THE RADICAL CHALLENGE TO THE ANTITRUST ORDER

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The U.S. antitrust order is undergoing a radical challenge along three key dimensions. First, the challengers seek to denaturalize markets and replace a commitment to competition with an anti-domination norm. Second, the challengers seek to dramatically alter institutional arrangements, with Congressional legislation and agency rulemaking replacing antitrust's longstanding commitment to judicial common law incrementalism. Finally, the challengers would replace the antitrust order's preferred juridical approach—open-ended rule of reason analysis—with a return to bright-line prohibitory rules and a related demotion of economists as decision-makers. Each of these challenges entails significant consequences, many of them unintended, counter-productive, or perverse. Contrary to the broad consensus that antitrust should be apolitical, a shift to an anti-domination norm would require antitrust analysis to become more explicitly political, considering the relative deserts of different classes of stakeholders. It also threatens the antitrust agencies' objectivity and independence by requiring them to coordinate policy decisions with other bodies. The bid to curtail judicial supremacy might work if Congress passed significant new legislation, but, failing that, the challengers' strategy of suing and then refusing to settle in order to reform the law is putting judges ever more firmly in charge of antitrust norms. Similarly, an aggressive rule-making strategy may backfire and further entrench the influence of judges. Finally, a push for rules of per se illegality may push courts to the opposite extreme—creating new rules of per se legality. Paradoxically, although antitrust reformers often cite Europe as a model of more aggressive antitrust enforcement, a return to formal per se rules and a demotion of economic analysis would move the United States in the opposite direction from trends in Europe.

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INTRODUCTION

American antitrust law is undergoing a radical challenge. At one level, this is not news to anyone who has followed the headlines over the last three or four years. In 2020, the New York Times passed the Wall Street Journal in stories mentioning "antitrust,"[1] headlining antitrust's elevation from a routine business story to national political one. With committed neo-Brandeisians running the Biden Administration's Justice Department Antitrust Division, Federal Trade Commission, and White House competition policy,[2] dozens of antitrust bills introduced in Congress[3] and "bet the company" lawsuits against Facebook, Google, Apple, Microsoft, and other

1. Data compiled from ProQuest database; on file with author.

2. *See, e.g.*, Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087, 1110–11 (2022) (describing appointment of prominent neo-Brandeisians Lina Khan as Chair of FTC, Tim Wu to National Economic Council, and Jonathan Kanter as Assistant Attorney General for Antitrust in the Justice Department).

3. The most significant antitrust bills pending at the time of this writing and introduced in 2023 include the Journalism Competition and Preservation Act of 2023, S. 1094, 118th Cong. (2023); AMERICA Act, S. 1073, 118th Cong. (2023); Preserve Access to Affordable Generics and Biosimilars Act, S. 142, 118th Cong. (2023); Prescription Pricing for the People Act of 2023, S. 113, 118th Cong. (2023); Increasing Prescription Drug Competition Act, S. 574, 118th Cong. (2023); Competitive Prices Act, H.R. 2782, 118th Cong. (2023); Affordable Prescriptions for Patients Act of 2023, S. 150, 118th Cong. (2023); and Consumer Protection and Due Process Act, S. 1076, 118th Cong. (2023).

marquee companies pending in court, there is no question that antitrust is at a generational moment.

But, if a reinvigoration of what historian Richard Hofstadter called a "faded passion"[4] is self-evident, what is not as obvious is the radicalness of the challenge to the antitrust order. It is not just that there is broad political consensus that the American economy has become overconcentrated, that Big Tech has become too powerful, that antitrust enforcement has become too stodgy, or that antitrust law has become too permissive of dominance. Such shortcomings might be corrected through reforming antitrust doctrines, appointing more aggressive enforcers and significantly increasing their budgets, and generally upping the game on antitrust enforcement. But the current challenge would do much more than that. The current challenge would dramatically rewrite antitrust's first principles— its institutional commitments and juridical approach—with sweeping consequences for not only the antitrust enterprise, but also for the organization of the American economy.

At the outset, it is important to clarify the significance of the key words in this Article's title and thesis in order to avert misunderstanding. The "antitrust order" refers broadly to the de facto system that has been in place for many decades to operationalize the Sherman Act and its successor statutes. While this system has evolved over time, most of its key components have been stable since the New Deal, and every component has been stable since the passage of the Hart-Scott-Rodino Act in 1976 and the Supreme Court's adoption of a consumer welfare standard in 1979. The claim that this order is under "challenge" denotes the fact of ongoing contestation. This Article catches the challenge in mid-stream, and it is too early to tell what its resolution will be. Finally, and at the greatest risk of being misunderstood, this Article refers to the challenge as "radical." Here, radical is not meant as an epithet but rather to convey the dramatic character of the challenge to the incumbent system. If the challenge is successful, it will result in the most significant reordering of the American antitrust system since its founding.

Although it is too early to tell whether the radical challenge will prove successful, the early signs suggest that the challenge is facing considerable obstacles. This is not just because of incumbent resistance but particularly because of the design of the challengers' agenda, whose various components seem to be at cross-purposes. If it proceeds on its current course, the radical challenge is likely to produce unintended, counter-productive, and even perverse consequences. Even though there is considerable appetite nationally for antitrust reform and the challengers have struck a chord with

4. RICHARD HOFSTADTER, *What Happened to the Antitrust Movement*?, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1st ed. 1965).

many constituencies, the challengers' package of interventions threatens to backfire. Antitrust may become more politicized, the antitrust agencies may become less independent, and the courts may become more influential. Even if the challengers succeed in parts of their agenda—for example by securing new legislation from Congress and more rules of per se illegality—they may simultaneously induce counteractions—such as rulings against FTC rulemaking power, the growth of rules of per se *legality*, and misalignment with European antitrust—that gut their most significant aspirations. On its current terms, the radical challenge has little likelihood of achieving its comprehensive aims and a considerable likelihood of entrenching the status quo.

To advance these arguments, this Article proceeds as follows. Part I defines the incumbent antitrust order along three key dimensions: first principles, institutional commitments, and juridical approach. Existentially, the incumbent order is defined nominally by an increasingly controversial consumer welfare standard ("CWS"), but more accurately by a commitment to competition as the default organizing principle for the American economy. While much of the controversy has focused on CWS's legitimacy as a matter of legislative history[5] and whether it is sufficiently flexible to accommodate socio-economic interests such labor market monopsony[6] or innovation,[7] the debate over CWS and the pro-competition policy reflects something deeper than its juridical origins or particular applications. At its core, CWS reflects an understanding of markets and competition among market actors as natural, spontaneous, pre-political, and utility-maximizing. CWS-oriented antitrust seeks to bolster free and natural markets as against distortive anticompetitive forces in order to grow the social pie. Institutionally, it pursues this goal by delegating incremental common law authority to judges and relying on technocratic engagement by antitrust enforcement agencies leading to consensual settlements in the vast majority of cases. Juridically, the incumbent order divides competitive behavior into two archetypes for adjudicatory purposes. A first, and relatively small, category consists of behaviors presumed to distort competition without any sufficient justification. These are treated as per se illegal and criminalized. A second, residual, and much larger category consists of behaviors with complex welfare consequences that must be judged under an open-ended rule of reason reliant on expert

5. *See, e.g.*, Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2354 (2013).

6. *E.g.*, Eugene K. Kim, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L. J. 428, 434 (2020).

7. *E.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 576 (2012) (reporting on judicial decisions that dismissed innovation concerns as outside the scope of consumer welfare standard).

economic analysis. Thus, economists have largely superseded lawyers as the key actors in the incumbent order. These are the key features of the incumbent order.

Part II defines the radical challenge, analyzing its key attributes along the same three dimensions. Existentially, the radical challenge seeks not only to displace CWS as antitrust's organizing principle, but to uproot its assumptions about markets and competition as natural, spontaneous, pre-political, and beneficial. Drawing on the emerging law and political economy movement, the radical challenge argues for an understanding of markets as politically constructed and the parameters of competition and coordination as established by self-interested power structures rather than neutral or objective principles.[8] The challengers would replace competition with anti-domination as antitrust's organizing principle. Institutionally, the radical challenge identifies judges as the chief culprits in instituting an antitrust order that has led to dramatic consolidations of economic power and wealth, thus threatening liberal values, social justice, and even democracy itself.[9] The challengers seek to uproot this status quo by relocating decisional power to Congress (through new legislation), the FTC (through substantive rulemaking), and populist juries. The challengers also seek to diminish the role of administrative discretion and technocratic settlements, preferring adversarial trials that will develop public legal principles. Juridically, the challengers seek to push antitrust liability norms from standards to rules, creating a much larger domain of per se prohibitions and, consequently, a much smaller domain for the rule of reason. This push entails the ascendency of lawyers and the demotion of economists.

Again using the matrix of first principles, institutional arrangements, and juridical mode, Part III critically analyzes the implications of the radical challengers' agenda for the antitrust order. On first principles, the shift to an anti-domination principle entails a more explicitly political flavor for antitrust enforcement, as it requires contextual examination of the relative deserts of different interest groups. It also forces antitrust out of its disciplinary silo and requires greater coordination between antitrust agencies and other regulators or political officials, with important implications for the independence and legitimacy of the antitrust agencies. On institutional commitments, the challenge to judicial supremacy and bureaucratic settlements is already in progress but is paradoxically setting up the courts for an even more important role than before since the refusal to settle cases puts judges squarely in charge of deciding them. Relatedly, the bid to replace the courts' common law function with agency rulemaking is running into the potentially

8. Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 52, 69 (2014).

9. Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1679, 1681 (2020).

insurmountable hurdle that the courts will be the ones to decide on the FTC's rulemaking power and the legality of its rules, which could not only set back the FTC's rulemaking agenda but also imperil the FTC's independence from the executive branch. Finally, the challengers' project of replacing the rule of reason with rules of per se illegality is likely to induce counter-effects, such as the hardening of rules of per se legality and misalignment between U.S. and EU antitrust enforcement.

I. THE INCUMBENT ORDER

A. First Principles: Consumer Welfare and Competition

In 1979, citing Robert Bork, the Supreme Court adopted a consumer welfare standard for antitrust, asserting that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[10] The Court has reiterated that or a similar proposition many times since.[11] Critics have argued that Bork misinterpreted the Sherman Act's legislative history and hence led the Court into error.[12] More generally (and as discussed in greater detail in Part II(A)), reformist critics attribute the laxity of antitrust enforcement and that laxity's role in consolidating economic power and market concentration to

10. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)).

11. *E.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021) ("Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare."); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 902 (2007) (discussing effects of policy in question on "competition and consumer welfare"); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324 (2007) (judging effects of predatory overbidding on consumer welfare); Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (discussing "antitrust laws' traditional concern for consumer welfare and price competition"); Nat'l Collegiate Athletics Ass'n v. Bd. of Regents, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (citation omitted)).

12. *See* Lande, *supra* note 5, at 2354; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 69–70 (1982); Daniel R. Ernst, *The New Antitrust History*, 35 N.Y. L. SCH. L. REV. 879, 882 (1990); John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 265–90 (1988); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1136 (1987); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1142 (1981); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 563–64 (2012); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law*?, 42 U.C. DAVIS L. REV. 1375, 1435 n.259 (2009).

CWS.[13] For example, Barry Lynn—the Executive Director of the Open Markets Institute and an early mentor to FTC Chair Lina Khan—has argued that CWS "cleared the way for three decades of corporate concentration that has remade almost every corner of the U.S. political economy," "result[ing] in a wide variety of effects deeply harmful to businesses, workers, and consumers, effects that increasingly threaten basic balances in our society and our political system."[14] Columbia Law Professor Tim Wu, who served as Special Assistant to the President for Technology and Competition Policy from 2021 to 2023, argues that Bork's CWS has "enfeebled the law" and "discarded far too much of the role that law was intended to play in a democracy, namely, constraining the accumulation of unchecked private power and preserving economic liberty."[15]

But although the Supreme Court's adoption of CWS as official antitrust mascot clearly had consequences, the CWS in its narrowest, Borkian sense is nothing like the actual organizing principle of the incumbent antitrust order. Bork's critics often charge that Bork engaged in linguistic "chicanery"[16] or "an Orwellian term of art that has little or nothing to do with the welfare of true consumers."[17] Accurate or not,[18] the gravamen of the charge is that Bork advocated for an antitrust policy narrowly focused on allocative efficiency and misleadingly called such a policy "consumer welfare," even though it would explicitly approve conduct that transferred wealth from consumers to producers.[19] True enough, that is what Bork argued as

13. *See,* e.g., Darren Bush, *President Trump's Antitrust Division: An Essay on the Same Old, Same Old*, 70 MERCER L. REV. 671, 682 (2018) (arguing that the consumer welfare standard "led us to the concentration problems we face in the economy today"); MARC JARSULIC ET AL., CTR. FOR AM. PROGRESS, REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY 17 (2016); ROOSEVELT INST., UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER 22–23 (Nell Abernathy et al. eds., 2016).

14. *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition, and Consumer Rts. of the S. Comm. on the Judiciary* (2017) (statement of Barry C. Lynn, Executive Director, Open Markets Institute).

15. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 17 (2018).

16. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 49 (1985).

17. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 199 (2008).

18. *See generally* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L. J. 835, 845–47 (2014) (defending Bork against criticisms of this nature).

19. Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 249 (1999).

consumer welfare,[20] but that is nothing like the center of gravity in the incumbent antitrust order.

To the contrary, contemporary antitrust has adopted a much broader sense of CWS (if it has really adopted CWS at all). This can be seen up and down antitrust's scaffolding. On the question most provoking Bork's critics—the exclusion of wealth transfers from harm to consumer welfare—it is hard to find any expression in contemporary antitrust doctrine that disregards higher consumer prices not accompanied by output reductions.[21] The Supreme Court's antitrust doctrine holds that increased prices constitute an anticompetitive effect separately from output effects.[22] Courts are more likely to find a cartel agreement when demand elasticity in the market is low—meaning that a collusive agreement will result in higher prices but not much of a decline in output.[23] Similarly, the antitrust agencies make clear in their Horizontal Merger Guidelines that efficiencies from a merger only count against anticompetitive effects to the extent that they offset any price increases.[24] A defendant who argued for immunity from antitrust liability because its conduct resulted in price increases but no output reduction would have no chance of winning in an American court today.

