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SHOULD ANTITRUST CONSENT DECREES REGULATE POST-MERGER PRICING?

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ABSTRACT

Competitors proposing to merge sometimes propose price regulation in a consent decree as a condition of receiving merger approval. Antitrust enforcement agencies in the United States have been reluctant to use such price-regulating decrees, as they suffer from practical problems in implementation. It is less recognized, however, that the use of consent decrees to regulate post-merger prices may be unlawful. Such decrees exceed the scope of antitrust law and blur the distinction between the legislative power to regulate prices and the executive power to enforce the antitrust laws. Despite the willingness of merging parties to accept price regulation in consent decrees, economic and constitutional considerations counsel against antitrust enforcement agencies adopting this practice.

I. INTRODUCTION

Frequently, the antitrust review of a proposed merger of competitors ends with a consent decree that approves the merger on the condition that the merging parties divest particular assets to alleviate competitive concerns.[1] It is surprising, however, that there are no well-defined principles for what merger remedies—divestiture or other alternatives—should enter a consent decree. We address this issue in the context of one particularly important potential remedy: post-merger pricing. A current example of this possible remedy is the merger proposed by XM Satellite Radio and Sirius Satellite Radio in February 2007. In testimony before the House Judiciary Committee, the

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1 The first consent decree was issued over 100 years ago. *See* Victor H. Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 MICH. L. REV. 1051, 1051 2 n. (1958) (noting that the first consent decree was issued in United States v. Otis Elevator Co. on June 1, 1906).

CEO of Sirius offered to sign a consent decree that, for four years, would freeze the price that the merged firm could charge.[2] Similarly, AT&T and BellSouth made price-freeze commitments as part of the Federal Communications Commission's aproval of their merger in December 2006.[3] Parties to hospital mergers also have made commitments concerning post-merger pricing in their respective markets.[4]

The prospect of an antitrust enforcement agency approving a merger on the condition that the merged firm submit to price regulation presents at least two significant questions. First, as a matter of sound antitrust policy, should price regulation even be negotiable? Second, is price regulation imposed by consent decree lawful? In Section II of this article, we analyze the economics of why parties to a merger would agree to a price-regulating consent decree. In Section III, we explain the reluctance of the antitrust enforcement agencies to use price-regulating consent decrees in mergers. In Section IV, we analyze the normative question of whether such decrees are likely to be socially beneficial. In Section V, we analyze the positive question of whether they are lawful.

II. THE ECONOMICS OF CONSENTING TO PRICE REGULATION

The primary concern of the antitrust authorities when analyzing a proposed merger is its probable effect on price, which the *Merger Guidelines* analyze in terms of market power:

> Mergers are motivated by the prospect of financial gains. The possible sources of the financial gains from mergers are many, and the Guidelines do not attempt to identify all possible sources of gain in every merger. Instead, the Guidelines focus on the one potential source of gain that is of concern under the antitrust laws: market power.[5]

This concern over market power is properly understood as a concern over price, because the "power" is that over price. Indeed, every issue arising in merger cases—the relevant market, how many firms occupy that market, whether entry barriers exist, whether entry is likely, and so forth—arises precisely because it informs the determination of the merger's price effects. If the merging parties can persuade the antitrust enforcement agency that any

[2] Representative Ric Keller of Florida asked Mel Karmazin, CEO of Sirius, whether, "as a condition to securing approval from the federal government for this merger," he "would agree to pricing restrictions for a period of time." Antitrust Task Force Subcommittee, House Committee on the Judiciary, Competition and the Future of Digital Music, February 28, 2007. "Yes," Mr. Karmazin answered. *Id.*

[3] *See* In the Matter of AT&T Inc. and BellSouth Corp. Application for Transfer of Control, 22 F.C.C.R. 5662 (2006) (Memorandum Opinion and Order). With respect to their core businesses, AT&T and BellSouth were not actual competitors in a relevant geographic market.

[4] *See, e.g.*, Thomas L. Greaney, *Night Landings on an Aircraft Carrier: Hospital Mergers and Antitrust Law*, 23 AM. J.L. & MED. 191 (1997).

[5] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 0.1 (1997), at http://www.usdoj.gov/atr/public/guidelines/hmg.htm [hereinafter Horizontal Merger Guidelines].

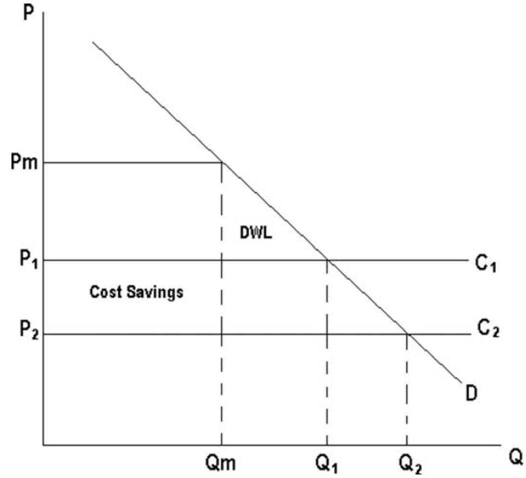

Figure 1. The basic Williamson diagram.

of these issues indicates that the merged entity will lack power over price, the merger will probably be cleared.[6]

Given the importance of the merger's effect on price to the outcome of the antitrust review, it is not surprising that the parties to a merger may offer to freeze prices after the merger. The economic motivation for such a commitment is straightforward and has been understood since at least 1968, when Oliver Williamson published his classic analysis of the welfare tradeoffs of horizontal mergers.[7] For a given demand schedule, a firm's profits entirely depend on the relationship between price and cost. For profits to rise following a merger, price must rise (as a result of market power) or costs must decline (as a result of efficiencies). Williamson's contribution was to compare these two individual effects and characterize the merger's total effect as the net effect of any increase in market power and any efficiencies flowing from the merger.

