at 587–91 (cataloging the scholarly dialogue surrounding the Supreme Court's use of textualism in recent years).

86. Although the present authors do not endorse statutory interpretation techniques that flatly bar the use of legislative history, this Article will employ textualism as articulated by Scalia and Garner in *Reading Law*. *See generally* SCALIA & GARNER, *supra* note 84. That being said, there are many variations of textualism, *see* Krishnakumar, *supra* note 82, at 585, 587–88, 591, 621 (citing Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020)), and all of the authors agree that statutory text should play an important role in adjudication.

87. *See* SCALIA & GARNER, *supra* note 84, at 56 (expositing the "Supremacy-of-Text-Principle," which declares that the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means").

88. *Id.* at 33.

89. Scalia and Garner provide a list of English-language dictionaries and legal dictionaries and legal treatises for each time period that they consider to be "useful and authoritative." *See id.* app. at 419–24 (providing an extensive list of recommended dictionaries to help in ascertaining the textual meaning of statutes).

90. *See id.* at 78 ("Words must be given the meaning they had when the text was adopted."). Immediately after Scalia and Garner introduce the "fair reading" method, they cite three sources as guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, four dictionary definitions of key terms. *Id.* at 34–37. Their inclusion of Appendix A, "A Note on the Use of Dictionaries," also is instructive. As an example, Justice Alito's textualist opinion in *Bostock v. Clayton County* cites six dictionaries contemporaneous with the statute in an appendix to ascertain what the word "sex" meant in 1964. 140 S. Ct. 1731, 1784–89 (2020) (Alito, J., dissenting).

91. *See* SCALIA & GARNER, *supra* note 84, at 320–21 (explaining the canon of imputed common law meaning, which is often ascertained with the aid of dictionaries and legal treatises, and cautioning that common law meaning may be changed by statute). For additional textualist considerations, see Robert H. Lande & Richard O. Zerbe, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497, 509–18 (2020).

92. SCALIA & GARNER, *supra* note 84, at 56 ("[T]he purpose must be derived from the text, not from extrinsic sources such as legislative history . . . .").

93. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

analysis does not add to or subtract from the statute's exact language.[94] So, for example, textualism would frown upon the idea of inferring non-explicit exemptions, exceptions, and the like in order to effectuate a perceived overall goal or purpose of the statute.[95] According to Scalia and Garner, "once the meaning is plain, it is not the province of a court to scan its wisdom or its policy."[96]

A textualist analysis of Clayton Act section 7 must ask how a reasonable person would interpret the statute's plain words.[97] A textualist should interpret this language fairly and reasonably, though not always strictly literally: "[T]he good textualist is not a literalist."[98] Relatedly, the textualist "absurdity doctrine" requires avoiding any interpretation of a statute that would lead to an absurd conclusion.[99]

1. "Or": A Distinct Prohibition.—The natural reading of section 7 reveals two distinct statutory prohibitions: (1) mergers that may substantially lessen competition, and (2) mergers that may tend to create a monopoly. Yet, given the near-total lack of enforcement activity and scholarly discourse involving the latter, a threshold question arises: Does the statute's second prong actually create a distinct prohibition?

We begin, as we must, with the ordinary meaning of the statutory text.[100] In *Reiter v. Sonotone Corp.*,[101] the Court faced the task of interpreting a disjunctive created by the word "or" in section 4 of the Clayton Act.[102] Section 4 grants standing to anyone "injured in [their] business *or* property" by an antitrust violation.[103] "[O]ur starting point," Chief Justice Burger

94. SCALIA & GARNER, *supra* note 84, at 93 ("Nothing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as a matter not covered.").

95. As Justice Gorsuch noted in *Bostock*, "[U]nexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'" 140 S. Ct. at 1749 (alteration in original) (quoting SCALIA & GARNER, *supra* note 84, at 101).

96. SCALIA & GARNER, *supra* note 84, at 353 (quoting G. GRANVILLE SHARP & BRIAN GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 5 (10th ed. 1953)).

97. *See id.* at 69–77 (discussing the "Ordinary-Meaning Canon," which requires that words in a statute be "understood in their ordinary, everyday meanings").

98. ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (Amy Gutmann ed., 1997); *see also Bostock*, 140 S. Ct. at 1825 ("[C]ourts must follow ordinary meaning, not literal meaning.") (Kavanaugh, J., dissenting); SCALIA & GARNER, *supra* note 84, at 355–56 (rejecting the "false notion that words should be strictly construed").

99. Scalia and Garner endorse a "narrow version" of the absurdity doctrine. *See* SCALIA & GARNER, *supra* note 84, at 234, 237–38 (positing that the absurdity doctrine should be limited to typographical errors, spelling mistakes, and clear drafting errors).

100. *E.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1654 (2021).

101. 442 U.S. 330 (1979).

102. *Id.* at 338–39.

103. 15 U.S.C. § 15(a) (emphasis added).

wrote, "must be the language employed by Congress."[104] The Court roundly rejected defendants' "strained construction [that] would have [the Court] ignore the disjunctive 'or' and rob the term 'property' of its independent and ordinary significance."[105] Collapsing the two prongs would have been doubly wrong. Courts must "give effect, if possible, to every word Congress used."[106] And "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."[107]

Section 7 contains the same disjunctive term, "or."[108] As *Reiter* instructs, ignoring the text on either side of the disjunctive would violate fundamental principles of textualism. The two statutory clauses that sandwich the term "or" are quite different from each other.[109] Textualist adjudicators should construe a statute "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[110] Any interpretation that ignores or collapses the unique text in section 7's second prong would not do so. Statutory text separated by a disjunctive must have separate meanings unless the context "dictates" otherwise.[111] And nothing in section 7 dictates that the text after the disjunctive is meaningless or superfluous.

In sum, the text of section 7 "plainly" creates two prohibitions: the first on mergers that may substantially lessen competition, and the second on mergers that may tend to create a monopoly.[112] Any contrary interpretation would violate fundamental principles of textualist analysis.

2. "May Be . . .": A Probabilistic Standard.—Section 7 uses the same paired verbs, "may be," to qualify both prongs.[113] A rigorous textualist analysis of the second prong must therefore begin with the word "may," the verb motivating the language in the second infinitive clause. Does "may" equate to "will," or to "more likely than not"? Or can a lower probability suffice?

In their influential treatment of textualism, Justice Scalia and Bryan Garner identified four English-language dictionaries from the relevant time

104. *Reiter*, 442 U.S. at 337.

105. *Id.* at 338–39.

106. *Id.* at 339 (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

107. *Id.*

108. 15 U.S.C. § 18.

109. Following the disjunctive is a new verb ("tend"), a different infinitive ("to create"), and a different object ("monopoly"). 15 U.S.C. § 18.

110. Hibbs v. Winn, 542 U.S. 88, 101 (2004) (alteration in original) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181–86 (rev. 6th ed. 2000)).

111. *Reiter*, 442 U.S. at 339.

112. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590–91 (1957).

113. 15 U.S.C. § 18.

period of 1901 to 1950 as the "most useful and authoritative."[114] All four dictionaries contain definitions of "may." The principal definition[115] from each of these sources follows.

The Century Dictionary and Cyclopedia (1904):

> To have power; have ability; be able; can. In the absolute original use, 'can,' now rare . . . except where a degree of contingency is involved . . . . The principal uses are as follows: (a) To indicate subjective ability, or abstract possibility: rarely used absolutely . . . (b) To indicate possibility with contingency . . . (f) In law, *may* in a statute is usually interpreted to mean *must*, when used not to confer a favor, but to impose a duty in the exercise of which the statute shows that the public or private persons are to be regarded as having an interest.[116]

The Oxford English Dictionary (1933):

> The primary sense of the verb is to be strong or able, to have power . . . . [T]o have power or influence; to prevail (*over*). . . . Expressing objective possibility, opportunity, or absence of prohibitive conditions; = CAN . . . . *Law*. In the interpretation of statutes, it has often been ruled that *may* is to be understood as equivalent to *shall* or *must*. . . . Expressing subjective possibility, i.e. the admissibility of a supposition. a. . . . In relation to the future (*may* = 'perhaps will').[117]

Webster's Second New International Dictionary (1934):

> To have power; to be able . . . . **a** *Archaic*. Ability; competency; —now expressed by *can* . . . . **b** Liberty; opportunity; permission; possibility; as, he *may* go; you *may* be right. . . . **c** Desire or wish[] . . . . **d** Contingency . . . . Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force.[118]

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114. *See* SCALIA & GARNER, *supra* note 84, app. at 419.

115. The full English-language and legal dictionary definitions are reproduced in an appendix to this Article. *See* Appendix, at 1–52, https://texaslawreview.org/lande-newman-slaughter-appendix/ [https://perma.cc/G3FZ-T7RW].

116. 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3667–68 (William Dwight Whitney ed., 1904).

117. 6 THE OXFORD ENGLISH DICTIONARY 256–58 (1961 reprt.) (1933).

118. WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1517 (1934) [hereinafter WEBSTER'S].

Funk & Wagnalls New Standard Dictionary of the English Language (1943):

> **1.** To have permission; be allowed; have the physical or moral opportunity; as, you *may* go[] . . . . **2.** To be contingently possible; as it *may* be . . . . **6.** *Law.* To have liberty or power to: often (in the construction of statutes) held to mean *must*, as imposing obligation, tho in every other use *may* has only a permissive or discretionary connotation.[119]

These dictionaries contained three distinct definitions of "may."[120] The first defines "may" in terms of a possibility or contingency.[121] The second defines "may" to mean "can," although some sources went on to explain that this "absolutist" usage was rare.[122] The third definition is specialized; the sources state that in some statutes "may" meant "must," but that these usages are in instances when the government compels someone to do something.[123] None of Scalia and Garner's "most useful and authoritative" sources defined "may" in terms of certainty or as meaning "will." Nor did any of the sources define "may" in terms of probably or as meaning "more likely than not."[124]

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119. 2 FUNK & WAGNALLS: NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1531 (rev. ed. 1943) [hereinafter FUNK & WAGNALLS].

120. None of the period's legal dictionaries or treatises recommended by Justice Scalia contained different definitions. *See Appendix*, at 11–20, 29–30, 37–39, 45–52, https://texaslawreview.org/lande-newman-slaughter-appendix [https://perma.cc/G3FZ-T7RW]; *see also* Robert H. Lande, *Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law*, 2023 UTAH L. REV. 813, 829–30 (2023) (explaining that the legal dictionaries selected by Scalia and Garner also contained three general definitions).

121. *See* THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 116, at 3667 ("To indicate possibility with contingency . . . ."); THE OXFORD ENGLISH DICTIONARY, *supra* note 117, at 256–58 ("Expressing objective possibility, opportunity . . . ."); WEBSTER'S, *supra* note 118, at 1517 ("To have power; to be able . . . possibility[] . . . ."); FUNK & WAGNALLS, *supra* note 119, at 1531 ("To be contingently possible; as, it *may* be; you *may* get off . . . .").

122. *See* THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 116, at 3667 ("To have power; have ability; be able; can. In the absolute original use, 'can,' . . . ."); THE OXFORD ENGLISH DICTIONARY, *supra* note 117, at 256–58 ("[A]bsence of prohibitive conditions; = CAN."); WEBSTER'S, *supra* note 118, at 1517 ("Ability; competency;—now expressed by *can*."); FUNK & WAGNALLS, *supra* note 119, at 1531 ("To have permission; be allowed; have the physical or moral opportunity as, you *may* go[] . . . .").

123. *See* THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 116, at 3668 ("In law, *may* in a statute is usually interpreted to mean *must*, when used not to confer a favor, but to impose a duty in the exercise of which the statute shows that the public or private persons are to be regarded as having an interest."); THE OXFORD ENGLISH DICTIONARY, *supra* note 117, at 256–58 ("*Law*. In the interpretation of statutes, it has often been ruled that *may* is to be understood as equivalent to *shall* or *must.*"); WEBSTER'S, *supra* note 118, at 1517 ("Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*[] . . . ."); FUNK & WAGNALLS, *supra* note 119, at 1531 ("[O]ften (in the construction of statutes) held to mean *must,* as imposing obligation[] . . . .").

124. *See supra* notes 116–122 and accompanying text (listing no definition of "may" that means "will").

Working backward, the third definition is facially inapplicable to a textualist analysis of section 7 because the statute is not an instance of the government imposing an "obligation" on firms to merge with or acquire one another. Section 7 imposes negative prohibitions, not positive requirements.[125] The second, "absolutist" definition—to mean "can" or only a theoretical possibility of creating a monopoly—also seems unlikely to capture the original meaning of section 7. If theoretical possibilities were enough, section 7 might well prohibit all or nearly all mergers. Recall Justice Scalia's warning that "the good textualist is not a literalist."[126]

This leaves the first definition of "may," as requiring a "probability" or "contingency" of tending to create a monopoly. More than a theoretical possibility is required; less than a certainty can suffice. Dictionaries of the time do not equate "may" with "more likely than not," "probably," or "greater than a 50% likelihood."[127] Rather, a modest probability appears to be enough. Roughly contemporaneous legal sources often invoke a "reasonable probability."[128] This seems roughly correct. That said, careful textualist judges and litigants would do well to also explain that the statutory language does not equate to "more likely than not."[129] Without an express reminder of this, poorly reasoned opinions might inadvertently depart from the statutory text to use atextual language like "probably."

An accurate and useful textualist explanation of section 7's probabilistic standard would be along the lines of the following: "The ordinary, original usage of 'may . . . be' requires more than a theoretical or trivial possibility but does not equate to 'more likely than not.' Instead, the statutory text requires only a modest, reasonable probability."

3. "Tend to Create a Monopoly": An Incipiency Prohibition.—With the introductory verb ("may") defined, a careful textualist analysis must turn next to each term that follows the disjunctive: "tend to create a monopoly." Each has a distinct, original meaning. Again, the four dictionaries that Scalia

125. To be sure, the Hart-Scott-Rodino Act imposes some positive requirements. *See* 15 U.S.C. § 18a(a) (imposing filing requirements). But that provision, enacted several decades after the 1914 Clayton Act, is not the one we are concerned with at present.

126. SCALIA, *supra* note 98, at 24.

127. *See supra* notes 116–121 and accompanying text.

128. *See, e.g.*, Int'l Shoe Co. v. FTC, 29 F.2d 518, 519–20 (1st Cir. 1928) (interpreting the original 1914 version of the Clayton Act); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 315 (D. Conn. 1953) (interpreting section 7 as amended in 1950).

129. As a contemporaneous scholar discussing the 1950 amendments explained, "[I]t is hard to believe that 'reasonable probability' should be construed to mean a 51 per cent likelihood, for unique and complex events such as mergers are hardly amenable to the statistics of probability." Bok, *supra* note 75, at 255. Bok also pointed out that construing section 7 to require proof of a greater than 50% probability would "give[] the statute very little significance apart from the Sherman Act." *Id.* That, in turn, would violate the core textualist principle of giving effect to all of the statutory text wherever possible.

and Garner identify as the "most useful and authoritative" from the relevant time period contain informative definitions of each.

