

LAWLESS ANTITRUST

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INTRODUCTION

Very few decisions throughout the course of antitrust history have attracted as much criticism as *Ohio v. American Express (AmEx)*,¹ handed down by the U.S. Supreme Court in 2018.² Commentators decried its insistence on market definition even in the face of proven harmful effects,³ forced combination of nonsubstitutable services into the same product market,⁴ hyperfixation on output effects,⁵ disregard for regressive spillover harms,⁶ destabilizing effect on subsequent antitrust decisions,⁷ and more. These were, by and large, internal critiques.⁸ The targets were not the Court's underlying methodology but rather its low-quality application.⁹ To most antitrust insiders, the methodology itself must have seemed unremarkable.¹⁰

But was it? The *AmEx* majority began not with the text of the relevant statute, nor with any applicable precedent, nor even with a summary of the facts at issue from the trial record.¹¹ Instead, *AmEx* began with an extended discussion of academic literature that was almost entirely theoretical in nature: six scholarly articles and one book, invoked a total of thirty-nine times.¹² Of the fourteen authors whose work made an appearance, thirteen were microeconomists. And this was more than mere throat clearing; it provided the normative justifications for most of the decision's heavily criticized doctrinal moves.

Such an approach would, in many other areas of law, be quite unusual. Suppose a judicial opinion involving a dispute under the Fair Labor Standards Act of 1938¹³ (FLSA) were to begin not with a reference to the statute's text, nor with a discussion of any relevant judicial precedent, nor

1. 138 S. Ct. 2274 (2018).

2. See, e.g., Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 84 ANTITRUST L.J. 883, 883 (2022) (“On June 25, 2018, the U.S. Supreme Court issued what may be the worst antitrust decision in many decades.”); John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 581 (2022) [hereinafter Newman, *The Output-Welfare Fallacy*]; Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2077–78 (2020); Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 46; RANDY M. STUTZ, AM. ANTITRUST INST., WE’VE SEEN ENOUGH: IT IS TIME TO ABANDON AMEX AND START OVER ON TWO-SIDED MARKETS 1 (2020), <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/Amex-Commentary-4.21.20-Final.pdf> [<https://perma.cc/M2E3-FLWU>].

3. Salop et al., *supra* note 2, at 895.

4. See *id.* at 898.

5. Newman, *The Output-Welfare Fallacy*, *supra* note 2, at 608.

6. See *id.* at 610.

7. STUTZ, *supra* note 2, at 3.

8. John Henry Schlegel, *Of Duncan, Peter, and Thomas Kuhn*, 22 CARDOZO L. REV. 1061, 1061 n.4 (2000) (explaining that internal critiques are “made from within the premises of the system under examination”).

9. See *supra* notes 2–8 and accompanying text.

10. See *id.*

11. See generally *Ohio v. American Express*, 138 S. Ct. 2274 (2018).

12. See generally *id.*

13. 29 U.S.C. §§ 201–219.

even with a recitation of the underlying facts, but instead with a multipage exegesis of an ongoing academic debate among one camp of labor-relations theorists, and then go on to rely heavily on that material for decision-making. This would strike many observers as remarkable, even bizarre. It is not how the Supreme Court's FLSA opinions operate.¹⁴ From the start of their legal training, attorneys and future judges learn that a judicial opinion begins by reciting the "facts of the case," "then discuss[es] the law," and then "applies the general legal principles to the particular facts of the dispute."¹⁵

Yet an "alegal"—or, put another way, lawless—methodology is quite commonplace in U.S. antitrust decision-making and discourse.¹⁶ For decades, antitrust has viewed itself as "exceptional" and "peculiar" in this regard.¹⁷ The conventional excuse, first offered by scholars associated with the Chicago school, is that the antitrust statutes are so vague as to be content-free, a "blank check" for judges.¹⁸ But as recent academic research makes clear, that notion cannot withstand scrutiny even as to the Sherman Act,¹⁹ let alone the subsequent Clayton Act²⁰ and Federal Trade Commission Act²¹ (the "FTC Act"). This research offers a counterweight to the orthodox position that antitrust is, and should be, "exceptional[ly]" lawless.²² That said, existing critiques of antitrust's alegal turn²³ have not yet exposed its sheer breadth and depth.

This Essay examines lawless antitrust in action. It excavates a swath of alegal moves that occurred during the "End of Antitrust History."²⁴ Some of these have attracted scattered criticism, while others appear to have escaped

14. See, e.g., *E.M.D. Sales, Inc. v. Carrera*, 145 S. Ct. 34, 37 (2025) (beginning with a reference to the "Fair Labor Standards Act of 1938" and a quotation from applicable precedent, *Price Waterhouse v. Hopkins*).

15. Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 GREEN BAG 2D 51, 53–54 (2007).

16. See Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1191 (2014) ("Antitrust is a peculiar area of law, one that has long been treated as exceptional by the courts. . . . [Antitrust] precedent . . . changes on a sea of economic—rather than legal—theory.").

17. *Id.*; see also Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 180–81 (2021); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1206 (2021); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 268 (1982).

18. See, e.g., Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986).

19. 15 U.S.C. §§ 1–7. See generally Paul, *supra* note 17; Arthur, *supra* note 17.

20. 15 U.S.C. §§ 12–27.

21. 15 U.S.C. §§ 41–58; see Tim Wu, *There Is No Antitrust Exception to Rules of Statutory Interpretation*, PROMARKET (May 19, 2023), <https://www.promarket.org/2023/05/19/there-is-no-antitrust-exception-to-rules-of-statutory-interpretation/> [https://perma.cc/G7PQ-AG56].

22. For an earlier critique of this methodology in antitrust, see Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2548–49 (2013).

23. For a recent example, see generally Zephyr Teachout, *Homecoming: Antitrust as a Domain of Law* (Apr. 23, 2024) (unpublished manuscript), <https://ssrn.com/abstract=4804609> (on file with the *Fordham Law Review*).

24. Lina M. Khan, *The End of Antitrust History Revisited*, 113 HARV. L. REV. 1655, 1655 (2020).

critical notice. Together, they present a fuller picture of lawless antitrust in practice.

Fully appreciating the breadth and depth of lawless antitrust is essential for understanding a fundamental—yet underappreciated and frequently misunderstood—pillar of the new antimonopoly movement. The emergence of this movement may be the single most significant event in recent antitrust history. For just over three years, beginning November 2021, both federal antitrust enforcement agencies were under the leadership of key antimonopoly movement figures. This period, though relatively brief, yields a historical track record that can, if analyzed closely, reveal core goals and priorities.

Headlines and critical commentary during this time focused on discrete enforcement actions, agency guidance, rulemakings, and the like. Less often noticed—but no less important—was a sea change in methodology. As this Essay explains, the new antimonopoly movement in power sought to restore the role of law to antitrust. This paradigm shift was emphatically not a rejection of economics or other nonlegal disciplines—on the contrary, the agencies sought and retained top-level economic talent and greatly expanded their analytical toolkits during this period. Nor was it an abandonment of the rule of law, as some especially shrill critics claimed.²⁵ Quite the opposite: while in power, the new antimonopoly movement consciously pushed back against several instances of lawless antitrust that had occurred during the preceding four decades.

The new antimonopoly movement's revival of law—paying attention to statutory text, understanding legislative purposes and structures, and following applicable precedent—was not blind formalism. Nor was it the product of naïve nostalgia for a bygone era. Methodology matters. Without a role for law, there can be no rule of law. It follows that rejecting lawless antitrust is essential if we are to have a healthy antitrust enterprise.

I. LAWLESS ACTION

The alegal moves that make up much of what is often called “modern” antitrust are myriad. They take the form sometimes of action and sometimes of inaction. They appear in judicial decisions, administrative agency adjudications, and competition advocacy from the federal agencies. Though not exhaustive, the following discussion catalogs instances of lawless antitrust throughout a four-decade period stretching from roughly 1980 through 2020. It begins with action, and action in its most familiar legal form: decisional.

25. See Christine Wilson, *Why I'm Resigning as an FTC Commissioner*, WALL ST. J. (Feb. 14, 2023, at 12:08 ET), <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d> (on file with the *Fordham Law Review*).

A. Adjudication

Adjudication has been an especially impactful tool for alegal antitrust. Both trial court and intermediate appellate opinions have repeatedly flouted fundamental legal principles in antitrust matters. Especially stark, yet rarely discussed, was the judicial abolition of a validly enacted statutory provision—a move that consciously rejected statutory text, precedent, and legislative history. District court opinions have also amended another provision, striking statutory text that resulted from a deliberative legislative process and inserting idiosyncratically preferred language in its place. These practices were not confined to the federal judiciary. Under new political leadership in the early 1980s, the Federal Trade Commission (FTC or the “Commission”) used its agency-adjudication process in similar ways, issuing lawless opinions that effectively faced no institutional checks. And, more recently, federal judges have begun amending yet another statute—one enacted by Congress to empower an administrative agency—so as to arrogate that power back into the judiciary.

1. Abrogating Statutes

Perhaps the most striking examples of lawless antitrust involve abrogation of legitimate, democratically enacted federal statutes. Effectively repealing the prohibition on harmful exclusive-dealing and tying restrictions under Clayton Act section 3 was a significant, yet largely overlooked, plank of the Chicago school’s antitrust project. Scholars have previously noted the collapse of most antitrust law into a single standard, the “rule of reason.”²⁶ The erasure of section 3 was part of that strategy.