These two effects appear graphically in Figure 1, featured in Williamson's 1968 work. There is a demand curve, *D*, and a pre-merger cost curve of C_1. (Williamson characterized this curve as the average cost curve, although, for purposes of illustration, the curve can be either an average or a marginal cost curve.) Costs are assumed to be identical for individual firms in the market. For simplicity, assume that before the merger the various firms in the market are perfectly competing such that $P_1 = C_1$. The competitive equilibrium is efficient in the sense that firms are maximizing profits and there is no way for the firms to improve total welfare.

[6] *See, e.g.*, *id.* § 0.2.

[7] Oliver E. Williamson, *Economics as an Antitrust Defense: The Welfare Trade-Offs*, 58 AM. ECON. REV. 18 (1968).

Suppose two firms in this market merge and realize efficiencies that lower their combined marginal costs from C_1 to C_2. Suppose also that the merger confers enough market power for the firm to raise price profitably to P_m, which causes the quantity demanded in equilibrium to fall to Q_m. The higher price and lower quantity cause a deadweight loss in allocative efficiency equal to the triangle labeled *DWL*. However, cost savings result from the merger, and the firm earns a higher margin on each unit that it sells compared to the margin each firm earned before the merger. Despite the reduction in quantity from Q_1 to Q_m, there is an increase in welfare—actually an increase in producer surplus—equal to the rectangular area labeled *Cost Savings* in Figure 1. After the merger, price is higher and output lower in equilibrium. Williamson's point was that, setting aside distributional concerns, the merger increases overall welfare if the cost savings exceed the deadweight loss.[8] That outcome is an empirical question, and it may or may not be the case in Figure 1. The observation that a merger resulting in a price increase may nevertheless increase total welfare as a result of cost savings, in practice, does not really affect whether the enforcement agencies would approve a merger where the cost savings to the firm outweigh the deadweight loss flowing from the price increase. If the courts and enforcement agencies use a pure consumer welfare standard,[9] Williamson's observation remains just that—an observation. In Figure 1, consumer welfare has actually fallen, and thus this merger would not be approved under a consumer-welfare standard.

However, it is also possible that the cost savings associated with the merger will outweigh the additional revenues (from the price increase) flowing from an increase in market power. Figure 2 displays this case.

Before the merger, price is again assumed to be $P_1 = C_1$, where C_1 is the pre-merger marginal cost for the firms. Efficiencies resulting from the merger reduce C_1 to C_2, which is substantially lower. Meanwhile, the market power acquired by the firms through the merger is in this case assumed to be not so great, such that the profit-maximizing price, despite being well above the post-merger marginal cost, is still lower than the pre-merger price P_1. Under the consumer-welfare standard—indeed, under any welfare standard—this merger would be approved. There is no deadweight loss here. Instead, there is an increase in both producer welfare and consumer welfare as a result of the merger's cost savings. That result follows even though substantial market power may have resulted from the merger.

Figure 1 shows the merged firm having the ability to raise price. At the same time, efficiencies exert downward pressure on the post-merger price. Given that the merging parties know that the enforcement agencies will not approve the merger merely because the cost savings outweigh the deadweight

8 *See id.* at 21–22.

9 *See* An Renckens, *Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense*, 3 J. COMPETITION L. & ECON. 149 (2007).

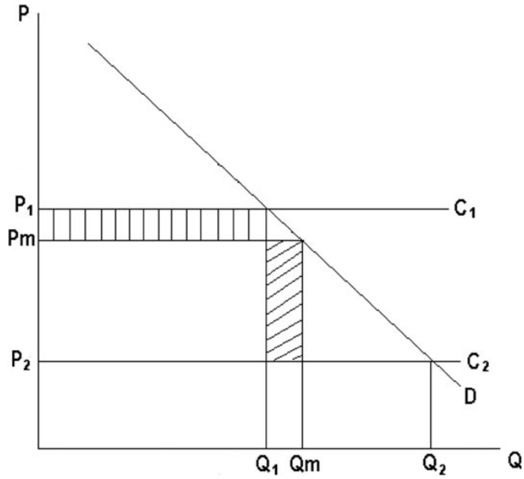

Figure 2. Cost savings exceeding price increase.

loss, the parties could attempt to win merger approval by offering to compensate consumers to offset the price increase. The "compensation" here would be an agreement between the merged firm and the government that the merged firm would not raise the price. Even though P_1 in Figure 1 is not the profit-maximizing price to the merged firm, the firm would still benefit from the efficiencies of the merger because after the merger the firm would earn a margin equal to $P_1 - C_2$ on each unit sold.

Given a pre-merger price of P_1, as long as there are marginal cost savings to the merger as shown in Figure 1, the merging firm will have an incentive to pay up to the amount of the cost-savings to win merger approval. For this reason, merging firms can rationally offer to freeze prices for some period of time following the merger, or at least agree not to raise price, even if the firm gains market power as a result of the merger.

III. THE RELUCTANCE OF ANTITRUST ENFORCEMENT AGENCIES TO EMPLOY PRICE-REGULATING CONSENT DECREES

The Antitrust Division of the Department of Justice and the Federal Trade Commission are responsible for enforcing section 7 of the Clayton Act, which prohibits mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[10] When a proposed merger raises competitive concerns, the reviewing agency must choose whether to file a lawsuit to block the merger entirely or to negotiate a settlement—a consent decree—that would allow the merger to proceed subject to conditions

[10] 15 U.S.C. § 18.

specified in the decree. Of course, the agency must file a complaint in either event, as there can be no consent decree without a complaint for it to settle.[11]

The federal government's civil antitrust suits are usually settled through a consent decree.[12] The Antitrust Procedures and Penalties Act of 1974—better known as the Tunney Act—requires the DOJ to file a proposed consent decree with the court 60 days before its effective date, give the public an opportunity for comment, and publish a "competitive impact statement" in the *Federal Register*.[13] The Tunney Act does not apply to the FTC. Nonetheless, the agency typically solicits public comment on proposed decrees and submits them to a court for approval before implementation.[14] Use of consent decrees in merger cases has grown since passage of the Hart–Scott–Rodino Act in 1976.[15] An HSR filing notifies the government of the merging parties' intentions, and thus it provides a cushion of time during which the government can instruct the parties on how they must modify their transaction to prevent the government's challenge to the merger under section 7 of the Clayton Act.