What Is the Plain, Original Meaning of "Tend"? The word "tend" precedes the second prong's infinitive. Principal dictionary definitions of "tend" from period sources follow:

The Century Dictionary and Cyclopedia (1904):

> **1.** To move or be directed, literally or figuratively; hold a course. . . . **2.** To have a tendency to operate in some particular direction or way; have a bent or inclination to effective action in some particular direction . . . . **3.** To serve, contribute, or conduce in some degree or way; be influential in some direction . . . .[130]

Oxford English Dictionary (1933):

> **I.** To have a motion or disposition to move towards . . . . **1.** . . . To direct one's course, make one's way, move or proceed towards something . . . . **2.** . . . To have a disposition to advance, go on, come finally, or attain *to* (*unto*, *towards*) some point in time, degree, quality, state, or other non-material category; to be drawn *to* or *towards* in affection.[131]

Webster's Second New International Dictionary (1936):

> **1.** To move or direct one's course in a certain direction;—usually with *to* or *toward.* **2.** To be directed or have a tendency; conscious or unconscious, to any end, object, or purpose; to exert activity or influence in a particular direction . . . .[132]

Funk & Wagnalls New Standard Dictionary of the English Language (1943):

> **1.** To exert an influence in a certain direction or toward a certain end; have a bent, aptitude, or tendency; aim; conduce . . . . **2.** To move in a certain direction . . . as, he *tended* toward the mountain; his path *tended* upward.[133]

These principal definitions are quite consistent: section 7 prohibits mergers that may "move" the firm in the direction of monopoly. Notably, none of the sources define the statutory term to require any particular

130. *See* 8 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 116, at 6228.
131. 11 THE OXFORD ENGLISH DICTIONARY, *supra* note 117, at 176–77.
132. WEBSTER'S, *supra* note 118, at 2599–600.
133. 2 FUNK & WAGNALLS, *supra* note 119, at 2481.

quantum of movement, or that the movement results in a monopoly or near monopoly.

When the Clayton Act was passed, the Sherman Act was already in force, section 2 of which makes it illegal for a firm to "monopolize[] or attempt to monopolize."[134] The Supreme Court interpreted Sherman Act section 2 in 1905 to require that the conduct at issue give the defendant at least a "dangerous probability" of success at actually attaining monopoly power.[135] The text of the Clayton Act, however, does not impose such a requirement. Instead, the term "tend" encompasses any movement in the direction of monopoly, whether or not the merger in question poses a dangerous probability of in fact yielding a monopoly. As courts and scholars often put it, section 7 generally creates an "incipiency" prohibition.[136] Textualist analysis confirms that the second prong specifically does so.

What Is the Plain, Original Meaning of "Create"? "[T]o create" operates as the second prong's infinitive. Principal dictionary definitions of "create" from period sources follow:

The Century Dictionary and Cyclopedia (1903):

> **1.** To bring into being; cause to exist; specifically, to produce without the prior existence of the material used, or of other things like the thing produced; produce out of nothing . . . . **2.** To make or produce from crude or scattered materials; bring into form; embody . . . . **3.** To make or form by investing with a new character or functions; ordain; constitute; appoint: as, to *create* one a peer.[137]

The Oxford English Dictionary (1933):

> **1.** *trans*. Said of the divine agent: To bring into being, cause to exist; *esp*. to produce where nothing was before, 'to form out of nothing' . . . . **2.** . . . To make, form, constitute, or bring into legal existence (an institution, condition, action, mental product, or form, not existing before). Sometimes of material works . . . . **4.** To cause, occasion, produce, give rise to (a condition or set of circumstances).[138]

134. 15 U.S.C. § 2 (taking effect in 1890).

135. Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (establishing the "dangerous probability" requirement for attempted monopolization cases).

136. *See, e.g.*, Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 156 (2019) (describing section 7 as "reach[ing] anticompetitive harm in its incipiency").

137. 2 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 116, at 1339.

138. 2 THE OXFORD ENGLISH DICTIONARY, *supra* note 117, at 1151–52.

Webster's Second New International Dictionary (1934):

> **1**. To bring into being; to cause to exist;—said esp. of the formation of the world . . . . **2.** Hence, to cause to be, or to produce, by fiat or by mental, moral, or legal action; as: **a** To invest with a new form, office, or character; to constitute by an act of law or of sovereignty; to appoint; as, to *create* one a peer. **b** To produce, form, or bring to pass, by influence over or stimulation of others; as, to *create* a favorable public opinion. **c** To produce as by an act of grace . . . . **3**. To cause or occasion; to form;—said of natural or physical causes and especially of social and evolutional forces; as, new environment *creates* new forms of life.[139]

Funk & Wagnalls New Standard Dictionary of the English Language (1943):

> **1.** To cause to be or to come into existence, especially as distinguished from, or in opposition to, evolution or the modifying of anything already existent . . . . **2.** To produce as a new construction out of existing materials; make new a form of preexisting substances; produce as a wholly new organization . . . . **3.** To be the cause of; produce; occasion . . . .[140]

Here again, the principal definitions are consistent. The text of Clayton Act section 7 prohibits mergers that may tend to "bring into being" or "cause" a monopoly. In other words, the statute may operate to bar a transaction where neither firm has pre-existing monopoly power, but would, if consolidated, create a firm that satisfies the statutory requirements.

What Is the Plain, Original Meaning of "Monopoly"? The final term in section 7's second prong is "monopoly." Principal definitions from the most authoritative period dictionaries follow:

The Century Dictionary and Cyclopedia (1904):

> **1.** An exclusive privilege to carry on a traffic . . . . **3.** In *polit. econ.*, and as used in a general sense in law, such an exclusive privilege to carry on a traffic, or deal in or control a given class of articles, as will enable the holder to raise prices materially above what they would be if the traffic or dealing were free to citizens generally. In this sense, that exclusive control of a particular kind of product which results from the legitimate ownership of the only land from which it can be obtained, as in the case of some mineral waters, or earths, or

139. WEBSTER'S, *supra* note 118, at 621.

140. 1 FUNK & WAGNALLS, *supra* note 119, at 609.

> ores, is sometimes spoken of as a natural monopoly, in contrast to the artificial monopolies created by state grant. . . . [A] man is popularly said to have a *monopoly* of any business of which he has acquired complete control.[141]

The Oxford English Dictionary (1933):

> **1.** Exclusive possession of the trade in some article of merchandise; the condition of having no competitor in the sale of some commodity . . . . **3.** . . . Exclusive possession, control, or exercise of something.[142]

Webster's Second New International Dictionary (1936):

> [E]xclusive control of the supply of any commodity or service in a given market; hence, often, in popular use, any such control of a commodity, service, or traffic in a given market as enables the one having such control to raise the price of a commodity or service materially above the price fixed by free competition.[143]

Funk & Wagnalls New Standard Dictionary of the English Language (1943):

> The exclusive right, power, or privilege of engaging in a particular traffic or business, or the resulting absolute possession or control; especially, in political economy, such control of a special thing, as a commodity, as enables the person or persons exercising it to raise the price of it above its real value, or above the price it would bring under competition.[144]

Here yet again, the period dictionaries are generally consistent. All speak in terms of "control." One source refers only to "exclusive" control,[145] but the others take a somewhat broader view.[146] Two sources are perhaps most relevant to understanding how "monopoly" was used in a statute like the Clayton Act. These meanings refer to a sufficient degree of control—enough control over a market to allow a firm the ability to raise prices above the level that would obtain under more competitive conditions.[147] But a 100% share of the relevant market is not required. This definition of "monopoly"

141. 5 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 116, at 3843.
142. 6 THE OXFORD ENGLISH DICTIONARY, *supra* note 117, at 624.
143. WEBSTER'S, *supra* note 118, at 1587.
144. 2 FUNK & WAGNALLS, *supra* note 119, at 1605.
145. *See supra* note 142 and accompanying text.
146. *See supra* notes 141, 143–144 and accompanying text.
147. *See supra* notes 143–144 and accompanying text.

roughly corresponds with how judges have long interpreted "monopoly power" in Sherman Act section 2 cases.[148] Because Sherman Act section 2 prohibits monopolization and attempted monopolization, a large body of case law has grappled with the meaning of "monopoly." Definitions vary, but most case law coalesces around this basic concept: "Monopoly" power is sufficient power to "control" an important aspect of competition.[149]

B. Judicial Interpretations

Judicial precedent focusing on section 7's second prong is relatively rare. That said, a handful of decisions actually discuss mergers that "may tend to create a monopoly" at some length. Case law generally confirms the foundational textualist findings above. This is especially true when decisions discuss overarching legal standards and principles. That being said, we also found that some decisions collapse into sloppy or circular reasoning when they turn to applications. And a few courts have departed from the statutory text, although not when engaging in sustained or focused analysis. These courts do not try to explain or justify deviations from the statutory text, suggesting that such deviations were more likely inadvertent than deliberate.

First, case law firmly supports the existence of a second, distinct statutory prohibition. The Supreme Court's *du Pont* decision, applying the pre-1950 Clayton Act, is quite clear on this.[150] At issue was a consummated vertical stock acquisition.[151] The Government did not allege a first-prong violation.[152] Instead, its theory was that the acquisition's effect had been "to tend to create a monopoly."[153] According to the Court, that theory was valid.[154] Because section 7 is "written in the disjunctive," the Court explained, it reaches not only acquisitions that may substantially lessen competition but also acquisitions that may tend to create a monopoly.[155] Section 7 has operative force even where its "lessen competition" prong is

148. Lande & Zerbe, *supra* note 91, at 528–29, 568–72.

149. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.").

150. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 591–92 (1957).

151. *Id.* at 588, 590.

152. *Id.* at 591. The Government likely chose not to allege a "substantially lessen competition" violation due to historical uncertainty over that prong's applicability to vertical mergers.

153. *Id.*

154. *Id.* at 592. Before the 1950 amendments, section 7 contained a third prong. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914). In addition to mergers where the effect may be "to substantially lessen competition" or "tend to create a monopoly," the Act also prohibited mergers where the effect "may be . . . to restrain such commerce in any section or community." *Id.* Although the case technically applied the pre-1950 Clayton Act, the basic structure was the same as today: "effect may be" followed by multiple prohibitions, each separated by the disjunctive "or." 15 U.S.C. § 18.

155. *du Pont*, 353 U.S. at 590–91.

clearly not in play.[156] Other federal appellate, district-court, and administrative decisions applying the 1914 Clayton Act were in accord: The statute's "tend to create a monopoly" language creates a distinct prohibition.[157]

Adjudicators applying the 1950 amendments to section 7 continued to reach the same conclusion. In *Bethlehem Steel*, a district court condemned a merger between two iron-and-steel companies, stating that "'[t]end to create a monopoly' clearly includes aggravation of an existing oligopoly situation."[158] The FTC, in a decision affirmed by the Supreme Court, observed that even where section 7's first prong does not apply, "resort may be had, with entire propriety, to the statute's tendency-to-monopoly clause."[159] Again in *Brillo*,[160] the Commission explained that "[t]he [Clayton] Act *also* encompasses minute acquisitions which tend to monopoly."[161] As recently as 2016, a federal district court analyzed the two prongs separately.[162] Although the second prong is often overlooked or omitted, no adjudicator has called it redundant or invalid.[163] Moreover, courts applying

156. *Id.* at 592.

157. Aluminum Co. of Am. v. FTC, 284 F. 401, 407 (3d Cir. 1922) ("[T]he lessening of competition is not the only effect . . . which the Congress sought to avoid. It intended as well to prevent a transaction 'where the effect' may 'tend to create a monopoly,' which is the effect which the Commission found in the [present case]."); Ozdoba v. Verney Brunswick Mills, Inc., 152 F. Supp. 136, 139 (S.D.N.Y. 1946) ("This section is in the disjunctive and does not alone apply to substantial lessening of competition . . . but also comprehends a situation where the effect of the acquisition is to restrain commerce or tend to create a monopoly."); *see* Transamerica Corp. v. Bd. of Governors of Fed. Rsrv. Sys., 206 F.2d 163, 168–69 (3d Cir. 1953) (analyzing separately the Board's findings that stock acquisitions violated both the "substantially lessen competition" and the "tend to create a monopoly" prongs of section 7); Vanadium-Alloys Steel Co., 18 F.T.C. 194, 209 (1934) ("The Commission's order under Section 7 can, however, have different foundations than that of substantially lessening competition between the two corporations concerned. It can be based, according to the plain language of Section 7, upon the ground that it . . . tends to create a monopoly of any line of commerce.").

158. United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 607 (S.D.N.Y. 1958); *see also* United States v. Pennzoil Co., 252 F. Supp. 962, 971 (W.D. Pa. 1965) ("[Section] 7 provides a remedy where there may be a substantial lessening of competition or where there may be a tendency to create a monopoly . . . .").

159. Procter & Gamble Co., 63 F.T.C. 1465, 1577 (1963), *set aside sub nom.*, Procter & Gamble, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).

160. Brillo Mfg. Co., 56 F.T.C. 1672 (1960).

161. *Id.* at 1679 (emphasis added).

162. *In re* Zinc Antitrust Litig., No. 14-cv-3728, 2016 WL 3167192, at *23 (S.D.N.Y. June 6, 2016).

163. *See, e.g.*, Swift & Co. v. FTC, 8 F.2d 595, 597 (7th Cir. 1925) ("It is worthy of note that such [prohibited] effect may be either to . . . substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition; . . . or . . . tend to create a monopoly of any line of commerce. [The first prong] cannot be construed without considering . . . [the 'tend to create a monopoly' prong]. If the court were to read into [the first prong] the elements which petitioner has asked us to insert, what would become of the requirements

the same language ("may . . . tend to create a monopoly") in other provisions of the Clayton Act uniformly agree that the disjunctive "or" sets up two distinct paths for finding a statutory violation.[164]

Second, the weight of authority recognizes that section 7's second prong incorporates the same probabilistic standard—a "reasonable probability" or "a reasonable likelihood"—as the first prong. Judicial opinions generally recognize that "may be" applies to the "tend to create a monopoly" prong.[165] And the Supreme Court's only extended treatment of the second prong, *du Pont*, is quite clear: "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from [mergers] . . . but also to arrest in their incipiency restraints or monopolies in a relevant market which, *as a reasonable probability*, appear at the time of suit likely to result from the [merger]."[166] "[T]he Government may proceed at any time that an acquisition may be said with *reasonable probability* to contain a threat that it may . . . tend to create a monopoly of a line of commerce."[167] The Court did not try to limit section 7's scope to only those mergers that "will," "will probably," or are "likely" to tend to create a monopoly or even a near monopoly.[168]

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of . . . [the 'tend to create a monopoly' prong]?"); Breck P. McAllister, *Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly*, 3 A.B.A. SEC. ANTITRUST L., at 124, 143 (1953) (describing the first and second prongs as distinct prohibitions).

164. Sidney Morris & Co. v. Nat'l Ass'n of Stationers, Off. Outfitters & Mfrs., 40 F.2d 620, 625 (7th Cir. 1930) ("The word 'or' [in Clayton Act section 2] cannot be ignored. If the effect . . . is to substantially lessen competition, there is no necessity for plaintiff to establish the alternative, to wit, that the effect tended to create a monopoly. Likewise if the effect was to 'tend to create a monopoly' it would not be necessary to show that such effect 'substantially lessened competition.'"); *see also* Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947) ("[T]he tendency of the arrangement to accomplishment of monopoly [in violation of Clayton Act section 3] seems obvious."), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006); Carter Carburetor Corp. v. FTC, 112 F.2d 722, 733–34 (8th Cir. 1940) (analyzing separately the two prongs of Clayton Act section 3).