Another common criticism of CWS—in perhaps unwitting conflict with the one discussed in the previous paragraph—is that CWS focuses solely on prices to the exclusion of other dimensions of

20. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 105–115 (1978) (outlining Bork's understanding of the consumer welfare model).

21. Arguably, the closest statement comes from a footnote in a concurring opinion by Justice O'Connor asserting that tying arrangements may be beneficial if they enabled price discrimination. Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 n.4 (1984) (O'Connor, J., concurring) ("Price discrimination may, however, decrease rather than increase the economic costs of a seller's market power."). Notably, O'Connor's musings (from Bork) were not adopted by the Court and were just that—musings.

22. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("Direct evidence of anticompetitive effects would be 'proof of actual detrimental effects [on competition],' such as reduced output, increased prices, or decreased quality in the relevant market." (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986))); *id.* at 2288 ("This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.'" (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993))).

23. *E.g.*, Kleen Prods. LLC v. Int'l Paper Co., 831 F.3d 919, 927 (7th Cir. 2016).

24. U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES 30–31 (2010) [hereinafter HMG] (["T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market.").

consumer wellbeing, such as innovation and variety.[25] But that simply is not incumbent antitrust doctrine. As the D.C. Circuit has held, "the . . . assumption that the prices paid by consumers (regardless of the quality of the resulting product) are the sole focus of antitrust law is flawed. 'The principal objective of antitrust policy is to maximize consumer welfare *by encouraging firms to behave competitively*.'"[26] The standard compendium of cognizable procompetitive and anticompetitive effects includes such dimensions as innovation, quality, service, and variety.[27] Similarly, the Horizontal Merger Guidelines make clear that, in merger analysis, price is simply used as a shorthand for all dimensions of consumer welfare, including quality, variety, service, and innovation.[28] Whether or not antitrust law does a good job of protecting those non-price values, considerations beyond price are indubitably relevant considerations in the current antitrust order.

A fairly recent criticism holds that CWS focuses solely on the welfare of consumers and excludes the protection of workers.[29] Such criticisms are understandable given the "consumer" in CWS, but it is hardly the case that the incumbent antitrust order holds that

25. *E.g.*, Aryeh Mellman, *Measuring the Impact of Mergers on Labor Markets*, 53 COLUM. J.L. & SOC. PROBS. 1, 2 (2019) (asserting that that CWS "is only concerned with the increased prices of products"); Stucke, *supra* note 12, at 575 (asserting that consumer welfare standard is "synonymous with static price competition").

26. United States v. Anthem, Inc., 855 F.3d 345, 366 (D.C. Cir. 2017) (quoting Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 539 (2013)).

27. *E.g.*, FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 172 (3d Cir. 2022) ("Anticompetitive effects can include price increases and reduced product quality, product variety, service, or innovation."); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 478 (7th Cir. 2020) (holding that cognizable procompetitive effects include higher output, improved product quality, energetic market penetration, successful research and development, and cost-reducing innovation).

28. HMG, *supra* note 24, at 2 ("Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence.").

29. Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 600 (2020) ("The [consumer welfare] standard is hard to reconcile with plainly anticompetitive restraints that do not affect consumers and instead affect only upstream sellers and workers, such as no-poaching agreements."); Hiba Hafiz, *Rethinking Breakups*, 71 DUKE L. J. 1491, 1593–94 (2022) (contrasting consumer welfare with worker welfare); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 587 (2018) (contrasting consumer welfare standard with worker welfare standard).

anticompetitive abuses creating labor market monopsony are outside the purview of antitrust. In its most recent antitrust decision, the Supreme Court unanimously, and without suggesting that it was doing anything unusual, applied Section 1 of the Sherman Act to invalidate an NCAA rule prohibiting the compensation of student athletes as workers.[30] Lower courts have applied antitrust law to a variety of allegedly anticompetitive restrictions on worker wages or mobility.[31] Similarly, the antitrust agencies have brought cases against employers alleging anticompetitive effects in labor markets—with neither courts nor agencies suggesting that the CWS was any impediment to such claims.[32] Whether or not the courts and agencies have been sufficiently attentive to labor market issues, the assumption that CWS formally blocks consideration of labor market effects is simply wrong.

If a narrow, Borkian CWS is not the first principle of the incumbent antitrust order, then what is? The most general and accurate answer is that incumbent antitrust enshrines a value called "competition" as its ordering economic principle. This commitment finds expression in a variety of maxims and doctrines, such as the oft-repeated announcement that the Sherman Act protects "competition, not competitors."[33] The Supreme Court has described the Sherman Act as reflecting "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"[34] Competition is held sacrosanct such that,

30. National Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151, 2163–66 (2021).

31. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 195 (2d Cir. 2001) (employer information-sharing agreement that allegedly depressed employee wages); *In re* High-Tech Employee Antitrust Litig., No. 11-CV-02509-LHK, 2015 WL 5158730, at *1 (N.D. Cal. Sept. 2, 2015) (agreement among high-tech employers not to poach each other's employees); Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1106, 1109 (9th Cir. 2021) (non-solicitation agreement among healthcare staffing agencies); Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1250–51 (11th Cir. 2022) (no-hire agreement among franchisor and franchisees); *In re* Outpatient Med. Ctr. Employee Antitrust Litig., 630 F. Supp. 3d 968, 976, 982 (N.D. Ill. 2022) (no-solicitation agreement); Borozny v. Ratheon Tech. Corp., No. 3:21-cv-1657-SVN, 2023 WL 3719649, at *1, *3–4 (D. Conn. May 30, 2023) (no-poach agreement).

32. Robert Anello, *Are DOJ's No-Poach Prosecutions Getting Poached?*, FORBES (May 10, 2023), https://www.forbes.com/sites/insider/2023/05/10/are-dojs-no-poach-prosecutions-getting-poached/?sh=2ad3f4c51646 (reporting on criminal cases brought by DOJ concerning alleged no-poach agreements).

33. The Supreme Court first made this claim in *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) and has repeated it many times since. *E.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007); Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 338 (1990).

34. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

despite the wide variety of virtues a defendant may advance to justify a challenged practice, the one defense she absolutely may not assert is that competition was excessive or "ruinous," thus justifying an effort to quash or mitigate competition.[35] To be recognized as a legitimizing virtue, a practice must accept competition as inherently good, hence earning the moniker "procompetitive,"[36] whereas those acts that diminish competition—"anticompetitive" acts—are the evils to be restrained.[37]

Despite the conceptual inroads made by welfarist economics since the 1970s, the antitrust system's commitment to competition as organizing principle does not rest primarily on the utilitarian observation that competition maximizes social welfare. Rather, the assumption underlying the incumbent antitrust order—one going back to the formative era of antitrust and carried forward to contemporary antitrust—is that competition among rivals is the spontaneous and natural state of markets and that actions that impede competition are unnatural and distortive.[38] Pervasively throughout its history, the Supreme Court has described competition as a "natural" or "ordinary" state[39] and anticompetitive behavior that

35. Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 346 (1982) ("It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies." (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221–22 (1940))).

36. The idea that antitrust virtues are those that intensify competition traces to Justice Brandeis's holding in *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

37. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2160 (2021) (citing precedent "distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

38. *See* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 13 (1999) (describing the view in formative era of antitrust law that competition is the natural state of markets and that it produces natural or ordinary prices).

39. Am. Column & Lumber Co. v. United States, 257 U.S. 377, 410–11 (1921) (observing that the challenged restraint operated on "natural competitors" and would subvert competition among a group of "naturally competing dealers"); United States v. United States Steel Corp., 251 U.S. 417, 461 (1920) ("While it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business and further legitimate trade, it did intend to effectively reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which from their nature, or effect, have proved effectual to restrain interstate commerce."); Northern Secs. Co. v. United States, 193 U.S. 197, 327–29 (1904) (referring to "all the advantages that would naturally come to the public under the operation of the general laws of competition" and describing

eliminates such natural competition as a "distortion."[40] At the core of antitrust policy lies the assertion that competition spontaneously erupts (to the benefit of society) when markets are free from deliberate distortions by governments or private actors.

From the assumption that antitrust promotes the continuation of markets in their natural and pre-political competitive condition the entire edifice of contemporary antitrust is built. This can been seen in the system's answer to Justice Holmes's complaint that the Sherman Act "says nothing about competition" and that insisting on atomistic competition among natural persons would "make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."[41] Holmes had in mind a literalistic fixation on competition as maximizing the number of competitors, such that any contract committing two parties to cooperate rather than to compete would violate the antitrust laws—thus ending all partnerships, corporations, and associations, and with them most of civilization. The answer to this, given later by Brandeis (perhaps ironically), is that an agreement that restricts competition in one way can more than compensate by promoting competition in another way, thus producing a net effect that is "procompetitive."[42] Thus, for example, if two former competitors enter into a partnership that makes them compete more effectively against other firms, they are enhancing and amplifying the market's natural state of competitiveness. They are therefore acting consistently with the antitrust laws. In contrast, if they merely collude to suppress competition, they have violated the law.

The incumbent antitrust order's charter is to protect the state of competition that ostensibly arose organically when Adam Smith's butcher, brewer, and baker looked to their own self-interest to

challenged contracts as thwarting "the natural laws of competition"); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 337 (1897) ("Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life.").

40. *E.g.*, Comcast Corp. v. Behrend, 569 U.S. 27, 37 (2013) (referring to antitrust violations as market "distortions"); Atlantic Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 339 n.8 (1990) ("Every antitrust violation can be assumed to 'disrupt' or 'distort' competition."); Nat'l Collegiate Athletic Ass'n v. Bd of Regents, 468 U.S. 85, 110 n.42 (1984) (accepting Solicitor General's argument that antitrust violations lead to "distorted price"); Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984) (referring to evil of tying arrangements as distortion of freedom of trade and competition); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 408 (1978) (referring to "potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.").

41. Northern Secs. Co. v. United States, 193 U.S. 197, 403, 411 (1904) (Holmes, J., dissenting).

42. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

produce goods in competition with other butcher, brewers, and bakers.[43] It assumes that courts and agencies can identify markets that work according to the natural laws of competition and those that show signs of distortion. Prohibited anticompetitive behavior is that which creates distortions.

B. Institutional Commitments: Judges, Agencies, and Settlements

The second major pillar of the incumbent antitrust order is its institutional commitment to judges, agencies, and settlements as the principal modalities of antitrust enforcement. The most important piece of this is the primacy of judges as expositors of the substance of antitrust law. Although Congress has passed a number of substantive statutes beginning with the Sherman Act in 1890—the Clayton[44] and FTC[45] Acts of 1914, the Robinson-Patman Act of 1936,[46] and the Celler-Kefauver Act[47] of 1950 being the most important ones—over time, the texts of the antitrust statutes have proven relatively unimportant in the substantive specification of antitrust law.[48] With the implicit acquiescence of Congress, the courts have treated the antitrust statutes as delegations of power to create a federal common law of competition with a free hand, constrained, if at all, only by stare decisis.[49] Thus, the "Chicago School" revolution in the courts that began in the 1970s involved a wholesale rewriting of antitrust doctrines by judges based on new economic understanding. Congress simply was not involved. The courts have

43. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 19 (C.J. Bullock ed., P.F. Collier & Son Company 1909) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.").

44. 15 U.S.C. §§ 12–27.

45. 38 Stat. 717, 15 U.S.C. § 45.

46. No. 74–692, 49 Stat. 1526, 15 U.S.C. §§ 13.

47. 64 Stat. 1125, 15 U.S.C. § 18.

48. *See generally*, Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021).

49. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute . . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions." (alteration in original)); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732–33 (1988) (describing Sherman Act adjudication as a common-law process, drawing on pre-Sherman Act common law precedents and dynamic common law); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

even felt free to "write down" or effectively disregard statutes like the Robinson Patman or Celler Kefauver Acts that have relatively determinable meanings when the economic theories embodied in those Acts fell out of favor.[50]

American antitrust's orientation toward judicial supremacy may be contrasted to adjacent areas of economic law in which Congress has played a significant role in recent decades. Copyright law has seen the Music Modernization Act of 2018,[51] the Digital Millennial Copyright Act of 1998,[52] the Copyright Term Extension Act of 1998,[53] and the Copyright Renewal Act of 1992.[54] Patent law has seen the America Invents Act of 2011,[55] the American Inventors Protection Act of 1999,[56] and the Hatch-Waxman Act of 1984.[57] Trademark law has seen the Trademark Dilution Act of 1995,[58] the Anticybersquatting Consumer Protection Act of 1999,[59] and the Trademark Dilution Revision Act of 2006.[60] Securities and financial regulation has seen Private Litigation Securities Reform Act of 1995,[61] the Securities Litigation Uniform Standards Act of 1998,[62] the Sarbanes Oxley Act of 2002,[63] and the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010.[64] Consumer protection law has seen a list of federal acts too long to list, but including at least the Consumer Financial Protection Act of 2010,[65] the Gramm-Leach-Biley Act of 1999,[66] the Identity Theft and Assumption Deterrence Act of 1998,[67] the Video Privacy Protection Act of 1998,[68] and the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994.[69] Antitrust law has seen nothing comparable. The last significant substantive intervention by Congress in antitrust was in 1950.[70] Putting aside the recent sweep of proposed legislation (discussed in Part II),

50. Crane, *supra* note 48, at 1207.
51. Pub. L. No. 115–264, 132 Stat. 3676.
52. Pub. L. No. 105–304, 112 Stat. 2860.
53. Pub. L. No. 105–298, 112 Stat. 2827.
54. Pub. L. No. 102–307, 106 Stat. 264.
55. Pub. L. No. 112–29, 125 Stat. 284.
56. Pub. L. No. 106–113, 113 Stat. 1501.
57. Pub. L. No. 98–417, 98 Stat. 1585.
58. Pub. L. No. 104–98, 109 Stat. 985.
59. Pub. L. No. 106–113, 113 Stat. 1501.
60. Pub. L. No. 109–312, 120 Stat. 1730.
61. Pub. L. No. 104–67, 109 Stat. 737.
62. Pub. L. No. 105–353, 112 Stat. 3227.
63. Pub. L. No. 107–204, 116 Stat. 745.
64. Pub. L. No. 111–203, 124 Stat. 1376.
65. Pub. L. No. 111–203, 124 Stat. 1955.
66. Pub. L. No. 106–102, 113 Stat. 1338.
67. Pub. L. No. 105–318, 112 Stat. 3007.
68. Pub. L. No. 100–618, 102 Stat. 3195.
69. Pub. L. No. 103–297, 108 Stat. 1545.
70. *See* Pub. L. No. 81–899, 64 Stat. 1125.