In the early 1910s, the Supreme Court issued multiple decisions announcing a defendant-friendly “rule of reason” framework for Sherman Act cases.²⁷ Congress responded swiftly by passing the Clayton Act, a definitive rejection of the judge-made rule of reason. Relative to the Sherman Act, the Clayton Act’s prohibitions were more specific (limiting judicial autonomy) and easier to demonstrate. Among the new provisions was section 3, which bars exclusive-dealing and tying arrangements that “may” either “substantially lessen competition or tend to create a monopoly.”²⁸ Both its probabilistic standard and its thresholds for proving the requisite level of power (under the first prong) and effect (under the second) are markedly easier to satisfy than the corresponding aspects of the Sherman

26. See, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 379 ¶ 1500 (3d ed. 2010); John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 *IND. L.J.* 501, 501–02 (2019); Rebecca H. Allensworth, *The Commensurability Myth in Antitrust*, 69 *VAND. L. REV.* 1, 5 (2016). The rule of reason “condemns restraints whose negative competitive effects (‘anticompetitive effects’) outweigh their benefits to competition (‘procompetitive effects’).” *Id.* at 5 n.7.

27. See generally *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

28. 15 U.S.C. § 14.

Act.²⁹ For decades, section 3 operated as a key part of the antimonopoly toolkit: a prophylactic measure meant to “nip monopoly in the bud.”³⁰

Shortly after his elevation from the University of Chicago Law School to the federal bench, Judge Richard A. Posner authored the U.S. Court of Appeals for the Seventh Circuit’s opinion in *Roland Machinery Co. v. Dresser Industries, Inc.*³¹ Judge Posner’s legal analysis of section 3 began by correctly observing that the Supreme Court had applied a relatively easy-to-satisfy, probabilistic test in *Standard Oil Co. v. United States (Standard Stations)*.³² Despite that, Judge Posner ventured, “[I]t now appears most unlikely that such agreements . . . will be judged by [that] simple and strict test.”³³ Instead, he decided, “They will be judged under the Rule of Reason.”³⁴

With that blunt declaration, Judge Posner expressly erased section 3 from the U.S. Code. He did so without referencing the Clayton Act’s text, analyzing its original public meaning, or consulting its extensive legislative history. By way of support, all *Roland Machinery* could muster was a concurring opinion from a Sherman Act case, a Supreme Court opinion that had approvingly cited *Standard Stations*, and an out-of-circuit district court decision.³⁵

Today, *Roland Machinery* boasts more than 1,000 citations by subsequent judicial decisions.³⁶ The leading antitrust treatise prescribes a “rule of reason” analysis for all exclusive dealing cases, regardless of which statute is at issue.³⁷ Courts regularly collapse the broader scope of Clayton Act section 3 into the narrower confines of the Sherman Act.³⁸ And neither federal enforcement agency has brought a stand-alone section 3 case in over four decades.³⁹

29. See Robert H. Lande, John M. Newman & Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L. REV. 785, 845 (2025).

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

31. 749 F.2d 380 (7th Cir. 1984).

32. *Id.* at 393 (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949)).

33. *Id.*

34. *Id.*

35. See *id.* (first citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44–46 (1984) (concurring opinion); then citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333–35 (1961); and then citing *Am. Key Corp. v. Cumberland Assocs.*, 579 F. Supp. 1245, 1256–57 (N.D. Ga. 1983)).

36. See generally *id.* (showing over 1,200 citing decisions as of March 9, 2026, on Westlaw).

37. AREEDA & HOVENKAMP, *supra* note 26, at 379 ¶ 1500 (“Ever since [the Supreme Court’s 1911 *Standard Oil* decision,] antitrust law has been governed by the ‘rule of reason.’”).

38. Michael Swerdlow, *Resurrecting Section 3 of the Clayton Act 3* (unpublished manuscript) (on file with the *Fordham Law Review*).

39. First & Waller, *supra* note 22, at 2250 (lamenting that today, it may be “harder . . . to prove a Clayton Act violation than a Sherman Act violation”).

2. Administrative Rulings

Administrative rulings by the FTC have been another locus of lawless antitrust. This is an unusually powerful tool because it can evade direct institutional accuracy and accountability safeguards.⁴⁰ Yet the role these rulings have played has gone largely unnoticed.

a. Altering Law

Upon assuming the FTC's reins in 1981, Chicago-aligned leadership faced a choice. Robust enforcement during the previous administration left a pipeline of active in-house cases, including merger challenges based on lost potential competition and litigation targeting vertical restraints. For years, "Chicagoan" academic commentators had criticized both theories of harm.⁴¹ New agency heads who shared those views might have simply dismissed the pipeline cases. But a Commission willing to disregard the law could instead hear the ongoing appeals, issue respondent-friendly opinions, and thereby erect a barrier to any future enforcement efforts. Because the victorious respondents will not appeal, and the Commission cannot appeal itself, such opinions stand a uniquely high chance of surviving—regardless of how poorly reasoned or legally questionable they might be.

*B.A.T. Industries*⁴² was one such case. The FTC had issued an administrative complaint in 1980 seeking to unwind an acquisition based on concerns about lost potential competition.⁴³ Chicagoan academics had critiqued that theory of harm, but the Supreme Court had already explained that the same general standard applies to all merger challenges under section 7 of the Clayton Act.⁴⁴ The Court had also already recognized that cognizable harm can occur via the precise mechanism at issue in *B.A.T.*⁴⁵ and had further developed and applied this theory of harm just a few years earlier.⁴⁶ As a doctrinal matter, then, the law was fairly well settled by the mid-1970s. Section 7 generally prohibits acquisitions that pose a reasonable probability of substantially lessening competition.⁴⁷ Where a market is already concentrated, the acquiring firm has feasible ways to enter other than

40. See 15 U.S.C. § 45 (permitting appeals from Commission decisions to federal appellate courts).

41. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 266–67 (rev. ed. 2021) (critiquing potential-competition doctrine); *id.* at 289–320 (arguing that vertical restraints are not harmful and instead are efficient).

42. 104 F.T.C. 852 (1984).

43. *Id.* at 917.

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

45. *Id.* at 578 (“The anticompetitive effects with which this product-extension merger is fraught can easily be seen: . . . the acquisition eliminates the potential competition of the acquiring firm.”).

46. See generally *United States v. Marine Bancorporation*, 418 U.S. 602 (1974).

47. 15 U.S.C. § 18.

buying the target firm, and those ways are reasonably likely to yield substantial beneficial effects, the acquisition violates the statute.⁴⁸

The Commission's *B.A.T.* opinion, issued in 1984, instead described a four-element test.⁴⁹ The fourth required proof that the acquiring firm "would have entered the market independently" if unable to enter via acquisition.⁵⁰ Such a test deals in certainties, not probabilities, and therefore deviates from both statutory text ("may be") and binding precedent.⁵¹ The Commission went further still. Invoking an academic article by Professor Donald F. Turner, *B.A.T.* required "clear proof" of this novel fourth element.⁵² Nowhere else in antitrust law does this evidentiary standard apply. The Supreme Court had declared that the same general legal standard applies across all Clayton Act merger cases.⁵³ In *B.A.T.*, the Commission announced a category-specific rule with a different substantive test and a different evidentiary hurdle.

b. Erasing Law

*Beltone Electronics Corp.*⁵⁴ presented a similar opportunity. The complaint, issued in 1973, alleged that the respondent had violated Clayton Act section 3's prohibition on exclusive dealings that may substantially lessen competition or tend to create a monopoly.⁵⁵ The Commission issued its opinion in 1982. *Beltone* began with a doctrinal pronouncement: "[T]he law concerning . . . vertical arrangements has undergone considerable evolution, with the most significant development being the Supreme Court's ruling in *Continental T.V., Inc. v. GTE-Sylvania, Inc.*"⁵⁶ That case, according to the Commission, "established a rule of reason for all types of non-price vertically-imposed dealer restrictions."⁵⁷

But *Continental T.V., Inc. v. GTE Sylvania Inc.*⁵⁸ had applied the Sherman Act.⁵⁹ It did not purport to extend the rule of reason to the Clayton Act,⁶⁰ a statute enacted specifically to override the judge-made rule of reason.

48. *See Marine Bancorporation*, 418 U.S. at 624.

49. *B.A.T. Industries*, 104 F.T.C. 852, 923 (1984).

50. *Id.* at 924, 926.

51. § 18; *see Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) ("Congress used the words 'may be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties.").

52. *B.A.T.* at 925 & n.32 (quoting Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1384 (1965)). By way of legal support, the Commission's opinion miscited and misconstrued several lower court opinions. Only an opinion of the U.S. Court of Appeals for the Fifth Circuit—which did not involve a Clayton Act merger challenge and similarly relied on Professor Turner's policy preferences—supported the "clear proof" test.

53. *See FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

54. 100 F.T.C. 68 (1973); *id.* at 176.

55. *Id.* at 160.

56. *Id.* at 177.

57. *Id.* at 192.

58. 433 U.S. 36 (1977).