The Antitrust Division's *Policy Guide to Merger Remedies*, issued in 2004, prefers "structural" remedies that "generally will involve the sale of physical assets by the merging firms."[16] Indeed, one section of the document is entitled "Structural Remedies Are Preferred."[17] Similarly, the FTC's policy statement on merger remedies relies almost exclusively on asset sales or divestiture.[18] Unlike the FTC, however, the Antitrust Division explains the policy choices that will inform the consent decrees that the Division will propose to the court. The DOJ guidelines distinguish structural remedies (involving divestiture) from conduct remedies, which "entail injunctive provisions that would, in effect, manage or *regulate* the merged firm's post-merger business

11 *See, e.g.*, 2 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 327(a) (2004).

12 *See, e.g.*, Spencer Weber Waller, *Prosecution By Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1408–09 (1998) ("More than seventy percent of government civil antitrust suits are concluded by consent judgments."); *see also* 2 AREEDA & HOVENKAMP, *supra* note 11, ¶ 327.

13 15 U.S.C. § 16(b).

14 *See* Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 92 n.112 (1999).

15 *See, e.g.*, Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1197 WIS. L. REV. 873, 894–95 (1997); John R. Wilke & Bryan Gruley, *Merger Monitors: Acquisitions Can Mean Long-Lasting Scrutiny By Antitrust Agencies*, WALL ST. J., Mar. 4, 1997, at A1.

16 *Antitrust Division Policy Guide to Merger Remedies*, U.S. Dep't of Justice, Antitrust Division (October 2004), at http://www.usdoj.gov/atr/public/guidelines/205108.htm [hereinafter *DOJ Merger Remedies*].

17 *Id.* § II.A.

18 *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies*, at http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm [hereinafter *FTC Merger Remedies*].

conduct."[19] A constraint on post-merger pricing contained in a consent decree would be one form of conduct regulation.

In expressing its preference for structural remedies over conduct remedies, the Antitrust Division explicitly criticizes price agreements as a component of consent decrees.[20] The Department of Justice disfavors using consent decrees to fix a price or an allowable range of prices for the post-merger firm.[21] Notably, however, there is no mention of the lawfulness of such consent decrees in either the Antitrust Division's formal guidelines or the public statements of DOJ officials. It is not feasible to prove a negative through an exhaustive search of the public statements of Antitrust Division officials; however, given that the *Policy Guide to Merger Remedies* are written as if price-regulating consent decrees are within the DOJ's discretion to request of a court, it is reasonable to assume that the Antitrust Division believes that it would be lawful (though imprudent) to seek such a decree in a given case.

The FTC has also said that consent decrees should not include conditions on price, noting in one case that conditioning mergers on agreements not to raise price does "not preserve competition within any possible meaning" of the Clayton and Sherman Acts.[22] Like the Antitrust Division, the FTC disfavors price regulation through consent decrees because of the monitoring costs, which would continue over the life of the decree.[23] Further evidence of the FTC's disfavor of decrees that regulate price is shown by the FTC's position in several merger cases, primarily hospital mergers, in which the parties proposed price regulation as a condition of the merger and the FTC refused to consent to those conditions.[24] In one FTC case, the merging parties defeated a preliminary injunction motion in part on the basis of their promise not to raise price after the merger.[25] Though the FTC refused to sign the agreement in that case, the FTC did not argue that such an agreement exceeds the agency's statutory authority in the first place.

In that case, *Butterworth Health Corp. v. FTC*,[26] the merging parties were the two largest acute care hospitals in Grand Rapids, Michigan. Although

[19] *DOJ Merger Remedies*, *supra* note 16 (emphasis added).

[20] *Id.*

[21] *See, e.g.*, R. Hewitt Pate, Assistant Att'y Gen'l, Antitrust Division, U.S. Dept. of Justice, Senate Committee on the Judiciary *Antitrust Enforcement in the Agricultural Marketplace* (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testimony/201430.htm.

[22] Reply Brief for Plaintiff Appellant FTC at 5, FTC v. Butterworth Health Corp., Case No. 1:96-CV-49 (6th Cir. 1997) [hereinafter *Butterworth Reply Brief*].

[23] Mary Lou Steptoe & David Balto, *Finding the Right Prescription: The FTC's Use of Innovative Merger Remedies*, 10 ANTITRUST 16 (Fall 1995) ("The FTC has consistently rejected these proposals on the grounds that it is not a price-regulating agency, compliance is difficult to monitor, and competition is the proper driving force for pricing decisions.").

[24] *See* Butterworth Health Corp. v. FTC, 946 F. Supp. 1285 (W.D. Mich. 1996); FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998).

[25] *See* Butterworth Health Corp. v. FTC, 946 F. Supp. 1285 (W.D. Mich. 1996).

[26] *Id.*

the district court found that the FTC had established a prima facie violation of section 7 of the Clayton Act, it denied a preliminary injunction, largely on the basis of the merging parties' "Community Commitment"—a signed agreement not to raise price for three years following the merger.[27] The FTC did not consent to the Community Commitment,[28] yet the district court made it a binding condition of the denial of preliminary injunction:

> As a condition of issuance of the judgment order, ... the Court will require defendants, through their counsel and chief executive officers, to sign and submit for approval a proposed consent decree incorporating the terms of the Community Commitment and expressing defendants' agreement to be bound thereby during the pendency of any appeal from this Court's order or during the pendency of any administrative proceedings, to the extent actions in furtherance of the merger and implicating the assurances of the Community Commitment are undertaken.[29]

So the court in *Butterworth Health* effectively fashioned a consent decree—directly between the court and the parties rather than between the FTC and the parties—that regulated post-merger pricing for three years. Over the FTC's objection and without any discussion of the lawfulness of such judicially imposed price regulation, the Sixth Circuit affirmed the consent decree.[30]

Sector-specific regulatory agencies also influence outcomes in merger cases. Typically, the requisite regulatory action is the approval of the transfer of an agency-granted license or authorization from the assignor to the assignee. The regulator reviews the license transfer under a public interest standard, which is more elastic than the consumer welfare standard in antitrust law. A standard portion of the public interest analysis, however, duplicates the economic analysis that the DOJ or FTC would conduct in a merger review. The regulator may seek to impose price regulation as a condition of its approval of the transfer application.[31]

When the Federal Communications Commission approved AT&T's acquisition of BellSouth in December 2006, the agency imposed price regulation on the merging parties as a condition of approval.[32] For 30 months, the merged

[27] *Id.* at 1294, 1298 (discussing how commitment would freeze price for three years).