Congress has effectively communicated that antitrust is judicial property.

One important caveat involving merger enforcement is needed with respect to the judicial supremacy observation. Since 1976, the Hart-Scott-Rodino Act ("HSR") has required parties contemplating most significant mergers to provide pre-merger notification to the Justice Department and FTC and further enables the agencies to delay the merger's closing by issuing a "second request" for information.[71] HSR has largely shifted merger enforcement from a judicially driven practice to an agency-driven one, reflected by the fact that the Supreme Court has not decided a substantive merger case since 1976.[72] Rather than litigating, the merging parties and the antitrust agencies usually engage in a technocratic negotiation over the settlement, with the usual outcomes being satisfaction of any agency concerns over the merger and hence clearance, agreement on structural or conduct remedies to be embodied in a consent decree, or abandonment of the transaction by the merging parties. Few merger cases are litigated to Article III judges.

The DOJ's practice with respect to merger challenges and settlements can be gleaned from a fine parsing of the Antitrust Division's workload statistics. For the period 2010–2019, the Justice Department reported that it "challenged" 186 mergers.[73] Of these, 101 involved complaints filed in federal courts, and another eighty-four involved transactions that were "restructured or abandoned prior to filing a complaint."[74] However, that does not mean that 101 merger cases were actually litigated to judges. Another table in the same statistical compilation shows that, over the same period, the DOJ settled eighty-six merger challenges it filed and voluntarily dismissed its complaint as to another nine.[75] Over that same ten-year period, it only litigated six merger cases to a judicial decision (winning five and losing one).[76]

FTC statistics tell a similar story. For the period 1996–2021, the FTC challenged 432 mergers.[77] Of these, 349 were through negotiated consent decrees, thirteen through administrative complaints, and seventy through requests for preliminary injunction

71. 15 U.S.C. § 18a(e)(2).

72. The last substantive merger decision by the Supreme Court was *United States v. Citizens and S. Nat. Bank*, 422 U.S. 86 (1975).

73. ANTITRUST DIV. U.S. DEP'T OF JUST., ANTITRUST DIV. WORKLOAD STAT. FY 2010 – 2019 4 (2023).

74. *Id.* There is an unexplained discrepancy of one between the 186 total challenges reported and the sum of the 101 filed complaints and eighty-four deals restructured or abandoned without complaint (totaling 185). *Id.*

75. *Id.* at 6.

76. *Id.*

77. *Data Sets*, FTC, https://www.ftc.gov/policy-notices/open-government/data-sets (last visited Apr. 14, 2024).

in federal court.[78] As a percentage of all merger challenges, the FTC involved Article III judges as decision-makers in 16 percent of its cases compared to the Justice Department's six percent,[79] although this discrepancy reflects the difference in time period being measured, including the beginning of the Biden Administration. In the years 2020-21, roughly corresponding with the beginning of the Biden Administration, the FTC challenged twenty-five mergers, settling only thirteen through consent decrees and bringing ten preliminary injunction proceedings and two administrative proceedings, a decided swing in the direction of litigation[80] (discussed further in Part II).

Because so few merger cases have been litigated over the past few decades and the agencies' attitude toward a merger is likely dispositive of the outcome in most cases, the agencies' merger guidelines have become the most important guidepost bearing on the likelihood that a merger will be allowed to close.[81] Hence, merger enforcement is best understood as a bureaucratic practice rather than one primarily mediated by either Congress or the courts.

In sum, the incumbent antitrust order is characterized institutionally by judicial supremacy with respect to the specification of antitrust law, with the exception of merger enforcement, which is largely centered on negotiation between the antitrust agencies and the parties, typically resulting in a consensual settlement.

C. Juridical Approach: Rules, Standards, and Economists

The final pillar of the incumbent antitrust order is the system's preference for open-ended standards over bright-line rules, with the consequence that economists have been elevated as primary actors in determining antitrust issues, both in theory and in practice. The simplest expression of this phenomenon is the diminishing scope of antitrust's rule of per se illegality. Since the early days of antitrust jurisprudence, restraints on competition falling within the scope of Section 1 of the Sherman Act have been categorized into either a per se rule of illegality, in which case the restraint was illegal without consideration of market power, anticompetitive effects, or procompetitive justifications, and a "kitchen sink" rule of reason in which all of the facts concerning the restraint had to be considered and interpreted in order to ascertain its legality.[82] Over the last three

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* Hillary Greene, *Guideline Institutionalization: The Role of the Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 803–09 (2006) (analyzing increasing influence of merger guidelines).

82. *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1500 (2022) (explaining foundational per se rule and rule of reason concepts).

or four decades, the courts have moved many of the practices that were previously subject to per se analysis into the rule of reason. These include non-price vertical restraints,[83] maximum resale price setting,[84] resale price maintenance,[85] and (arguably, at least) tying arrangements.[86] Even as previously per se categories have transitioned to rule of reason analysis, no new per se categories have been created.[87] Further, the courts have limited application of the per se rule even as to existing per se categories by allowing defendants to justify certain practices under a "Quick Look" analysis or re-characterizing literal price fixing arrangements as something other than price fixing because of their plausible efficiency justifications.[88]

Although the shift from per se analysis to the rule of reason is most pronounced under Section 1 of the Sherman Act, the established antitrust order reflects similar values as to the other two major headings of antitrust liability: monopolization claims under Section 2 of the Sherman Act and mergers analyzed under Section 7 of the Clayton Act. Effectively, all Section 2 analysis occurs under a rule of reason that requires the plaintiff to demonstrate market power in a properly defined relevant market and the anticompetitive effects of the challenged behavior, with the defendant free to argue for the procompetitive justifications for the behavior.[89] Similarly, merger analysis passed from a period where anticompetitive effects were presumed based on a comparatively simple analysis of the number of firms in the market and their shares of the market, to much more complex analysis involving economic theory, empirical analysis, and modeling.[90]

83. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 41–42, 51 n.18, 69–70 (1977).

84. State Oil Co. v. Khan, 522 U.S. 3, 12, 15–16 (1997).

85. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007).

86. *See* Daniel A. Crane, *Tying Law for the Digital Age*, 99 NOTRE DAME L. REV. 821 (2023).

87. *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 158–59 (2013) (rejecting FTC's argument that reverse payment patent settlements should be treated as presumptively unlawful and requiring rule of reason analysis instead).

88. *E.g.*, California Dental Ass'n v. FTC, 526 U.S. 756, 759, 763, 769–71, 780 n.15 (1999).

89. *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc) (describing Section 2 analysis as akin to rule of reason); Mid-Texas Communications Sys., Inc. v. Am. Tel. & Tel. Co., 615 F.2d 1372, 1389 n. 13 (5th Cir. 1980) ("It is clear . . . that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied").

90. The Justice Department and FTC's 2010 Horizontal Merger Guidelines, which were largely the product of two academic economists holding the chief economist positions at the Justice Department and FTC, represent a high-water mark for the rejection of formal structural analysis in favor of econometric tools.

The shift toward open-ended rule of reason analysis entailed the ascendency of economists, both as influential on the specification of legal rules to be adopted by courts and as star witnesses in cases litigated before courts, or, in merger cases, negotiated between the agencies and the parties. On the specification of legal rules, the influence of economic theory has become increasingly pronounced, as manifested by citations to economists' work in judicial decisions. Consider the progression in citation to economic theory in three important antitrust decisions of the last decades. In *Brooke Grp, Ltd. v. Brown & Williamson Tobacco Corp.*[91] in 1993, the Supreme Court cited academic work by economists about ten times; in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*[92] in 2007, it cited economists' academic work over twenty times; and in *Ohio v. American Express Co.*[93] in 2018, it cited economists' work over forty-five times. Indeed, it is fair to say that *American Express* reads as much like an economics article as a legal opinion.

If economists' academic work is influential in legal opinions, the participation of economists as expert witnesses or consultants is critical in antitrust litigation and agency merger review.[94] On the government side, the antitrust agencies have moved from being staffed entirely by lawyers to employing significant numbers of economists. The Justice Department did not hire its first economist until 1936,[95] and economists played a relatively small role at the Antitrust Division until the 1970s.[96] Today, however, the Justice Department typically employs fifty to sixty PhD economists, about one for every six lawyers it employs.[97] The FTC typically employs about eighty PhD economists (although some of them support the

See Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, ANTITRUST L.J. 49, 55 (2010).

91. Brooke Grp, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

92. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

93. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

94. *See generally* MARC A. EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE (1991); JOHN E. KWOKA JR. & LAWRENCE J. WHITE, THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY (3d ed. 1999).

95. R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 ALB. L. REV. 787, 791 n.12 (2005).

96. Lawrence J. White, *The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion* 9 (NYU Law & Econ. Rsch. Paper Series, Working Paper No. 08–07, 2008).

97. *Antitrust Division (ATR),* DOJ, https://www.justice.gov/file/1489426/download (last visited Feb. 19, 2024); *Expert Analyst Group,* DOJ, https://www.justice.gov/atr/expert-analysis-group (last visited Apr. 14, 2024).

FTC's consumer protection function).[98] Both agencies employ a chief economist who is typically a leading academic with significant prestige and influence in the organization. On the private side, the shift toward economically minded rule of reason analysis has spurred the creation of an economist industrial complex, with large consulting groups organized similarly to law firms employing hundreds of economists to work on antitrust matters.[99] In-house lawyers in antitrust cases have come to learn that their economist fees may approach their legal fees and have come to see their choice of expert economists and economic consulting groups as nearly as consequential as their choice of law firms and lawyers.

An apt illustration of the centrality of economists in the incumbent antitrust order appears in the Justice Department's unsuccessful challenge to AT&T's acquisition of Time Warner.[100] The trial and appeal played out as a contest between the government's expert, the Berkeley economist and former Deputy Assistant Attorney General for Antitrust Carl Shapiro, and the University of Chicago and former Deputy Assistant Attorney General for Antitrust, Dennis Carlton. The decision in the case seemed to come down to whether Shapiro's argument that the merger would increase Turner Broadcasting's bargaining leverage under a Nash equilibrium model or Carlton's empirical disputation of the applicability of this theory to the facts was more persuasive.[101] Between them, the district court and D.C. Circuit opinions cited Shapiro and Carlton's opinions over ninety times, about as often as they cited case law.[102]

In sum, the incumbent antitrust order is characterized by a preference for open-ended, fact-specific rule of reason analysis in which economic theory and evidence is prioritized. This orientation implies, and has produced, the growth of an economist class within the antitrust profession on par in prestige and influence with the lawyer class.

98. *Economist Recruiting*, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/careers-ftc-bureau-economics (last visited Apr. 14, 2024).

99. A search on the websites of just two of the larger economic consulting groups—Charles River Associates and Compass Lexecon, located over 500 economists offered to provide expert assistance on antitrust matters. *Our Professionals*, COMPASS LEXECON, https://www.compasslexecon.com/all-professionals/?fwp_professional_services=8593%2C8596%2C581 (last visited Apr. 14, 2024); *Our People*, CHARLES RIVER ASSOCS., https://www.crai.com/our-people/?page=1&sort=role&service=765 (last visited Apr. 14, 2024).

100. United States v. AT&T, Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

101. *AT&T*, 310 F. Supp. at 187, 201.

102. *AT&T*, 916 F.3d at 1029.

II. THE RADICAL CHALLENGE

A. First Principles: Law and Political Economy

As explained in Part I.A, the contest over first principles between the incumbent antitrust order and its radical challenger plays out at two levels. At a superficial level, there is an ongoing debate over whether Bork's consumer welfare standard should be retained. This is largely a distraction since nothing like Bork's proposed consumer welfare standard has actually been adopted by the courts or antitrust agencies. When it is understood that antitrust's actual organizing principle is a nominal commitment to competition as the underlying driver of our economy (whether or not current antitrust doctrines and practices actually advance that commitment) many of the proposed alternatives to consumer welfare would not seem to change much at all. Many reformists argue for some version of a standard that would protect competition, which simply restates antitrust's existing core commitment. For example, former White House antitrust czar Tim Wu has proposed a "competitive process" standard that would protect competitive processes "as opposed to trying to achieve welfare outcomes[.]"[103] Marshall Steinbaum and Maurice Stucke have proposed an "effective competition standard," that would seek to "promote competition wherever in the economy it has been compromised[.]"[104] Common to both of these proposals is a commitment to preserving competition. Although the authors of these proposals might go about protecting competition differently than incumbent antitrust attempts to do and with different results, they are existentially aligned with the nominal first principle of the incumbent antitrust order.

But there is another challenge to antitrust's first principles that is less conspicuous but more consequential because it does not accept competition as an unalloyed good and would have antitrust do something quite different than promoting competition as a general matter. This is the assertion associated with the rising law and political economy ("LPE") movement that the foundational fault with the incumbent antitrust order is its acceptance of markets as natural, pre-political, and morally neutral. At its core, this argument attacks the very premise that competition—or, at least competition as classically understood in American antitrust law—is unimpeachably desirable. It is that assault on antitrust as a pro-competition policy that marks the challenge as radical.

103. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (April 2018), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf.