165. *See, e.g.*, New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 358 (S.D.N.Y. 1995) ("Section 7 of the Clayton Act . . . prohibits acquisitions that may have the effect of substantially lessening competition, or that may tend to create a monopoly in any line of commerce in any section of the country."); United States v. Pennzoil Co., 252 F. Supp. 962, 971 (W.D. Pa. 1965) ("[Section] 7 provides a remedy where there may be a substantial lessening of competition or where there may be a tendency to create a monopoly . . . ."); Nat'l Supply Co. v. Hillman, 57 F. Supp. 4, 7 (W.D. Pa. 1944) ("Section 7 of the Clayton Act forbids . . . [acquisitions] 'where the effect of such acquisition may be to substantially lessen competition . . . ,['] or where the effect of such acquisition may 'tend to create a monopoly.'" (quoting 15 U.S.C. § 18)).

166. United States v. E.I. du Pont de Nemours & Co., 353 US 586, 589 (1957) (emphasis added).

167. *Id.* at 597 (emphasis added); *cf. id.* at 607 ("We repeat, that the test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.").

168. In *Penn-Olin*, the Court wrote that "[t]he requirements of the amendment are satisfied when a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of

Lower-court decisions are somewhat scattered on this question. Some appear to recognize that "may be" sets a more flexible standard than "will" or "probably."[169] Others, though somewhat opaque, seem to posit that mergers violate section 7 where they tend to create a monopoly without a probabilistic qualifier.[170] To be fair, this is technically accurate: If a merger *will in fact* tend to create a monopoly, it of course violates section 7.[171] And these decisions do not say that mergers violate section 7 *only* where they in fact tend to create a monopoly. Some lower court decisions have ignored or misstated the statutory text of the second clause of section 7.[172] A court that quoted and used these opinions' language could easily permit mergers that Congress wanted the statute to prevent. But unlike the Supreme Court's *du Pont* decision, none of these cases focused in any depth on section 7's second prong. Nor did they attempt to explain or justify their deviations from the statutory text.

The lone textualist analysis of "may be . . . to tend to create a monopoly" we located appears in a Clayton Act section 3 case. There, the First Circuit was emphatic: "The language is '*may* be,' not 'is' or 'will be.' . . . [I]t is not necessary that the court should find that it *will* lessen competition or *will* tend

competition in the relevant market is shown." United States v. Penn-Olin Co., 378 U.S. 158, 171 (1964). This is technically accurate—showing that a merger will *in fact* cause a tendency toward monopoly is (more than) enough. The Court did not say that "may be" applies only to the first prong. And only the first prong was actually at issue; the Court did not mention the second prong again.

169. United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 135 (N.D. Cal. 1966) (framing the issue before the court as whether the "reasonably probable effect" of the challenged acquisitions would be "substantially to lessen competition or to tend to create a monopoly"); *Pennzoil*, 252 F. Supp. at 988 ("The purpose of § 7, then, is not only to prevent a substantial lessening of competition, or the tendency to create a monopoly, but also to arrest incipient threats to competition where they appear at the time of suit to be reasonable probabilities as proscribed by that section.").

170. In *Transamerica Corp.*, the Third Circuit framed the question as whether the (consummated) merger had created a "tendency to monopol[y]." Transamerica Corp. v. Bd. of Governors of Fed. Rsrv. Sys., 206 F.2d 163, 169 (3d Cir. 1953); *id.* at 170 ("[T]he lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case . . . ."). But elsewhere the decision included the probabilistic standard: "[A stock] acquisition is a violation only if its effect *may be* in fact to substantially lessen competition . . . , to restrain commerce or to tend to create a monopoly." *Id.* (emphasis added).

171. *See infra* Part V.

172. HTC Swed. AB v. Innovatech Prods. & Equip. Co., No. 3:07-CV-232, 2008 WL 4510710, at *14 (E.D. Tenn. Sept. 30, 2008) ("To properly allege a violation of § 7 of the Clayton Act, a party must claim that . . . the effect of the merger is to substantially lessen competition or tend to create a monopoly."); Advoc. Org. for Patients & Providers v. Mercy Health Servs., 987 F. Supp. 967, 973 (E.D. Mich. 1997) ("[T]o succeed on their claim [plaintiffs] will have to show that the merger is likely to substantially lessen competition or tend to create a monopoly . . . . [T]he ultimate issue . . . is whether the merging firm acting unilaterally or collectively with other firms, will be able to increase prices above the competitive price."); United States v. Republic Steel Corp., 11 F. Supp. 117, 121 (N.D. Ohio 1935) ("Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that . . . the courts, should inquire . . . whether [a merger] actually tends to create a monopoly." (citing Standard Fashion Co. v. Magrane-Hous. Co., 258 U.S. 346, 356–57 (1922))).

to create a monopoly; it is enough to find that it *may* lessen competition or *may tend* to create a monopoly."[173] This is promising: When a court actually engages with the statutory text, it can reach the right conclusion.

Third, although precedent is limited, it is in accord that any movement in the direction of monopoly can suffice. The Supreme Court in *du Pont* framed the test as "measurably closer."[174] The Commission has explained that a "minute" movement toward monopoly is enough in a second-prong case,[175] and that a "relatively slight" negative effect can violate section 7.[176] The Supreme Court's decision in *International Salt Co.*,[177] applying section 3's identical "tend to create a monopoly" language, confirms this interpretation: "Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop[] . . . ."[178] A statutory prohibition on conduct that may "tend to create a monopoly," the Court explained, "condemn[s] the direction of the movement."[179]

Fourth, case law is generally in agreement that "tend to create a monopoly" imposes an incipiency prohibition—that it sets a lower threshold

173. Standard Fashion Co. v. Magrane-Hous. Co., 259 F. 793, 798 (1st Cir. 1919) (emphasis in original), *aff'd*, 258 U.S. 346 (1922).

174. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957) (adopting as "correct[]" this language from *Transamerica Corp.*, 206 F.2d at 169). Both *Transamerica* and *du Pont* involved consummated mergers, hence the retrospective framing.

175. Brillo Mfg. Co., 56 F.T.C. 1672, 1679 (1960).

176. Procter & Gamble Co., 63 F.T.C. 1465, 1577 (1963), *set aside sub nom.*, Proctor & Gamble Co., 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967). The Supreme Court subsequently instructed the Court of Appeals to affirm and enforce this Commission decision. FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967).

177. 332 U.S. 392 (1947), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

178. *Id.* at 396.

179. *Id.* A number of subsequent lower court cases cite these incipiency cases. *See* Ginsburg v. INBEV NV/SA, 649 F. Supp. 2d 943, 947 (E.D. Mo. 2009) ("A violation of Section 7 'can occur when there is a threat or possibility of substantially lessening competition or creating a monopoly.' . . . 'No restraints, monopolies, or substantial lessening of competition need actually occur to violate section 7.'" (quoting Midwestern Mach., Inc. v. Nw. Airlines, Inc., 167 F.3d 439, 442 (8th Cir. 1999))); Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557 (Fed. Cir. 1997) ("[S]ection 7 of the Clayton Act deals with 'monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.'" (quoting Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 124 (1986) (Stevens, J., dissenting), *abrogated on other grounds by* Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448 (Fed. Cir. 1998))); Panache Broad. of Pa., Inc. v. Richardson Elecs., Ltd., No. 90 C 6400, 1995 WL 584345, at *13 (N.D. Ill. Oct. 2, 1995) (requiring that plaintiffs plead "tendency toward monopoly or reduced competition" without specifying a necessary quantum). Further, Judge Bork has taken a similar view in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*: "[S]ection 7 of the Clayton Act[is] a statute aimed at halting 'incipient monopolies and trade restraints outside the scope of the Sherman Act' . . . which therefore applies a much more stringent test than does rule-of-reason analysis under section 1 of the Sherman Act." 792 F.2d 210, 220 (D.C. Cir. 1986) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962)).

for liability than the Sherman Act. In *du Pont*, the Court declared that "[t]he Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil."[180] Section 7 "is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."[181] Another court put it flatly: "The clear object of § 7 [is] . . . to nip monopolistic tendencies in their incipiency."[182] And in *International Salt*, a section 3 case, the Court explained that "tend to create a monopoly" means the law does not "await arrival at the goal before condemning the direction of the movement."[183]

C. *Legislative History*

The legislative history behind section 7 confirms the three primary conclusions laid out above: (1) "tend to create a monopoly" imposes a distinct prohibition from the first prong; (2) the same probabilistic standard applies across both prongs; and (3) the second prong sets an "incipiency" standard, a lower bar for illegality than the more difficult-to-satisfy Sherman Act tests. The following discussion summarizes the relevant portions of the legislative materials that accompanied both the 1914 Clayton Act and the 1950 amendments to section 7.

First, the legislative history confirms that "tend to create a monopoly" is a distinct provision with its own operative force. Early drafts of the 1914 Clayton Act contained only the first prong.[184] But during the reconciliation process, House conferees "insisted that to prohibit just the acquisitions where the effect was 'substantially' to lessen competition would not accomplish the designed aim of the statute," since "a corporation might acquire the stock of another corporation, and there would be no lessening of competition, but the tendency might be to create monopoly or to restrain trade or commerce."[185] That concern prompted Congress to add "tend to create a monopoly" (as well as the later-removed "restrain trade" prong).[186] Also in 1914, a minority in the Senate tried to strike the "may . . . tend to create a monopoly" prong from the statute, arguing that it was redundant in light of the "may . . . substantially . . . lessen competition" prong.[187] They were unsuccessful,

180. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).
181. *Id.* at 589.
182. Granader v. Pub. Bank, 281 F. Supp. 120, 122 (E.D. Mich. 1967), *aff'd*, 417 F.2d 75 (6th Cir. 1969).
183. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947), *abrogated on other grounds*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).
184. *du Pont*, 353 U.S. at 592 (quoting 51 Cong. Rec. 16002 (1914)).
185. *Id.* at 591–92 (quoting 51 Cong. Rec. 16002 (1914)).
186. *Id.*
187. 51 Cong. Rec. 14319 (1914).

indicating that Congress in 1914 did not view the "may . . . tend to create a monopoly" prohibition as redundant.[188]

During the run-up to the Celler–Kefauver amendments in 1950, Senator Donnell and Mr. Kelly of the FTC's Office of General Counsel discussed this exact question. Senator Donnell asked, "But this statute evidently is talking about two different things, is it not, when it says: To lessen competition, or to tend to create a monopoly. Those are two separate and distinct things, are they not?"[189] Mr. Kelley replied, "The word 'or' is there."[190] The Senate Report likewise clarified that the statute imposes two distinct prohibitions: "It is intended that acquisitions which substantially lessen competition, *as well as* those which tend to create a monopoly, will be unlawful . . . ."[191] The House Report was, if anything, even more clear: It "stated that two tests of illegality were included in the proposed Act[,] whether the merger substantially lessened competition or tended to create a monopoly."[192] Section 7's second prong prohibits some mergers that the first does not reach, and vice versa.[193]

Second, the legislative history affirms that the same probabilistic standard—"may be"—applies to both prongs of section 7. This language is the result of legislative compromise. Early on, the House version of the 1914 Clayton Act would have criminalized mergers whose "effect *is* to eliminate or substantially lessen competition . . . or create a monopoly."[194] The Senate softened the penalties from criminal to civil liability, but also lowered the bar for enforcers from "is" to "may be."[195] That same basic "compromise"[196] is still in effect today.[197] The legislative history of the 1950 Celler–Kefauver

188. *du Pont*, 353 U.S. at 617–18 n.11 (Burton, J., dissenting).

189. *Corp. Mergers & Acquisitions: Hrgs. on H.R. 2734 Before a Subcomm. of the S. Comm. on the Judiciary*, 81st Cong. 44 (1950) (statement of Sen. Forrest C. Donnell) [hereinafter *Senate Hearings*]. Mr. Kelley of the FTC later expressed his personal view that the two prongs have the same scope but admitted that the actual drafter of the bill "probably" thought otherwise. *Id.* at 39. Senator Donnell continued to express his view that the two prongs are distinct throughout. *See, e.g.*, *id.* at 47 ("Pardon me, Mr. Kelley, but the bill does not say 'and' tendency to create. It says 'or.' It is either or.").

190. *Id.* at 44.

191. S. REP. NO. 81-1775, at 5 (1950) (emphasis added); *see also* John M. Blair, *Planning for Competition*, 64 COLUM. L. REV. 524, 540–41 (1964) ("The amended Section 7 has two tests which were quite deliberately intended *not* to be duplicative of each other.").

192. Brown Shoe Co. v. United States, 370 U.S. 294, 321 n.36 (1962).

193. H.R. REP. NO. 81-1191, at 12–13 (1950) ("The bill is intended to permit intervention . . . when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to . . . create a monopoly . . . .").

194. McAllister, *supra* note 163, at 125 (alteration in original).

195. *Id.* n.3.

196. 51 Cong. Rec. 16002 (Statement of Sen. William E. Chilton).

197. Similar compromises resulted in Clayton Act §§ 2 and 3, which originally would have criminalized price discrimination and exclusive dealing. McAllister, *supra* note 163, at 128 n.15

amendments reaffirms this conclusion. During a subcommittee hearing, Senator Donnell observed, "[The bill] does not say that the effect of which *is* to tend to create monopoly. It says may be . . . . [U]nless the words 'may be' . . . modify also the words 'tend to create a monopoly,' it seems to me that the sentence is absolutely meaningless."[198] Mr. Kelley replied, "It may modify both clauses," and Representative Celler chimed in, "It is in the statute, the words 'may be.'"[199] Elsewhere, the congressional record confirms that the statutory text "may be" equates to a "reasonable probability."[200] Section 7's second prong prohibits mergers that pose a reasonable probability of tending to create a monopoly, not just mergers that will in fact tend to create a monopoly.

Third, the legislative history reinforces that section 7's second prong sets a lower threshold for liability than the Sherman Act.[201] The Senate Report accompanying the 1950 amendments was direct: "The purpose of [the bill] was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act."[202] So was the House Report: "The present bill is not intended as a mere reenactment of [the Sherman Act's] prohibition."[203] Congress intended section 7 to reach "far beyond the Sherman Act."[204] This broader scope makes sense—why go through all the trouble of enacting and later amending section 7 if it were merely coextensive with Sherman Act section 2? Making clear that courts should not import harder-to-satisfy Sherman Act standards into section 7 cases was one of the primary reasons underlying the 1950 Celler–Kefauver amendments.[205]

(quoting 51 Cong. Rec. 16273). Congress opted for civil liability but swapped in the easier-to-prove "may be" for the harder-to-satisfy "is." *Id.* (quoting 51 Cong. Rec. 16273). The framers "felt that [text] would tend to give the section more elasticity and breadth." *Id.* (quoting 51 Cong. Rec. 16273 (statement of Rep. Edwin Webb)).