[28] Brief for Plaintiff Appellant FTC at 14, FTC v. Butterworth Health Corp., Case No. 1:96-CV-49 (6th Cir. 1996).

[29] *Butterworth Health*, 946 F. Supp. at 1302–03.

[30] FTC v. Butterworth Health, 1997 U.S. App. LEXIS 17422, 1997-2 Trade Cas. (CCH) 71,863 (6th Cir. 1997).

[31] For a survey of the FCC's use of merger conditions, *see* HAROLD FURCHTGOTT-ROTH, A TOUGH ACT TO FOLLOW?: THE TELECOMMUNICATIONS ACT OF 1996 AND THE SEPARATION OF POWERS (2006). *See also* Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the FCC*, 11 GEO. MASON L. REV. 143, 154 (2002) (noting that the parties in FCC-reviewed mergers "have no real opportunity to challenge either the FCC's analysis of competitive concerns or the factual determinations on which that analysis is based").

[32] *See AT&T/Bellsouth Order*, *supra* note 3; *see also* Scott Leith, *Democrats Wrung Concessions From AT&T*, COX NEWS SERVICE, Dec. 29, 2006.

firm must charge a fixed price of $10 per month for DSL service to new customers.[33] Curiously, the literal text of the condition imposes a price floor as well as a price ceiling. In contrast, the DOJ allowed the merger to proceed unchallenged, without conditions.[34]

In sum, though the DOJ and the FTC have a well-established practice of settling merger cases through consent decree, both have publicly opposed negotiating consent decrees that regulate price as a condition of merger approval. In contrast, the FCC has sought to include such a condition in an order approving a merger. At least one circuit court, the Sixth Circuit, has denied a preliminary injunction to block a merger in light of the fact that the merging parties agreed not to raise price for three years. With the policy preferences of the agencies in mind, it is now possible to frame the question lingering throughout this entire discussion squarely: Is it lawful and appropriate to insert price regulation in consent decrees?

IV. ARE PRICE-REGULATING CONSENT DECREES WISE ANTITRUST POLICY?

The Antitrust Division considers itself populated with "law enforcers, not regulators."[35] Nonetheless, the Division's opposition to negotiating prices as a component of consent decrees is largely based on practical concerns of implementation and oversight, rather than doubt over the propriety and lawfulness of such a consent decree. The Division's *Policy Guide to Merger Remedies* articulates four reasons why it considers "conduct" remedies, like price regulation, to be inferior to structural remedies:

> Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm's activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter. As one example, a requirement that the merged firm not raise price may lead it profitably, and inefficiently, to reduce its costs by cutting back on quality—thereby effecting an anticompetitive increase in the "quality adjusted" price. Third, a conduct remedy may restrain potentially procompetitive behavior. . . . Fourth, even where "effective," efforts to regulate a firm's future conduct may prevent it from

33 *See AT&T/BellSouth Order*, *supra* note 3, at 148 ("Within six months of the Merger Closing Date, and continuing for at least 30 months from the inception of the offer, AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area, who have not previously subscribed to AT&T's or BellSouth's ADSL service, a broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of $10 per month.").

34 *See* Press Release, *Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth*, October 11, 2006, at http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm ("After thoroughly investigating AT&T's proposed acquisition of BellSouth, the Antitrust Division determined that the proposed transaction is not likely to reduce competition substantially.").

35 Pate, *supra* note 21.

> responding efficiently to changing market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.[36]

The Antitrust Division's concerns are echoed in the FTC's reply brief in *Butterworth Health*.[37]

The first cost discussed in the *Policy Guide to Merger Remedies* is a true cost, but largely an uninteresting one, for every consent decree has monitoring and enforcement costs.[38] More troublesome are the underlying economics. Ignoring the costs of implementation, the notion that price caps will preserve consumer welfare after the merger is far from clear. The analysis here involves revisiting the Williamson diagrams. For the sake of argument, we assume that the relevant market and the level of demand are both well-defined and known. Initially, it is worth noting that price caps as a condition of merger approval are not even worthy of discussion unless there are efficiencies, in the form of reduced marginal costs, that are specific to the merger. This proposition follows from the merging parties' incentives in the first place. For example, if the merger does not reduce marginal costs, such that the costs in Figure 1 remain at C_1 following the merger, then a merged firm subjected to price regulation has nothing to gain. It is true that the regulation will prevent the merged firm from raising price after the merger, thus preventing any deadweight loss from arising. However, the merged firm itself gains nothing: There is no cost saving and thus no increase in producer surplus. Consequently, the post-merger price and quantity would be unchanged, and there is effectively no change in the welfare of any party.

One can make this point even more strongly. For price caps to be attractive to the merging parties, the cost savings from the merger need to be substantial and long-lived. The merger will entail transactions costs, and the merged firm's costs may fluctuate over time for some reason, such that the price cap reduces any profits that the merged firm is able to earn. For example, in Figure 1, if the merged firm agrees to a price cap equal to some level, P_1, which is calculated to give it a particular operating margin after the merger, as was done in *Butterworth Health*,[39] then any subsequent cost increase will erode that margin, potentially driving the merged firm out of business. To be sure, the decree that incorporates the price cap could incorporate a

[36] *DOJ Merger Remedies*, *supra* note 16.

[37] *See Butterworth Reply Brief*, *supra* note 22, at 14–15 (noting that the Community Commitment in that case gave the merging parties the ability to set supracompetitive prices); *see also* Steptoe & Balto, *supra* note 23, at 16.