104. Steinbaum & Stucke, *supra* note 29, at 595.

A good jumping off point to understanding this element of the radical challenge is a book review of Tim Wu's *The Curse of Bigness* written by Lina Khan shortly before she assumed her post as Chair of the FTC.[105] Clearly sympathetic to Wu's critique of Chicago School antitrust and about to assume a senior post in the same political administration as Wu, Khan echoes and buttresses Wu's three central claims: "(1) that antitrust and antimonopoly are central to America's political tradition and critical safeguards of a democratic republic . . . ; (2) that the structure of our economy inextricably shapes our experience as citizens . . . ; and (3) that the decades-long project to defang antitrust is the product of an intellectual revolution that redefined how we assess competition through adopting "consumer welfare' as the law's only goal."[106] Khan then observes that the failures of incumbent antitrust documented by Wu "have created an opening for Neo-Brandeisian scholars to revisit foundational questions and make the case for recovering an approach to antitrust that is rooted in its antimonopoly values."[107] Rather than simply arguing for "technical fixes" to the antitrust order, Neo-Brandeisianism has an opportunity to offer "an alternative normative vision of what the law stands for[.]"[108] Given that Khan is sympathetically reviewing Wu, and that Wu offers just such an alternative normative vision—the aforementioned competitive process standard—here would be the moment for Khan to say whether Wu's alternative vision meets with her approval, or whether she has something different in mind. But she doesn't. Instead, she moves back into attack mode—this time against "post-Chicagoan scholars" who largely accept Chicago's normative vision but critique its application.[109] Then, at the end of the review, Khan summarizes her view by again giving Wu credit for contributing "to a public conversation about the risks of extreme economic concentration and the need to recover the antimonopoly philosophy of thinkers like Justice Brandeis[,]" before adding the critical pitch—that the conversation to which Wu has contributed "is taking place against the backdrop of a broader 'law and political economy' movement that is interrogating how laws that structure markets and our economy can be reconstituted to promote egalitarian and democratic ends."[110] This LPE movement is broader than antitrust, and includes areas like labor law, public utility regulation, and "public options," all of which

105. Khan, *supra* note 9 (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)).

106. *Id.* at 1658–59 (citations omitted).

107. *Id.* at 1676.

108. *Id.*

109. *Id.* at 1677.

110. *Id.* at 1681.

are necessary to achieving the wider "antimonopoly goals of rebalancing power and checking private domination."[111]

Khan first advanced the idea that antitrust law and anti-monopoly more generally should concern itself primarily with allocation of power and preventing domination in an article co-authored with another prominent neo-Brandeisian, Zephyr Teachout, written before Khan began law school.[112] Khan and Teachout argued that "in highly concentrated markets a few dominant companies can assume enough power to restrain, and even control, the actions of others[,]"[113] and created a taxonomy of forms of anti-democratic private governance through market power. They argued that when economic power is unduly concentrated, it causes citizens to be unduly dominated in ways that inhibit them from "exhibiting and modeling the vibrant sense of self that is required for true self-government."[114] The underlying premise of Khan and Teachout's anti-domination argument was the assertion that "[m]arket structure is deeply political" and that "corporate structure is [] political because it inscribes what we can and cannot do, and hence imposes on citizens a form of private governance unaccountable to the public."[115] Implicitly, the core fault of the incumbent order is its failure to acknowledge that markets are politically created and hence, the system's denial of responsibility for the existing allocation of social and economic power and its failure to restructure markets in order to rebalance power.

This challenge to the law's naturalization of markets lies at the core of the LPE movement that Khan endorsed as key to her vision for antitrust. While the argument that classical liberal thought tends to naturalize markets is not new,[116] a key goal of the LPE movement is to denaturalize markets, firms, and competition, particularly with respect to antitrust and anti-monopoly. Thus, in an influential framing article for the LPE movement, Jedediah Britton-Purdy, David Grewal, Amy Kapczinski, and Sabeel Rahman cite antitrust as example of a legal field "shaped by the depoliticization and

111. *Id.* at 1682. Former FTC Commissioner Christine Wilson argues that the neo-Brandeisan world view is Marxist. Christine S. Wilson & Adam S. Cella, *Deconstructing the Worldview of the Neo-Brandeisians Through Marxism and Critical Legal Studies*, 29 GEO. MASON L. REV. 961, 967–71 (2022). My goal in this article is not to deconstruct the radical challengers ideologically but rather to analyze the effects of their agenda on the terms on which it is offered.

112. Teachout & Khan, *supra* note 8.

113. *Id.* at 37.

114. *Id.* at 60.

115. *Id.* at 37.

116. *See,* e.g., BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF THE NATURAL ORDER 32, 102 (2011) (arguing that the eighteenth-century discourse concerning free markets tended to naturalize markets as a realm of natural liberty).

naturalization of market-mediated inequalities."[117] Sanjukta Paul critiques antitrust law for "naturalizing the coordination embodied in hierarchically organized business firms[.]"[118] Sandeep Vaheesan wishes to call attention to the ways in which the "regulation of state-enabled markets makes antitrust inherently political."[119] Elettra Bietti argues that "neoclassical economic thinking in U.S. antitrust law, has had the distinctive effect of obscuring the social dimensions of digital markets, naturalizing the purported separability between markets and politics."[120]

The denaturalization of markets entails the denaturalization of the competition that markets are assumed spontaneously to produce, and hence presents an existential challenge to the incumbent antitrust order's commitment to competition as an unalloyed good. Several scholars associated with the LPE movement have made explicit their rejection of competition as antitrust's ordering principle. On the LPE Project website, Sanjukta Paul argues that a "root and branch reconstruction" of antitrust requires acknowledging that "[p]romoting competition . . . is incomplete as a goal of law because it fails to account for the fact that antitrust law (and law more generally) is always choosing among forms of economic coordination, always allocating economic coordination rights."[121] In a brief essay published in *Law and Inequality*, Sandeep Vaheesan argues that "competition can be socially corrosive and wasteful."[122] He observes that "[w]hile reinvigorating competition between large corporations would transfer power and wealth from big business to consumers, workers, small businesses, and citizens, a *general* promotion of competition would not have salutary effects."[123] He gives as examples of sectors in which competition should not be promoted infrastructure services that are natural monopolies, labor markets, and competition between political entities.[124]

The conceptual skirmishing over the incumbent order's naturalization of markets and competition takes concrete form with

117. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1790 (2020).

118. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 382 (2020).

119. Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L. J. 980, 986 (2018).

120. Elettra Bietti, *Self-Regulating Platforms and Antitrust Justice*, 101 TEX. L. REV. 165, 177 (2022).

121. Sanjukta Paul, *Root and Branch Reconstruction in Antitrust: A Symposium*, LPE PROJECT (Apr. 4, 2022), https://lpeproject.org/blog/root-and-branch-reconstruction-in-antitrust-a-symposium.

122. Sandeep Vaheesan, *Competition Can Be Socially Corrosive and Wasteful*, 37 MINN. J. L. & INEQ. 143, 143 (2019).

123. *Id.* at 144.

124. *Id.* at 144–47.

respect to antitrust law's treatment of labor. Much of the recent conversation over antitrust reform has focused on CWS's supposed failure to protect labor interests as though this were an aggregated problem, when there are, in fact, two very different questions at play. One is whether antitrust law has done enough to protect workers from labor monopsony power held by employers.[125] That question can be addressed in conventional harm to competition terms—more competition among employers means less monopsony or oligopsony power and hence higher wages and better terms for employees. But the other side of the coin—whether antitrust law is *too aggressive* in policing worker organizations or agreements—presents exactly the opposite perspective on the value of competition. Whereas competition among employers may increase worker welfare, competition among workers tends to diminish it—an observation made long ago by Marx.[126] If antitrust law is dedicated to protecting competition as the natural state of markets, it will at best unevenly serve the anti-domination goal of structuring markets to produce the desired redistribution of wealth in favor of workers.

The consequences for labor of antitrust's commitment to preserving spontaneous market competition as its prime directive can be seen in the differing treatment accorded to corporations and labor unions or other worker organizations. In principle, corporations can be formed or merged only when doing so preserves or intensifies the competition that would exist in an atomistic market of individual persons. Thus, corporate mergers are lawful when they amplify a market's natural competitive state and unlawful when they impair or diminish competition. The same cannot be said for labor unions, whose purpose is not to amplify the competition among workers but, quite the opposite, to ensure that wage competition does drive wages below acceptable levels. For this reason, antitrust law has long targeted labor unions as akin to cartels, and it took multiple interventions by Congress to remove union bargaining from the scope of the antitrust laws.[127] Outside of the statutory and non-statutory labor exemptions recognized by the courts, worker efforts to exercise collective power against employers—particularly in the independent contractor gig economy—face continued hostility from antitrust law.[128]

125. ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 30 (2021).

126. KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 65–67 (Dirk J. Struik ed., Martin Milligan trans., Int'l Publishers 1964) (explaining how wage competition drives workers to accept subsistence wages).

127. *See* Crane, *supra* note 48, at 1223–26.

128. *See* Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 45–46 (2019) (arguing that, even as antitrust law has empowered gig economy platforms to obtain market power, it has prevented "subordinates from coordinating among themselves to strengthen

The LPE critique of incumbent antitrust would call all of this, and more, into question. If markets are understood as politically constructed, then competition itself is a political creation rather than a spontaneous action or natural state. The goal of antitrust should not be to preserve or strengthen competition for its own sake but to structure (or replace) markets in order to achieve a desirable distribution of social and economic power. Sometimes that may require structuring markets to encourage competition between particular actors, at other times that may require structuring markets to make sure that other actors do *not* compete, and at still other times it might require eliminating markets (and hence competition) entirely in favor of some other mode of economic organization. Competition would become just one lever available to antitrust enforcers, one to either push or pull in order to achieve desired results.

Outside the United States, antitrust law is generally known as "competition law," reflecting antitrust's existing orientation toward the pursuit of competition. The radical challenge to the antitrust order calls this orientation into question. Rather than competition, the radical challengers are concerned with power. If they are successful, what was previously known as competition law may become known as "power law."

B. Institutional Commitments: Congress, Agencies, and Trials

There is clearly a great deal of dissatisfaction among reformers with the antitrust doctrines created by the courts in recent decades. The political class, in particular, has made a point of excoriating the Supreme Court for creating monopoly-friendly antitrust doctrines. For example, Senator Amy Klobuchar's book on antitrust argues as a primary theme that "conservative U.S. Supreme Court decisions have taken antitrust law further and further from its original congressional intent."[129] Senator Elizabeth Warren and Representative Mondaire Jones have introduced legislation that would strip the Supreme Court of jurisdiction over merger appeals,[130] a curious proposal given that the Supreme Court has not decided a

their own hand in negotiations"); Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1547 (2018) (explaining that antitrust prohibits collective organization by gig economy workers to bargain with the gig platforms).

129. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE xiii (2021).

130. *Warren, Jones Introduce Bicameral Legislation to Ban Anticompetitive Mergers, Restore Competition, and Bring Down Prices for Consumers*, ELIZABETH WARREN (Mar. 16, 2022), https://www.warren.senate.gov/newsroom/press-releases/warren-jones-introduce-bicameral-legislation-to-ban-anticompetitive-mergers-restore-competition-and-bring-down-prices-for-consumers.

merger case in nearly fifty years[131] but one that accentuates the suspicion that the Court cannot be trusted on antitrust matters.

The attack on the judiciary is not limited to criticism of the courts' current jurisprudence and arguments for its replacement with new doctrines by persuading courts that their former views were wrong—the path followed by the Chicago School with dramatic success in the 1970s forward. Proponents of radical reform see a need to overturn not just particular legal doctrines or cases created by the courts, but the privileged place of the judiciary when it comes to the creation of antitrust law and the common law mode of antitrust decision-making. Lina Khan argues that "an antitrust system where legal rules are devised exclusively by Article III judges who approach antitrust as a domain of 'law made by judges as they see fit' bears signs of democratic illegitimacy" and that "exclusive reliance on case-by-case adjudication has yielded a system of antitrust rules that is unpredictable and indeterminate, undermining traditional rule-of-law principles."[132] Similarly, Sanjukta Paul argues that the "contemporary form of judicial primacy in antitrust is both historically distinctive and has been closely bound up with a particular set of substantive views about markets and regulation."[133] Like Khan, Paul envisions an institutional transition as key to the success of antitrust reform.

If judges are no longer going to be the primary formulators of antitrust rules and doctrines, then who is? The obvious answer is Congress, which has been largely out of the picture since 1950. The sheer volume of antitrust bills pending in Congress[134] and their aggressivity in overturning existing doctrines[135] suggest a potential legislative path to undoing the Chicago Revolution in the courts. State legislatures also seem to be waking up to the possibility of antitrust reform, for example with a bill in the New York legislature

131. JAY B. SYKES, CONG. RSCH. SERV., ANTITRUST REFORM AND BIG TECH FIRMS 18 n.176 (2023).

132. Khan, *supra* note 9, at 1679.

133. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 242 (2021).

134. *See supra* note 3.

135. For example, Senator Klobuchar's Competition and Antitrust Law Enforcement Act would change the standard of predictive harm in mergers from "substantially" to "materially," shift the burden of proof to the merging parties in cases involving significant increases in market concentration, acquisitions of nascent competitors, or deals values at more than $5 billion and would create new liability for "exclusionary conduct" that has "an appreciable risk of harming competition." Allen Grunes & William Moschella, *The Competition and Antitrust Law Enforcement Reform Act: Section-by-Section Analysis*, BROWNSTEIN (Feb. 22, 2021), https://www.bhfs.com/insights/alerts-articles/2021/the-competition-and-antitrust-law-enforcement-reform-act-section-by-section-analysis.

that would align New York law with European abuse of dominance standards.[136]

Although new legislation might fix perceived doctrinal flaws in contemporary antitrust and, for the moment, relieve judges of their supremacy in antitrust norm creation, it would not necessarily achieve the institutional goals of the radical challengers. Unless Congress changes its historical course and becomes committed to frequent reengagement with substantive antitrust law of the kind that it performs in other areas of economic policy,[137] the present moment of antitrust political saliency may turn out to be a hundred-year flood, followed by the resumption of business as usual, i.e., judicial supremacy. Further, given that the courts have gradually "read down" prior antitrust reform statutes like the Clayton, FTC, Robinson Patman, and Celler Kefauver Acts to align with the courts' common-law-rendered antitrust policies,[138] any doctrinal reforms achieved through new legislation may soon begin to erode.