59. *Id.*

60. *See id.*

Nonetheless, the Commission went on to apply a rule-of-reason analysis. Shifting into pure policy preference, *Beltone* declared that “it seems desirable to require reasonably clear evidence of probable overall competitive harm” before finding a violation.⁶¹ The Commission then evaluated the respondent’s proffered procompetitive justifications (a hallmark of the rule of reason⁶²) and purported to engage in various “welfare tradeoffs.”⁶³ Having found “potentially counterbalancing” albeit “unquantifiable welfare effects,” the Commission was “reluctant . . . to condemn the practice of exclusive dealing.”⁶⁴ *Beltone* thus effectively abrogated a congressionally enacted statutory provision. Congress gave the FTC broad authority to define and prohibit “unfair methods of competition,” but that authority stops well short of repealing U.S. Code provisions.⁶⁵

c. Rejecting Law

More recently, in 2022, then-FTC Commissioner Christine S. Wilson issued a concurring opinion⁶⁶ that outright rejected ostensibly binding case law. The Commission’s majority opinion in the *Illumina, Inc.*⁶⁷ vertical-merger matter analyzed the challenged merger under alternative frameworks. One was the “ability-and-incentive” test that two lower courts had applied.⁶⁸ The other was the multifactor liability test that the Supreme Court had used in *Brown Shoe Co. v. United States*⁶⁹ and that dozens of subsequent cases had applied. Then-Commissioner Wilson took issue with the latter. “I do not join this part of the [majority] Opinion,” Commissioner Wilson declared, “because there is no ‘*Brown Shoe* standard’ in modern antitrust analysis.”⁷⁰ Despite conceding that “*Brown Shoe* has not been overturned,” Commissioner Wilson claimed that it had nevertheless ceased to exist. As support for that claim, Commissioner Wilson’s opinion posited that (1) the federal agencies’ 2020 Vertical Merger Guidelines had not invoked the Supreme Court’s test; (2) “all recent” litigated vertical merger cases had used the other test; (3) the most recent application of the Supreme Court’s test cited by the FTC majority was *Fruehauf Corp. v. F.T.C.*,⁷¹ a

61. *Beltone Elecs. Corp.*, 100 F.T.C. at 209.

62. *See, e.g.*, Newman, *Procompetitive Justifications*, *supra* note 26.

63. *Beltone*, 100 F.T.C. at 217.

64. *Id.* at 218.

65. *See, e.g.*, *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

66. Concurring Opinion of Commissioner Christine S. Wilson at 1, *Illumina, Inc.*, FTC Dkt. No. 9401 (Mar. 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401wilsonconcurringopinion.pdf [<https://perma.cc/JE8H-G8BY>].

67. Opinion of the Commission, *Illumina, Inc.*, FTC Dkt. No. 9401 (Mar. 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf [<https://perma.cc/Q5RP-FMPK>].

68. *See id.* at 40–65.

69. 370 U.S. 294 (1962).

70. Concurring Opinion of Commissioner Christine S. Wilson, *supra* note 66, at 1.

71. 603 F.2d 345 (2d Cir. 1979).

Second Circuit opinion from 1979; and (4) some academics dislike the Supreme Court's test.⁷²

Let us take each in turn. *First*, federal agency guidelines cannot formally overturn a Supreme Court decision. The antitrust agencies' merger guidelines are not even legally binding on the agencies themselves; they cannot overturn dozens of U.S. Supreme Court and appellate judicial decisions. *Second*, "all" of the "recent" opinions that had applied the ability-and-incentive test amounted to a total of two: one in 2022 and the other in 2018. Even if "recent" cases were the only ones that count, a federal court had applied the Supreme Court's framework as recently as 2016,⁷³ a fact that Commissioner Wilson's opinion neglected to mention. *Third*, Commissioner Wilson's opinion ignored what had transpired in the Second Circuit after 1979. In *United States v. American Cyanamid Co.*,⁷⁴ a district court (urged on by the Reagan-era U.S. Department of Justice) decided to apply "[c]ontemporary economic theory" instead of the Supreme Court's test to a challenged vertical merger.⁷⁵ The Second Circuit, writing in 1983, condemned that move as lawless: "While *Brown Shoe* and its progeny have been the subject of considerable criticism by academicians . . . these cases nonetheless continue to constitute the current state of the law as prescribed by the Supreme Court, which circuit and district courts are bound to follow."⁷⁶ This passage also neatly addresses Commissioner Wilson's fourth and final attempt at support: when academic policy preferences conflict with clearly governing law, adjudicators are supposed to apply—not reject—the law.

3. Amending Statutes

Section 7 of the Clayton Act prohibits mergers and acquisitions whose effect "may be" substantially to lessen competition or to tend to create a monopoly.⁷⁷ Textualist research indicates that "may be" signifies a probabilistic standard.⁷⁸ The statute does not require proof that a merger "will," "will probably," or "will likely" be harmful. Instead, a "reasonable probability" is enough.⁷⁹ The Clayton Act's legislative history confirms this.⁸⁰ Throughout the 1950s, 1960s, and early 1970s, the Supreme Court

72. Concurring Opinion of Commissioner Christine S. Wilson, *supra* note 66, at 2.

73. *In re Zinc Antitrust Litig.*, No. 14-cv-3728, 2016 WL 3167192, at *23–24 (S.D.N.Y. June 6, 2016).

74. 719 F.2d 558 (2d Cir. 1983).

75. *Id.* at 566–67; *see* *United States v. Am. Cyanamid Co.*, 556 F. Supp. 361, 369 (S.D.N.Y.), *rev'd*, 719 F.2d 558 (2d Cir. 1983).

76. *American Cyanamid Co.*, 719 F.2d at 567.

77. 15 U.S.C. § 18.

78. *See* Lande, Newman & Slaughter, *supra* note 29, at 803. *See generally* Basel J. Musharbash & Daniel A. Hanley, *Toward a Merger Policy That Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act*, 63 DUQUESNE L. REV. 1 (2025).

79. Judicial opinions issued contemporaneously with the 1914 enactment of section 7 identify the standard as one of "reasonable probability." *See, e.g.*, *Int'l Shoe Co. v. FTC*, 29 F.2d 518, 519–20 (1st Cir. 1928).

80. *See generally* Lande, Newman & Slaughter, *supra* note 29.

repeatedly described “reasonable probability” as the standard.⁸¹ And although the Court has not revisited the issue in a Clayton Act case since then, it has repeatedly made clear that a “reasonable probability” does not mean “likely” or a “preponderance of the evidence.”⁸²

That is the law according to text and precedent. But recently, some district court judges—whether consciously or sloppily due to the lawless atmosphere of modern antitrust—have been judicially amending section 7, inserting their preferred language in place of Congress’s chosen text. In *United States v. UnitedHealth Group, Inc.*,⁸³ for example, Judge Carl J. Nichols repeatedly stated that to prevail, enforcers must prove that a merger “*would be likely to*” substantially lessen competition.⁸⁴

Replacing “may be” with phrases like “would be likely to” is a legislative function. Judicial assumption of that role violates basic separation-of-powers principles.⁸⁵ Here, it upsets a careful balance struck by Congress through democratic deliberation. Softening liability from criminal to civil reduced the statute’s deterrent effect, a change elected legislators were willing to make only as part of a process that simultaneously expanded the scope of the statutory prohibition.⁸⁶

4. Altering Institutional Structures

In 1973, Congress amended the FTC Act to authorize the agency to seek preliminary injunctions in federal court pending parallel in-house administrative proceedings. Section 13(b) authorizes federal judges to grant such relief where, “weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”⁸⁷ The statute’s text does not require the FTC to prove that it will “likely” or “probably” ultimately succeed in the administrative proceeding. Congress deliberately chose *not* to require proof in federal court that the agency “will succeed,” nor even that it “will probably” succeed, in its administrative merits proceeding.⁸⁸ The goal was to ensure that “injunctive relief” be broadly

81. See generally *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

82. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (collecting cases).

83. 630 F. Supp. 3d 118 (D.D.C. 2022).

84. *Id.* at 129–30, 133–34, 152 (emphasis added).

85. Some may object that the U.S. Congress is especially dysfunctional of late, creating a need for some other branch to take up the lawmaking slack. But Congress can, and still does, act. The current dysfunction may well be temporary. And there is no popular (or even academic) outcry for “more large-scale mergers” that might necessitate this action in this area.

86. Breck P. McAllister, *Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly*, 3 A.B.A. SECTION ANTITRUST L. 124, 135–36 (1953) (describing the legislative compromise that yielded civil liability instead of criminal sanctions, with a low probabilistic threshold for liability).

87. 15 U.S.C. § 53(b).

88. See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (analyzing the legislative history of section 13(b) of the FTC Act).

available to the FTC” during its pending administrative processes.⁸⁹ Otherwise, as the Supreme Court has pointed out, “the Commission’s efforts would be frustrated” because the difficulty of “unscrambl[ing] merged assets frequently prevents entry of an effective order of divestiture.”⁹⁰

Nonetheless, some federal judges recently began requiring proof in section 13(b) proceedings that the Commission will ultimately succeed on the merits. For example, consider Judge Jacqueline Scott Corley’s statement of the law in *FTC v. Microsoft Corp.*:⁹¹ “[T]o establish a likelihood of success . . . the FTC must show [that] . . . competition would probably be substantially lessened.”⁹² That is the substantive merits standard for a violation. In other words, that is what plaintiffs would need to prove at trial, yet Judge Corley insisted that the FTC needed to prove it to receive a temporary preliminary injunction. Judge Corley also stated that the outcome in this proceeding “turn[ed] on whether . . . the [g]overnment has met its burden of establishing, through ‘case-specific evidence,’ that the merger . . . is likely to substantially lessen competition.”⁹³ Again, that is—and in fact overstates—the final merits standard.