198. *Senate Hearings*, *supra* note 189, at 86–87 (statement of Sen. Forrest C. Donnell) (emphasis added).

199. *Id.* at 87.

200. *E.g.*, S. REP. NO. 81-1775, at 6 (1950); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962) (observing that Congress understood "may" as a probabilistic standard, as evidenced by similar constructions of the phrase "quoted from prior decisions of the Court in antitrust cases" and the "final" Senate Report, which was "explicit on the point").

201. One student note summarily dismissed the possibility that legislative history might shed any light on section 7's second prong. Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 771 n.25 (1952). But as our analysis explains, that is incorrect.

202. S. REP. NO. 81-1775, at 4 (1950).

203. H.R. REP. NO. 81-1191, at 8 (1950).

204. S. REP. NO. 81-1775, at 5 (1950).

205. *See, e.g.*, McAllister, *supra* note 163, at 143 (concluding "nothing could be more clear than" that the legislative history shows that section 7 and the Sherman Act have different scopes). This is likely why Congress dropped the "restrain trade" prong. *Id.* ("The elimination [thereof] eliminates . . . any likelihood that the broad Sherman Act tests will again be applied.").

D. *A Model Description of the Legal Standard for Adjudicators*

The text of section 7's second prong provides a relatively simple, clear prohibition on certain mergers. And the legislative history aligns closely with textualist analysis, confirming the findings laid out above. Case law generally does so as well. That being said, some decisions appear to reflect judicial confusion and uncertainty. To help guide future analyses, a model description of the statutory requirements and standards follows:

> The second prong of Clayton Act section 7 prohibits mergers that pose even a modest, reasonable probability of tending to create a monopoly. This requires more than a theoretical or trivial possibility but does not equate to an "equally likely to" or "more likely than not" requirement. The statute does not require that the merger would in fact create a monopoly or a dangerous probability of a monopoly. Instead, a merger violates the second prong if it may move the combined firm appreciably in that direction.

This description reflects the substantive content of the statute's text and, if applied faithfully, should help adjudicators avoid at least three potential pitfalls. The first is erroneously raising the probability threshold. The second is mistakenly restricting application to outright monopolization or attempted monopolization. The third is confusing the two halves of section 7 and requiring that plaintiff demonstrate a lessening of "competition." As the next Part explains, the text of section 7's second prong maps out a distinct scope of liability.

III. The Unique Scope of "May . . . Tend to Create a Monopoly"

With a clear understanding of the second prong's text now in place, the unique scope of this statutory prohibition can emerge. Both prongs of section 7 contain a probabilistic qualifier, a requisite quantum of change, a direction of change, and an object. The probabilistic qualifier—"may"—is the same for both prongs. But in every other aspect, the two are distinct.

Fig. 1. Elements of Section 7's Two Prongs, Compared

	Probability	Quantum	Direction	Object
First Prong	"may"	"substantially"	"lessen"	"competition"
Second Prong	"may"	"tend"	"to create"	"monopoly"

Some key differences are readily apparent. The second prong does not require a "substantial[]" movement toward monopoly; any appreciable tendency is enough.[206] The first prong hinges on whether "competition" may be substantially lessened; the second does not. As a result, it is especially clear that the statute's second prong does not create an efficiencies-based defense.[207] A negative impact on "competition" is not necessarily required for liability.[208] And, at the same time, the object—monopoly—imposes a built-in limiting principle.[209]

A. No "Substantially" Requirement: Any Tendency Is Sufficient

One clear difference between section 7's two prongs is the quantum of effect required for illegality. The first prong prohibits mergers where the effect may be "*substantially* to lessen competition."[210] A less-than-substantial effect is not enough to violate the first prong.[211] In practice, then, the term "substantially" sets a minimum threshold for illegality under the first prong. Congress in 1914 was concerned that this threshold could inadvertently create a statutory loophole: A shrewd firm might buy its way to dominance via a series of less-than-substantial acquisitions.[212] The framers filled that potential gap with section 7's second prong.[213]

The second prong omits the "substantially" requirement. Instead, section 7's second prong imposes the easier-to-satisfy "tend to create" threshold. As a basic textualist matter, any tendency toward monopoly—even one that is less than substantial—can be enough to violate the second prong. Acquisitions are prohibited if they are even modestly likely to move the acquirer closer to monopoly power, without regard to whether the delta would be "substantial" or not.[214]

206. *See infra* subpart III(A).

207. *See infra* section III(B)(1).

208. *See infra* section III(B)(2).

209. *See infra* section III(B)(3).

210. 15 U.S.C. § 18 (emphasis added). The word "substantially" originally split the first-prong's infinitive. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18). Responding to prescriptivist grammarians, Congress in 1950 simply flipped "substantially" and "to" in section 7's first prong. Baer, *supra* note 7, at 5.

211. *E.g.*, Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) ("Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance.").

212. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 591–92 (1957) (describing the legislative backstory of section 7's "tend to create a monopoly" prong).

213. *Id.*

214. One of the Supreme Court's earliest decisions interpreting the Celler–Kefauver Amendment summarizes this difference as follows: "The requirements of the amendment are satisfied when a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial

Here again, precedent—though sparse—confirms this straightforward textualist analysis. In *du Pont*, the Supreme Court framed the requirement in "may . . . tend to create a monopoly" cases as any movement "measurably closer to [monopoly]."[215] Interpreting identical language in Clayton Act section 3, the Court observed that "it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement."[216]

A handful of lower courts and agency decisions have specifically addressed the second prong; they generally agree that any tendency can suffice. In *Mirant Corp.*,[217] for example, the district court denied defendants' motion to dismiss a section 7 claim brought by the State of California against two acquirers of electricity-generating plants.[218] Perhaps due to the unusual factual background,[219] the court relied on the statute's second prong. As a result of the challenged acquisitions, the complaint alleged, the defendants had charged 100–200% higher prices than they could have in deconcentrated markets.[220] The court's reasoning was straightforward: "Monopoly power is the power to exclude competition or control prices. . . . Allegations of the ability to control prices, therefore, suffice to allege that an acquisition tends toward monopoly."[221] The court did not ask whether the quantum of change was "substantial[]," only whether the requisite tendency was present.[222]

The FTC's opinion in *Brillo* is clearer still. In *Brillo*, the acquirer already had a 45.3% share of the nationwide market for household steel

lessening of competition in the relevant market is shown." United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171 (1964). The Court included "reasonable likelihood" only as to the second prong in that particular passage, but the weight of authority follows the actual text of the statute and applies it to both. *See supra* notes 165–168.

215. *du Pont*, 353 U.S. at 592 (quoting Transamerica Corp. v. Bd. of Governors of Fed. Rsrv. Sys., 206 F.2d 163, 169 (3d Cir. 1953)).

216. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

217. California *ex rel.* Lockyer v. Mirant Corp., 266 F. Supp. 2d 1046 (N.D. Cal. 2003), *aff'd sub nom.* California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831 (9th Cir. 2004), *and op. amended on denial of reh'g and aff'd*, 387 F.3d 966 (9th Cir. 2004).

218. *Id.* at 1057.

219. Historically, a single regulated utility, PG&E, had generated and provided all electricity in California. In the 1990s, California legislatively required PG&E to divest several generators. It sold five to one defendant and three to the other. In other words, before the challenged acquisitions, there was no competition in the relevant markets. The state did not explicitly invoke section 7's second prong. But the defendants argued that the acquisitions actually "moved the electricity market *away* from monopoly and, therefore, could not have lessened competition or tended to create a monopoly." *Id.* at 1054–55 (emphasis added).

220. *Id.* at 1055.

221. *Id.*

222. *Id.* (holding that "[a]llegations of the ability to control prices, therefore, suffice to allege that an acquisition tends toward monopoly" without inquiring as to substantiality of effect).

wool.[223] The target firm had only a 0.3% share.[224] Nonetheless, the Commission found that these share data reasonably supported an inference that the acquisition violated section 7.[225] "It [was] not controlling that the share held by [the target firm] was a fraction of one percent" because "[t]he [Clayton] Act also encompasses minute acquisitions which tend to monopoly."[226] A "minute" effect may not be "substantial," but it does not need to be under section 7's second prong.

The agency made this point again in *Procter & Gamble Co*.[227] In situations "where the aggravation of non-competitive market conditions by the merger may seem relatively slight," the Commission wrote, proceeding under "Section 7's 'substantially to lessen competition' clause" could raise "conceptual difficulties."[228] But "[i]f so, resort may be had, with entire propriety, to the statute's tendency-to-monopoly clause."[229] Even a "relatively slight" effect can be enough for liability in a second-prong case.[230]

To be sure, some opinions contain imprecise language that seems out of step with the statute itself, and one of the objectives of this Article is to help steer the courts in the direction of section 7's text. At one point in *du Pont*, for example, the majority posited that section 7 applies "whenever the reasonable likelihood appears that the acquisition will result in . . . the creation of a monopoly of any line of commerce."[231] The statement is accurate, but potentially misleading: Section 7 also applies whenever a reasonable likelihood exists that an acquisition will "tend" to create a monopoly, not just when it is reasonably likely to actually create one. The *du Pont* Court itself made this clear later on in the same opinion: "[T]he Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may . . . tend to create a monopoly of a line of commerce."[232]

It bears keeping in mind that "may be" imposes a limiting principle on both of section 7's prongs. Plaintiffs proceeding under either prong must demonstrate a reasonable probability of the requisite tendency.[233] In second-prong cases, the size of the potential tendency need not be substantial. But the probability itself must be at least reasonable. As the Supreme Court has

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223. Brillo Mfg. Co., 56 F.T.C. 1672, 1678 (1960).

224. *Id.*

225. *Id.* at 1679.

226. *Id.*

227. 63 F.T.C. 1465 (1963), *set aside sub nom.*, Proctor & Gamble, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).

228. *Id.* at 1577.

229. *Id.*

230. *Id.*

231. United States v. E.I. du Pont de Nemours & Co., 353 US 586, 592 (1957).

232. *Id.* at 597.

233. *Id.* at 598.

explained, a "mere *possibility* of a . . . tendency to monopoly will not establish the statutory requirement that the effect of an acquisition 'may be' such . . . tendency."[234]

Moreover, although the "tendency" element is easier to satisfy than the first prong's "substantially" element, it too acts as a built-in limiting principle. Because some deals do not change the acquirer's power in a given market, even a monopolist does not increase or entrench its power in a given market with every acquisition.[235] Although section 7's second prong requires very close scrutiny of dealmaking by dominant firms, it allows even an already-dominant firm to pursue mergers and acquisitions that will not further entrench or increase its power.

B. *"Monopoly" Instead of "Lessen[ed] Competition"*

Another significant difference between section 7's first and second prongs is the end state Congress sought to avoid. The first prong seeks to avoid "lessen[ed] competition," whereas the second seeks to avoid "monopoly." The following discussion outlines three distinct propositions that flow from the second prong's prohibition of mergers that may tend to create a monopoly.

1. No Efficiencies Defense, Rebuttal, or Exception.—The viability of an "efficiency" rebuttal or defense under any part of Clayton Act section 7 is uncertain. Longstanding—albeit somewhat distant—Supreme Court precedent casts considerable doubt on its existence.[236] But lower court decisions are somewhat mixed.[237]

234. *Id.*

235. Most obviously, a conglomerate with a monopoly in one market may be able to make an acquisition involving a second, totally unrelated market without affecting its monopoly power in the first market.

236. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) ("We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because . . . it may be deemed beneficial. A value choice . . . has been made for us already, by Congress when it enacted the amended § 7."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). The Court decided these cases under section 7's first prong, though the relevant passages were general in nature.

237. *Compare, e.g.*, Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790–91 (9th Cir. 2015) (expressing skepticism "about the efficiencies defense in general and about its scope in particular" and stating that even if such "predicted efficiencies" were "true," they would be "insufficient to carry [defendant]'s burden of rebut[al]."), *with* United States v. AT&T Inc., 310 F. Supp. 3d 161, 191 (D.D.C. 2018) (stating that defendants can carry their rebuttal

Again, the analysis begins—as it must—with the statutory text.[238] A textualist approach asks whether an efficiency rebuttal (or defense, or exception) appears in the words of the statute. It does not. None of the second prong's language, analyzed above,[239] invokes anything resembling an efficiency-based defense. The plain, original meaning of this text bars mergers that "may . . . tend to create a monopoly," full stop. Dictionaries from the relevant time period did not limit the definition of either "create" or "monopoly" to only inefficiently created monopolies.[240] That ought to dispositively decide the question for textualists: It is inappropriate for judges to make up a defense even if they personally believe that doing so would be good public policy[241] or believe that Congress really meant to create one.[242]

It would have been simple to include such a defense in section 7. Congress certainly knew how to write one: The 1936 Robinson–Patman Act amendments to Clayton Act section 2 contain an express efficiency-based defense.[243] Section 2 forbids price discrimination whose effect "may be substantially to lessen competition or tend to create a monopoly"[244]—the same language as in section 7. But unlike section 7, Clayton Act section 2 goes on to provide a defense for defendants who can prove that their pricing was due to "differences in the cost of manufacture, sale, or delivery."[245] In other words, Congress expressly created a cost-savings exception to section 2 for differential pricing caused by efficiency reasons.[246] No such exception

burden via proof of post-merger efficiencies that will outweigh any anticompetitive effects), *aff'd on other grounds*, 916 F.3d 1029 (D.C. Cir. 2019).

238. *E.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).

239. *See supra* subpart II(A).

240. *See supra* subpart II(A).

241. SCALIA & GARNER, *supra* note 84, at 353 ("[O]nce the meaning is plain, it is not the province of a court to scan its wisdom or its policy." (quoting G. GRANVILLE SHARP & BRIAN GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 5 (10th ed. 1953))). In an influential article, Oliver Williamson theorized that a merger could yield a monopoly with increased pricing power, yet with sufficiently lower internal cost structure such that the monopoly is nonetheless allocatively efficient. Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 23 (1968).

242. Scalia & Manning, *supra* note 93, at 1612 ("[E]ven if you think our laws mean not what the legislature enacted but what the legislators intended, there is no way to tell what they intended *except* the text. Nothing but the text has received the approval of the majority of the legislature and of the President . . . . Nothing.").

243. *See* 15 U.S.C. § 13(a) (providing an exception for price "differentials which make only due allowance for differences in . . . cost").

244. *Id.*

245. *Id.*

246. Antitrust enforcers can, of course, use their discretion to decline to challenge mergers they believe are likely to produce significant cost savings and unlikely to meaningfully increase market power.

appears in section 7, which Congress went on to amend just fourteen years later.[247]

Here again, the legislative history is consistent with the text of section 7: Neither traditionalist nor textualist statutory analysis create an efficiency-based defense.[248] The floor debates over the 1914 Clayton Act do contain some references to mergers' effect on internal, productive efficiency.[249] Some expressed concern about striking a balance between protecting the public against concentrated corporate power and the lower prices or higher quality that "honest . . . cooperation" can yield.[250] But others responded that the former poses a serious enough societal threat to warrant some sacrifice of the latter.[251] Even an opponent of the 1950 amendment who raised concerns about efficiency limited his concern to "harmless" mergers among smaller firms trying to compete against bigger ones.[252] The concern did not extend to mergers among bigger players that may tend to create monopolies. The general view among the Amendment's supporters, who

247. Similarly, Congress expressly created a defense in the Federal Deposit Insurance Act for bank mergers "whose effect . . . may be substantially to lessen competition, or to tend to create a monopoly" when the public interest "clearly outweigh[s]" the "anticompetitive effects." 12 U.S.C. § 1828(c)(5)(B). Of course, "public interest" contemplates something broader than just productive efficiencies, but the point is that Congress can expressly create defenses to anti-merger laws when it chooses to do so.