Perhaps understanding that legislative reforms are neither certain nor durable, the radical challengers are focusing considerable attention on another institution with the potential ability to engage in a more sustained challenge to judicial supremacy: the FTC. In particular, the challengers argue that the FTC should engage in substantive antitrust rulemaking under Section 5 of the FTC Act. Former FTC Commissioner (and current Consumer Financial Protection Bureau Director) Rohit Chopra and current Chair Lina Khan argue that an antidote to the fact that "antitrust today . . . is developed entirely through adjudication" is for the FTC to engage in substantive antitrust rulemaking in order to "lower enforcement costs, reduce ambiguity, and facilitate greater democratic participation."[139] Sanjukta Paul similarly argues that FTC rulemaking "can improve the substance of the rules themselves."[140] President Biden's July 2021 Executive Order on Promoting Competition in the American Economy[141] ordered a number of executive agencies, including the Department of Agriculture, the Treasury Department, the Department of Transportation, the Department of Health and Human Services, the Department of Commerce, and the Department of Defense, to engage in pro-competition rulemaking. Likewise, the Executive Order "encouraged" the FTC to engage in substantive antitrust rulemaking with respect to labor non-compete agreements, unfair data collection and surveillance, restrictions on right of repair, anticompetitive

136. S. Res S933C, 2021 Sess. (N.Y. 2021).

137. *See supra* notes 6–9.

138. Crane, *Antitrust Antitextualism*, *supra* note 48, at 1215–16.

139. Robit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 357 (2020).

140. Paul, *supra* note 133, at 250.

141. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

agreements delaying generic drugs, unfair competition in Internet marketplaces, unfair occupational licensing restrictions, tying agreements or exclusionary practices in real estate, and "any other unfair industry-specific practices that substantially inhibit competition."[142]

The FTC took a first step toward this new rule-making role in January of 2023, when it released a Notice of Proposed Rulemaking ("NPRM") that would ban most non-compete clauses in labor or employment agreements.[143] If the non-compete NPRM serves as a statement of intent with respect to the FTC's new institutional role, then the gauntlet has clearly been thrown down to judicial supremacy. The proposed role would not only render immediately illegal 30 million existing contracts,[144] but it would supersede hundreds of years of judicial common law precedent in which non-compete agreements were scrutinized under a rule of reason.[145] The NPRM is not only a challenge to particular doctrines concerning covenants not to compete but to the very process of judges deciding whether contested covenants not to compete are lawful or not. If it is a sign of things to come, the NPRM represents a significant institutional shift, not only in the FTC issuing rules, but it doing so in a way that cuts out judges from playing a role that for centuries they have played.

FTC rulemaking would curtail the role of judges by moving from an adjudicatory to a legislative model, but other bypasses of the judiciary also seem to be in the works. Judges are not the only institutional players behind the courtroom bar. Juries sit there too, and none of the perceived infirmities of incumbent antitrust doctrine or decision can be thrown at the feet of jurors. But while jurors nominally have a role to play in private damages cases and criminal cartel cases, they have no evident role to play in government cases to block mergers or enjoin anticompetitive practices, since such cases

142. *Id.*

143. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

144. Eugene Scalia, *The FTC's Breathtaking Power Grab Over Non-Compete Agreements*, WALL ST. J. (Jan. 12, 2023, 6:50 PM), https://www.wsj.com/articles/the-ftcs-breathtaking-power-grab-noncompete-agreements-rule-capital-investment-wage-gap-job-growth-compliance-11673546029.

145. The English common law on non-compete agreements goes back to at least the early fifteenth century. *See Dyer's Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414); *see* Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461, 475 (1989) (reporting that Dyer's case was first reported English case on covenants not to compete). The principle that covenants not to compete are governed by a rule of reason goes back to at least the eighteenth century. Mitchel v. Reynolds, 24 Eng. Rep. 347, 348 (Q.B. 1711).

are equitable. Thus, for example, if the FTC or Justice Department sue to break up Facebook or Google, they will be stuck with a bench trial before an Article III judge subject to the pro-monopoly prejudices, or at least stuck with the pro-monopoly doctrines, of which the radical challengers complain.

But not if they can get to a jury instead, and the Justice Department at least seems to be trying. Its January 2023 lawsuit against the Google with respect to its AdTech practices—a case in which the government seeks the extraordinary remedy of breaking up Google's AdTech empire—includes a demand for a jury trial.[146] The government apparently predicates its jury demand on the fact that it is claiming damages on behalf of the federal government. Although the government does have a statutory right to seek damages[147] and has occasionally done so in the past, requesting a jury trial in such cases represents a break with precedent. In almost all previous occasions that the United States has sought damages for antitrust injuries to the federal government, it has contented itself with a bench trial.[148] Putting aside the doubtful question of whether the United States itself has a right to a jury trial in antitrust cases, there can be little doubt about the interpretation of the government's demand. Unlike the FTC, the Justice Department cannot dodge judges by

146. *See* Complaint at 140–41, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023), https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc-2023 (demanding "divestiture of, at minimum, the Google Ad Manager suite, including both Google's publisher ad server, DFP, and Google's ad exchange, AdX, along with any additional structural relief as needed to cure any anticompetitive harm.").

147. 15 U.S.C. § 15a.

148. Complaint, United States v. Bekaert Steel, No. B-85-3879 (D. Md. Sept. 12, 1985); Complaint, United States v. Alliant Techsystems Inc., No. 94-1026 (C.D. Ill. Jan. 19, 1994); Complaint, United States v. SG Interests I, Ltd., No. 1:12-cv-00395-RPM (D. Colo. Feb. 15, 2012); Complaint, United States v. Pfizer, Inc., No. 4-71 Civ. 403 (D. Minn. May 30, 1974); Complaint, United States v. Azzarelli Const. Co., No. 79-3178 (C.D. Ill. July 27, 1979); Complaint, United States v. Borden, Inc., No. 74-560-PHX-CAM (D. Ariz. Aug. 16, 1974); Complaint, United States v. Champion, Int'l Corp., No. 74-698 (D. Or. Sept. 6, 1974); Complaint, United States v. Gypsum Co., No. C-71-2467-AJZ (N.D. Cal. Dec. 30, 1971); Complaint, United States v. Jier Shin Korea Co., No. 2:20-cv-1778 (S.D. Ohio Apr. 8, 2020); Complaint, United States v. Brighton Building & Maint. Co., No. 79-C-1816 (N.D. Ill. May 4, 1979); Complaint, United States v. Hyuandai Oilbank Co., No. 2:19-cv-1037 (S.D. Ohio Mar. 20, 2019); Complaint, United States v. CS Caltex Corp., No. 2:18-cv-1456 (S.D. Ohio Nov. 14, 2018); Complaint, United States v. West Gulf Mar. Ass'n, No. H-84-1941 (D. Md. May 10, 1984); Complaint, United States v. North Dakota Hosp. Ass'n, No. 82-83-131, (D.N.D. Aug. 25, 1983); Complaint, United States v. Armco Steel Corp., No. 73-H-1427 (S.D. Tex. Apr. 30, 1974); Complaint, United States v. RMI Co., No. 81-4177 (E.D.N.Y. Dec. 30, 1981); Complaint, United States v. Alton Box Board Co., No. 76 C 1638 (N.D. Ill. Apr. 30, 1976).

going up the chain to rule-making, but it may be able to dodge them by going down the chain to juries.

The radical challengers clearly seek to reduce the role of judges, but recall that courts play a relatively small role when it comes to mergers, where bureaucratic process resulting in settlement between the agencies and merging parties is the customary practice.[149] Here too, the challengers have designs on a significant institutional rearrangement. At the FTC, Lina Khan has "has signaled she wants to take more lawsuits to court — instead of settling with companies — to push the boundaries of antitrust law and return to the kind of trustbusting not seen since the last century."[150] Khan has taken the position that there is a benefit to challenging "law violations" "that the current law might make it difficult to reach."[151] As noted earlier, the preliminary statistics showing that the Biden FTC is choosing to litigate far more merger challenges than the agency historically did.[152]

The reformers' antipathy to settlement is even more pronounced at the Justice Department, where Assistant Attorney General Jonathan Kanter has made clear his opposition to the routine practice of settling cases rather than litigating. In testimony to Congress, Kanter stated that he is "committed to bringing difficult cases" and that "the Antitrust Division is building a team of litigators that are ready for the challenge."[153] Kanter has bluntly stated that he is interested in "pursuing remedies—not settlements."[154] Reflecting these views, the Justice Department has shied away from consent

149. *See supra* Part I.B.

150. David McCabe, Cecilia Kang & Karen Weise, *Lina Khan, Aiming to Block Microsoft's Activision Deal, Faces a Challenge*, N.Y. TIMES (Dec. 9, 2022), https://www.nytimes.com/2022/12/09/technology/lina-khan-ftc-microsoft-activision.html.

151. David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html.

152. *See supra* text accompanying notes 79–80.

153. Jonathan Kanter, Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights 4 (Sept. 20, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

154. Jonathan Kanter, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section 6 (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york; *see also* Josh Sisco, *DOJ Probing Live Nation and Ticketmaster for Antitrust Violations*, POLITICO (Nov. 18, 2022, 6:28 PM), https://www.politico.com/news/2022/11/18/live-nation-ticketmaster-antitrust-violations-taylor-swift-00069564 ("Assistant Attorney General Jonathan Kanter, who heads up the DOJ's antitrust division, has said repeatedly that he prefers to litigate rather than settle enforcement actions").

decrees in merger cases, instead pursuing an aggressive litigation agenda. The Antitrust Division entered into a merger consent decree on November 12, 2021,[155] four days before Kanter was confirmed as Assistant Attorney General. It then pursued a string of seven merger challenges, none of them involving a settlement or consent decree, before finally settling a merger through consent decree in September 2023.[156]

The radical challengers seek to displace courts and their common law antitrust decision making but also the bureaucratic and technocratic modality that has characterized merger review, and much of public antitrust enforcement more generally, for decades. In its place, they would substitute legislation, agency rulemaking, juries, and law-generating litigation.

C. Juridical Approach: Rules, Regulators, and Lawyers

Finally, the radical challengers dispute the incumbent order's preference for open-ended rule of reason analysis over bright-line rules. They complain that the shift to the rule of reason has increased the complexity of antitrust enforcement and dramatically reduced its potency, thus enabling the consolidation of economic power. Thus, Rohit Chopra and Lina Khan argue that the "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct" that "calls for 'speculative, possibly labyrinthine, and unnecessary' analysis and appears to exceed the abilities of even the most capable institutional actors" and "deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system."[157] Khan and Sandeep Vaheesan argue that "[t]he shift from per se rules and presumptions to the rule of reason and other standards-based tests has dramatically undercut antitrust enforcement."[158] Writing on her own, Khan has argued that "the heightened role of economic expertise" from implementing the rule of reason has "rendered the law unpredictable and indeterminate."[159] Elsewhere, she has argued that the rule of reason approach to exclusionary conduct cases is unlikely to permit effective policing of innovation-based harms in dominant online platforms, which

155. Proposed Final Judgment, United States v. S&P Global, Inc., No. 1:21-cv-03003 (D.D.C. Nov. 12, 2021).

156. Final Judgment, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. Sept. 13, 2023).

157. Chopra & Khan, *supra* note 139, at 359–60 (citing Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 87 (2010)).

158. Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 274 (2017).

159. Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. 960, 973 (2018).

suggests the need for bright-line rules requiring the separation of platforms and commerce.[160] Over at the Justice Department, Assistant Attorney General Jonathan Kanter has argued that "[t]oo often, we have treated the test for illegality as essentially a rule of reason balancing framework, limited to models that attempt to concretely predict the precise effects of a merger on prices."[161]

Since the radical challengers currently hold the reins of the federal antitrust agencies but not the courts, their immediate project has been to articulate new enforcement approaches that would shift legal standards back in the direction of bright-line rules. Movements in this direction have already occurred at both the FTC and Antitrust Division.

At the FTC, the most conspicuous example of the rejection of the rule of reason in favor of a more rule-bound approach appears in the Commission's policy guidance with respect to enforcement of the "unfair methods of competition" ("UMC") prong of Section 5 of the FTC Act.[162] In a nutshell, the backstory is this: The Supreme Court has long held that Section 5's UMC prohibition covers at least anything that is also illegal under Sections 1 and 2 of the Sherman Act but also something more.[163] In the 1980s, stung by a string of judicial defeats, the FTC largely abandoned the project of articulating a penumbral reach of UMC beyond the Sherman Act and fell back to enforcing UMC as co-extensive with the Sherman Act.[164] However, beginning just over a decade ago, there was renewed interest in enforcing an independent UMC standard. Partisan skirmishing over what that might look like appeared to be resolved in 2015 when the Obama FTC, with the support of the minority Republican commissioners, released a Statement of Enforcement Principles regarding UMC.[165] In a statement that seemed entirely uncontroversial at the time—not only given its bi-partisan nature and its consistency with the state of the law in the courts—the

160. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1031 (2019).

161. Assistant Attorney General Jonathan Kanter, Keynote Speech at Georgetown Antitrust Law Symposium (September 13, 2022).

162. 15 U.S.C. § 45(a)(1).

163. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (holding that "[t]he standard of 'unfairness' under the FTC Act . . . encompass[es] not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons"); FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966) (holding that the FTC may go further than the reach of the Sherman Act and "stop in their incipiency acts and practices which, when full blown, would violate those Acts" (quoting FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953))).

164. DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 135–41 (2011).

165. Policy Statement, FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015).

Commission announced as one of its three principles that UMC would proceed under the rule of reason.[166]

The 2015 Statement stood for the remainder of the Obama Administration and throughout the Trump Administration, but it was one of the first antitrust casualties of the Biden Administration. Lina Khan was confirmed as FTC Chair on June 15, 2021.[167] On July 9, 2021, over the dissent of the two Republican commissioners, the FTC issued a statement withdrawing the 2015 statement.[168] The withdrawal Statement left no doubt that the challengers viewed rule of reason analysis as a prime culprit in the timidity of current antitrust law. It asserted that:

> [B]y subjecting Section 5 to a framework similar to the rule of reason, the Commission hamstrings its enforcement mission with an approach that poses significant administrability concerns. The current iteration of the rule of reason invites courts to assess whether particular business conduct is 'unreasonable,' including through determining whether the 'procompetitive' effects of the conduct outweigh any "anticompetitive" effects. Famously unwieldy, the standard leads to soaring enforcement costs, risks inconsistent outcomes, and has been decried by judges as unadministrable or exceedingly difficult to meet.[169]

On November 10, 2022, the FTC released its new UMC Policy Statement.[170] Unsurprisingly, the Commission explicitly rejected a rule of reason approach to UMC enforcement, observing that "given the distinctive goals of Section 5, the inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."[171] Although allowing that consideration of a firm's market power, anticompetitive effects, and procompetitive justifications might be required in some cases, the 2022 Statement

166. *Id.* ("[T]he act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.").