[38] For analysis of the practical issues in implementing antitrust consent decrees, *see* Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. CHI. LEGAL F. 353 (1987); E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 611 (2002) ("[A]n injunction could set maximum prices that a firm would be allowed to charge. This option, however, seems particularly troubling in the new economy because of the very rapid change of the market and the regulatory oversight that might be required to monitor conduct.").

[39] *Butterworth Health*, 946 F. Supp. at 1298.

mechanism to prevent that outcome; however, the need to add that complexity underscores the problem with heading down this path in the first place.

Once it is established that some level of cost savings is required for price caps to be in the merging firms' interests, a second concern immediately arises: At what price should the cap be set? In Figure 2, for example, the cost saving is so significant that the profit-maximizing price after the merger is lower than the pre-merger price. From consumers' perspective, the ideal price cap would be below P_m—in fact, consumer surplus would be maximized by setting the post-merger price as low as possible, at C_2. However, in all of the discussions of price regulation in consent decrees, the prices being considered are always at, or even perhaps slightly above, the pre-merger price. The likelihood that the merger-specific efficiencies would be large enough to produce the outcome in Figure 2 is surely very small. At the same time, however, the possibility does demonstrate that enforcement agencies may pick the wrong price—by setting a cap that, despite freezing the pre-merger price, is still too high. The problem is one of selecting the wrong counterfactual: But for the merger, would the equilibrium price in future periods be lower than the pre-merger price?

In Figure 2, the cost savings flowing from the merger give the merged entity an incentive, in the sense that it is profit-maximizing, to price below pre-merger costs even in the absence of a decree requiring the firm to do so. In this sense, one may criticize the argument that the price cap set in the decree may be "too high." However, to the extent that the price arrangement in a decree freezes price or provides a cap that effectively acts as a floor, future cost savings and competition that would otherwise reduce the market price are no longer sufficient for that to occur.[40]

In general, the price-regulating aspects of a consent decree can give the merging parties—and other competitors in the market—an excuse not to compete on price. Stephen Calkins' critique of *Butterworth Health* makes this point precisely. The prices charged by the merged hospitals in that case—which were subject to the "Community Commitment" that set a price for certain services going forward—were, in Calkins' view, higher than what they would have been without the Community Commitment:

> If any lesson has been well-learned by economists and even politicians, it is that regulation is a poor substitute for competition; yet, here, the court was establishing itself as a small regulatory body without any statutory support for doing so. Any hope that the court would be a singularly effective rate regulator was belied by the court's initial decree,

[40] There is some empirical support for this argument. In FTC v. Cardinal Health, 12 F. Supp. 2d 34, 65, 67 (D.D.C. 1998), the court expressed concern that, "[i]n the absence of real competition, . . . the prices set today could in effect become the floor tomorrow." Later in the opinion, the court noted that, "if the industry had made a promise not to raise prices in 1988 when McKesson first tried to acquire AmeriSource and froze prices at that time, the public would have been deprived of a reduction in the wholesale [price of over 3.5%]." *Id.* at 118–19.

> which directly lessened competition by ending discounts to certain managed care plans and by freezing rates when further decreases seemed quite possible.[41]

Calkins' criticism was written before the effects of the Community Commitment in *Butterworth Health* were realized. In a retrospective study, performed after the price commitments in *Butterworth Health* had expired, David Balto and Meleah Geertsma reached the same conclusion: "Th[e] case suggests how regulatory relief can be an inadequate substitute for competition. The court order has produced a[n] environment in which several [customers] believe that they are paying more . . . than they most likely would have absent the merger."[42]

In sum, even if one assumes that there is a well-defined relevant market and that demand in that market is known with certainty, it is still far from clear that post-merger rate regulation can be accomplished through a consent decree with any degree of success. As Calkins notes, "there is no meaningful way to know whether a consent order is a draconian imposition of unreasonable requirements or a blessing of a highly anticompetitive merger for the price of trivial relief."[43] Further, even if one assumes that the cost savings flowing from the merger are such that the merging parties would go along with regulation, it is still not clear where the price should be set. Finally, once a particular price is chosen, there is the risk that the price will become a floor rather than a ceiling, and that competition that would otherwise drive the market price down may never materialize. The outcome in *Butterworth Health*, where a court unsuccessfully attempted this sort of price regulation, exemplifies these difficulties.

Concerns over an antitrust court's ability to act as a miniature public utility commission are justified. Rate regulation has been historically performed by PUCs acting under the authority of state laws—and, before that, by municipalities acting pursuant to franchise agreements negotiated bilaterally with the public utility that was accepting an obligation to serve a designated territory.[44] Today, these PUCs are devoted to the purpose of setting just, reasonable, and nondiscriminatory rates in particular industries, and their tasks are rarely performed in an effortless fashion.[45] One cannot reasonably expect a federal district court to possess the resources and institutional competence of a public utility commission with hundreds of employees and decades of experience.

41 Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHNS L. REV. 1, 8 (1998).

42 David Balto & Meleah Geertsma, *Why Hospital Merger Antitrust Enforcement Remains Necessary: A Retrospective on the Butterworth Merger*, 34 J. HEALTH L. 129, 154 (2001).

43 Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 701 (2003).

44 *See* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 101 (1997) (discussing origins of public utility regulation).

45 Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1043 (1987) ("Regulation exacts a price . . . in terms of delayed decisions, expensive bureaucracy, diminished predictability, and imperfect replication of the free market.").

The market will be changing—after all, a merger ostensibly requiring price regulation is occurring. Moreover, there will be a need for continual oversight. These considerations outline a task that exceeds the current capabilities of the antitrust enforcement agencies and courts.[46] This is no surprise. The antitrust enforcement agencies and antitrust courts were never designed to be public utility commissions.[47]

What would rate regulation by decree resemble? Would each change of the rates in a post-merger market require a modification or waiver of the consent decree? Legislative rate regulation legally entitles public utility commissions to impose rates on a regulated firm, subject to the statutory constraint that rates be just and reasonable—for the regulated firm as well as for its customers—and subject further to the constraint imposed by the Takings Clause of the Fifth Amendment that the rate not be set so low as to constitute a confiscation of private property.[48] In contrast, any modification of regulation by consent decree requires further acts of mutual consent. If a private party, once it has consented to one price in an initial decree, is not bound by any legislation requiring it to accept a different price if the antitrust agency or court unilaterally deems a price change to be appropriate, then there will be no change. Litigation would be the only option. Such a proceeding would be doubly complex because it would combine ratemaking principles with the standard analysis (of general applicability) for modifying a consent decree.