By requiring proof of a violation, opinions like this upset a congressionally created institutional structure. They strip from an administrative agency its congressionally granted power of adjudication.⁹⁴ Whether self-aware or simply sloppy, these decisions reflect a lawless approach. Text, legislative history, and precedent make clear that these judges are not to decide the merits. Ignoring all of that, they decide the merits. Even Judge Posner conceded that “[o]ne of the main reasons for creating the [FTC] and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions.”⁹⁵

B. Advocacy

Federal antitrust agencies frequently engage in what they call “competition advocacy.” This umbrella label describes a wide range of activities, including filing amicus briefs, submitting statements to international organizations, and more. These strategies can help to persuade audiences to adopt a preferred position on a contestable legal question. Alternatively, they can flout the law in favor of an in-house preference. Like respondent-friendly agency opinions, they also face no direct oversight or accountability mechanisms.

89. *FTC v. Staples*, 970 F. Supp. 1066, 1071 (D.D.C. 1997).

90. *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.5 (1966).

91. 681 F. Supp. 3d 1069 (N.D. Cal. 2023).

92. *Id.* at 1090.

93. *Id.* at 1088–89 (third alteration in original) (quoting *United States v. AT&T, Inc.*, 916 F.3d 1029, 1037 (D.C. Cir. 2019)).

94. When paired with the Supreme Court’s decision in *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023), the FTC’s administrative adjudication process has become effectively unusable for most competition cases.

95. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986).

Section 2 of the Clayton Act,⁹⁶ often known as the Robinson-Patman Act, has long been a target of the antitrust orthodoxy. In 2015, the FTC expended time and resources to draft and file an amicus brief supporting the defendant in a Clayton Act section 2 proceeding. That brief explained that “[t]he FTC historically played a central role” in Clayton Act section 2 enforcement.⁹⁷ But, the brief continued, the FTC had self-consciously abandoned that role.⁹⁸ The brief argued for narrowing the statute’s scope, such that differentiated packaging cannot violate section 2(e) unless it contains express advertising. The brief cited no authority for this proposed rule, which was in clear tension with Supreme Court precedent holding that differential provision of (among other things) display cabinets without any express advertisements can violate section 2(e).⁹⁹

More recently, in 2020, the U.S. Department of Justice (DOJ) Antitrust Division (the “Division”) and the FTC jointly submitted to the Organisation for Economic Co-Operation and Development (OECD) a “Note by the United States” (the “2020 Note” or the “Note”) regarding “[c]onglomerate effects of mergers.”¹⁰⁰ The OECD, an international intergovernmental organization, does not make law, but it provides a forum for member states to seek to influence each other. It also provides a relatively accessible forum for making public statements, particularly for the FTC.¹⁰¹

In the 2020 Note, the federal agencies purported to describe the U.S. legal standard for merger review under section 7 of the Clayton Act. The Note correctly observed that the same general standard applies to all challenged transactions, regardless of the plaintiff’s theory of harm.¹⁰² But then the Note singled out the entrenchment theory of harm for different treatment.¹⁰³ Entrenchment theory, at least according to the Note, involves prohibiting mergers that strengthen an already dominant firm via greater efficiencies,

96. 15 U.S.C. § 13.

97. Brief of Amicus Curiae the Federal Trade Commission in Support of Defendants-Appellants and Reversal at 4, *Woodman’s Food Mkt., Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016) (No. 15-3001).

98. *Id.*

99. *See* *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 60 (1959).

100. Organisation for Economic Co-Operation and Development [OECD], *Conglomerate Effects of Mergers—Note by the United States*, at 3, DAF/COMP/WD(2020)7 (June 4, 2020) [hereinafter *OECD, 2020 Note*] (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967)).

101. Complaints, policy statements, rulemakings, and administrative decisions require a majority Commission vote; OECD submissions do not. *See generally, e.g.*, CHRISTIE GRAYMES THOMPSON, PRACTICAL L., *FTC CONSUMER PROTECTION INVESTIGATIONS AND ENFORCEMENT* (2014), <https://s3.amazonaws.com/cdn.kelleydrye.com/content/uploads/attachments/FTC-Consumer-Protection-Investigations-and-Enforcement.pdf> [<https://perma.cc/43L9-6WUC>]; Leslie E. John & Kayla Martin, *FTC’s New Section 5 Policy Statement Signals Significant Expansion of the Agency’s Enforcement Authority*, BALLARD SPAHR (Nov. 15, 2022), <https://www.ballardspahr.com/insights/alerts-and-articles/2022/11/ftcs-new-section-5-policy-statement-signals-significant-expansion-of-enforcement-authority> [<https://perma.cc/Z724-VKW2>].

102. *OECD, 2020 Note, supra* note 100, at 3 (citing *Procter & Gamble Co.*, 386 U.S. at 577).

103. *Id.* at 4.

access to a broader line of products, or greater financial resources.¹⁰⁴ The Note declared that entrenchment “is no longer viewed as valid under U.S. law or economic theory.”¹⁰⁵ As the Note conceded, entrenchment had been endorsed by the Supreme Court in *FTC v. Procter & Gamble Co.*¹⁰⁶ But, the Note continued, “legal and economic scholars and the Agencies” subsequently undertook a “critical examination” of entrenchment case law.¹⁰⁷ That critical examination, per the Note, led to the “ultimate rejection” of entrenchment law by those “legal and economic scholars and the Agencies.”¹⁰⁸

At least in theory, federal enforcement agencies operate within the confines of statutes and applicable Supreme Court precedent. Academic commentary can help to illuminate new vectors for enforcement within those confines, shed light on which of two valid-yet-competing interpretations is normatively desirable, and the like. But (at least in theory) it cannot provide grounds for agencies to “reject[]” binding precedent.¹⁰⁹

Moreover, despite purporting to rely on “economic rigor,” the 2020 Note misstated the facts, misread the case law, and misunderstood (if not willfully obscured) the economics. *Procter & Gamble* involved Procter & Gamble’s (P&G) acquisition of Clorox Chemical Co., a manufacturer of household liquid bleaches.¹¹⁰ The 2020 Note described Clorox’s market share as 48.8 percent; but as the Supreme Court’s opinion pointed out, that national-level figure was misleadingly low: Clorox’s share in some areas topped 60 percent.¹¹¹ Moreover, the relevant markets were highly concentrated, and Clorox’s share had been steadily increasing.¹¹² The 2020 Note omitted these facts.

As to the law and the economics, the 2020 Note cast *Procter & Gamble* as having naively prohibited a merger for making the combined company more efficient. But the Supreme Court had instead relied on three concerns. *First*, because P&G was already dominant over a wide range of other soaps, detergents, and cleansers, it wielded significant power over many retailers. Postacquisition, P&G could potentially induce retailers to discriminate against Clorox’s rivals by giving Clorox preferred shelf space, and/or use retailers as a means of disciplining new entrants or existing rivals that tried to compete with Clorox. *Second*, P&G could engage in predatory pricing of Clorox, relying on a diversified revenue stream from P&G’s other dominant positions to absorb the losses. *Third*, because of P&G’s size and dominant positions in other product markets, it already enjoyed volume-based

104. *Id.*

105. *Id.*

106. 386 U.S. 568 (1967).

107. OECD, *2020 Note*, *supra* note 100, at 4 (citing *Procter & Gamble Co.*, 386 U.S. at 577).

108. *Id.*

109. *Id.*

110. 386 U.S. at 569.

111. *See id.* at 571–72.

112. OECD, *2020 Note*, *supra* note 100, at 4.

discounts on advertising space. Acquiring Clorox, another firm that relied heavily on advertising to drive sales, would further increase P&G's advertising purchase volume.

Each of these concerns has valid economic theory underlying it. All else equal, a supplier that accounts for a large share of multiple differentiated products has more bargaining power over a retailer than a firm that accounts for a small share of those products.¹¹³ Predatory pricing, especially when the powerful firm has alternative revenue streams, can be a viable strategy.¹¹⁴ A dominant firm can induce trading partners to discriminate against the dominant firm's rivals.¹¹⁵ And while volume discounts might reflect lower cost of provision, they can also arise from increased monopsony power.

In isolation, any one of these concerns may not have supported liability. But the Court did not view each concern in isolation. Its approach reflected sound probabilistic analysis: even if each threat on its own has a relatively small chance of materializing, the decision-maker should consider the overall risk.¹¹⁶ Despite all of this, both federal antitrust agencies signed onto the 2020 Note announcing their "ultimate rejection" of the entire entrenchment doctrine based only—as we have seen—on a lazy doctrinal critique and sloppy economics.

II. INACTION

The DOJ and FTC are tasked with enforcing U.S. antitrust laws. That responsibility is, in theory, not optional. The Constitution's Take Care Clause¹¹⁷ requires the DOJ to enforce statutory prohibitions within its bailiwick, and the FTC Act "direct[s]" the FTC to do so.¹¹⁸ Nonetheless, over a period of several decades, these agencies adopted blanket, zero-enforcement policies as to multiple statutory provisions that they are supposed to enforce.

113. The difference hinges on the cost of a supplier "blackout" to a given retailer. Suppose Supplier *A* accounts for 60 percent and 55 percent of two products in differentiated-product markets, and Supplier *B* accounts for only 10 percent and 5 percent of those products. All else (demand elasticity, diversion ratios, per-item profitability, etc.) being equal, a blackout by Supplier *A* will be more costly for the retailer than a blackout by Supplier *B*.

114. See generally Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013) (explaining how Chicago school critiques of predatory-pricing doctrine failed to appreciate several scenarios in which predatory pricing can be a viable strategy).