167. PN254 – Lina M. Khan – Federal Trade Commission, CONGRESS.GOV, https://www.congress.gov/nomination/117th-congress/254 (last visited Apr. 14, 2024).

168. Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, FTC (July 9, 2021).

169. *Id.*

170. Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC (Nov. 10, 2022).

171. *Id.*

contemplates circumstances when conduct should be deemed "unfair" without elaborate inquiry into its actual effects on competition.[172] In other words, the FTC proposes an approach to UMC enforcement in which categories of competitive behavior that are not illegal at all under the Sherman Act are something approaching per se illegal under the FTC Act. This would mark a dramatic change from incumbent antitrust, shifting behavior that had not been challenged at all for many decades—or perhaps ever at all—straight into per se condemnation.

Unlike the FTC, the Justice Department has neither (arguable) rule-making power nor a special antitrust statute to enforce, but it does have one unique capacity with which to make the case for a return to per se rules: criminal enforcement. In recent decades, the Antitrust Division has brought criminal prosecutions in only the one remaining area of per se illegality—cartel agreements that violate Section 1 of the Sherman Act.[173] Since the 1970s, it has abandoned the practice of bringing criminal cases for violations of Section 2 of the Sherman Act,[174] where a rule of reason applies.[175] That is, until the radical challenge. In early 2022, the new leadership of the Antitrust Division made waves by announcing that it would consider bringing criminal cases under Section 2.[176] Then, in September of 2022, it followed through by bringing the first indictment for Section 2 violations since 1977.[177]

To be sure, the return to criminal Section 2 enforcement is not exactly synonymous with an effort to revive per se illegality. The Supreme Court has held that there is no bar to bringing criminal prosecutions under the rule of reason.[178] However, as a matter of practice, the Justice Department has restricted criminal enforcement of the Sherman Act to practices on which it could bring a per se claim.[179] It is difficult to imagine that a jury could find beyond a reasonable doubt that the government had proven a properly drawn relevant market, monopoly power, anticompetitive effects, and the absence of efficiency justifications—all elements of a rule of reason

172. *Id.* ("Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions.").

173. Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment*, 84 ANTITRUST L.J. 753, 755 (2022).

174. *Id.* at 754, 762.

175. *See* United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (outlining rule of reason approach for monopolization claims).

176. Crane, *supra* note 173, at 753.

177. Press Release, Office of Public Affairs U.S. DOJ, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022); *see also* Crane, *supra* note 173, at 755 (reporting that DOJ brought last criminal Section 2 case in 1977).

178. United States v. United States Gypsum Co., 438 U.S. 422, 440–41 (1978).

179. Crane, *supra* note 173, at 759–60.

monopolization claim.[180] Market definition alone is already a stumbling block to plaintiffs in civil antitrust cases where a mere preponderance of the evidence standard applies.[181] The Justice Department surely does not intend to bring criminal prosecutions based on complex econometric evidence of the kind that dominates contemporary rule of reason litigation. Rather, the kickstarting of criminal Section 2 enforcement is best understood as part of the radical program of reviving bright-line legal rules for antitrust law—rules of the kind that can be the subject of criminal enforcement.

In addition to pursuing a more rule-oriented approach as to areas of antitrust law within their exclusive jurisdiction, the agencies have joined forces in pursuing a more bright-line and legalistic approach as to mergers. In their recently released draft Merger Guidelines,[182] the agencies propose a marked shift from earlier versions of the guidelines, which, increasingly in successive iterations from 1968 forward, elevated technical economic analysis over formal legal analysis. Sharply reversing this trend, the draft guidelines would elevate formal legal analysis based on case law precedent. The guidelines begin with thirteen discrete merger principles based on judicial decisions, and banish to appendices the econometric principles that centered the Obama-era guidelines.[183] The agencies would bring back a strong structural presumption that mergers that increase concentration even slightly in highly concentrated markets (defined down from previous guidelines) harm competition,[184] prohibit horizontal mergers for firms with a thirty percent or greater market share,[185] and enact a strong presumption against vertical mergers involving a firm with a fifty percent or greater market share.[186]

180. *Microsoft*, 353 F.3d at 58–59; *see also* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 500 (2023) (discussing importance of relevant market definition and market power analysis in rule of reason analysis).

181. Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129 (2007) ("Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue."); Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 415 (2006) (describing market definition as a stumbling block in merger cases); Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason After Leegin,* 2011 U. ILL. L. REV. 805, 860 n.318 (describing market definition as a stumbling block in rule of reason cases).

182. U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMMISSION, DRAFT MERGER GUIDELINES (2023).

183. *Id.* at 3–4.

184. *Id.* at 6 (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)).

185. *Id.*

186. *Id.* at 17.

As noted in Part I.C., an important implication of the shift to the rule of reason was the elevation of economic theory and economists to an important role in antitrust adjudication. It follows that a shift toward per se rules would correspond with the demotion of economists as players in the antitrust order. Lina Khan has already made this association explicitly, finding the "heightened role of economic expertise" culpable for the law's unpredictability and ineffectiveness.[187] She has complained that rule of reason analysis involves the delegation of both factfinding and rulemaking to economists and has made economist testimony "the 'whole game' in an antitrust dispute."[188] Together with Sandeep Vaheesan, Khan has complained that a "change in personnel followed [antitrust's] ideological overhaul, as economists began to play a much larger role at the antitrust agencies, at the expense of lawyers."[189] Khan and Vaheesan argue that "[t]his shift in agency composition reflected and reinforced the shift in ideology, from broad political economy to narrow microeconomics."[190] To the radical challengers, the shift toward role of reason analysis and the corresponding elevation of economists was all part of an ideological project to favor corporate interests. As Matt Stoller, an influential anti-monopoly advocate at the American Economic Liberties Project, puts it, the Chicago School revolution "defanged the [Federal Trade] commission, put economists in charge and made it an agent of monopolists."[191]

The proposed shift toward per se rules and away from economic theory and economists would represent a dramatic shift in the antitrust order.

III. FUTURESHOCKS

The radical challengers articulate a vision for the American economy in which monopoly and industrial concentration are diffused, power, wealth and opportunity are dispersed, and democracy, thick and thin, is preserved. Whether or not their antitrust project would achieve those aims for the economy at large, it clearly would entail dramatic changes for the antitrust system. Again following the matrix of first principles, institutional arrangements, and juridical mold, this final Part considers the consequences of the radical challenge for the antitrust system, some

187. Khan, *supra* note 159, at 973.

188. Chopra & Khan, *supra* note 139, at 361 (citing Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1261 (2012)).

189. Khan & Vaheesan, *supra* note 158, at 270.

190. *Id.*

191. Leah Nylen, *Lina Khan's Big Tech Crackdown is Drawing Blowback. It May Succeed Anyway*, POLITICO (Sept. 29, 2021, 4:31 AM), https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581.

of which are already unfolding, and others which are likely to materialize in the future.

A. After Competition: Power and Politics

The radical challengers would replace competition with anti-domination as antitrust's first principle. This change would require a wholesale modification of antitrust doctrine, which is what the challengers want. But it would also have potentially unintended implications for the operation of antitrust law, its political neutrality, and the independence of the antitrust agencies.

One consequence of the switch to anti-domination would be that antitrust cases could no longer be governed by a single organizing principle but instead would require contextual and case-specific articulation of an applicable ground for decision. In the sense employed by the challengers, power is an inherently relative concept. Whether or not a particular practice results in undue power cannot be determined without first deciding the relative positions and entitlements of the counterparties. The incumbent antitrust order avoids that difficulty by assuming the legitimacy of the distribution of benefits achieved by competition. Although it employs a particular concept of power—market power—that power is technically defined in a way that avoids the need to decide how economic benefits should be allocated as between transacting parties. Competitive markets—ones free of market power—result in all surplus of exchange being captured by the counterparties (buyers in the case of supply markets, sellers in the case of purchase markets).[192] Thus, even a very large firm has zero market power in a conventional sense if consumers can easily substitute to another supplier, and a very small firm can have significant market power if ready substitutes are missing.[193] But power divorced from its technical economic meaning cannot serve as a decisional criterion without inviting comparisons of the relative desert of all affected parties. If the goal of antitrust law is to allocate power as between employees and employers, big businesses and small businesses, sellers and buyers, consumers and producers, and governments and citizens, in every antitrust case the question must be answered: who should be entitled to what? For example, if small businesses band together to counter the power of larger businesses, how far should they be allowed to go? Conventional antitrust reasoning provides an answer based on general principle: businesses can band together so long as their coordination increases competition

192. *See* Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1673 (2012).

193. *See* Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1354 (2020).

and must stop when their coordination lessens it.[194] But if power is no longer a function of competition but rather of relative entitlement, no general principle can answer the question. Instead, the distributive questions raised by antitrust as power allocation would require a complex set of contextual moral and political judgments about the relative merits of different social and economic classes.

Implementing that reticulated vision for antitrust would necessarily require the exercise of more political judgment and therefore make antitrust more explicitly political. Of course, one of the claims of the LPE movement is that antitrust law is *already* political—that antitrust law pretends to technocratic neutrality when, in fact, it is enacting a set of political preferences.[195] But even if that it is true, incumbent antitrust does not require its practitioners to explain why they are favoring one social interest over another on a case-by-case basis. The anti-domination approach would require just such an explanation. Antitrust decision makers would need to provide explicit justification for the lines they drew in allocating power as between competing social interests. Whether or not that would made antitrust more political in fact, it at least would make antitrust *seem* more political.

Managing an overtly political turn in antitrust will present distinct challenges. Ever since Richard Nixon's reported political abuses of antitrust,[196] a major project of the antitrust and legal establishment has been to separate antitrust from politics.[197] The Trump Justice Department was accused of breaking this norm with respect to its opposition to the AT&T/Time Warner merger, which Trump allegedly opposed because of his political enmity with CNN,[198] and the agency's relentless investigation of mergers of marijuana

194. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 5–7 (2006) (joint venture agreements are analyzed as single entities competing with other businesses); *Antitrust Guidelines for Collaborations Among Competitors*, FTC 6 (2000) https://www.ftc.gov/legal-library/browse/policy-statement-ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors (competitor joint ventures are lawful when they allow joint ventures to realize efficiencies that enable them to offer cheaper or better services to customers).

195. Khan, *supra* note 9, at 1677.

196. See Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, BRENNAN CTR. JUST. (Mar. 19, 2014), https://www.brennancenter.org/blog/itt-affair-why-public-financing-matters-political-conventions (reporting that Nixon instructed Justice Department to drop appeal involving ITT in light of ITT's commitment to donate $400,000 to 1972 Republican National Convention in San Diego).

197. *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1173–74 (2008).

198. Heidi Przybyla & Pete Williams, *Former DOJ Officials Raise Trump AT&T Interference Concerns*, NBC (March 8, 2018, 11:00 PM), https://www.nbcnews.com/politics/justice-department/top-attorneys-try-help-t-challenge-potential-trump-interference-n855036.

companies, allegedly because of the Attorney General's antipathy to marijuana.[199] Given that the progressive constituencies aligned with the radical challengers tend to view this alleged political weaponization of antitrust as a betrayal of the rule of law,[200] there will be some explaining to do if progressive antitrust begins to assert that, yes indeed, antitrust is inherently and unavoidably political and to unapologetically practice it as such.

Of course, the radical challengers do not mean that denaturalizing markets and recognizing that antitrust is an inherently political enterprise means that antitrust law should be deployed in a narrowly partisan sense to favor political allies and harm political adversaries. But they do mean that antitrust must be attentive to the ways in which decisions affect the distribution of power as between different constituencies and pull antitrust levers to achieve more equitable distributions. That is a very different mode of reasoning than one predicated on a constituency-agnostic commitment to competition—and one that requires much more explicit political judgments.

A corollary of that sort of forthright allocation of benefits to competing groups would be the impossibility of antitrust law continuing as an island or, as Herbert Hovenkamp has called it, a "residual regulator" that comes into play only when other regulatory branches cannot reach the problem.[201] As noted above, the LPE movement calls for antitrust to be understood as just one branch of a multidisciplinary legal project to redistribute social and economic power.[202] In order to accomplish that objective, antitrust decision makers will have to be far more engaged with decision makers from other regulatory domains. Such a shift toward an anti-domination organizing principle would dramatically alter the status quo arrangement in which antitrust law has tended to operate independently in its own silos, single-mindedly pursuing a pro-competition policy.

199. Jonathan B. Baker, *Why the Political Misuse of Antitrust Must be Prevented*, PROMARKET (July 20, 2020), https://www.promarket.org/2020/07/20/why-the-political-misuse-of-antitrust-must-be-prevented/; Dan Primack, *Whistleblower: Barr Directed Faulty Antitrust Reviews of Marijuana Mergers*, AXIOS (June 24, 2020), https://www.axios.com/whistleblower-barr-directed-faulty-antitrust-reviews-of-marijuana-mergers-e06c14ab-4122-47ce-acb9-6bac6f24d666.html.

200. *E.g.*, Maggie Jo Buchanan, *Trump's Politicization of the Justice System*, CTR. FOR AM. PROGRESS (Feb. 20, 2020), https://www.americanprogress.org/article/trumps-politicization-justice-system/.

201. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 13 (2005) (observing that antitrust is a "residual regulator" whose only "purpose is to promote competition to the extent that market choices have not been preempted by some alternative regulatory enterprise").

202. *Id.*

Labor law provides a good illustration. From the passage of the Sherman Act in 1890 to the passage of the Wagner Act in 1935, antitrust and labor policy were tightly intermeshed.[203] The Wagner Act took the labor question entirely out of antitrust, creating a separate regulatory scheme to govern labor disputes.[204] Thereafter, labor law and antitrust law proceeded on separate tracks, interacting only on jurisdictional questions such as whether a particular activity fell within the statutory or non-statutory labor exemption, and hence was out of bounds for antitrust governance. A shift in antitrust policy to focus on labor questions in general, and the appropriate allocation of power between workers and employers more particularly, will inevitably require breaking down the antitrust and labor silos that have largely kept their distance since 1935. The FTC and National Labor Relations Board ("NLRB") recently reflected this shift by signing a Memorandum of Understanding ("MOU") to enhance cooperation between the agencies.[205] The MOU commits the agencies to information sharing, consultation, cross-agency training, and coordinated outreach.[206] While increased intermeshing of the agencies may enhance their effectiveness in tackling labor problems, it also threatens to diminish the FTC's traditional position as an agency singularly focused on maintaining competitive markets and protecting consumers. Further, given the political nature of the trade-offs contemplated by an anti-domination paradigm, the need to coordinate with other agencies on policy judgments calls into question the FTC's historical assertion of independence from other agencies and other branches of government, an issue discussed next.