248. This discussion rests heavily on research that first appeared in Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 131–35 (1982).

249. *See* Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RSRV. L. REV. 381, 396 (1980) (discussing legislative history regarding Congressional concerns about mergers' effect on efficiency). For the most extensive contrary view to this Article's view on the efficiencies defense, see generally *id.*

250. "The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring." 51 CONG. REC. 14223 (1914) (remarks of Sen. Thompson).

251. Acknowledging the possibility that antimerger legislation might sacrifice corporate efficiency, one Senator nevertheless strongly condemned monopolies because they "divide our people into classes, breed discontent and hatred, and in the end, riot, bloodshed, and French revolutions." *Id.* at 15955 (remarks of Sen. Borah).

252. Rep. Goodwin stated: "By preventing harmless and reasonable mergers among small and medium-sized concerns, this bill . . . will foreclose the chance that they may by consolidation or acquisition ever approximate either the size or the efficiency that the big competitors have already achieved." 95 CONG. REC. 11487 (1949); *see also Senate Hearings*, *supra* note 189, at 206 (statement of George S. Eaton) (predicting that the bill would harm small businesses); *Amending Sections 7 and 11 of the Clayton Act: Hearings on H.R. 988, H.R. 1240, H.R. 2006, and H.R. 2734 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 81st Cong. 45 (1949) (statement of Gilbert Montague) ("By thus freezing each competitive unit to its present size and efficiency . . . these bills will hurt the small and medium-sized competitor, and will protect the large competitor, and will lay the dead hand of arrested development upon the entire national economy."); *id.* at 83 (statement of John M. Blair, Assistant Chief Economist, FTC).

ultimately carried the day, was that the Amendment probably would help, not hurt, productive efficiency.[253]

Professor Bok's seminal analysis of the Celler–Kefauver Amendment legislative debates did not find significant evidence of a congressional concern for efficiency.[254] Bok concluded, "[T]here is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations."[255] A few other commentators have argued that, when it amended section 7, Congress did have significant efficiency goals, but these arguments have been unable to point to evidence indicating that economic efficiency actually figured significantly in the debates leading to the 1914 Act or 1950 Amendment.[256] That is doubly true as to the statute's second prong.

Despite a trio of Supreme Court decisions stating that no efficiencies defense exists under section 7,[257] some subsequent lower courts have assumed the existence of such a defense.[258] However, none of these lower

253. For example, Rep. Celler stated: "Bigness does not mean efficiency, a better product, or lower prices." 95 CONG. REC. 11486 (1949); *see also id.* at 11495–96 (statement of Rep. Boggs) (explaining that mergers involving big firms often do not increase efficiencies). In Rep. Celler's view, the bill allowed small firms to merge, at least in part, to enable them to achieve increased efficiencies. *See, e.g.*, *id.* at 11488 (statement of Rep. Celler) (asserting that certain mergers increase small firms' ability to compete and thus do not fall within the purview of the Amendment).

254. Bok, *supra* note 75, at 230–33, 236, 307 n.252.

255. *Id.* at 318 (citations omitted); *see also id.* at 236–37 ("[C]ompetition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature.").

256. *See, e.g.*, Muris, *supra* note 249, at 397 ("Although not a major theme of the legislative history, efficiency was occasionally discussed.").

257. To be sure, each of these was decided primarily under the statute's first prong. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) ("We are clear . . . that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress . . . ."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). That said, if anything, the text of the second prong presents an even easier case for rejecting the defense's viability.

258. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (positing that "the trend among lower courts is to recognize the defense"); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991) (positing that the defense "is appropriate in certain circumstances"). Other courts have expressed strong skepticism about the fundamental viability of such a defense, then gone on to reject claimed efficiencies on the facts. *E.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348 (3d Cir. 2016) ("[W]e are skeptical that such an efficiencies defense even exists."); Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 788–89 (9th Cir. 2015). Even among courts that have recognized such a defense, only a tiny handful of opinions

court cases were decided under the "may . . . tend to create a monopoly" clause.[259] Moreover, these opinions offer little to no justification for assuming an efficiency defense, rebuttal, or exception. They do not analyze even the statutory text, let alone the legislative history.[260] The most extensive discussion was in *University Health*,[261] where the court's analysis seems to hinge on the word "competition."[262] Of course, section 7's second prong contains no reference to "competition."[263] Thus, even among the circuits that have assumed an efficiencies defense exists, their reasoning (such as it is) does not extend to the statute's second prong. Very rarely should a lower court depart from both statutory text and Supreme Court precedent; no good reason for doing so is present here.[264]

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have found defendants' claimed efficiencies to be cognizable. FTC v. Butterworth Health, 946 F. Supp. 1285, 1301 (W.D. Mich. 1996), *aff'd per curiam*, 121 F.3d 708 (6th Cir. 1997); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 217 (S.D.N.Y. 2020); United States v. AT&T Inc., 310 F. Supp. 3d 161, 191, n.17 (D.D.C. 2018) (dictum), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

259. For a list of the seventeen lower court cases that discuss the efficiency justification, all of which were first-prong cases, see Appendix, at 53, https://texaslawreview.org/lande-newman-slaughter-appendix/ [https://perma.cc/G3FZ-T7RW].

260. Instead, these cases cited the federal antitrust agencies' merger guidelines and (sometimes) normative legal scholarship. *Id.*

261. FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

262. *Id.* at 1222–23 ("[W]hether an acquisition would yield significant efficiencies . . . is an important consideration in predicting whether the acquisition would substantially lessen competition . . . . Thus, evidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition.").

263. 15 U.S.C. § 18.

264. The most recent scholarly analyses of merger efficiencies also suggests that there should be no efficiencies defense or rebuttal in merger cases. Scholars—including Richard Posner, who as a law clerk wrote the draft opinion in *Philadelphia National Bank*—have pointed out that claimed efficiencies from mergers rarely materialize. *See, e.g.*, Philadelphia National Bank *at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205, 210 (2015) [hereinafter *Posner Interview*] (stating that "[m]ergers rarely seem to improve efficiency"); *see also* Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783, 815–26 (reviewing the literature); Newman, *supra* note 11, at 1540–45 (reviewing cases and scholarly arguments pertaining to mergers and efficiencies in digital markets). Research also indicates that claimed efficiencies are difficult to predict and verify reliably. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976) ("I would not allow a generalized defense of efficiency."); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1638 (1983) ("[M]erger enforcement officials would virtually never be able to quantify the costs and benefits of particular mergers accurately enough for the kind of objective balancing that [certain merger] model[s] make[] appear so simple."). And research indicates that even where mergers do produce efficiency gains, those gains are rarely passed on to the merged firm's trading partners or consumers. *See* Mark Glick, Robert H. Lande & Darren Bush, *The Efficiency Rebuttal in the New Merger Guidelines: Bad Law and Bad Economics*, ANTITRUST, Summer 2024, at 20, 24 (identifying that "the weight of the evidence indicates that horizontal mergers do not reduce costs in a significant percentage of high-concentration mergers," and cases that have sufficient efficiency gains to offset a unilateral price increase "are difficult if not impossible to come by").

2. Negative Effect on Competition Not Necessarily Required.—Another readily apparent difference between section 7's two prongs is that the second prong does not necessarily require proof of any negative effect on competition. Of course, some mergers that may tend to create a monopoly will also negatively impact competition. But proof of the latter is not an element of a second-prong violation.[265] This has at least two implications for antitrust enforcement and adjudication. First, in some special circumstances explained further below, an acquisition may have no immediate impact on competition, yet nonetheless move the acquirer toward monopoly.[266] Second, acquisitions can still violate section 7 where the size of the effect on competition is too difficult or "minute" to measure reliably.[267] This can be because the relevant market is already so concentrated that competition is already largely deadened, for example,[268] or where the target firm would contribute an appreciable but small amount to the acquirer's power.

3. "Monopoly" as Limiting Principle.—Of course, the statute does not ban *all* mergers by already-powerful firms. The statute specifically prohibits transactions that may tend to create a monopoly. Yet market conditions may be such that monopoly is virtually impossible. The acquirer may be highly unlikely to gain a monopoly regardless of the merger in question.[269]

To carry its burden in a second-prong merits case, a plaintiff must demonstrate that the effect of the merger may be to tend to create a monopoly. That entails proving that if the probabilistic effect were in fact to happen, it

265. *See, e.g.*, Brillo Mfg. Co., 56 F.T.C. 1672, 1674, 1679 (1960) (finding a second-prong violation despite the administrative law judge's conclusion "that the evidence showed that the industrial market had continued to be as keenly competitive after the acquisition as before and that there was no record basis for concluding that it would not so continue").

266. *See infra* subpart V(A) (giving an example of beachhead acquisition in serial-acquisition strategy).

267. *Brillo*, 56 F.T.C. at 1679 (reasoning that "[i]t [was] not controlling that the share held by [the target firm] was a fraction of one percent" because "[t]he [Clayton] Act also encompasses minute acquisitions which tend to monopoly").

268. Procter & Gamble Co., 63 F.T.C. 1465, 1577 (1963) (citing United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 607 (S.D.N.Y. 1958)), *set aside sub nom.*, Proctor & Gamble, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).

269. For example, consider the facts of *V. Vivaudou, Inc. v. FTC*, 54 F.2d 273 (2d Cir. 1931). The merged firm's combined share of national revenues in perfumes and cosmetics was at most 5.8%, and there were "from 300 to 500 different perfumery and cosmetic manufacturers throughout the United States," as well as "3,000 face powder manufacturers." *Id.* at 274–75. And there was no evidence of post-merger price increases or output reductions. *Id.* at 275. Of course, the lack of either should not be fatal to any given challenge. John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 614–17 (2022). But on these facts, the prospect of monopoly was vanishingly remote. As explained in subpart V(C), § 2.1 of the 2023 Merger Guidelines explains that mergers like this one are not even close to the challenge threshold. *See infra* note 370.

would move the acquirer closer to having or maintaining a monopoly.[270] The textualist analysis above[271] aligns with how modern observers use the term "monopoly" as a term of art in antitrust law and economics. Economists and legal analysts alike tend to use "market power" as a blanket concept. The degree of market power exists on a spectrum, from none at all to total control. "Monopoly power" is a relatively high degree of market power.[272] Courts and commentators often describe monopoly power as "substantial" market power.[273] In a second-prong section 7 case, the plaintiff does not need to prove that the merger will create—or, in consummated merger challenges, has created—a monopoly. But the plaintiff does need to prove that the merger may tend to create a monopoly.[274] Many firms have *some* degree of market power over an aspect of competition (e.g., price or quality). That is not the test.

This requirement acts as a built-in limiting principle. Proving only that the merger may yield a concentrated market, without more, appears not to be sufficient.[275] That principle should not be taken too far, of course. As markets become increasingly concentrated, they often become more prone to monopolization.[276] Consequently, evidence that the relevant market is

270. The defendants in *Mirant Corp.* accordingly "argue[d] that their acquisitions moved the electricity market *away from* monopoly." California *ex rel.* Lockyer v. Mirant Corp., 266 F. Supp. 2d 1046, 1054 (N.D. Cal. 2003) (emphasis added), *aff'd sub nom.* California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831 (9th Cir. 2004), *op. amended on denial of reh'g and aff'd*, 387 F.3d 966 (9th Cir. 2004).

271. *See supra* subpart II(A).

272. The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). In the Sherman Act context, "[m]onopoly power under § 2 requires, of course, something greater than market power under § 1." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992).

273. *E.g.*, Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991); Safeway Inc. v. Abbott Lab'ys, 761 F. Supp. 2d 874, 886 n.2 (N.D. Cal. 2011); AREEDA & HOVENKAMP, *supra* note 41, ¶ 801 ("[T]he Sherman Act § 2 notion of monopoly power . . . is conventionally understood to mean 'substantial' market power."); McWane, Inc. v. FTC, 783 F.3d 814, 826 (11th Cir. 2015) (calling "market power" a "lesser-included element of monopoly power").

274. 15 U.S.C. § 18; *see infra* subpart II(A) (undertaking a textualist analysis of Clayton Act § 7).

275. United States v. Mfrs. Hanover Tr. Co., 240 F. Supp. 867, 936 (S.D.N.Y. 1965) ("The grand design of Clayton § 7 was, of course, to curb tendencies toward monopoly in their incipiency, but 'incipiency' . . . cannot be stretched to the extreme of curbing every . . . tendency toward[] concentration."). Interestingly, the lone scholarly work to go into any substantive depth on section 7's second prong took a somewhat different view. *See* Bok, *supra* note 75, at 311–12 n.260 (suggesting that monopoly, in the section 7 context, be understood as encompassing a market's general "trend[] toward concentration," rather than the more narrow Sherman Act definition that focuses on the specific merger, in order to effect the congressional purpose of "curbing concentration").

276. *See* 2023 GUIDELINES, *supra* note 16, at § 2.7 ("If an industry has gone from having many competitors to becoming concentrated, it may suggest greater risk of harm, for example, because

already concentrated is quite relevant to deciding whether a merger may tend to create a monopoly.[277] And it bears emphasizing that the legal test is not whether a merger may create a monopoly—such mergers can "of course" violate section 7 and may even violate Sherman Act section 2.[278] Instead, the question is whether the merger poses a modest, reasonable probability of moving the merged firm appreciably closer to that status.

IV. The Sound Policy Underlying "May . . . Tend to Create a Monopoly"

For more than a century, Congress has consciously retained section 7's distinct ban on mergers that may tend to create a monopoly.[279] Judicial endorsement of this prong is scant, but uniform: This is "good law" in the sense of being valid, in force. Does it also reflect good policy?

Antitrust economics has long recognized that the more power a firm can wield, the more harm it can cause to consumers, workers and other input suppliers, and society at large.[280] A sliding-scale approach to legal analysis can account for this dynamic. As a result, such an approach can, at least in theory, yield better decisional outcomes than applying a single bright-line rule to all defendants. That said, a pure sliding scale can entail excessive administration costs as compared to a simple, bright-line rule. A more balanced approach combines the best of both alternatives.

Congress has elsewhere designed, and courts have interpreted, the antitrust laws so as to provide this balance. The two key provisions of another antitrust law, the Sherman Act, function in this way. Sherman Act section 1's "rule of reason" sets a relatively low bar for proving the requisite amount of power, but a relatively high bar for proving the conduct at issue is harmful.[281] In comparison, Sherman Act section 2 sets a higher bar to prove the requisite amount of power (monopoly power) but a lower bar to prove the defendant's

new entry may be less likely to replace or offset the lessening of competition the merger may cause.").