115. See, e.g., *Lorain J. Co. v. United States*, 342 U.S. 143, 152 (1951) (affirming that a dominant publisher violated Sherman Act § 2 by pressuring advertising customers not to deal with the publisher's primary rival).

116. Suppose the overall question is whether a given merger has a 40 percent probability of yielding harmful effects. The merger at issue might cause harmful effects via one or more of three different mechanisms. Each mechanism has an independent 15 percent probability of causing harm. The adjudicator should conclude that the given merger exceeds the probability threshold ($0.15 + 0.15 + 0.15 = 0.45 > 0.40$).

117. U.S. CONST. art. III, § 3.

118. 15 U.S.C. § 45(a)(2).

A. Nonenforcement

For decades, at least three statutory antitrust provisions went entirely or almost entirely unenforced by the federal agencies. First, the text of Sherman Act § 2 states that “[e]very person who shall monopolize, or attempt to monopolize . . . any part of [interstate commerce] shall be deemed guilty of a felony.”¹¹⁹ The statute uses exclusively criminal language,¹²⁰ although courts and the Justice Department have long treated § 2 as a hybrid criminal-civil prohibition.¹²¹ The first criminal monopolization case under § 2 was filed in 1903.¹²² Throughout the following seven decades, DOJ enforcers brought some 168 criminal actions under Sherman Act § 2.¹²³ But those efforts ceased—abruptly and entirely—in 1978.¹²⁴

Clayton Act section 2, enacted in 1914 and amended in 1936, prohibits various forms of harmful price discrimination. For several decades, the federal agencies actively enforced this section alongside other core Clayton and Sherman Act provisions. The FTC alone issued nearly 1,400 complaints alleging violations of Clayton Act section 2 between 1937 and 1971.¹²⁵ But influential academic commentators began to criticize Clayton Act section 2 in the 1960s, using increasingly heated rhetoric that culminated in then-Professor Robert Bork’s condemnation of this statute as “the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory.”¹²⁶ Although Congress had acted to strengthen the law, the federal antitrust agencies began to defang it. The Justice Department stopped enforcing Clayton Act section 2 in the 1960s.¹²⁷ The FTC last made an effort to enforce it in 1988, issuing complaints alleging that the six largest book publishers had systematically discriminated against small bookstores in favor of national big-box retailers.¹²⁸ Soon thereafter, the FTC dropped those cases and litigated no new Clayton Act section 2 cases for more than three decades.¹²⁹

119. *Id.* § 2.

120. *Id.* (using the terms “guilty,” “felony,” “conviction,” “punished,” and “imprisonment”).

121. Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment*, 84 ANTITRUST L.J. 753, 756 (2022).

122. *Id.* at 755.

123. *Id.*

124. *Id.*

125. JAY B. SYKES, CONG. RSCH. SERV., LSB11257, FTC REVIVES ENFORCEMENT OF THE ROBINSON-PATMAN ACT (2025), <https://www.congress.gov/crs-product/LSB11257> [<https://perma.cc/444J-FYFG>].

126. BORK, *supra* note 41, at 382. See generally Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014).

127. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 316 (2007), https://digital.library.unt.edu/ark:/67531/metadc1228317/m2/1/high_res_d/amc_final_report.pdf [<https://perma.cc/K42C-N3G3>].

128. Press Release, FTC, FTC Dismisses Its Cases Against Six of the Country’s Largest Book Publishers (Sep. 20, 1996), <https://www.ftc.gov/news-events/news/press-releases/1996/09/ftc-dismisses-its-cases-against-six-countrys-largest-book-publishers> [<https://perma.cc/SR9V-ZAES>].

129. See SYKES, *supra* note 125. A sharply divided FTC did enter a negotiated—i.e., nonlitigated—consent decree in 2000 predicated on Clayton Act section 2. See generally

Section 8 of the Clayton Act bars individuals from serving as officers or directors of two rival corporations simultaneously,¹³⁰ a prophylactic measure against harmful collusion and coordination. The federal antitrust agencies once actively enforced section 8.¹³¹ But here again, agency litigation subsequently ceased altogether.¹³² The historical record contains a few scattered suggestions of investigative efforts. But neither federal agency initiated formal action.¹³³ Unsurprisingly, academic research indicates that the number of same-industry interlocking directorates increased substantially.¹³⁴ At least some of these likely violated the statute.¹³⁵

B. Anti-Enforcement

As to Clayton Act section 2, the agencies repeatedly went beyond mere passive nonenforcement. In 1977, the Justice Department expended considerable resources to research, compile, and publish an extensive report that heavily criticized Clayton Act section 2 and recommended that Congress give “serious consideration . . . to repealing” it.¹³⁶ In 1996, a divided Commission affirmatively voted to dismiss the FTC’s 1988 book publisher complaints.¹³⁷ And as described above, on at least one occasion, the FTC expended time and resources to intervene and file an amicus brief supporting the defendant in a private Clayton Act section 2 proceeding, a brief that urged adoption of a defendant-friendly position in sharp tension with existing Supreme Court precedent.¹³⁸

McCormick & Co., 129 F.T.C. 903 (2000). The decree required only that the defendant stop violating the law. *See generally id.*

130. 15 U.S.C. § 19.

131. *See* Robert Jay Preminger, *Deputization and Parent-Subsidiary Interlocks Under Section 8 of the Clayton Act*, 59 WASH. U. L.Q. 943, 952 (1981) (discussing the “small number of section 8 cases filed since enactment of the statute”).

132. *See generally, e.g.*, BRIANNE KUCERIK, MICHAEL MOISEYEV, JEFFREY PERRY & KELLY MCCUBREY, WEIL, GOTSHAL & MANGES LLP, PUTTING BOARDS ON NOTICE: FTC ANNOUNCES FIRST SECTION 8 ENFORCEMENT ACTION SINCE THE 1980S (2023), <https://www.weil.com/-/media/files/pdfs/2023/september/putting-boards-on-notice-ftc-announces-first-section-8-enforcement-action-since-the-1980s.pdf> [<https://perma.cc/3F2K-QGMM>] (explaining that the FTC has hardly enforced section 8 since the 1980s).

133. *Id.* (identifying the Google chief executive officer’s voluntary resignation in 2009 from Apple’s board following an FTC investigation and a voluntary deal restructuring in 2016 to resolve DOJ concerns arising out of a merger investigation).

134. *See, e.g.*, Yaron Nili, *Interlocking Directorates in the United States*, in RESEARCH HANDBOOK ON COMPETITION AND CORPORATE LAW 288, 300–01 (Florence Thépot & Anna Tzanaki eds., 2025); Lane Miles, Mark A. Lemley & Rory Van Loo, *Anticompetitive Directors*, 125 COLUM. L. REV. 1939, 1941 (2025).

135. *See* Anoop Manjunath, Nathan Kahrobai, Mark A. Lemley & Ishan Kumar, *Illegal Interlocks Among Life Science Company Boards of Directors*, J.L. & BIOSCIENCES, Jan.–June 2024, at 1, 9.

136. U.S. DEP’T OF JUST., REPORT ON THE ROBINSON-PATMAN ACT 261 (1977).

137. *Id.*

138. *See supra* notes 98–99 and accompanying text.

C. When Is Inaction Lawless?

Writing in 2024, shortly before being appointed and confirmed as an FTC Commissioner, Mark R. Meador described the federal antitrust agencies' treatment of Clayton Act section 2 as "lawless."¹³⁹ Nonenforcement generally raises serious rule-of-law and separation-of-powers questions, in addition to offending basic notions of equity and fairness.¹⁴⁰ That said, as with most general rules, exceptions do exist. Agencies have limited resources and often cannot identify and prosecute every single violation. Out of necessity, then, agencies frequently need to exercise some discretion when selecting which cases to pursue.¹⁴¹ Sometimes the statutes themselves grant discretion in the form of waiver authority.¹⁴² Most commentators agree that some instances of nonenforcement are legitimate. Where to draw the line is the subject of a sprawling debate among scholars of administrative law.¹⁴³

Although the precise boundaries between legitimate and illegitimate inaction are not always clear, legitimate examples share certain characteristics. *First*, in a democratic system, the process leading up to the agency decision matters. Decisions that reflect a good-faith attempt to understand and better effectuate the democratic will represented in a statute comport with rule-of-law principles.¹⁴⁴ To the extent nonaction instead reflects disdain for the democratic will represented in a statute, it undermines the rule of law.¹⁴⁵ And a decision made without consulting affected stakeholders, or after considering only the self-interested advocacy of potential defendants,¹⁴⁶ does not comport as well with rule-of-law ideals as a decision made after evaluating diverse views. *Second*, agencies can legitimately make decisions that reflect the need to allocate scarce resources. For example, an agency might decide not to challenge a given merger because doing so would involve substantial resource outlays and litigation risk. Carrying out that decision entails virtually no agency resources, leaving open the possibility that it rested (at least in part) on pragmatic concerns

139. Mark Ross Meador, *Not Enforcing the Robinson-Patman Act Is Lawless and Likely Harms Consumers*, FEDSOC BLOG (July 9, 2024), <https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers> [https://perma.cc/SQH3-ALP3].

140. *Id.*; see also Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1519–20 (2018).

141. Nielson, *supra* note 140, at 1519–20.

142. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 276 (2013).

143. Nielson, *supra* note 140, at 1518–19 (collecting sources).

144. See BRIAN Z. TAMAHANA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 112–13 (2004) (identifying the democratic enactment process as a core aspect of a thickly realized rule of law).