Proponents of price-regulating decrees might argue that the foregoing criticisms are exaggerated because the conditions on price—if they mirror those in *Butterworth Health* or the AT&T/BellSouth merger—will last only for a finite period. This argument is unpersuasive, however. If the Antitrust Division or FTC is willing to consent to a merger subject to only short-term restrictions on the post-merger price, one must wonder whether the price-regulating decree was indeed necessary in the first place.

V. ARE PRICE-REGULATING CONSENT DECREES LAWFUL?

Apart from the practical and economic concerns over implementing price regulation by consent decree, one confronts a potentially larger question: Is price regulation through consent decree lawful? Two problems exist. First, such a decree may be unlawful because it lacks a clear delegation of legislative authority to the antitrust enforcement agency. Second, even if there is a

[46] *See* Greaney, *supra* note 4, at 218.

[47] *See* Breyer, *supra* note 45, at 1043 (comparing antitrust courts to regulatory bodies and concluding that antitrust courts are not appropriate for price regulation). *Cf.* RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE 16 (2007) (discussing difficulty of implementing a consent decree that regulated price to prevent predation by a monopolist).

[48] *See* SIDAK & SPULBER, *supra* note 44, at 101.

delegation of such authority, it may be an unconstitutional violation of the separation of powers.

A. The Absence of a Delegation of Legislative Authority to Regulate Prices

One can frame the delegation issue two ways for any particular legislation. First, one can ask whether a delegation has occurred in the first instance. Second, one can challenge a delegation that has concededly occurred.[49] The issue raised in the present context is whether the Sherman Act and associated legislation constitutes a delegation of the power to regulate price through approval of an antitrust consent decree. Despite popular belief that the delegation doctrine, or non-delegation doctrine, lives "a fugitive existence at the edge of constitutional jurisprudence,"[50] it remains the case that the Constitution places both procedural and substantive limitations on the authority and power of agencies charged with enforcement of the laws, including the antitrust laws.[51] That is, even if there are no limits on Congress's power to delegate legislative authority to agencies, there still must in fact be a delegation and the agency must be acting within the scope of that delegation.[52] The emphasis here is whether the antitrust enforcement agencies would exceed their discretion in enforcement of the antitrust laws in approving price-regulating consent decrees.

The Tunney Act, the only antitrust-specific law that addresses the consent decree process, is not helpful in addressing the lawfulness of price-regulating decrees. Though it outlines the procedures for implementation of a consent decree, the Tunney Act says nothing about the actual substance of consent decrees. It does impose an "in the public interest" requirement on decrees, but the Tunney Act does not otherwise specify the remedies that the DOJ may or may not ask a court to impose through the consent decree process. Further, as noted earlier, the Tunney Act does not apply to the FTC at all. So although there is a well-established practice of using consent decrees to allay the government's competitive concerns over proposed mergers, there is no statutory guidance to govern the permissible content of those decrees.[53]

[49] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.").

[50] Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 17 (1982).

[51] *See* ERNEST GELLHORN & ROBERT M. LEVIN, ADMINISTRATIVE LAW AND PROCESS 27 (1997).

[52] *See Am. Trucking Ass'n*, 531 U.S. at 474.

[53] We do not explore whether the DOJ should choose to challenge a merger or require a decree in the first place. There was criticism of the DOJ's approval, without conditions, of the merger of AT&T and BellSouth in 2006. *See, e.g.*, Amy Schatz & Siobhan Hughes, *Justice Department Criticized For Approving Big AT&T Deal*, WALL ST. J., Oct. 12, 2006, at B4. However, the

There is an extensive literature on the consent decree process generally, and its nature as a contract between a private party or parties and the government.[54] In terms of antitrust decrees, most of the literature focuses on the perceived shift from enforcement to de facto regulation at the antitrust enforcement agencies.[55] The literature that does specifically discuss price regulation by consent decree is almost exclusively commentary—negative commentary—on *Butterworth Health*. For example, Stephen Calkins, who was on the brief for the FTC in that case, has argued that the court there "was establishing itself as a small regulatory body without any statutory support for doing so."[56] Others who have discussed price regulations and conditions on price as an aspect of consent decrees evidently take their propriety for granted, and those commentators address only practical issues.[57] This lack of commentary is surprising, because there is essentially no legal justification for the practice of regulating price by consent decree. The reason is simple: rate regulation is a legislative act rather than a judicial or an executive act.[58] Consent decrees, insofar as they are the joint product of executive and judicial branch powers, are not legislative and therefore are not a constitutional means of regulating prices.

Rate regulation in federal law dates to the passage of the Interstate Commerce Act in 1887 and the formation of the Interstate Commerce Commission (ICC) as a means to regulate the railroads.[59] The Act was the first federal effort to regulate commerce,[60] and the ICC's authority was subsequently expanded to include the power to set rates in a variety of transportation-related industries.[61] Since the inception of rate regulation, the

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DOJ has prosecutorial discretion to bring or dismiss any particular complaint. *See, e.g.*, John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies,"* 34 LOY. U. CHI. L.J. 749, 791 (2003).

[54] *See, e.g.*, SIDAK & SPULBER, *supra* note 44, at 101; Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987); Flynn & Bush, *supra* note 53, at 790 ("Congress did not give the DOJ the right to determine the remedy in a litigated case by submitting a proposed consent decree in circumstances where a consent decree is entirely inappropriate.").

[55] *See, e.g.*, E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1053–54 (1986) (noting that the shift from enforcement to regulatory emphasis was without clear congressional approval).