B. Confrontation with the Courts

The radical challengers see judges as central culprits in the neutering of antitrust law and propose to constrain the influence of judges through new legislation and FTC rulemaking.[207] Whether or not the challengers succeed in the long run, their approach is paradoxically setting up just the opposite effect in the short to medium term—enhanced influence for the federal judiciary in the specification of antitrust norms and institutional arrangements.

This is particularly true given the challengers' simultaneous antipathy to courts and settlements. In the past, the antitrust agencies have sought to reform antitrust doctrines in ways that the courts might not endorse by avoiding the courts as decision makers.

203. Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 44 (2008).

204. *Id.* at 45.

205. Press Release, Federal Trade Commission, Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022).

206. *Id.*

207. *See generally* Khan, *supra* note 159, at 967–72 (arguing in part judicial decision making in antitrust has led to a shift away from a rules-based approach).

Thus, for example, when the FTC decided to reinvigorate an independent unfair methods of competition standard after decades of neglect,[208] it started by bringing challenges it could resolve through modest consent decrees that would escape judicial review.[209] Similarly, when the Obama Administration sought to reinvigorate scrutiny of vertical mergers, it did so through consent decrees rather than litigation,[210] which would have given the courts the opportunity to push back. The radical challengers might have followed this path, but they have expressed as much antipathy to settlement as to judges.[211] The problem with this approach is that, in the absence of settlement, it is judges who get to decide how to resolve the dispute. The challengers are simultaneously criticizing the courts as culprits and asking them to decide more cases—which brings to mind the restaurant patrons in Woody Allen's *Annie Hall* who complain that the food is terrible and the portions are small.[212]

The enhancement of the judicial role is most apparent in mergers, one of the areas in which the radical challengers particularly fault the doctrines created by the federal judiciary.[213] From the passage of the Hart-Scott-Rodino Act in 1976 until very recently, most mergers that raised antitrust issues were resolved bureaucratically at the antitrust agencies, with only one or two requiring a judicial decision in a typical year.[214] Further, the Supreme Court stayed out of merger policy altogether, not deciding a single case since 1976.[215] But though the radical challengers abhor the merger doctrines created by the lower courts and have reason to suspect that the Supreme Court may be even worse.[216] Their aversion to settling is handing more cases to the

208. Press Release, Federal Trade Commission, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022).

209. Negotiated Data Solutions LLC, FTC File No. 0510094-4234, (decision and order, Sept. 22, 2008); Intel Corp., FTC No. 9288 (decision and order, Aug. 3, 1990).

210. United States v. Google Inc., No. 1:11-cv-0688, 2011 U.S. Dist. LEXIS 124151, at *2 (D.D.C. Oct. 5, 2011) (Google acquisition of ITA); United States v. Comcast Corp., No. 1:11-cv-00106, 2011 U.S. Dist. LEXIS 116381, at *2–3 (D.D.C. Sept. 1, 2011) (Comcast/NBC Universal merger); United States v. Ticketmaster Ent, Inc., No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626, at *2 (D.D.C. July 30, 2010) (Ticketmaster acquisition of Live Nation).

211. McCabe et al., *supra* note 150.

212. ANNIE HALL (Metro-Goldwyn-Mayer Studios 1977).

213. *E.g.*, Khan, *supra* note 159, at 967–68 (calling Chicago School commitment to efficiency in merger policy "a grotesque distortion of the antitrust laws that Congress passed").

214. Crane, *supra* note 203, at 51–54.

215. *See* United States v. Nat'l Ass'n. of Sec. Dealers, Inc., 422 U.S. 694, 733 (1975).

216. As lower court judges, Justices Kavanaugh and Thomas cast doubt on the continuing viability of interventionist merger precedents from the 1960s. *See*

courts for decision and inviting renewed attention by the Supreme Court. As noted in Part II(B), between 2010-2019, the Justice Department litigated a total of six cases to a judicial decision, winning five and losing one. During the calendar year 2022 alone, it litigated four merger cases to a judicial decision, winning one and losing three.[217] In other words, the Justice Department's "no settlement" policy resulted in it losing three times more merger cases in a single year than it had lost over the entire preceding decade. The FTC is faring no better, with conspicuous loses in high-profile merger challenges against Microsoft (Activision)[218] and Meta (Within),[219] and a judicial decision calling into question the standard the FTC employed in its own administrative decision that is now on appeal.[220] While this story is still being written, for now the agencies' policy of refusing to settle and instead litigating to change the law is primarily resulting in the agencies losing their cases while the courts double down on the existing legal norms, and indeed extend them to new areas like technology platforms. This trend is only likely to accelerate under the agencies' new merger guidelines, which substitute formal legal analysis, mostly from the decades before the Chicago School revolution,[221] for contemporary economic principles. Far from challenging judicial supremacy, this approach is almost certain to draw the courts—and the Supreme Court in particular—much more into formulating merger policy than at any time since the mid-1970s.

United States v. Anthem, Inc., 855 F.3d 345, 376 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (expressing view that "the Supreme Court in the 1970s therefore shifted away from the strict anti-merger approach that the Court had employed in the 1960s in cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294 . . . (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 . . . (1963)."); United States v. Baker Hughes Inc., 908 F.2d 981, 990–91 (D.C. Cir. 1990) (Thomas, J.) (asserting that Supreme Court "cut . . . back sharply" 1960s merger precedents and "discarded" aspects of its interventionist merger rulings).

217. United States v. UnitedHealth Group, Inc., 630 F. Supp. 3d 118, 123 (D.D.C. 2022) (rejecting merger challenge); United States v. Bertelsmann SE & Co. KGAA, 646 F. Supp. 3d 1, 11–12 (D.D.C. 2022) (blocking merger); United States v. United States Sugar Corp., No. 21-1644, 2022 WL 4544025, at *1 (D. Del. 2022) (rejecting merger challenge); United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 16553230, at *1 (D. Md. 2022) (rejecting merger challenge).

218. FTC v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 WL 4443412, at *1 (N.D. Cal. 2023).

219. FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 903 (N.D. Cal. 2023).

220. Microsoft, 2023 WL 4443412, at *1, *12 (rejecting FTC's holding in Illumina/Grail administrative proceeding that "[t]o harm competition, a merger need only create or augment either the combined firm's ability or its incentive to harm competition. *It need not do both*.").

221. Geoff Manne has calculated that the average year of the cases cited in the draft guidelines is 1982, or 1975 when weighted by cites. @geoffmanne, TWITTER (July 19, 2023, 2:08 PM), https://twitter.com/geoffmanne/status/1681727830017839106?s=20.

The same may turn out to be true of the FTC's strategy of lessening judicial influence by engaging in substantive antitrust rulemaking.[222] The threshold question regarding the NPRM on employment non-competes will be whether the FTC even has substantive rulemaking power under Section 6g of the FTC Act—a question that some administrative law experts predict may be decided against the Commission.[223] Even assuming that the courts eventually hold that the FTC generically has substantive rulemaking power over unfair methods of competition, there are certain to be further challenges to the lawfulness of a rule sweeping aside hundreds of years of judicial precedent, particularly under the major questions doctrine.[224] The FTC's strategy of replacing judges with administrative rules could quite easily result in a showdown in which the courts double down on antitrust norm-creation as their common law prerogative.

In such an outcome lies even further risks to the FTC's institutional position, particularly to its political independence. Since the Supreme Court's *Humphrey's Executor v. United States*[225] decision in 1940, FTC Commissioners have been insulated from the President's removal power, making the Commission politically independent from the executive branch.[226] *Humphrey's Executor* was grounded on the view that the FTC's functions are "quasi-legislative, quasi-judicial" rather than executive in character.[227] Already, this description of the FTC has come into serious doubt, and developments in Supreme Court precedent on agency independence suggest that *Humphrey's Executor* is hanging by a thread.[228] A Supreme Court decision rejecting FTC rulemaking, and hence relegating the Commission to the quintessential executive function of law enforcement (at least with respect to its original antitrust function), would provide further fodder to the unitary executive theorists bent on corralling administrative agencies in general, and the FTC in particular, into the political superintendence of the White House. Such a result may occur with or without the FTC's expansive NPRM

222. Chopra & Khan, *supra* note 139.

223. *See* Richard J. Pierce, *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, *in* RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION 101 (Daniel A. Crane, ed. 2022); Maureen K. Ohlhausen & Ben Rossen, Dead-End Road: National Petroleum Re ners Association and FTC "Unfair Methods of Competition" Rulemaking, in *id.* at 31; Berin Szóka and Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature*, *in id.* at 49.

224. Daniel A. Crane, *FTC Independence after* Seila Law, *in Rulemaking Authority*, *supra* note 223, at 271.

225. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

226. *Id.* at 629.

227. *Id.* at 624.

228. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020).

on non-competes, but the Commission's strategy of pushing for a controversial rule that busts centuries of judicial common law doctrine may be the straw that broke the camel's back.

In sum, the radical challengers' simultaneous challenge to judicial supremacy, the status quo in antitrust norms, and settlements is paradoxically resulting in an elevation of the importance of judges in the antitrust order, without the reforms in antitrust doctrines desired by the challengers. In the long run, this could all be part of a "win by losing" strategy in which Congress reacts to judicial obstruction of antitrust reform by passing major antitrust reform legislation. But in the short run at least, the challengers seem to have bolstered rather than diminished judicial influence.

C. In with Lawyers, Out with Economists

As outlined in Part II(C), the radical challengers seek to overturn antitrust's shift toward open-ended rule of reason analysis and economists' role in running that system and replace it with bright-line rules administered by lawyers. The challengers see rule of reason analysis as a tool of non-enforcement and a return to per se prohibitions as a path to enhanced antitrust policing of dominance and economic concentration. This Part analyses the implications of this campaign against the rule of reason along two dimensions: (1) the tug-of-war between rules and standards in the domestic antitrust system; and (2) the relationship between Washington and Brussels.

1. Rules and Standards

Before diagnosing the implications of the challengers' quest for more per se rules, it is important to contextualize the challengers' assertion that the rule of reason has been an obstacle to aggressive antitrust enforcement. Certainly, there is some basis for the assertion that when practices that were once condemned as per se illegal shifted to rule of reason analysis, it became all but impossible for plaintiffs to challenge them. In support of this view, one might cite to leading Chicago School advocates like Richard Posner who admitted that the rule of reason " is little more than a euphemism for nonliability,"[229] or Frank Easterbrook who admitted that adjudication under the rule of reason "as a practical matter meant that [the challenged practices] were declared lawful per se."[230] Or,

229. Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977).

230. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 305 (1987).

one could consult Michael Carrier's work showing that defendants win rule of reason cases over ninety-nine percent of the time.[231]

But generalizing about rule of reason analysis from these types of assertions or studies would paint a misleading picture of the contemporary antitrust order. Most of the cases underlying those assertions concerned vertical intra-brand restraints like resale price maintenance and vertical non-price restraints that at one time had been per se legal and then shifted to rule of reason treatment.[232] Such cases were very difficult for plaintiffs to win for the very reasons that justified the shift in doctrine—vertical intra-brand restraints usually do not harm competition. But vertical intra-brand restraints are far from paradigmatic of all contemporary rule of reason cases. In the last several decades, plaintiffs have scored significant victories under the rule of reason when challenging a variety of competitive practices like pay-for-delay pharmaceutical settlements,[233] bans on student athlete compensation,[234] publisher agreements about e-book pricing,[235] restrictive practices involving credit card companies,[236] joint venture agreements,[237] and real estate listing rules.[238] Those are all Sherman Act Section 1 cases decided under the formal rubric "rule of reason," but the practical domain of rule of reason analysis—including market definition, market power, anticompetitive effects, and procompetitive justifications—is far wider than just those cases. All monopolization and merger cases—indeed, all antitrust cases other than those denominated per se illegal under Section 1—are rule of reason cases, and no plausible claim could be made that Section 2 or merger analysis is a euphemism for per se legality. Between 2001-2020, the federal antitrust agencies enjoyed a 65 percent win rate in

231. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009); *see also* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991) (reporting that defendants have won over 90 percent of rule of reason decisions in vertical nonprice cases since Sylvania).

232. *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 887 (overruling Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

233. FTC v. Actavis, Inc., 570 U.S. 136 (2013); *In re* Lipitor Antitrust Litig., 868 F.3d 231 (3d Cir. 2022); Impax Labs v. FTC, 994 F.3d 484 (5th Cir. 2021); FTC v. AbbVie, Inc., 976 F.3d 327 (3d Cir. 2020); *In re* Loesterin 24 FE Antitrust Litig., 814 F.3d 538 (1st Cir. 2016).

234. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

235. United States v. Apple, Inc., 791 F.3d 290, 329–30 (2d Cir. 2015) (finding Apple liable under rule of reason in addition to per se rule).

236. Pulse Network, LLC v. Visa, Inc., 30 F.4th 480 (5th Cir. 2022); United States v. Visa USA, Inc., 344 F.3d 229 (2d Cir. 2003).

237. Starr v. Sony BMG Music Enter., 592 F.3d 314 (2d Cir. 2010).

238. Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011).

litigated merger challenges.[239] Since the D.C. Circuit's en banc *United States v. Microsoft*[240] decision explained Section 2 analysis as a form of rule of reason—and then ruled in part in favor of the government plaintiffs have won scores of monopolization cases.[241]

Although the radical challengers complain about open-ended rule of reason analysis as the obstacle to antitrust enforcement, the actual juridical obstacle to antitrust enforcement may be just the opposite.

239. Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. 1, 6 (2022); *see also* Nancy L. Rose & Carl Shapiro, *What Next for the Horizontal Merger Guidelines?*, 36 ANTITRUST 4, 6 (2022) (reporting that the antitrust agencies have a high win rate in merger challenges).