145. See *id.*

146. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8–9 (1997) (identifying impartiality in application as a core rule-of-law principle); see also TAMAHANA, *supra* note 144, at 112–13 (identifying protection of social-welfare rights as a core aspect of a thick conception of rule of law).

about resource constraints.¹⁴⁷ But nonenforcement that requires additional effort and resources to carry out is more likely to reflect some other, less legitimate motive. And of course, an ad hoc nonenforcement decision resulting from a quid pro quo arrangement made to personally benefit the agency decision-maker and the affected private parties is universally viewed as illegitimate, even if it incidentally saves some agency resources.¹⁴⁸ *Third*, legitimate inaction is generally not tantamount to an outright repeal of the statute(s) in question.¹⁴⁹ Deciding not to challenge one party's misconduct due to resource constraints does not create blanket immunity for all other parties engaging in similar misconduct. A decision that has the effect of substantially or even totally repealing a democratically enacted statute, on the other hand, tends to erode the rule of law.¹⁵⁰

This yields a three-factor framework that assesses the (1) *process* leading up to the decision, (2) *purpose* of the decision, and (3) *effect* of the decision. Applying these principles to the examples described above, the agencies' nonlitigation policy toward section 8 of the Clayton Act perhaps falls into a gray area. On the one hand, the agencies could not have justified this as a good-faith attempt to better understand and effectuate the statute. Nor do they appear to have undertaken any democratic consultation with stakeholders. But neither agency affirmatively expended resources to undermine the statute, leaving open the possibility that the policy at least partly reflected resource constraints. If anything, occasional instances of investigative effort indicate that some agency resource expenditures went toward carrying out the statutory mandate. These occasional instances of investigative efforts also likely softened any antideterrent effects.

The DOJ's nonenforcement of Sherman Act § 2's criminal prohibition raises more serious legitimacy concerns. This does not appear to have been a good-faith attempt to better understand and effectuate the statute, nor does the agency appear to have undertaken any democratic consultation with stakeholders. While the DOJ's inaction did not involve affirmatively taking steps to undermine the law, this was a blanket policy rather than a case-by-case decision-making process, making it less likely to have reflected legitimate concerns about resource constraints. Turning to effect, this was a blanket policy adopted by the only entity with the power to enforce the prohibition. As such, it was tantamount to an executive branch repeal of a democratically enacted statutory prohibition—a repeal that remained in effect for nearly five decades. This may well have been illegitimate inaction.

The federal agencies' treatment of Clayton Act section 2 appears most problematic. The process was suspect: neither agency appears to have

147. See generally Frank H. Easterbrook, *On Not Enforcing the Law*, REGULATION, Jan./Feb. 1983, at 14.

148. See, e.g., Zachary S. Price, *The Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1145 (2015); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693–95 (1999).

149. E.g., Price, *supra* note 148, at 1137.

150. E.g., Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 CARDOZO L. REV. 1513, 1514 (2009); Price, *supra* note 148, at 1141.

undertaken any meaningful democratic consultation with stakeholders to better understand the ramifications of nonenforcement. And this was a blanket policy, kept in place for multiple decades, not a thoughtful case-by-case determination. All that can be said in its defense is that private parties also have standing to sue under the statute.¹⁵¹ But this was also more than mere nonaction; both federal agencies took affirmative steps to undermine the law. Those steps required deliberate outlays of agency resources, indicating that the blanket zero-enforcement policy was not based on legitimate, pragmatic concerns about resource constraints. Commissioner Meador appears to have been correct: as to Clayton Act section 2, the federal antitrust agencies likely crossed the line into lawlessness.

III. RESTORING THE ROLE OF LAW

For a little over three years, key figures in the new antimonopoly movement assumed leadership of the primary federal antitrust agencies. Critics of their work frequently decried their supposed abandonment of “consumer welfare” as antitrust’s goal. But debates over antitrust’s goal(s) have become largely unproductive, and the following discussion will not retread that well-worn path. Instead, it parses the actual historical track record. That record, analyzed closely, reveals a sustained effort to restore law to antitrust—a much more interesting and instrumentally important methodological counterrevolution.

A. *In Practice: 2022 to 2025*

In 2021, Lina Khan assumed the role of FTC chair, and Jonathan Kanter was nominated to oversee the DOJ Antitrust Division. But Kanter was not confirmed until mid-November 2021, and the FTC did not reach full strength until Alvaro Bedoya’s confirmation as commissioner in May 2022. To get the clearest sense of this new movement’s goals and priorities, then, analysis can focus on the period stretching from mid-2022 through the change of administration in January 2025.

One of the full-strength FTC’s first enforcement actions challenged Meta’s proposed acquisition of Within Unlimited, a virtual-reality app studio.¹⁵² The agency’s theory of harm was lost potential competition. In briefing, the FTC pushed back against multiple lawless moves described above. The agency explained, responding to Meta’s motion to dismiss the case, that the proper standard required only a “reasonable probability,” not “clear proof,” that Meta would have entered the relevant market but for the challenged acquisition.¹⁵³ This position aligned with statutory text and Supreme Court precedent—and it was a marked departure from the Commission’s 1984

151. Cf. Easterbrook, *supra* note 147, at 15.

152. See generally *FTC v. Meta Platforms Inc.*, No. 22-cv-04325, 2023 WL 8629125 (N.D. Cal. Dec. 13, 2023).

153. Plaintiff’s Opposition to Defendants’ Motion to Dismiss Amended Complaint at 12–16, *Meta Platforms*, 2023 WL 8629125 (No. 22-cv-04325).

B.A.T. opinion.¹⁵⁴ The FTC’s Meta/Within briefing also declined to tack on another extra requirement—advocated for by the FTC itself just a few years earlier—of proving “there are few other firms that can enter effectively.”¹⁵⁵

In September 2022, the FTC and ten state attorneys general sued pesticide manufacturers Syngenta and Corteva, alleging that the defendants had been paying distributors to forego carrying rivals’ products.¹⁵⁶ Among other violations, the complaint alleged that these tactics violated section 3 of the Clayton Act,¹⁵⁷ the first claim brought by a federal enforcer under this statute in two decades. In briefing, the FTC and its state partners carefully distinguished Clayton Act section 3 from the Sherman Act, the FTC Act, and assorted state antitrust laws. This work paid off. Unlike *Roland Machinery* or *Belton*, the district court’s first opinion in *FTC v. Syngenta Crop Protection AG*¹⁵⁸ treated the relevant statutes as creating distinct prohibitions with distinct scopes and tests.¹⁵⁹

As to Clayton Act section 8, in mid-October 2022, the DOJ Antitrust Division announced that seven individuals had resigned from five companies in response to agency statements of concern over potentially illegal interlocking directorates.¹⁶⁰ This was not a one-off action: by August 2023, the Division had announced fifteen resignations from eleven corporate boards.¹⁶¹ The FTC, for its part, issued an order in October 2023 to prevent the creation of an interlocking directorate via a pending merger.¹⁶² All of this caused a considerable stir among the private defense bar, with firms issuing dozens of client letters warning of “reinvigorated” federal enforcement after decades of dormancy.¹⁶³

154. 104 F.T.C. 852 (1984).

155. *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015).

156. Complaint at 2, *FTC v. Syngenta Crop Prot. AG*, 711 F. Supp. 3d 545 (M.D.N.C. 2024) (No. 22CV828).

157. *Id.*

158. 711 F. Supp. 3d 545 (M.D.N.C. 2024).

159. *Id.* at 581.

160. Press Release, U.S. Dep’t of Just., Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates (Oct. 19, 2022), <https://www.justice.gov/archives/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially> [https://perma.cc/6DUT-W6CA].

161. Press Release, U.S. Dep’t of Just., Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department’s Ongoing Enforcement Efforts Against Interlocking Directorates (Aug. 16, 2023), <https://www.justice.gov/archives/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing> [https://perma.cc/54CW-NN3L].

162. Press Release, FTC, FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Oct. 10, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-approves-final-order-prevent-interlocking-directorate-arrangement-anticompetitive-information> [https://perma.cc/A8JL-CWBZ].

163. Rebecca Farrington et al., *DOJ Announces Seven Director Resignations from Five US Public Company Boards in the Most Recent Wave of Reinvigorated Clayton Act Section 8 Enforcement*, WHITE & CASE (Oct. 21, 2022), <https://www.whitecase.com/insight-alert/doj-announces-seven-director-resignations-five-us-public-company-boards-most-recent> [https://perma.cc/N6WS-EJWK].