[56] Calkins, *In Praise of Antitrust Litigation*, *supra* note 41, at 9.

[57] *See, e.g.*, Sullivan, *supra* note 38, at 611; Greaney, *supra* note 4, at 218 (noting that the *Butterworth Health* district court "engaged in rate regulation" and citing practical issues, but ignoring whether the practice was legal in the first instance).

[58] *See* ICC v. Cincinnati, New Orleans & Tex. Pac. R. Co., 167 U.S. 479, 505 (1897) ("The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function.").

[59] *See, e.g.*, George M. Chandler, *The Interstate Commerce Commission: The First Twenty-Five Years*, 16 TRANSP. L.J. 53 (1987).

[60] *See id.* at 55.

[61] *See* Edward C. Donovan, *The Interstate Commerce Commission and the Boundaries of Agency Discretion in Statutory Interpretation*, 60 GEO. WASH. L. REV. 1357, 1358 (1992).

Supreme Court has recognized the uniquely legislative nature of this type of action. In the Court's 1908 decision in *Prentis v. Atlantic Coast Line Co.*, Justice Holmes, in an opinion addressing a challenge to local rate regulations, distinguished judicial power from legislative power in the context of price regulation:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.[62]

Justice Holmes clearly established the distinction between the legislative act of price regulation and a different act—a judicial inquiry—that occurs in the presence of legislation. One might answer that consent decrees are not judicial creations, because it is not a court, but one of the antitrust enforcement agencies that initiates the decree process, and those agencies are acting pursuant to a congressional mandate to enforce the antitrust laws.[63] However, for a variety of reasons, this line of argumentation cannot redeem the unlawfulness of rate regulation by consent decree.

First, any price-regulating antitrust consent decree, even if negotiated by the antitrust enforcement agencies pursuant to a statutory mandate, will become effective only after a court has approved it pursuant to the Tunney Act. Consequently, it is technically not the agency's action that regulates price following a merger, but rather the combined actions of the agency and the court. The price regulation has no force of law without judicial approval. As Justice Holmes noted in the line of railway cases that followed the passage of the Interstate Commerce Act, "when the final act is legislative the decision which induces it cannot be judicial."[64] Under the consent decree process, the entity finally inducing the result is the court. For price-regulating decrees, that fact would imply that a court would be wielding legislative power, which Justice Holmes emphasized a court may not do.

Second, even if one were to assume that a court-approved consent decree is an act of the agency proposing the decree and not an act of the court approving the decree, no aspect of the antitrust laws could be mistaken for a congressional grant of authority to regulate the level of prices in the marketplace. To the contrary, the antitrust laws have consistently been interpreted to mean that competition itself should determine those prices.[65] In *Arizona v. Maricopa County Medical Society*, the Supreme Court explained that the *per se* rule against price-fixing is unwavering: There must be a unified

[62] 211 U.S. 210, 226 (1908).

[63] *But see* Butterworth Health Corp. v. FTC, 946 F. Supp. 1285 (W.D. Mich. 1996) (court-initiated decree).

[64] *Prentis*, 211 U.S. at 227.

[65] Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

application of the principle that competition should set prices, regardless of the industry and regardless of the proposed benefits of such price fixing.[66] That is, the Court held that the *per se* rule should apply regardless of what procompetitive benefits the parties to the agreement offer: "the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if pro-competitive justifications are offered for some."[67] So even if the enforcement agencies argue that the price agreement in the price-regulating consent decree is intended to prevent anticompetitive conduct by the merged firm, such decrees are nevertheless proscribed by the *per se* rule. Though the *Maricopa County* Court was discussing firms setting prices rather than the antitrust agencies doing so, the Court's reasoning—that the Sherman Act is a competition statute and not a price-regulating statute—applies with full force.

Third, even in the face of the Interstate Commerce Act itself, the Supreme Court has not allowed agencies to regulate rates without explicit congressional grants of authority. For example, the ICC did not receive such a grant of authority until at least 1906, almost twenty years after the passage of the Act.[68] In *ICC v. Cincinnati, New Orleans & Texas Pacific Railway*, an 1897 decision challenging the ICC's authority, the Court emphasized the need for explicit congressional delegation of authority to regulate prices:

> The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function. . . . That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct.[69]

If Congress did not provide for rate regulation of the railroads in the Interstate Commerce Act in 1887, then the Sherman Act, passed three years later, certainly did not delegate to the Department of Justice or the federal judiciary the even broader authority to regulate price in any given product market, by decree or otherwise. Similarly, the Sherman Act is silent in this respect, and thus it necessarily lacks the "clear and direct" language required for such a delegation of legislative authority to be recognized. For these reasons, price-regulating consent decrees cannot be seen as enforcement of the antitrust laws or even consistent with the Sherman Act in the first instance. To the contrary, such regulation "is a legislative and not an administrative or judicial function."[70]

Although the DOJ and FTC have stated that they disfavor price regulation in consent decrees, the agencies have remained relatively silent on whether

[66] *Id.* at 350–51.
[67] *Id.* at 351.
[68] *See, e.g.*, Paul Stephen Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This Endangered Species*, 32 AM. U. L. REV. 335, 342 (1983).
[69] 167 U.S. 479, 505 (1897).
[70] *Id.*; *see also* Calkins, *supra* note 56, at 9.

they consider it lawful to insert such regulation into a decree. There is evidence that these agencies consider price-regulating decrees to be within their power to implement. For example, the Antitrust Division's *Policy Guide to Merger Remedies* explicitly references price regulation,[71] which suggests that, although the Division "prefers" structural (divestiture) remedies, it regards conduct remedies, including price caps, as being within the agency's authority to implement. If the Antitrust Division thought that price caps exceeded its remedial authority, it would not use them as an example in its merger remedy guidelines.

