IS ANTITRUST LAW, POLICY, OR POLITICS?

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I. INTRODUCTION

Thirty years ago, Harry First posed a simple but provocative question: Is antitrust *law* or is it *policy*?[1] The question was motivated by developments taking place in antitrust enforcement in the early 1990s. The agencies were making greater use of consent decrees and crafted remedies than ever before.[2] Broad, forward-looking guidance, particularly in the form of economic commentary, was crowding out evolution of antitrust through judicial decision of litigated cases.[3] Changes like these drove Harry to question what exactly antitrust was supposed to be. The depth of this question, and the non-obviousness of its answer, made the work a treasure.

Harry's argument embraced both positive and normative considerations. The positive considerations were conspicuous and empirical. The question—

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[1] Harry First, *Is Antitrust Law*, 10 ANTITRUST 9 (1995).

[2] *See id.*

[3] *See id.*; A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (1995).

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What *is* antitrust?—demanded a trip to the trenches. What were the agencies doing? How were disputes getting resolved? What was the published record of what was illegal and likely to be opposed? Normative considerations tiptoed into the argument. Harry did not try to answer anything as broad as what antitrust optimally should be. Instead, he tackled a narrow and pragmatic question: Were changes in antitrust enforcement heading in a good direction?

In brief but persuasive analysis, Harry concluded that antitrust was drifting toward regulatory policy.[4] He cautioned that this change was not costless. It traded concrete precedent and law for abstract expressions of transient policy positions. Harry predicted that the drift toward policy would eventually sap the strength from antitrust.[5] He recommended a reverse-course in the direction of law and legalistic enforcement.[6]

Today, I want to revisit Harry's question. Excuses for returning to the subject can be found throughout the changes that have taken place in antitrust over the past decade. The reemergence of populist antitrust rhetoric,[7] the sudden spike in political attention to antitrust law,[8] and the sweeping changes that have taken place in administrative practices under the Biden administration[9] all invite a fresh look at the question: What exactly is antitrust supposed to be?

Returning to Harry's question also presents an opportunity to expand its scope. The law-policy continuum that Harry explored in 1995 is insufficient for mapping recent developments. Instead, I will pose a generalization of Harry's question: Is antitrust *law*, is it *policy*, or is it *politics*?

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[4] First, *supra* note 1, at 9; *see also* Melamed, *supra* note 3 at 13.

[5] First, *supra* note 1, at 11–12.

[6] *Id.* at 12.

[7] *See infra* notes 50–53 and accompanying text.

[8] *See infra* notes 54–57 and accompanying text.

[9] *See infra* notes 58–66 and accompanying text.

II. Law, Policy, and Politics

Why does it matter if antitrust is law, policy, or politics? It matters because each of these categories represents a distinct approach to regulation. The categories overlap, to be sure, but they are not the same. They do not promise similar results. And movement from one category to another is not costless for enforcement outcomes.

A. Law and Legalistic Regulation

Harry identifies "legalistic regulatory culture" as focusing on the protection of individuals against harmful acts.[10] Law is "individual-case oriented" in this understanding, as well as "fact bound, and backward looking."[11] In a legalistic approach to regulatory enforcement, substantive law is developed and applied through the litigation of specific disputes in unique factual contexts. Enforcement standards emerge from the iterative application of precedent to concrete facts, one case at a time.

One wrinkle in this definition of legalistic regulation is that seems to focus on adjudication to the exclusion of legislation. Specific and detailed statutes are also a source of law and would rank as legalistic regulatory culture if they existed in antitrust. Harry's focus on adjudication reflects the obvious point that the brevity and vagueness of the antitrust statutes relegates the development of substantive enforcement standards to adjudication, not legislation.

But there are other wrinkles. Law in the common law tradition has never been exclusively about what happened in the past. As soon as precedential effect is given to judicial decisions, those decisions become as much about social policy and the regulation of future behavior as about responding to past acts.[12] So, even in a purely adjudicated context, the game is not exclusively about the

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[10] First, *supra* note 1, at at 9.

[11] *Id.*

[12] *See* Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 572–75 (1987) (discussing the forward-looking effect and considerations in precedential decisions); *see also* Frederick Schauer, *Do Cases Make Bad Law*?, 73 U. Chi. L. Rev. 883 (2006).

identification and resolution of past injuries.[13] The backdrop of potential legislative override also muddies the distinction between adjudication and politics. The substance of legalistic regulation, as Harry identifies it, always exists at the pleasure and peril of legislative coalitions.

Still, these overlaps conceded, the functional implications of a legalistic approach to regulatory enforcement are distinct enough to justify focusing on law as one paradigmatic mode of regulation. Just as Harry's definition focuses on the resolution of individual disputes with private consequences, a legalistic regulatory culture directs attention to concrete questions like what the defendants have done in a particular case, rather than abstract matters like optimal behavior or status considerations like the social or political standing of the respective litigants at a given moment in time.[14] Law grows haphazardly in this approach, but its growth is shaped by the sober influences of concrete facts and the need to do justice between real people in real cases.