The federal antitrust agencies also distanced themselves from the purported “ultimate rejection” of entrenchment case law in the 2020 Note described above. In May 2023, the FTC challenged the proposed merger of two pharmaceutical companies, Amgen and Horizon Therapeutics.¹⁶⁴ The FTC’s theory of harm centered on entrenchment. Horizon already enjoyed monopoly positions in two relevant markets in which Amgen did not compete.¹⁶⁵ By adding Horizon’s drugs to Amgen’s already-substantial portfolio, the complaint alleged, the combined firm could pressure customers to favor its own products and disfavor rivals’, thereby entrenching Horizon’s preexisting monopolies.¹⁶⁶

The FTC and DOJ’s jointly issued Merger Guidelines (the “2023 Merger Guidelines”), promulgated in December 2023, observed that entrenchment doctrine was good law.¹⁶⁷ Although the 2023 Merger Guidelines did not expressly condemn or withdraw previous agency statements, the difference between the two documents was stark. Where the 2020 Note had purported to “reject[]” Supreme Court precedent based on the policy preferences of “legal and economic scholars and the Agencies,”¹⁶⁸ the 2023 Merger Guidelines sought to reflect statutory text and governing case law.¹⁶⁹

The reaction to these new guidelines from the antitrust orthodoxy typifies the extent to which antitrust had previously departed from traditional legal principles.¹⁷⁰ The 2023 Merger Guidelines cited—for the first time—the underlying statutes, as well as Supreme Court and federal appellate case law.¹⁷¹ Many commentators were aghast.¹⁷² Professor Dennis W. Carlton, senior managing director of a well-known consulting firm, wrote that his “main complaint is that the radically altered form of the 2023 [Merger] Guidelines . . . has transformed them . . . into a legal guide of how the enforcement agencies interpret the antitrust laws.”¹⁷³ In other words, two law enforcement agencies had issued a guide on how they would interpret

164. Complaint at 2–4, Amgen Inc., FTC Dkt. No. 9414 (June 22, 2023).

165. According to the complaint, Horizon charged approximately \$650,000 for a six-month course of treatment of one of the drugs and \$350,000 for the other. *Id.* at 3.

166. *Id.*

167. See U.S. DEP’T OF JUST. & FTC, MERGER GUIDELINES 18 para. 2.6 (2023).

168. *Id.*

169. See Lande, Newman & Slaughter, *supra* note 29, at 838.

170. For an example of orthodox commentators praising previous agency guidelines precisely because they deviated from precedent, see Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 312 (1983) (“Virtually every provision deviates from precedent.”).

171. Alexander Raskovich, *Conflict or Continuity?: An Analysis of the 2023 Merger Guidelines*, 31 GEO. MASON L. REV. 1043, 1045 (2024).

172. *Id.* at 1056 (complaining about “the apparent shift away from economics toward reliance on pull-quotes from old case law”); Bruce D. Sokler, Robert G. Kidwell, Payton T. Thornton & Matthew Tikhonovsky, *New Merger Enforcement Toolkit: FTC and DOJ Release Final 2023 Merger Guidelines*, MINTZ (Dec. 27, 2023), <https://www.mintz.com/insights-center/viewpoints/2191/2023-12-27-new-merger-enforcement-toolkit-ftc-and-doj-release-final> [<https://perma.cc/J3K4-N8LM>] (“The final 2023 Guidelines cite decades-old merger caselaw, which has been heavily criticized in the academic literature.”).

173. DENNIS W. CARLTON, *THE 2023 MERGER GUIDELINES: A CRITICAL ASSESSMENT* 1 (2024).

the law. Even more moderate commentary faulted the antitrust agencies for relying too heavily on law instead of “expert opinion and economic scholarship.”¹⁷⁴

During this period, the DOJ Antitrust Division also revived criminal prosecution under § 2 of the Sherman Act.¹⁷⁵ In late 2022, the Division secured a guilty plea in *United States v. Zito*¹⁷⁶ and indicted twelve individuals in *United States v. Martinez*,¹⁷⁷ both of which included § 2 counts.¹⁷⁸ Again in 2024, the Division secured a guilty plea that included a § 2 count.¹⁷⁹ These actions marked the first criminal enforcement under Sherman Act § 2 in over four decades.¹⁸⁰

And the FTC revived Clayton Act section 2 enforcement in a pair of lawsuits filed toward the tail end of this period. In December 2024, the agency sued the largest U.S. distributor of wine and spirits for allegedly charging independent retailers higher prices than large chain stores.¹⁸¹ Then, in January 2025, the FTC sued PepsiCo, alleging that it had been providing one large, big-box retailer unfair pricing advantages over competing retailers.¹⁸²

To be sure, not every new initiative during this period was met with success. The FTC’s Meta/Within litigation was a mixed bag—the agency prevailed on Meta’s motion to dismiss but lost its bid for a preliminary injunction. That said, the district court’s opinion yielded several beneficial holdings and, in general, put potential-competition doctrines back on the table for the first time in several decades.¹⁸³ The FTC’s

174. Herbert Hovenkamp, *The 2023 Merger Guidelines: Law, Fact, and Method*, 65 REV. INDUS. ORG. 39, 41 (2024).

175. 15 U.S.C. § 2.

176. No. 22-cr-00113, 2022 WL 16549305 (D. Mont. Oct. 31, 2022).

177. Indictment, *United States v. Martinez*, No. 22-cr-00560 (S.D. Tex. Nov. 9, 2022).

178. Plea Agreement, *United States v. Zito*, No. 22-cr-00113 (D. Mont. Sep. 19, 2022); Indictment, *United States v. Martinez*, No. 22-cr-00560 (S.D. Tex. Nov. 9, 2022).

179. Jeffrey Martino, Byron Tuyay, Kristen Lloyd & Allison Simkins, *United States: DOJ Scores Its Second Successful Sherman Act Section 2 Criminal Prosecution*, BAKER MCKENZIE (Apr. 29, 2024), https://insightplus.bakermckenzie.com/bm/antitrust-competition_1/united-states-doj-scores-its-second-successful-sherman-act-section-2-criminal-prosecution [<https://perma.cc/6MYH-9WX5>].

180. Daniel L. Zelenko, Jeff Severson, David Griffith & Jessica Franzetti, *Bridging the Guidance Gap: Exploring Criminal Sentencing for the Antitrust Division’s Historical and Renewed Enforcement of Section 2*, 39 ANTITRUST 12, 12 (2024).

181. Complaint, *FTC v. S. Glazer’s Wine and Spirits, LLC*, No. 24-cv-02684 (C.D. Cal. Dec. 12, 2024).

182. Press Release, Fed. Trade Comm’n, *FTC Sues PepsiCo for Rigging Soft Drink Competition* (Jan. 17, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-sues-pepsico-rigging-soft-drink-competition> [<https://perma.cc/53SM-ATZU>].

183. The FTC had litigated one merger challenge, *FTC v. Steris*, 133 F. Supp. 3d 962 (N.D. Ohio 2015), based on a potential-competition theory between 1980 and 2021. But the district court in that case declined even to recognize the theory as valid and rejected the agency’s challenge on the facts. *Id.* at 966.

Microsoft/Activision¹⁸⁴ merger challenge fared less well.¹⁸⁵ In briefing, the agency sought to restore the institutional structure Congress established for preliminary-injunction actions brought by the FTC in federal court. But the district court failed to apply the law as it stands, and an appellate panel declined to correct the error. And in May 2025, the FTC, under new leadership, voted to dismiss its own Clayton Act section 2 price discrimination lawsuit against PepsiCo.¹⁸⁶

Nonetheless, the overall picture that emerges is of a concerted effort to restore the role of law to the antitrust enterprise. This methodological component of the new antimonopoly movement has been underappreciated by most critical commentary, much of which offers only straw man caricatures and piecemeal attacks on particular enforcement actions or agency guidance.¹⁸⁷ But then, so too was the full breadth and depth of the Chicago school's methodological revolution underappreciated by many skeptics and critics, at least until relatively recently.¹⁸⁸ Chicagoan agency heads and judges imposed a top-to-bottom rewrite of antitrust—a new goal, new metrics for testing cases against that goal,¹⁸⁹ new rules,¹⁹⁰ new empirical assumptions to guide application of those rules,¹⁹¹ and a new methodology that almost entirely jettisoned legal materials and toolkits. Methodological reform is essential to a “root and branch reconstruction” of antitrust.¹⁹² And the new antimonopoly movement, during its relatively brief period in power, appears to have understood and acted on this principle.

This is not blinkered formalism. Normatively, it reflects a healthy respect for constitutional separation of powers and democratic ideals. If a validly enacted statute is to be amended or repealed, the legislative branch is

184. See generally Complaint, Microsoft Corp. and Activision Blizzard, Inc., No. 9401 (F.T.C. Dec. 8, 2022).

185. For a thoughtful framing of this type of case, see Rebecca Haw Allensworth, *Long-Term Consumer Welfare*, 79 VAND. L. REV. 101 (forthcoming 2026).

186. Press Release, FTC, FTC Dismisses Lawsuit Against PepsiCo (May 22, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-dismisses-lawsuit-against-pepsico> [<https://perma.cc/2QFG-UK4Y>].

187. This trend began even before antimonopoly movement figures served in leadership positions. See generally John M. Newman, *Reactionary Antitrust*, CONCURRENTS, Nov. 2019, at 66.

188. See generally Paul, *supra* note 17.

189. See Newman, *The Output-Welfare Fallacy*, *supra* note 2, at 573 (explaining that the Chicagoan metric for testing conduct against goals is output effects).

190. See generally John M. Newman, *Microsoft's Ramble Through the Wilds* (2025) (unpublished manuscript) (on file with the *Fordham Law Review*) (analyzing the U.S. Court of Appeals for the District of Columbia Circuit's decision in *United States v. Microsoft Corp.* to apply the rule of reason, rather than the Supreme Court's quasi-*per se* illegality rule, to a tying restriction).

191. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11 (1984).