277. *See, e.g.*, United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 607 (S.D.N.Y. 1958) ("'Tend to create a monopoly' clearly includes aggravation of an existing oligopoly situation.").

278. Brown Shoe Co. v. United States, 370 U.S. 294, 328 (1962).

279. Blair, *supra* note 191, at 540–41 ("The amended Section 7 has two tests which were quite deliberately intended *not* to be duplicative of each other."). Blair is perhaps the only previous commentator to recognize the importance of operationalizing both prongs. Praising the FTC's endorsement of the second prong in *Procter & Gamble*, Blair predicted that "the tests of law . . . incorporated in this decision should at long last make Section 7 the effective instrument which Congress intended it to be against this most serious of all current dangers to the competitive system." *Id.* That prediction unfortunately has not come to pass—yet.

280. *See, e.g.*, 2023 GUIDELINES, *supra* note 16, §§ 1, 1.1 (explaining that "[m]arket concentration is often a useful indicator of a merger's likely effects on competition").

281. *See supra* notes 43–51 and accompanying text (explaining that the Clayton Act imposes a lower threshold for proving a violation than the Sherman Act).

conduct was harmful.[282] In other words, the more powerful the defendant, the more stringent the legal standard that applies to that defendant's conduct. Rather than a pure sliding scale, Congress created two statutory alternatives, thereby keeping some of the administrative advantages of bright-line rules.

By excavating the force and function of section 7's second prong, we can see a similar dynamic at work in the Clayton Act. The two prongs of Clayton Act section 7 create a two-part sliding scale. The first prong sets a relatively low bar as to the merged firm's power, but includes the "substantially" qualifier for effects.[283] The second prong sets a relatively high bar as to the merged firm's power, but a relatively low effects requirement (any "tend[ency]" can suffice).[284]

Fig. 2. Excavating the Second Prong Reveals Section 7's Sliding Scale

	First Prong	Second Prong
Merged Firm's Power	Easier to satisfy	Harder to satisfy
Size of Merger's Effect	Harder to satisfy	Easier to satisfy

Like the Sherman Act's two sections, the two prongs of Clayton Act section 7 impose a sliding scale: Where a higher degree of power is present, a lower threshold for proving harm is appropriate. Section 7's second prong is not only good law, but also good policy.

In fact, the leading antitrust treatise endorses a somewhat similar prescription, albeit without reference to the second prong of section 7. Professors Areeda and Hovenkamp observe that "[n]o merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized."[285] For mergers that would create either a "monopolist or a dominant firm," they would immediately shift the burden of production to defendants to demonstrate that "entry is so easy that

282. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").

283. *See* 15 U.S.C. § 18 (prohibiting mergers that may "substantially . . . lessen competition").

284. *See id.* (prohibiting mergers that may "tend to create a monopoly").

285. AREEDA & HOVENKAMP, *supra* note 41, ¶ 911a.

monopoly profits could not be sustained for any significant length of time."[286] But the proposal invokes Sherman Act section 2.[287] Excavating section 7's second prong offers a clearer basis for what is, at its heart, a sound policy impulse. With both statutory prongs restored, section 7 itself can provide the desired sliding scale. This more straightforward statutory basis aligns elegantly with the text and history of the relevant statutes.[288]

Preventing the creation of monopoly power—"to nip monopoly in the bud"—was one of the primary policy goals that motivated Congress to pass, and later strengthen, the Clayton Act.[289] The Sherman Act's prohibition on monopolization applies only to conduct that has resulted in actual or attempted monopolization,[290] and monopolies can engage in "myriad" forms of harmful exclusion.[291] Once acquired, monopoly power is often durable.[292] And remedies for Sherman Act violations that eliminate the power itself have been somewhat rare.[293] At the same time, a robust and growing body of empirical evidence confirms that merger-specific efficiencies are not especially common or substantial,[294] a view long shared by prominent antitrust theorists like Richard Posner.[295]

Against this backdrop, the forgotten half of section 7 can—and should—play an important role in antitrust enforcement. If only the first prong of the statute is enforced, potentially harmful mergers may be permitted. Durable, entrenched monopolies may be allowed to form, deadening the competitive processes that can benefit downstream customers, workers and other upstream input suppliers, and business start-ups that wish to enter the fray. The discussion that follows identifies scenarios and gives examples of the types of harmful combinations that may be prevented by active second-prong enforcement.

286. *Id.* ¶ 911b ("Even relatively easy entry should not ordinarily be a defense . . . .").

287. *Id.* ¶ 906.

288. *See supra* Part II (explaining that the Clayton Act was meant to impose a lower threshold for proving a violation than the Sherman Act).

289. Laidlaw Acquisition Corp. v. Mayflower Grp., Inc., 636 F. Supp. 1513, 1518 (S.D. Ind. 1986) (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 592–93 (1957)).

290. *See* 15 U.S.C. § 2 (applying to defendants who "shall monopolize" or "shall . . . attempt to monopolize").

291. United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

292. *See* Newman, *supra* note 11, at 1503–06 (discussing the durability of monopolies in digital markets).

293. *See* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1958–59 (2020) ("[L]arge antitrust breakups have not occurred in decades, and were always rare . . . .").

294. *See, e.g.*, Glick et al., *supra* note 264, at 20–24 (collecting sources challenging the efficiencies defense).

295. *Posner Interview*, *supra* note 264, at 210 ("Mergers rarely seem to improve efficiency.").

V. Operationalizing "May . . . Tend to Create a Monopoly"

Because the stakes are so high, the antitrust enterprise must take great care to get this right. To that end, the following discussion first identifies a set of concrete factual scenarios in which section 7's second prong bars mergers that could slip past the first prong, offers unique analytical advantages,[296] or does both.[297] Second, we assess the federal antitrust agencies' 2023 Merger Guidelines treatment of "may . . . tend to create a monopoly."[298] This Part concludes by identifying and addressing what will likely be the most frequently asked questions and oft-raised objections about the forgotten half of section 7.[299]

A. Applications

Scores of judicial and administrative opinions issued throughout the course of more than a century help to identify the scope of section 7's "may substantially lessen competition" prong. As we explain above, the statutory text, a handful of cases, and the legislative history provide a workable set of first principles for applying section 7's second prong. That said, its scope is markedly less settled by existing case law. Judges, enforcers, and practical-minded scholars alike will need to know when the second statutory prong imposes a distinct prohibition, offers a superior analytical tool, or does both. The following discussion identifies a number of such scenarios. To be clear, a given merger may in some cases violate both statutory prongs. These scenarios and examples are not pigeonholed into "distinct prohibition," "distinct analytical advantage," or "both."[300] Nor is this list of scenarios meant to be exhaustive. But even this initial survey reveals a broad and varied collection of settings that are especially ripe for second-prong enforcement.

Scenario 1: Effect of merger may be too small to "substantially" lessen competition. Some mergers and acquisitions cause smaller changes to competitive conditions than others. Suppose a market-leading firm were to acquire a very small rival, supplier, customer, or supplier of complementary products. Suppose, further, the evidence indicates that the acquisition may both lessen competition and tend to create a monopoly. As the Supreme Court

296. As explained more fully below, such advantages can include increased predictability, savings in litigation costs, a reduction in costly false negatives, and more. *See infra* notes 302–306 and accompanying text.

297. *See infra* subpart V(A).

298. *See infra* subpart V(B).

299. *See infra* subpart V(C).

300. We avoid this for at least two reasons. First, there is some substantive overlap between section 7's two prongs. Some of the mergers that fit these scenarios will also be barred under section 7's first prong, creating some risk of inadvertently artificially narrowing the scope of the first prong while demarcating the scope of the second. Second, given the unusually foundational nature of this project—it is exceedingly rare to uncover a critically important statutory provision that has simply escaped everyone's notice—this sort of pigeonholing would be premature.

has explained, section 7's first prong does not apply where the negative effect on competition would be truly "de minimis."[301] Where a merger may insubstantially lessen competition and tend to create a monopoly, proceeding only under the first prong would increase error costs. The merger should be prohibited, yet first-prong analysis would fail to do so: a false negative, with society at large bearing the consequences.[302] Moreover, even if the effects were substantial but close to the line, exclusively first-prong analysis could invite intensive defense-side arguments. At best, this would require scarce judicial and enforcer resources to analyze; at worst, it could yield additional costly false negatives. Second-prong analysis can thus offer multiple advantages in this type of scenario. The following hypotheticals illustrate more specific factual variations in which section 7's second prong may potentially be useful:

> *Example 1a.* The leading seller in a relevant market has a 40% share. The next largest firm has a 20% share. The leading seller acquires a small competitor that has a 0.5% share.
>
> *Example 1b.* The facts are the same as in Example 1a, except that the leading seller is acquiring a downstream distributor instead of a competitor.
>
> *Example 1c.* A large conglomerate firm recently expanded into the relevant market. Its share is 1.5%, but its internal projections indicate that it is unlikely to grow further. The incumbent market leader has a 45% share. The large conglomerate firm proposes to acquire the market leader. The merged firm would likely shutter the conglomerate's existing operations in the relevant market, and at least some customers would likely migrate to the incumbent's product.[303]

301. Brown Shoe Co. v. United States, 370 U.S. 294, 328–29 (1962).

302. Error-cost analysis runs throughout much of antitrust. Judge Easterbrook famously used it to argue for rules that would systematically favor defendants. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 17–19 (1984). But judicial opinions had long employed the concept. *E.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927) ("Agreements which create . . . potential power [to fix prices] may well be held to be . . . unlawful . . . without placing on the government . . . the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.").

303. This scenario could extend also to cases involving purely potential competition.

Scenario 2: Powerful acquirer tries to "litigate the fix" via open offers, nonbinding commitments, or other partial remedies. The majority of judicial decisions adopt the position that, to be cognizable, a "fix" for an anticompetitive merger would need to restore the pre-merger level of competition.[304] Nonetheless, a few cases have departed from this approach, on the theory that defendant-generated "fixes" are relevant to liability determinations, rather than at the more natural remedy stage of adjudication.[305] These opinions ask whether even an incomplete remedy—i.e., one that still leaves the merger, on balance, anticompetitive—at least makes the harmful effect on competition less than "substantial."[306] If so, these courts reason, the harmful merger should be allowed, with society bearing the resulting cost.[307] Setting aside whether this minority view is correct (doubtful) or desirable (almost certainly not), section 7's second prong may offer a way to obviate the issue in some cases before these courts. In second-prong cases, because the merger may be moving the market toward a monopoly, defendants' partial remedies cannot defeat a finding of liability even if they would make the harmful effects less than "substantial."[308]

Scenario 3: Exact amount of harm from merger may be difficult to assess. In a given case, the exact amount or quantum of harm to competition caused by a merger may be relatively difficult to assess.[309] For example, the underlying technology may be especially new, such that the degree of

304. *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (explaining that the remedy must cure the harm in full); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 76 (D.D.C. 2015) (rejecting a proposed remedy that would not "maintain the intensity that characterizes the present competition" between the defendants).

305. *See* Illumina, Inc. v. FTC, 88 F.4th 1036, 1059 (5th Cir. 2023) (putting the burden on the defendants, at the rebuttal stage of liability determination, to show that the defendants' preferred remedy "sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition"); *see also* United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 132–34 (D.D.C. 2022) (disagreeing with the majority view that defendants must prove that divestitures would fully mitigate the merger's competitive harms, but applying the view anyway).

306. *See, e.g.*, *Illumina*, 88 F.4th at 1059 (holding that the defendant was only required to show that voluntary fixes sufficiently mitigated the competitive harms "such that [the merger] was no longer likely to *substantially* lessen competition"); *see also UnitedHealth Grp.*, 630 F. Supp. 3d at 133 n.4 (hypothesizing a defendant-generated divestiture that would leave the market "just a little less competitive than the market before").

307. *See, e.g.*, *Illumina*, 88 F.4th at 1061–62 (holding that the defendant on remand was not required to prove that the voluntary fixes would entirely mitigate the harms); *UnitedHealth Grp.*, 630 F. Supp. 3d at 134, 155 (ruling that the defendant's divestitures overcame the government's prima facie case that a merger absent the accompanying divestiture was likely to substantially lessen competition).

308. *See* Brillo Mfg. Co., 56 F.T.C. 1672, 1679 (1960) ("The [Clayton] Act *also* encompasses minute acquisitions which tend to monopoly." (emphasis added)).

309. *Cf.* FTC v. Cmty Health Sys., Inc., No. 5:24-CV-00028-KDB-SCR, 2024 WL 2854690, at *2 (W.D.N.C. June 5, 2024) (stating that "the impact of Novant buying LNR on the competitive balance between Novant and Atrium may be modest overall and is certainly difficult to quantify . . .").

competitive importance of a particular product is unusually uncertain. To be clear, proving a first-prong section 7 violation does not require mathematical certainty or precision regarding the amount of reasonably probable harm. Nonetheless, proceeding only under section 7's first prong can risk costly false negatives. The following examples illustrate specific factual variations in which the second prong may potentially be useful as an additional or alternative mode of analysis:

> *Example 3a.* A large firm recently launched a platform technology and quickly gained a 50% share of the platform market. Another large firm is likely to enter the platform market sometime in the near future. Dozens of applications run on this technology. One particular type of application is likely to be an important way to attract new users to the underlying platform, but it is not yet clear precisely how important it will be. The incumbent firm proposes to acquire the company that operates the leading version of this application. Some evidence indicates that the incumbent wants to acquire this target to maintain or increase the incumbent's market position in the platform market.

> *Example 3b.* The first-to-market firm is the only participant currently selling a product in the relevant market, such that its share measured by revenue is 100%. Multiple other firms are currently developing products that, when launched, would also be in the market. The incumbent firm proposes to acquire one of these firms. It is not clear yet exactly when the new products will be launched or precisely how much substitution away from the incumbent's products the new entrants would attract.

Scenario 4: Initial acquisition is the first step in a roll-up strategy. Accumulating market power through a series of acquisitions is a familiar page in the monopoly playbook. Private equity firms have deployed this roll-up strategy across a staggering array of industries.[310] A roll up typically starts

310. BRENDAN BALLOU, PLUNDER: PRIVATE EQUITY'S PLAN TO PILLAGE AMERICA 30–31 (2023); *see also* Slaughter, *supra* note 14, at 14–15 (describing roll ups as general strategy amenable to many types of industry); Statement of Comm'r Rohit Chopra Regarding Private Equity Roll-Ups and the Hart–Scott–Rodino Annual Report to Congress 1 (July 8, 2020), https://www.ftc.gov /system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf [https://perma.cc/24LC-QFR4] [hereinafter Statement of Comm'r Chopra] (illustrating how many private equity firms use the roll-up strategy across different contexts). The FTC has recently taken multiple actions against such strategies. *See* Complaint at 3, FTC v. U.S. Anesthesia Partners, Inc., 2024 WL 2137649, at *3 (S.D. Tex. Sept. 21, 2023) (No. 4:23-CV-03560-KH) (anesthesia

with an initial "beachhead" or "platform" acquisition of one market participant.[311] The acquirer may not have participated in the market at all before making this initial acquisition.[312] Next, the acquirer completes a series of subsequent acquisitions.[313] Taken as a whole, a roll-up strategy can clearly violate section 7's first prong. Yet, if viewed in isolation, it is less clear whether the initial acquisition can do so. Because the acquirer was not a market participant beforehand, the initial acquisition may not affect market shares or concentration levels in the short run. Regardless of whether a beachhead acquisition may "substantially lessen competition," however, it may "tend to create a monopoly" by moving the acquirer in the direction of possessing monopoly power.