B. Policy and Bureaucratic Regulation

As a counterpoint to law, Harry identifies "bureaucratic regulatory culture" as focusing on broader policy questions like "how the economy should be structured and run."[15] This policy-based approach to regulation is "group oriented, theory based, and forward looking."[16] It is regulatory policy of a technocratic

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[13] Remedies are forward-looking as well. The Holmesian view of legal remedies as nothing more than prices to be paid for engaging in certain acts finds intuitive application in antitrust's imposition of trebled damages as a way of disincentivizing anticompetitive price elevation. O. W. Holmes, *Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").

[14] Today, this narrowed focus is enforced by rules of evidence. *See, e.g.*, Fed. R. Evid. 402 (requiring evidence to be legally relevant to be admissible); Fed. R. Evid. 403 (providing for discretionary exclusion on the basis of unfair prejudice), Fed. R. Evid.404 (prohibiting character and propensity reasoning).

[15] First, *supra* note 1, at at 9.

[16] *Id.*

variety. One imagines expert agency staffers debating, promulgating, and enforcing rules and policies in a process of regular communication and cooperation with regulated parties.

This definition recalls the distinction between legislation and agency rulemaking.[17] Agencies empowered to develop rules and enforce laws—particularly under vague empowering statutes—inevitably exercise a great deal of regulatory discretion. The need for transparency in the exercise of that discretion motivates forward-looking announcements. Guidance documents, policy statements, and advisories are the bread and butter of bureaucratic regulation.

Here, again, we must not overstate the distinction. Bureaucratic regulatory authority arises from empowering legislation and is exercised against a backdrop of political oversight and punctuated judicial review.[18] Even expert and specialized agency staff are constrained to roam within a field bounded by statutes and ultra vires review.[19] On the political side, opportunities for manipulation and intrusion into policymaking abound.[20]

But, despite these caveats, the identification of bureaucratic policymaking as a distinct mode of regulation is again helpful in thinking about enforcement consequences. Bureaucratic regulatory enforcement is likely to be both broader and narrower than legalistic enforcement. At the broad end, substantive rules and policies are often abstract and forward looking—think, guidance documents and policy statements. At the narrow end, close communication between regulators and regulated parties invites out-of-court resolutions of disputes. Negotiated

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[17] *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002) (explaining this distinction in the context of the nondelegation doctrine).

[18] *See* Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229 (2018).

[19] *Cf.* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024); W. Virginia v. Env't Prot. Agency, 597 U.S. 697 (2022).

[20] *Cf.* R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J.L. ECON. & ORG. 279, 280–81 (1987) (listing many ways that Congress may react to agency exercises of discretion).

remedies and consent decrees can be tailored so tightly that they leave no generalizable principles behind.[21]

Policy-based regulation is also more flexible than law. Opportunities for changing substantive rules and enforcement approaches are less frequent and more constrained in a legalistic context.[22]

C. Politics and Populist Regulation

Unexplored in Harry's formulation—but important to considering current events—is what we might call "political regulatory culture." Here, substantive laws and enforcement norms arise from political influences, like changing presidential administrations. Regulations reflect the influence of political coalitions and voter interests, not judicial interpretations or technocratic expertise. This description of political regulation overlaps with some articulations of populism.[23] It contemplates the vesting of enforcement authority in non-experts, unconstrained by the moderating influences of precedent or technical rigor and beholden only to transient coalitions in a democratic context.

This definition of political regulation borrows from several literatures. The discontinuous translation of voter preferences into political outcomes is well

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[21] *See* First, *supra* note 1, at 11.

[22] *Cf.* Frederick Schauer, *Why Precedent in Law (And Elsewhere) Is Not Totally (Or Even Substantially) about Analogy*, 2008 Persp. Psychol. Sci. 454 (2008) (noting that decision-making under the constraint of binding precedent is distinct even from reasoning by analogy outside the common law decision space).

[23] *See, e.g.*, Sheri Berman, *The Causes of Populism in the West*, 24 Ann. Rev. of Pol. Sci. 71 (2021).

studied in research on voting and majority rules.[24] Studies of populism and movement politics also contribute to understanding political regulation.[25]

Political actors are, of course, responsible for both creating and executing laws in the constitutional framework, so we should expect political regulation to overlap with legal and bureaucratic regulation. Bureaucratic agencies are subject to political control. Judges are appointed and funded through political processes.[26] At a philosophical level, all force of law ultimately derives from some degree of public support for legally imposed duties and prohibitions.[27]

But distinguishing political regulation from law and policy is still helpful. The distinction drawn here underlies constitutional separation of powers principles,[28] a common justification for which is the need to moderate the changes in law that would result from unconstrained political passions.[29] We are also focused on a

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[24] For a gentle introduction, see W. D. WALLIS, THE MATHEMATICS OF ELECTIONS AND VOTING (2014).