240. United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

241. Plaintiff wins at the federal appellate level. *See*, *e.g.*, Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002) (exclusive dealing, tortious conduct); Beech-Nut Nutrition Corp. v. Gerber Prods. Co., 69 F. App'x 350 (9th Cir. 2003) (predatory pricing); LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (bundled discounts); Geneva Pharm. Tech. Corp. v. Barr Laby's Inc., 386 F.3d 485 (2d Cir. 2004) (deception); Covad Commc'ns. v. Bell Atl. Corp., 398 F.3d 666 (D.C. Cir. 2005) (refusal to deal); U.S. v. Dentsply Int'l, 399 F.3d 181 (3d Cir. 2005) (exclusive dealing); Andrx Pharm. Inc. v. Elan Corp., PLC, 421 F.3d 1227 (11th Cir. 2005) (exclusionary settlement agreement); Spirit Airline, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005) (predatory pricing); Hydril Co. LP v. Grant Prideco LP, 474 F.3d 1344 (Fed Cir. 2007) (patent fraud); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007) (reneging on FRAND commitment); Newcal Indus., Inc. v. Ikon Off. Solution, 513 F.3d 1038 (9th Cir. 2008) (exclusive dealing, tying); Kaiser Found. Health Plan v. Abbott Lab'ys. Inc., 552 F.3d 1033 (9th Cir. 2009) (patent fraud); Masimo Corp. v. Tyco Health Care Grp., L.P., 350 F. App'x 95 (2009) (sole source and market share agreements); *In re* DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677 (2d Cir. 2009) (patent fraud, abusive litigation); W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010); (vertical conspiracy to restrain competition); E.I. du Pont de Nemours v. Kolon Indus., Inc., 637 F.3d 435 (4th Cir. 2011) (exclusive dealing); Z.F. Meritor v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012) (market share discounts); Lenox McLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114 (10th Cir. 2014) (deception); New York v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015) (exclusionary product reformulation); Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264 (6th Cir. 2015) (tying); McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015) (exclusive dealing); TransWeb LLC v. 3M Innovative Props., Inc., 812 F.3d 1295 (Fed. Cir. 2016) (patent fraud); *In re* Actos End-Payor Antitrust Litig., 848 F.3d 89 (2d Cir. 2017) (false FDA filing); *In re* Lipitor Antitrust Litig., 868 F.3d 231 (3d Cir. 2017) (patent fraud); Trendsettah USC Inc. v. Swisher Int'l, Inc., 761 F. App'x 714 (9th Cir. 2019) (refusal to deal); Wacker v. JP Morgan Chase & Co., 678 F. App'x 27 (2d Cir. 2017) (market manipulation); Curtin Mar. Corp. v. Santa Catalina Island Co., 786 F. App'x 675 (9th Cir. 2019) (conspiracy to monopolize); *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136 (9th Cir. 2019) (conspiracy to monopolize); Mountain Crest SRL v. Anheuser-Busch Inbev SA/NV, 937 F.3d 1067 (7th Cir. 2019) (retail distribution restrictions); *In re* Lantus Direct Purchaser Antitrust Litig., 950 F.3d 1 (1st Cir. 2020) (Orange Book manipulation); ViaMedia, Inc. v. Comcast Corp., 951 F.3d 429 (7th Cir. 2020) (refusal to deal, tying).

Just as the courts sometimes deploy rules of per se illegality, they are also capable of—and do—deploy rules of per se *legality*. For example, during the heyday of per se illegality for explicit resale price maintenance, the Supreme Court created the *United States v. Colgate Co.*[242] doctrine, which held that a manufacturer's announcement of a suggested resale price and of its unwillingness to do future business from any retailer that deviated from that price was not an agreement for purposes of Section 1 of the Sherman Act.[243] Since Section 1 requires agreement, firms could exercise their *Colgate* rights with per se immunity from antitrust scrutiny. In recent decades, the Supreme Court has created similar safe harbors or immunity zones for dominant firms, such as the rule that monopolists have an unqualified right to refuse to deal with competitors (subject to narrow exceptions)[244] or price at any level about average variable cost.[245] As Judge Boasberg recently explained in rejecting the FTC's challenge to Facebook's policy of not offering application programming interface (API) access to competitors, rules making refusals to deal per se lawful "are not premised on the view that [monopolist refusals to deal] are incapable of harming competition," but rather on "overriding considerations of antitrust policy."[246] What the FTC wanted and was denied in *FTC. v. Facebook, Inc.* was not a rule of per se illegality but a rule of reason inquiry into whether the challenged practices harmed competition. It was a hardline rule rather than an open-ended standard that blocked that inquiry.

In order to achieve their broader reform goals, the challengers would have to convince the courts not only to abandon the rule of reason, but also to abandon their safe harbors and rules of categorical legality. Considering the existing and coming confrontation between the reformers and the courts discussed in Part III(B), that might be a heavy lift. At a minimum, the reformers would be more likely to find success in challenging the existing immunizing rules than in advocating for new prohibitory ones. In other words, the reformers' most likely path to success in achieving antitrust reform would be to argue for *more* rule of reason, not less. But that is not the path that they have chosen.

242. United States v. Colgate & Co., 250 U.S. 300 (1919).

243. *Id.* at 307.

244. Verizon Commcn's. Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 415–16 (2004).

245. Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 n.1 (1993).

246. FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 22 (D.D.C. 2021) (citing Daniel A. Crane, *Does Monopoly Broth Make Bad Soup*?, 76 ANTITRUST L.J. 663, 669 (2010)).

2. Alignment with Brussels

Advocates of antitrust reform often point to Europe's much more aggressive stance toward dominance as a benchmark for effective antitrust enforcement.[247] Proposed state antitrust legislation would explicitly invoke Europe's "abuse of dominance" standard.[248] Overall, antitrust reformers tend to view Europe as having been more successful in preventing dominance and concentration in recent decades and propose that U.S. antitrust shift in a more European direction.[249]

But if that is to be the course of U.S. antitrust, one can reasonably ponder whether shifting toward a per se approach and demoting the role of economists and economic analysis would facilitate such a move or would instead frustrate trans-Atlantic cooperation and understanding. The answer is mixed. On the one hand, Europe has historically followed a more formal and rule-based approach to antitrust than the United States.[250] Further, recent acts of the European Parliament such as the Digital Markets Act ("DMA")[251] and Digital Services Act ("DSA")[252] impose a rule-like regulatory structure on dominant technology companies (called "gatekeepers"). So, there is a case to be made that U.S. antitrust law needs to become more rule-based in order to keep pace with Europe.

On the other hand, the overall trend in Europe in recent decades has been to move away from formalistic rules. Starting in the early 2000s, European competition law began to jettison from its form-based approach and gravitate toward an effects based analysis that

247. *See, e.g.*, letter from Sen. Elizabeth Warren to Gina Raimondo, Sec'y of Commerce (Dec. 14, 2021) (criticizing Secretary of Commerce for questioning EU antitrust actions against Big Tech companies); Klobuchar, *supra* note 129, at 317 (arguing that "American antitrust enforcers must be much more vigilant in monitoring high-tech companies, just as European officials have been").

248. 21st Century Antitrust Act, S933C, Reg. Sess. 2021–2022 (N.Y. 2021) ("It shall be unlawful for any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position.").

249. *E.g.*, Khan & Vaheesan, *supra* note 158, at 283 ("The antitrust agencies and courts should look to European Union abuse of dominance law for a model to emulate.").

250. A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 281 (2008) (describing European competition law as "highly structural" and "form based").

251. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1.

252. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

elevated the importance of economics.[253] In part, this was motivated by a desire to align EU competition law with the rule of reason approach that prevailed in the United States and was beginning to take hold in the growing number of antitrust regimes around the world. The formalism that had once characterized U.S. antitrust law and remained visible in EU competition law began to be understood as outmoded, rigid, and prone to costly error.

This shift in doctrinal framework implied an increasing role for economists in antitrust analysis at the European Commission. In contrast to the FTC, which has had an economics bureau since its founding in 1914, and the Justice Department, which created an economics unit in 1936,[254] the European Commission did not appoint a chief economist until 2003.[255] Economists were not as much needed when the liability rules were formalistic, but the role of economics at the Commission has grown dramatically in recent decades as the law has shifted toward analysis of competitive effects. In 2022, the European Commission's Directorate General for Competition (DG Comp) reported that thirty percent of its 809 employees were economists.[256] While not all of these employees have PhDs in economics, DG Comp does employ a large staff of PhD economists and has elevated the role of the Chief Economist to a role of prestige and influence within the Commission.[257] The clear trend in Europe has been toward effects-based economic analysis, with a corresponding rise in influence for economists. These, of course, are just the opposite prescriptions favored by the radical challengers.

253. Anu Bradford, Adam S. Chilton & Filippo Maria Lancieri, *The Chicago School's Limited Influence on International Antitrust*, 87 U. CHI. L. REV. 297, 312 (2020) (citing United Nations Conference on Trade and Development (UNCTAD) study from 2009 concerning "recent reforms in EU antitrust law 'from a form-based towards a more effects-based approach [as] an example of greater reliance on economic analysis.'"); Neelie Kroes, Member, Eur. Comm'n in Charge of Competition Policy, Speech at the Fordham Corporate Law Institute: Preliminary Thoughts on Policy Review of Article 82 (Sept. 23, 2005) (advocating an effects-based approach to Article 82 enforcement); Pierre Larouche, *The European Microsoft Case at the Crossroads of Competition Policy: Comment on Ahlborn and Evans*, 75 ANTITRUST L.J. 933, 962 (2009).

254. Lawrence J. White, *The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion* 9 (NYU Law & Econ. Research Paper No. 08-07, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091531.

255. R. Hewitt Pate, Tribute, *Robert H. Jackson at the Antitrust Division*, 68 ALB. L. REV. 787, 791 n.12 (2005); Lars-Handrik Röller & Pierre A. Buigues, *The Office of the Chief Competition Economist at the European Commission* 2 (May 2005), https://competition-policy.ec.europa.eu/system/files/2021-10/officechiefecon_ec.pdf.

256. Global Competition Review, Rating Enforcement, European Union's Directorate-General for Competition, Sept 7, 2022.

257. Chief Competition Economist, EUROPEAN COMMISSION, https://competition-policy.ec.europa.eu/chief-competition-economist_en (last visited Apr. 14, 2024).

In response to the challengers' assertion that a rule of reason framework and economic analysis of competitive effects is a hurdle to vigorous enforcement, one might ask how Europe has managed to crack down on Big Tech during precisely the period that it transitioned from rules to standards—effectively, from per se rules to the rule of reason. To the extent that doctrinal structures played a significant role, one answer is that U.S. and EU antitrust law differed in one particularly relevant way: Whereas, as discussed in Part III(A), U.S. courts employ numerous rules of per se legality or safe harbors, European courts do not.[258] Thus, above-marginal-cost prices, refusals to deal with competitors, price squeezes, and various other competitive practices that are categorically immune from antitrust liability in the U.S. are analyzed for their competitive effects in Europe.[259] In this sense, one explanation for Europe's greater aggressivity toward Big Tech dominance is that Europe employs a comprehensive rule of reason while the U.S. employs rules of per se legality, which again calls into question the generality of the challengers' preference for rules over standards.

A move toward more formal categorical rules and a lessening of the role of economics and economists would result in trend lines in the U.S. and Europe—and perhaps much of the rest of the world—crossing each other. That could complicate trans-Atlantic and international cooperation and convergence in antitrust and, at minimum, call into question the narrative that revitalizing antitrust enforcement means becoming more like Europe.

CONCLUSION

By historical lights, it is still too early to understand the path of radical challenge to the antitrust order. The last systematic challenge to the antitrust status quo—the Chicago School—began as an academic movement decades before it bore fruit in the courts.[260] The

258. *See* Daniel A. Crane, *Formalism and Functionalism in the Antitrust Treatment of Loyalty Rebates: A Comparative Perspective*, 81 ANTITRUST L.J. 209, 212–13 (2016).

259. Case C-280/08 P, Deutsche Telekom v. Comm'n, 2010 E.C.R. I-9555, ECLI:EU:C:2010:603 (finding margin squeeze unlawful); Case C-62/86, Akzo Chemie BV v. Comm'n European Communities, 1991 E.C.R. I-3359, EU:C:1991:286 (holding that prices above marginal cost but below total cost may be deemed abusive if they are determined as part of a plan for eliminating a competitor); Case C-418/01, IMS Health GmbH & Co. KG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-05039, EU: C:2004:257 (holding that a refusal to deal with a competitor violates European law if it prevents emergence of a new product, is unjustified, and precludes competition on a secondary market).

260. The Chicago School's policy agenda for antitrust was laid out as early as the 1950s, two decades before the Supreme Court began to embrace its ideas. *See generally* Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

current challenge has already taken a much more accelerated path. Whereas Chicago School scholars toiled patiently in the 1950s, 60s, and 70s to lay the foundation for their challenge—long before theyy obtained a sympathetic ear in the Supreme Court and figures like Richard Posner, Robert Bork, Frank Easterbrook, Bill Baxter, and Jim Miller were appointed to the federal bench or to head the antitrust agencies—the neo-Brandeisians burst into positions of leadership at the antitrust agencies less than five years after beginning to mount their challenge.[261] And, as noted,[262] their ostensible reform strategy is not primarily directed at courts—who may take a long time to groom to a new ideology—but at circumventing the courts through legislation and agency rule-making.

This strategy may eventually be successful in achieving reform every bit as consequential as the Chicago revolution, and on a more accelerated timeline. However, the early signs suggest that the challengers will face considerable difficulties. The various components of their agenda seem to be at cross-purposes and do not assemble into a cohesive machine. They are likely to produce unintended, counter-productive, and even perverse consequences. It remains to be seen whether the challengers will take stock and retool their agenda into something more synergistically integrated and calculated to succeed—call it neo-Brandeisianism 2.0. If not, the ultimate effect of the radical challenge may be to shift antitrust enforcement in directions quite different than those espoused by the challengers.

261. Lina Khan's student note on Amazon, published in 2017, is widely seen as the first academic salvo by the neo-Brandeisians. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 717, 742–43 (2017). Four years later, she was Chair of the FTC. David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html.

262. *See supra* Subpart II.B.