> *Example 4.* A private-equity firm identifies a market that is currently unconcentrated. The firm proposes to acquire a target company with a 25% share in the relevant market. Some evidence indicates that after this initial beachhead acquisition, the private-equity firm plans to undertake a series of successive acquisitions to eventually dominate the market.

Scenario 5: Relatively small successive acquisitions are part of roll-up strategy. After making an initial beachhead acquisition, a serial acquirer pursues successive "add-on," "bolt-on," or "tuck-in" acquisitions.[314] Each target on its own is typically relatively small. If viewed in isolation, it may be unclear whether a particular tuck-in acquisition (for example) is significant enough to threaten a "substantial" lessening of competition. Regardless of whether a particular acquisition may do so, however, it may "tend to create a monopoly" by moving the serial acquirer in the direction of a monopoly position. This is a particular application of the concept underlying Scenario 1, above.

> *Example 5.* The facts are the same as in Example 4, except that the private-equity firm goes on to undertake a series of successive bolt-

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practices); Statement of Chair Lina M. Khan, Joined by Comm'r Rebecca Kelly Slaughter & Comm'r Alvaro M. Bedoya, In the Matter of JAB Consumer Fund/SAGE Veterinary Partners 1–3 (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.06.13%20-%20Statement%20of%20Chair%20Lina%20M.%20Khan%20Regarding%20NVA-Sage%20-%20new.pdf [https://perma.cc/W9AW-CFT8] (veterinary clinics).

311. Sajith Mathews & Renato Roxas, *Private Equity and Its Effect on Patients: A Window into the Future*, 23 INT'L J. HEALTH ECON. & MGMT. 673, 674 (2022).

312. Slaughter, *supra* note 14, at 14 (positing a scenario in which a private equity firm purchases one of the firms in a duopolistic market).

313. *E.g.*, Statement of Comm'r Chopra, *supra* note 310, at 1.

314. *Id.*

> on acquisitions. Each successive bolt-on acquisition is relatively small when viewed in isolation. Some evidence indicates that the private-equity firm is using a roll-up strategy to eventually dominate the market.

Scenario 6: Mechanism for increasing acquirer's market power is competitively ambiguous. Some mechanisms for increasing market power, like acquiring a direct rival and withdrawing its product from the market, can clearly lessen competition. Others, like internally developing a superior product, can clearly increase competition. Still others can be more ambiguous. Advertising, for example, can spread the word about a product's features, increasing competition. But advertising can also be a tool for undermining fair competition by falsely disparaging rivals' products.[315] For another example, the Supreme Court has stated that vertical resale-price-maintenance requirements can sometimes lessen, but sometimes increase, competition.[316] Some mergers may entrench or increase an already-powerful merging firm's power via a competitive mechanism that is arguably ambiguous. In such cases, second-prong analysis—which does not hinge on a lessening of *competition*—can be especially workable.

> *Example 6.* A large technology firm already has a large, unique dataset used for one type of behavioral advertising. That firm proposes to acquire a company that has a different large, unique dataset used for another type of behavioral advertising. The relevant markets exhibit both direct and indirect network effects.

Scenario 7: Acquisition may tend to create a monopoly via multiple "mixed" mechanisms. Some mergers entrench or increase the acquirer's market power via a mix of both anticompetitive and efficiency-based mechanisms. Even in first-prong section 7 cases, the status of efficiencies defenses remains doubtful. That being said, lower courts in a few first-prong cases have departed from the Supreme Court's guidance and explicitly recognized such a defense, albeit a narrow one subject to strict limitations and requirements.[317] Still other courts have expressed skepticism about the

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315. *E.g.*, Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1266–68 (8th Cir. 1980) (affirming Sherman Act liability for "false, misleading, and deceptive" advertisement).

316. *Compare* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) ("Minimum resale price maintenance can stimulate interbrand competition[] . . . ."), *with id.* at 894 ("[T]he potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.").

317. *See, e.g.*, FTC v H.J. Heinz Co., 246 F.3d 708, 720–21 (D.C. Cir. 2001) (observing that "the trend among lower courts is to recognize the defense," but requiring "proof of extraordinary efficiencies" that are "more than mere speculation and promises about post-merger behavior").

viability of such a defense, yet gone on to analyze defendants' arguments in dicta.[318] That said, no court has ever recognized an efficiencies defense in a second-prong section 7 case.[319] Again, some mergers may tend to create a monopoly via a mix of mechanisms.[320] Suppose, for example, that a powerful incumbent acquires a nascent rival, and the merger would both dampen the competitive threat and also yield some cognizable efficiencies. Or suppose a merger may yield some cognizable short-run efficiencies but also threatens long-run harm.[321] In jurisdictions that recognize or are likely to analyze efficiencies defenses in first-prong cases, section 7's second prong could offer a streamlined and accurate alternative statutory framework.[322]

Scenario 8: Acquisition may tend to create a monopoly by otherwise giving a powerful acquirer a further leg up. Some mechanisms for increasing an acquirer's market power may not fit neatly into any of the preceding categories. Suppose, for example, that a dominant company in a platform market faces only a few rivals. The dominant company proposes to acquire a content producer that currently does not offer its content on the platform and has no plans to do so. If the acquisition goes through, the dominant company will immediately place the target firm's content on its platform while withholding the content from rival platform operators. There may well be a lessening of competition.[323] But because the content would not have been available to the rivals either way, the harm to "competition" may not be very intuitive to a generalist judge. Because section 7's second prong focuses instead on whether the acquisition may tend to create a monopoly, it may offer value here as well.

318. *See supra* note 258.

319. *See* Appendix at 53, https://texaslawreview.org/lande-newman-slaughter-appendix/ [https://perma.cc/G3FZ-T7RW].

320. On the wide range of motives that can prompt acquisitions, see John M. Newman, *Expanding the Merger Narrative: A Response to Sokol*, 70 FLA. L. REV. F. 179, 181–82 (2020).

321. This may be what Commissioner Harbour had in mind in her dissent to the FTC's decision not to pursue an in-depth investigation of Google's acquisition of DoubleClick. Dissenting Statement of Comm'r Pamela Jones Harbour, Google/DoubleClick, No. 071-0170, 8–9 (Dec. 20, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf [https://perma.cc/739P-R6WH] ("[B]ehavioral targeting may create economic efficiencies that would—in the short run—be attractive . . . . Still, marrying the two datasets raises long-term competition questions that beg further inquiry.").

322. To be clear, the second prong would not prohibit such a merger *because of* the efficiencies. The Supreme Court's *Cargill* opinion casts at least some doubt on whether such a theory of liability is currently viable. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 115–17 (1986) (rejecting the private plaintiff's theory that post-merger multi-plant efficiencies would allow the defendants to engage in a price–cost squeeze).

323. *See, e.g.*, Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 792 (9th Cir. 2015) ("At most, the district court concluded that St. Luke's might provide better service to patients after the merger. That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations.").

Scenario 9: Acquirer intends to remove a competitor from the market, tending to leave the remaining market under monopoly control. We discuss one private equity strategy (roll ups) above, but there is another pattern of behavior by private equity players that has generated substantial concern about competitive health in markets: the "strip-and-flip" approach. Imagine a private equity company completes a highly leveraged acquisition of one of two duopolists in a market. Before completing the acquisition, the buyer has no other holdings in the market and indeed does not intend to operate its newly acquired asset as a healthy competitor. Instead, the new owner plans to sell the component parts of the acquired business, declare bankruptcy to discharge remaining debts, and exit (at a substantial profit for the acquirer). The resulting market is now under monopoly control, albeit not by a party to the transaction. Centering the inquiry on whether the transaction may have "substantially lessened competition" may be analytically messy because the private equity buyer did not, pre-transaction, compete in the market. But the purchase could clearly have "tended" to "create a monopoly" by moving the resulting market in the direction of monopoly.

Scenario 10: The transaction eliminates a reputational (or similar) constraint that prevented the incumbent seller from exercising monopoly or near-monopoly power. Suppose an incumbent firm has a 100% share of the market for a well-known, life-saving pharmaceutical drug. The incumbent sells a wide variety of other pharmaceutical products. If the incumbent were to charge a true monopoly (or near-monopoly) price for the drug in question, it would face severe customer backlash across its entire product portfolio that would render the price increase unprofitable. The incumbent proposes selling that drug to a private equity buyer that does not face similar constraints. Some evidence indicates that, after the proposed transaction, there is a reasonable probability the private equity buyer would charge a monopoly or near-monopoly price for the drug. It is not clear that such a transaction could violate section 7's first prong because the pricing constraint in question is imposed by customers, not the incumbent's competition. But the transaction could clearly tend to move the market toward monopoly conditions.[324] Indeed, then-Commissioner Rosch of the FTC endorsed a second-prong, "tend to create a monopoly" approach on very similar facts in 2008.[325]

324. Concurring Statement of J. Thomas Rosch, FTC v. Ovation Pharmas., Inc., No. 081 0156, 1 (Dec. 16, 2008), https://www.ftc.gov/system/files/documents/public_statements/418091/081216ovationroschstmt.pdf [https://perma.cc/6L6M-9XUB].

325. *Id.* ("There is reason to believe that that transaction violated Section 7 of the Clayton Act, which makes unlawful, among other things, any acquisition that 'may tend to create a monopoly.'" (quoting 15 U.S.C. § 18)).

B. *"Tend to Create a Monopoly" and the Merger Guidelines*

Over the past several decades, the federal antitrust enforcement agencies have periodically published merger guidelines.[326] These documents are themselves not binding law. Instead, their purpose has traditionally been "to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied" by the agencies to analyze the legality of mergers and acquisitions.[327]

The guidelines' treatment of section 7's second prong has varied over time. The 1968 Merger Guidelines contained a passage on horizontal-merger analysis that may have relied at least partly on section 7's second prong: "The larger the market share held by the acquiring firm, the more likely it is that an acquisition will *move it toward*, or *further entrench it in*, a position of *dominance* . . . ."[328] This passage tracks almost verbatim our textualist analysis of section 7's second prong.[329] Although the '68 Guidelines mentioned "monopoly" just twice,[330] one of those mentions appeared in the discussion of potential-competition and entrenchment harms, perhaps a nod to the FTC's opinion in *Procter & Gamble*.[331] Finally, the '68 Guidelines explained that the government would "ordinarily challenge mergers" in highly concentrated markets where the acquirer already had 15% or more of the market and the target had 1% or more.[332]

The DOJ's 1982 Guidelines contained a similar "Leading Firm Proviso" that may have relied on section 7's second prong: "In some cases, typically where [the target] is small, mergers that *may create* or enhance the *market power of a single dominant firm* could pass scrutiny" under a typical analysis—but the DOJ would "likely" step in and challenge a merger of a "firm with a market share of at least 1 percent with the leading firm in the market, provided that the leading firm has a market share that is at least 35 percent and is approximately twice as large as that of the second largest firm in the market."[333] This text reappeared in the 1984 Guidelines.[334] The chosen language ("may create or enhance the market power of a single

326. *E.g.*, U.S. DEP'T OF JUST., MERGER GUIDELINES (1968) [hereinafter 1968 GUIDELINES]; U.S. DEP'T OF JUST., MERGER GUIDELINES (1982) [hereinafter 1982 GUIDELINES]; 2020 VERTICAL MERGER GUIDELINES, *supra* note 6; 2023 GUIDELINES, *supra* note 16.

327. 1968 GUIDELINES, *supra* note 326, ¶ 1.

328. *E.g.*, *id.* ¶ 4 (emphasis added).

329. *See supra* subpart II(A).

330. 1968 GUIDELINES, *supra* note 327, at ¶¶ 2, 17 (quoting 15 U.S.C. § 18).

331. *Id.* ¶ 17 ("[T]he purpose of the Department's enforcement activity regarding conglomerate mergers is to prevent changes in market structure that appear likely over the course of time to cause a substantial lessening of the competition that would otherwise exist or to create a tendency toward monopoly.").

332. *Id.* ¶¶ 5, 6.

333. 1982 GUIDELINES, *supra* note 326, § III(A)(2) (emphasis added).

334. U.S. DEP'T OF JUST., MERGER GUIDELINES § 3.12 (1984).

dominant firm") tracks quite closely with the text ("may . . . tend to create a monopoly") and meaning of section 7's second prong.

In an abrupt turn, both the 1992 and 2010 Merger Guidelines omitted any reference to dominance and eliminated the leading-firm proviso.[335] Instead, they relied explicitly—and exclusively—on section 7's first prong. When describing the document's purpose, the '92 Guidelines referred only to analyzing "whether a merger is likely substantially to lessen competition."[336] The 2010 Horizontal Merger Guidelines' introduction was similar: "These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition."[337] Again, no reference to section 7's second prong.[338] A few discussions of "merger[s] to monopoly" or "near-monopoly" appeared, but each was couched within the first prong of the statute.[339]

The 2020 Vertical Merger Guidelines focused even more narrowly on section 7's first prong.[340] Notably absent were any references to "dominance," "near-monopoly," or "monopoly power." Instead, the only relevant question identified was whether a given merger may "substantially lessen competition."[341] The total omission of the second statutory prong in

335. One of the principal drafters of the 2010 Guidelines portrayed the '92 Guidelines as having "*expanded* on the leading firm proviso [by] developing the idea of unilateral effects, i.e., that eliminating competition between the merging firms could itself constitute a substantial lessening of competition." Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 54 (2010) (emphasis added). But that is difficult to square with the actual guidelines. The leading-firm proviso explicitly addressed acquisitions that were too "small" to be challenged under the more commonly used standards but nonetheless "may create or enhance the market power of a single dominant firm." 1982 GUIDELINES, *supra* note 326, § III(A)(2). Unilateral effects, on the other hand, can arise whether the target firm is "small" or not, and whether the acquirer is a "single dominant" firm or not.

336. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 0.1 (1992).

337. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010).

338. *Id.*

339. *Id.* § 6 (unilateral effects); *id.* § 10 (efficiencies).

340. The FTC withdrew the 2020 Vertical Merger Guidelines in 2021. Statement of Chair Lina M. Khan, Comm'r Rohit Chopra & and Comm'r Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, No. P810034 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf [https://perma.cc/X3NE-6TT2].