192. William E. Kovacic, *The Roots of America's Competition Problem*, PROMARKET (Sep. 21, 2021), <https://www.promarket.org/2021/09/21/the-roots-of-americas-competition-revolution/> [<https://perma.cc/4JSM-DPEN>] (“The term ‘transformation’ expresses the movement's main ambition: what Sandeep Vaheesan has called a ‘root and branch reconstruction’ that aligns doctrine and policy with an egalitarian vision of citizen welfare and strives to dissolve monopoly power.”).

supposed to do so.¹⁹³ It is foundational to the U.S. legal system that the law of the land ought to reflect, however imperfectly, the will of the people. Effectively repealing a statute on the basis of whatever academic theory from one particular camp within a broad discipline happens to be en vogue is profoundly undemocratic. The new antimonopoly movement appears to embrace democratic ideals as a core plank of its platform. That is why the agencies sought, at least for a few years, to carry out their full congressional mandates.

*B. In Relation to the Role of Economics
and Other Disciplines*

Carving out a role for law in antitrust analysis does not require rejecting the use of other disciplines like economics. To the contrary, while the antimonopoly movement held leadership positions, it doubled down on using modern economics and simultaneously expanded agency capacity in other areas. Shortly after taking office, for example, Chair Khan appointed John Kwoka to serve as chief economic advisor, a position that does not appear to have existed previously. In 2022, Chair Khan named Aviv Nevo, another preeminent economist, to oversee the agency's Bureau of Economics. That same year, Assistant Attorney General Kanter tapped Susan Athey, yet another leading economist, to serve as chief economist for the Antitrust Division. Both agencies' economics arms were in "hiring mode" throughout this entire period.¹⁹⁴

At the same time, both federal antitrust agencies were expanding their analytical capacity beyond industrial-organization microeconomics. During this period, the FTC aggressively hired labor economists, health economists, environmental economists, and more.¹⁹⁵ The agency also created a new Office of Technology and staffed it with technologists who offered unique expertise across a wide range of cutting-edge fields.¹⁹⁶ Speaking from first-hand experience, these additions were immediately and immensely impactful. Similarly, the Antitrust Division brought on a range of new in-house expertise, from a principal economist with a specialty in labor economics to a new chief technologist, finance experts, and more.¹⁹⁷

Restoring the role of law to antitrust does not appear to necessitate jettisoning economics or any other discipline. Unfortunately, critics of the new antimonopoly movement seem not to understand this. A senior executive within the U.S. Chamber of Commerce, for example, wrote in 2022 that "Chair Khan . . . seeks to divorce economic analysis from antitrust

193. *See generally* Arthur, *supra* note 17.

194. TECH. POL'Y INST., ECONOMICS AT THE ANTITRUST AGENCIES (2023), <https://techpolicyinstitute.org/wp-content/uploads/2023/02/Economics-at-the-Antitrust-Agencies-transcript.pdf> [<https://perma.cc/RZ4P-VXWC>].

195. *Id.*

196. *See generally* FTC, FEDERAL TRADE COMMISSION ACCOMPLISHMENTS: JUNE 2021–JANUARY 2025 (2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-accomplishments-june-2021-january-2025.pdf [<https://perma.cc/S4GZ-5GDM>].

197. TECH. POL'Y INST., *supra* note 194.

law.”¹⁹⁸ But every case brought by the FTC and DOJ during the 2022–2025 period was heavily informed by economic analysis, every rulemaking at the FTC was heavily informed by economic research, and the federal agencies’ jointly promulgated 2023 Merger Guidelines reflected modern economic findings and principles.

What exactly is the critique, then? These critics are effectively insisting that microeconomics—and only microeconomics—provide answers to more fundamental questions. Should the federal antitrust agencies refuse to enforce a statute that Congress tasked them with enforcing and instead expend scarce resources trying to hinder its enforcement? Should the FTC issue administrative rulings that flout statutory text and precedent? Should both federal antitrust agencies issue statements proclaiming their “rejection” of binding case law? Critics believe that economics alone, and one particular strain of microeconomics at that, should provide the answer to such questions. Most members of the new antimonopoly movement would likely disagree. That divergence, I believe, is the space between the lawless antitrust of a previous era and an antitrust enterprise that includes an appropriate role for law.

C. *In Relation to the Rule of Law*

Perhaps because it should go without saying, the “dizzying array”¹⁹⁹ of proposed rule-of-law standards rarely expresses a fundamental truth: the rule of law requires a role for law. In the U.S. tradition, this means a role for legitimately enacted statutes and applicable, binding precedent, along with a transparent process for legal change that allows democratic input from affected stakeholders. Whatever else the rule of law may mean, it demands that no one—including the institutional actors who administer laws—be above the law.²⁰⁰ When federal judges and antitrust agencies effectively repeal or undermine a democratically enacted statutory provision, they trample on the rule of law.

A one-way ratchet dynamic makes this especially pernicious. Suppose an FTC administrative ruling were to take an especially expansive view of a statute’s scope. A formal mechanism exists to correct this type of ruling: the defendant can appeal the ruling to any federal intermediate appellate court and then again to the U.S. Supreme Court.²⁰¹ But consider a decision like *Beltone* that eliminates, rather than expands, an antitrust statute.²⁰² No direct mechanism exists for correction. The respondents will not appeal a favorable ruling. And the Commission cannot appeal itself. Or suppose the DOJ

198. Sean Heather, *Lina Khan’s Unfair and Deceptive Approach to Antitrust*, U.S. CHAMBER OF COM. (Sep. 20, 2022), <https://www.uschamber.com/antitrust/lina-khans-unfair-and-deceptive-approach-to-antitrust> [<https://perma.cc/AH9Z-Z9M3>].

199. Gerald J. Postema, *An “Almost Sacred Responsibility”: The Rule of Law in Times of Peril*, 107 JUDICATURE, no. 3, 2024, at 16, 17; see also Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOU. L. REV. 185, 186 (2019).

200. Postema, *supra* note 199 at 18–19.

201. See generally *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

202. See *supra* notes 61–65 and accompanying text.

Antitrust Division were to take an overly broad position in federal court. The defendant can push back at the pretrial and trial stages, appeal to an intermediate court if needed, and appeal to the U.S. Supreme Court after that. But where the Division decides instead *not* to enforce an antitrust statute, those institutional checks do not apply.

Critics of the new antimonopoly movement who seek to wrap themselves in the “rule of law” have remained silent as to this problem, despite its repeated occurrence between 1980 and 2021. Instead, they offer vague paeans to doctrinal concepts like “the rule of reason,” claiming that it is “necessary for the rule of law to prevail.”²⁰³ It is a bedrock rule-of-law requirement that no one can be above the law. And at least as far back as *Marbury v. Madison*,²⁰⁴ another foundational rule-of-law principle recognizes that a law with no teeth is no law at all.²⁰⁵ The “rule of reason,” as applied in Sherman Act § 1 cases, puts virtually every defendant above the law.²⁰⁶ But the critics who invoke the rule of reason as somehow “necessary” for the rule of law have largely remained silent on this problem as well.

What is more, some of these same critics argue that the judge-made “rule of reason” must apply to the FTC Act if we are to achieve rule of law. But Congress created the FTC Act specifically to reject the defendant-always-wins “rule of reason.”²⁰⁷ Applying the rule of reason to FTC Act cases is therefore tantamount to repealing the statute. The separation of powers is another fundamental rule-of-law principle, one with roots as far back as ancient Greece.²⁰⁸ Yet these critics demand that an administrative agency and the judiciary override Congress. Perhaps without even realizing it, this strand of critique engages in—and typifies—the very sort of lawlessness it claims to reject.

203. Brian Albrecht, *FTC Rejects Economics for ‘Fairness’*, TRUTH ON THE MKT. (Nov. 10, 2022), <https://truthonthemarket.com/2022/11/10/ftc-rejects-economics-for-fairness/> [https://perma.cc/39CK-5Q96]; Jonathan M. Barnett, *The FTC Abandons the Free Market*, TRUTH ON THE MKT. (May 2, 2022), <https://truthonthemarket.com/2022/05/02/the-ftc-abandons-the-free-market/> [https://perma.cc/3PEN-TGE8] (worrying that the FTC would not apply the rule of reason in FTC Act section 5 cases while ignoring the fact that Congress enacted FTC Act section 5 specifically to reject the rule of reason).

204. 5 U.S. (1 Cranch) 137 (1803).

205. *Id.* at 163 (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

206. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009) (finding that defendants won 221 of 222 such cases over a ten-year period).

207. Noah J. Phillips, *Rules Without Reason* (May 6, 2022), TRUTH ON THE MKT., <https://truthonthemarket.com/2022/05/06/rules-without-reason/> [https://perma.cc/RK44-59TK] (arguing that the Supreme Court has applied the rule of reason to Sherman Act § 1 cases, then concluding that the rule of reason must also apply to FTC Act section 5, despite the latter’s deliberate use of different language).

208. Stein, *supra* note 199, at 193 n.35 (citing ARISTOTLE, ARISTOTLE’S RHETORIC AND POETICS 20–21 (W. Rhys Roberts & Ingram Bywater trans., 1954)).

CONCLUSION

For several decades, antitrust viewed itself as “exceptional” and “peculiar”—exceptionally lawless in its methodology and peculiarly undisturbed by that fact. Even those who were uneasy with the status quo may not have appreciated the full extent to which the antitrust orthodoxy subverted, ignored, or outright rejected democratically enacted statutes and applicable case law. The new antimonopoly movement, during its brief period in power, upset the status quo—and it did so on multiple levels. While the debate over antitrust’s goals occupied a great deal of critical and public imagination, the methodological reorientation described herein is at least as central to this movement’s reconstructive project. It is always harder to build than to break. But if rule of law means anything at all, then the difficult task of rebuilding the antitrust enterprise must include carving out a role for law.