B. Separation of Powers: Executive or Judicial Exercise of Legislative Ratemaking Functions

The separation of powers is a doctrine designed to prevent the accumulation of power in a single branch of government, on the premise that "concentration of power in the hands of a single branch is a threat to liberty."[72] The idea is straightforward: When citizens delegate control to a governing body with multiple branches, "one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two."[73] Although one branch of government can affect—or have "partial agency in"—the acts of another branch,[74] there can be no argument that the executive branch or the judicial branch has the authority to legislate in the manner traditionally and historically reserved for the legislative branch. That action would be an "encroachment or aggrandizement [by] one branch against the others,"[75] as it would usurp legislative powers reserved to Congress under Article I. It would violate the separation of powers because "one branch [would] assume. . .a function that more properly is entrusted to another."[76]

Price-regulating consent decrees are likely to violate the separation of powers. Price caps, price freezes, and other price regulations are legislative acts. The Department of Justice is part of the executive branch, and its constitutional duty is to execute the laws faithfully—not to create them, including laws for regulating prices. When applied to the FTC, this argument becomes more complicated because it implicates the larger question of whether independent regulatory agencies that commingle executive and legislative powers (if not also judicial powers) are constitutional. We cannot resolve that debate here. So, for simplicity, we will confine the analysis to the constitutionality of the Antitrust Division's use of price-regulating decrees.

[71] *See DOJ Merger Remedies*, *supra* note 16.
[72] Clinton v. City of New York, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring).
[73] *Id.*
[74] Loving v. United States, 517 U.S. 748, 756 (1996).
[75] Buckley v. Valeo, 424 U.S. 1, 122 (1976), *quoted in* Mistretta v. United States, 488 U.S. 361, 381 (1989).
[76] INS v. Chadha, 463 U.S. 919, 963 (1983) (Powell, J., concurring).

It has been established that the regulation of prices is purely a legislative act.[77] Insofar as the constitutional principle of separation of powers is properly regarded as an anti-monopoly principle,[78] where the monopoly in this context is that over governmental powers, executive usurpation of the legislative function is necessarily a violation of the Constitution. Further, in the context of the antitrust laws, which in substance are largely judge-made laws, the risks of ignoring the separation of powers are even greater. William Baxter set the framework for this argument in an article published while he was Assistant Attorney General in the Antitrust Division.[79] In his description (some would say defense) of prosecutorial discretion that is vested in the Antitrust Division given the common law nature of antitrust law, Baxter described how the executive branch, in enforcing the antitrust laws, takes on unique responsibilities given the precedential nature of the cases it chooses to bring.[80] Baxter identified these responsibilities as implicating the separation of powers: "Of course, each branch of government must give due regard to the constitutional functions of its coordinate branches."[81] Baxter's argument was that the executive branch, through the Antitrust Division, given the common law nature of antitrust, has the unique ability to say what conduct is and is not prohibited by the antitrust laws.[82]

Though Baxter did not extend his analysis to the negotiation, formation, and approval of consent decrees, the notion that the Antitrust Division is uniquely positioned to affect the substance of antitrust law is even stronger in that context. Proposed decrees are almost exclusively the creation of the enforcement agency proposing the decree, and the subsequent approval of that decree will set a precedent for what is acceptable—both in terms of conduct of firms and contents of decrees—in executive enforcement of the antitrust laws. As Baxter noted, the successive "enforcement" of the antitrust laws in such a manner can incrementally infringe on the constitutional powers of the other branches.[83] More concretely, once the first price-regulating consent decree that approves a merger subject to price regulation is presented to a court and approved as being in the public interest, it is almost guaranteed that the parties to future merger enforcement actions will seek similar remedies. In such a world, the executive branch, through the Antitrust Division, will conduct merger enforcement through price regulation. This prospect,

[77] *See, e.g.*, *Prentis*, 211 U.S. at 226.
[78] J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 66 (1991).
[79] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 687 (1982).
[80] *Id.* at 687.
[81] *Id.*
[82] *Id.* at 687–88.
[83] *Id.* Baxter only explicitly discussed encroachment on the judiciary's function of settling cases or controversies rather than our concern of encroachment on the legislative function of price regulation. His argument, however, applies to our context.

then, presents the separation of powers issue head on, as the executive branch will have assumed the legislative function of ratemaking.

Price-regulating consent decrees may implicate the separation of powers in another respect. With respect to the Antitrust Division, such decrees may impinge on the powers of the executive branch and its power to execute the laws faithfully. While still a law professor, Judge Michael McConnell wrote:

> This is not the occasion for cataloging or justifying circumstances when the Constitution permits executive decisions that bind future legal discretion. Such instances are rare. But if an executive official can bind the discretion of his successors by unilateral action, there is no reason why he cannot do the same by way of settling a lawsuit. Conversely, if the official lacks the authority to bind the discretion of his successors, it is a pure bootstrap argument to say that he can do so by forging an agreement with a private party and submitting it to a court.[84]

The argument, then, is that if the Antitrust Division lacks the authority to regulate prices, then putting price regulation in a consent decree and having a court approve it does not resolve the constitutional issue. The combined actions of executive and judicial officers cannot produce a legislative act.

VI. CONCLUSION

If a merger creates both market power and efficiencies unique to the merged firm, the firms would rationally relinquish their power over price as a condition of merger approval. This inference flows directly from Oliver Williamson's analysis of the welfare tradeoffs of the merger process. This incentive to consent to price regulation has manifested itself recently in both litigated and proposed mergers. Although the Antitrust Division and the FTC disfavor consent decrees that regulate price, the FCC has approved mergers on the condition that the merged firm freeze its price. The U.S. Court of Appeals for the Sixth Circuit has affirmed a district court order denying an injunction on the condition that the parties to the merger not raise price. Apart from raising serious practical issues of implementation, price-regulating consent decrees raise constitutional questions that the antitrust enforcement agencies appear not to have addressed. This impromptu form of price regulation lacks the necessary delegation of legislative authority. In the alternative, if such delegation can be shown to exist, the practice nonetheless might constitute an impermissible exercise of legislative authority by the executive and judicial branches.

[84] Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies From Change*, 1987 U. CHI. LEGAL F. 295, 303–04 (1987) (citations omitted); *see also* Peter M. Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241 (1987); Rabkin & Devins, *supra* note 54.