341. 2020 VERTICAL MERGER GUIDELINES, *supra* note 6, § 2 (2020) ("The Agencies consider any reasonably available and reliable evidence to address the central question of whether a vertical merger may substantially lessen competition."); *id.* § 3 ("In any merger enforcement action involving a vertical merger, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition."); *id.* ("The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition."); *id.*

these Vertical Merger Guidelines is especially curious when one recalls that the Supreme Court's most in-depth treatment of that prong was in a vertical-merger case.[342]

For the first time in 2023, the agencies published guidelines that expressly refer to section 7's prohibition of mergers that "may . . . tend to create a monopoly."[343] As compared to previous iterations of the guidelines—especially those issued in 1992, 2010, and 2020—the 2023 Merger Guidelines make several notable moves. Right off the bat, the '23 Guidelines avoid limiting the "central" question to whether a merger violates section 7's first prong. Instead, these guidelines explain that "the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?"[344] Second, the agencies' second-prong analysis is not limited to horizontal mergers.[345] Third, efficiencies "that would not prevent the creation of a monopoly" do not justify mergers that may tend to create a monopoly.[346]

Are these changes for the better? A crucial purpose of merger guidelines is to help stakeholders understand how the federal antitrust agencies analyze mergers. Not every agency complaint during recent years has invoked section 7's second prong,[347] but some have—in particular, two recent complaints allege violations of both Clayton Act section 7 and Sherman Act section 2.[348] One of these involves a private-equity roll up of local anesthesia practices to gain an "increasingly dominant market position."[349] These complaints appear to indicate conscious deployment of section 7's "tend to create a monopoly" prong in certain cases. The picture that emerges is one of the federal agencies taking seriously their full congressional mandate—

§ 4(a) ("For mergers that warrant scrutiny, the Agencies will determine whether, based on an evaluation of the facts and circumstances of the relevant market, the merger may substantially lessen competition."); *id.* ("The Agencies may also determine that a merger may substantially lessen competition based on an evaluation of qualitative evidence of all potential effects."); *id.* ("To determine whether the merger may substantially lessen competition, the Agencies would analyze the specific facts and circumstances . . . .").

342. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957).

343. 2023 GUIDELINES, *supra* note 16, *passim* (using the phrase "tend to create a monopoly" thirty-two times).

344. *Id.* § 1.

345. *E.g.*, *id.* § 2.4 (potential-competition concerns); *id.* § 2.5 (vertical concerns).

346. *Id.* § 3.3.

347. *E.g.*, Complaint at 11, Nvidia Corp., No. 9404 (F.T.C. Dec. 2, 2021). One of the authors served as FTC Commissioner throughout this litigation; another served as deputy director of the FTC's Bureau of Competition during part of the litigation.

348. Complaint at 5, Sanofi, No. 9422 (F.T.C. Dec. 11, 2023); Complaint at 95–96, FTC v. U.S. Anesthesia Partners, Inc., No. 4:23-CV-03560 (S.D. Tex. 2023).

349. Complaint at 2–3, FTC v. U.S. Anesthesia Partners, Inc., No. 4:23-CV-03560.

including section 7's second prong. The agencies' merger guidelines should reflect up-to-date agency practice; the '23 Guidelines appear to do so.

Merger guidelines should also make an honest attempt to reflect the actual content of the underlying laws. In doing so, the starting point should always be the statutory text, followed by any binding judicial authority, then relevant lower-court and legislative materials. Our review of the statutory text, case law, and legislative history reveals that section 7's second prong imposes a distinct prohibition.[350] Its scope includes both horizontal and non-horizontal mergers.[351] And it does not permit efficiencies-based defensive arguments; it simply poses the straightforward question of whether the merger in question may tend to create a monopoly.[352]

The '23 Guidelines accurately reflect all of these legal principles. Instead of constricting the scope of analysis to just the first prong of section 7, these guidelines give appropriate weight to all of the statutory text. Instead of limiting second-prong analysis to horizontal acquisitions, these guidelines recognize, in accordance with Supreme Court precedent, that the same basic standards apply across different types of mergers.[353] And instead of inviting normative debate over whether a particular merger would tend to create a "good" or "bad" monopoly, these guidelines focus on the actual question posed by the statutory text and applicable Supreme Court precedent.[354] As to section 7's second prong, the '23 Guidelines not only appear to reflect current agency practice, but also represent a significant step toward reflecting the actual content of the underlying law.

C. *Questions, Objections, and Responses*

Given the near-total lack of scholarly discourse on section 7's second prong to date, the present contribution will likely invite a number of questions and surely draw some objections. The following discussion identifies and responds to the most likely of these. That said, our hope is that this discussion provides the starting point for judicial interpretations, responses from practitioners and academics, and future analytical advancements—in other words, that this will be the beginning, not the end, of a robust and ongoing discussion.

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350. *See supra* Part II.

351. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 386 (1956) (discussing the flexibility of the Act and application to a range of "changing types of commercial production and distribution").

352. *See supra* section III(B)(1).

353. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967) ("All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other.").

354. *See* 2023 GUIDELINES, *supra* note 16, § 3.3 ("Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.").

What if one party to the merger already has a monopoly? The statutory text prohibits mergers that may tend to "create" a monopoly. A literalist might wonder whether the statute therefore exempts mergers that would entrench or increase an already-existing monopoly. In its lone tend-to-create-a-monopoly decision, however, the Supreme Court squarely decided this question in the negative.[355] A merger violates section 7 "whether or not actual . . . monopolies . . . have occurred."[356] Of course, this sort of merger might also violate the Sherman Act, but the Clayton Act's scope does not end where the Sherman Act's begins.[357] An interpretation that would exempt acquisitions by outright monopolists while prohibiting acquisitions by less powerful firms may well violate the textualist axioms against literalism and absurdity.[358] Tellingly, courts have not interpreted "may be" to exempt mergers that have already caused the prohibited effect.[359] Nor have courts (mis)read the "may . . . substantially lessen competition" clause to immunize mergers in markets that are already not very competitive.[360] The leading treatise rejects that "restrictive" interpretation, reasoning by analogy that the Supreme Court has not interpreted Sherman Act section 2's use of the word "monopolize" to exempt conduct that simply maintains an already-existing monopoly.[361] The same logic should apply here.

Is intent to create a monopoly required? Plaintiffs bringing attempted-monopolization claims under Sherman Act section 2 must prove that the defendant had the "specific intent" to monopolize,[362] a requirement that might lead some to wonder whether a similar requirement applies under the Clayton Act. Here again, the Supreme Court has squarely answered the question in the negative. "It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended."[363] Nor, for that matter, is

355. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957).

356. *Id.*

357. Brown Shoe Co. v. United States, 370 U.S. 294, 328 (1962) ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act.").

358. For a brief description of the absurdity doctrine, see *supra* note 99 and accompanying text. *Cf.* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result.").

359. *See, e.g.*, Midwestern Mach., Inc. v. Nw. Airlines, Inc., 167 F.3d 439, 442 (8th Cir. 1999) (refusing to dispense with plaintiff's section 7 claim brought after a merger was consummated because "section 7 does not preclude a claim once the merger or acquisition is complete").

360. *E.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 355 (1963) (avoiding this error).

361. AREEDA & HOVENKAMP, *supra* note 41, ¶ 907.

362. *E.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

363. United States v. E.I. du Pont de Nemours & Co., 353 U. S. 586, 607 (1957); *see also id.* at 589 ("The section is violated whether or not . . . monopolies . . . are intended."); Treadway Cos. v. Brunswick Corp., 389 F. Supp. 996, 999 (D.N.J. 1974) ("No such finding of specific intent,

there any intent requirement for proving a violation of section 7's first prong.[364]

Does the second prong create a distinct prohibition in the real world—for example, do courts ever find that mergers will harm competition but not "substantially"? Again, one distinguishing characteristic of section 7's second prong is its lack of the substantially qualifier. One might wonder whether a court has ever held that a merger threatens to harm competition but that the threatened harm would not be "substantial" enough to violate the statute. At least one court has explicitly held as much.[365] Another has questioned whether a proffered remedy could render the net harm of a transaction less than substantial, such that it would be permissible under the first prong of section 7.[366] And it would not require much imagination to suspect that other courts have implicitly reasoned along these same lines—siding with defendants in close cases due to uncertainty over whether the harm was truly substantial and/or judicial reluctance to try to define substantial[367]—while expressly grounding their decisions on failure to prove other elements.

What are the limiting principles? Does this clause prohibit too many mergers and create uncertainty? Like the first statutory prong, section 7's second half creates a powerful tool for antitrust enforcement. That said, it also contains several built-in limiting principles. To carry the burden of proof in any second-prong case, a plaintiff must demonstrate multiple elements. First, a mere possibility of harm is insufficient. Instead, a "reasonable likelihood" is required.[368] Second, not every acquisition will move a firm appreciably in the direction of a monopoly. Many transactions do not enhance or entrench the acquirer's market power; these are clearly outside the scope of section 7's second prong. Third, as discussed above, the

however, is a necessary element for a conviction under the 'tendency to create a monopoly' provision of Section 7 of the Clayton Act."), *rev'd on other grounds sub nom.*, NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), *vacated on other grounds sub nom.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

364. *du Pont*, 353 U.S. at 589.

365. SCFC ILC, Inc. v. Visa U.S.A. Inc., 819 F. Supp. 956, 997 (D. Utah 1993) (finding that the "probable harms will not be significant"), *aff'd in relevant part, rev'd in part*, 36 F.3d 958 (10th Cir. 1994).

366. Illumina, Inc. v. FTC, 88 F.4th 1036, 1059 (5th Cir. 2023) (putting the burden on the defendants, at the rebuttal stage of liability determination, to show that their preferred remedy "sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition").

367. *Cf.* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 45–46, 55 (2016) (arguing that courts sometimes develop "high burdens" of proof to avoid the appearance of conceptually thorny balancing).

368. *du Pont*, 353 U.S. at 592, 597.

legislative choice to use the term "monopoly" provides yet another limiting principle.[369]

Guideline 1 of the 2023 Guidelines describes how current federal antitrust enforcers will undertake structural analysis of horizontal mergers under either statutory prong.[370] Suppose a given relevant market has ten participants, each with an equal market share of 10%. Any of those firms could buy any other participant, doubling their combined market share to 20%, without causing investigators to presume illegality.[371] Suppose, however, that one firm already has a 28% share, and the other nine firms each have 8%. A merger between the largest firm and one of the other participants would yield one firm with 36% of the market, four times the size of its next-largest rival. That would be enough to trigger the presumption.[372] Of course, the "presumption of illegality can be rebutted or disproved."[373] Guideline 5 contains a similar structural presumption where the merging firm has a share of greater than 50% of a "competitively significant" "related product market."[374]

In this way the '23 Guidelines offer clarity and predictability, while still carrying out the congressional mandate embodied in the second clause of section 7. If future enforcers instead try to overreach their mandate, there is no good reason to think that the statute's built-in limiting principles will fail.

What are the implications for other provisions of the Clayton Act that contain the same language? Clayton Act sections 2(a) and 3 prohibit certain types of price discrimination, exclusive dealing, and negative tying. Both contain language identical to the second prong of section 7.[375] As a result, although this Article focuses on section 7, many of its findings have implications for analysis and enforcement of these statutory provisions as well. Consider, for example, section 3's prohibition on exclusive dealing that

369. *See supra* section III(B)(3).

370. 2023 GUIDELINES, *supra* note 16, § 2.1. Per that Guideline, the agencies treat "markets with an HHI greater than 1,800" as "highly concentrated" and presume that a "merger that creates or further consolidates a highly concentrated market [and] involves an increase in the HHI of more than 100 points" may substantially lessen competition or tend to create a monopoly. *Id.* A similar presumption applies to a "merger that creates a firm with a share over thirty percent" of the total market. *Id.*

371. If two of ten firms, each with a 10% share, merge, the HHI increase would be 10 x 10 x 2 = 200, and the HHI would rise from 1000 to 1200. That post-merger HHI would be too low to trigger a presumption of illegality. *See supra* note 370.

372. *See* 2023 GUIDELINES, *supra* note 16, § 2.1 (explaining the threshold for a structural presumption). This is consistent with *United States v. Philadelphia National Bank*, 374 U.S. 321, 364–65 (1963) (inferring illegality based on a post-merger market share of 30% without requiring separate proof of reasonably probable anticompetitive effects in order to make out a prima facie case).

373. 2023 GUIDELINES, *supra* note 16, § 2.1.

374. *Id.* at § 2.5.A.2.

375. *Compare* 15 U.S.C. §§ 13(a) & 14, *with* 15 U.S.C. § 18.

may "substantially lessen competition or tend to create a monopoly."[376] Textualist analysis of this provision would yield the same conclusions as for section 7. Section 3's second prong creates a distinct prohibition,[377] entails probabilistic analysis,[378] imposes an incipiency standard,[379] does not require proof of "substantial" effects,[380] and does not permit efficiencies defenses.[381] As a result, second-prong analysis in some section 3 cases can likely increase administrability by streamlining adjudication, while simultaneously reducing costly erroneous outcomes. For example, courts applying section 3's first prong have sometimes grappled with how to analyze the "substantially" requirement.[382] Second-prong analysis sidesteps that issue. Scholars have recently begun to call for reinvigorating antitrust enforcement against exclusive-dealing requirements. Their proposals include simplifying adjudication through per se rules and/or rulemakings, particularly when the defendant is already dominant.[383] Dusting off Clayton Act section 3's second prong may offer a complement or alternative.

Conclusion

The second prong of section 7 offers an exceedingly rare opportunity. Over the past several decades, ideologically driven assumptions have encumbered some other areas of antitrust law with overly one-sided rules. Unsurprisingly, monopoly power in the United States mushroomed during this period.[384] Yet the Clayton Act's "may . . . tend to create a monopoly" prohibition has remained virtually untouched, and therefore unencumbered. Although regrettable as a missed opportunity, the historical nonuse of

376. 15 U.S.C. § 14.

377. *See supra* section II(A)(1).

378. *See supra* section II(A)(2).

379. *See supra* section II(A)(3). Some lower courts have bungled this point by purporting to collapse the Clayton Act section 3 standard into the Sherman Act's more difficult-to-satisfy "rule of reason." *E.g.*, Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984) (Posner, J.). Our analysis could help to prevent such errors going forward.

380. *See supra* subpart III(A).

381. *See supra* section III(B)(1).

382. *See, e.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334–35 (1961) (sifting through different precedents to analyze whether the effect would be substantial).

383. *E.g.*, Daniel A. Hanley, *Per Se Illegality of Exclusive Deals and Tyings as Fair Competition*, 37 BERKELEY TECH. L.J. 1057, 1062 (2022); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 681 (2017).

384. *See, e.g.*, Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 625–26 (2020) (finding significant increases in market power and markups since the 1980s); Joseph E. Stiglitz, *Market Concentration Is Threatening the US Economy*, PROJECT SYNDICATE (Mar. 11, 2019), https://www.project-syndicate.org/commentary/united-states-economy-rising-market-power-by-joseph-e-stiglitz-2019-03 [https://perma.cc/7Y6K-86FR] (highlighting the downward pressure on labor interests, demand, and innovation caused by recent growth in corporate profits and market power).

section 7's second prong offers a silver lining. This is essentially a brand-new anti-monopoly statute. Its roots may lie in the early twentieth century, but it appears ready-made to combat a serious modern problem.

Mergers and acquisitions that may tend to create a monopoly pose a clear threat to societal well-being. The Clayton Act was supposed to preserve open, competitive markets and stand as a bulwark against excessive concentrations of economic power. Consumers, workers, suppliers, and start-ups alike benefit when freed from the yoke of monopoly. With its long-forgotten second half activated at last, the Act may yet live up to its original potential.