[25] *See, e.g.*, Nicola Lacey, *Populism and the Rule of Law*, 15 ANN. REV. OF L. & SOC. SCI. 79, 78 (2019) (collecting works that study the recent emergence of populist movements in Europe and North America).

[26] *See generally* Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575 (2014) (discussing sources of judicial dependence on politics).

[27] *Cf.* KEN BINMORE, NATURAL JUSTICE (2011).

[28] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (asserting that the nondelegation principle—which separates valid delegations of lawmaking authority from invalid delegations of legislative power—is "rooted in the principle of separation of powers that underlies our tripartite system of Government").

[29] *Cf.* Rice v. Foster, 4 Del. 479, 486 (1847) ("In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker: the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate it by becoming their tyrants and oppressors.").

specific subset of political regulation. Nothing prevents a political body from delegating authority and then stepping back to allow expert agency staff decide how to exercise that authority—what we would call bureaucratic regulatory culture. Our concern, here, is the direct assumption of control over enforcement by inexpert politicians and their immediate appointees.[30]

If policy is more flexible than law, then politics is more flexible than policy. Apart from constitutional protections and the need to answer to voting bases, political coalitions face the least constraints of all on how they may change rules and redirect enforcement priorities.

III. The Law-Policy-Politics Triangle

The regulatory parameter space that is coming into focus is not a collection of discrete categories or even a continuum between poles; it is the surface of a triangle with law, policy, and politics at its points. Substantive law and enforcement norms can share features of all three approaches simultaneously. Indeed, antitrust and its ancestral expressions have long done exactly this, albeit with different loadings of law, policy, and politics over time.

A. Antitrust as Law

We needn't devote much effort to defending the idea that antitrust is law. Every indication is that it has been seen this way for a very long time. Blackstone's Commentaries, for example, indicate prohibitions on combinations in restraint of trade and monopoly long before the 1800s.[31] The common law antecedents of U.S. antitrust law include decisions like *Mitchel v. Reynolds*,[32] decided in 1711,

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[30] *Cf.* Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J. L. & Bus. 1 (2017) (describing populist anti-intellectualism as "the willingness of populists to seek endorsement of low-information audiences, rejection of facts and criticism, common use of conspiracy theories, and targeting of intellectuals as "corrupt elites").

[31] Sir William Blackstone, 4 Commentaries on the Laws of England: In Four Books ch.12, at 158-59 (15th ed. London: printed by A. Strahan, 1809).

[32] 1 P.Wms. 181, 24 Eng. Rep. 347 (K.B. 1711).

and *Darcy v. Allein*,[33] decided in 1602—though misreadings of the latter seems to have been more influential than the decision itself.[34] The eventual codification of antitrust law in the Sherman Act, Clayton Act, and Federal Trade Commission Act cinches the matter.

But while antitrust has never lacked the trappings of law, neither has it ever managed to work itself clean of policy tensions or political influence. From the start, it has always been *law and* these other things.

B. ANTITRUST AS POLICY

Blackstone's recitation of prohibitions on restraints of trade and monopolies places these offenses alongside similarly severe offenses such as "regrating" (which seems to have involved what we now call "retailing"),[35] "engrossing" (which similarly seems to have involved bulk purchasing with intent to resell),[36] and "forestalling" (which seems to have involved out-of-market purchasing, perhaps with intent to evade price controls).[37] The latter prohibitions sound strange to modern ears, but reflect the depth to which competition policy was once regulated by powerful guilds and local governments. William Letwin summarizes the situation succinctly:

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[33] Court of King's Bench, 1602, 11 Coke 84, 77 Eng. Rep. 1260.

[34] *See* Harold Evans, *The Supreme Court and the Sherman Anti-Trust Act*, 59 U. PA. L. REV. 61, 62–63 (1910); William F. Dana, *Monopoly under the National Anti-Trust Act*, 7 HARV. L. REV. 338 (1894).

[35] BLACKSTONE, *supra* note 31, at 158.

[36] *Id.*

[37] *Id.*; *see also* William L. Letwin, *English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 369 (1954) ("[T]he offense was generally understood quite literally as buying commodities before they had been carried into the actual market place or before the market had officially opened."). *But see* R. H. Britnell, *Forstall, Forestalling and the Statute of Forestallers*, 102 ENG. HIST. REV. 89 (1987) (interpreting forestalling as something closer to reselling at a markup).

> [T]he common law did not always defend freedom of trade and abhor monopoly. For a long time it did quite the opposite: it supported an economic order in which the individual's getting and spending were closely controlled by kings, parliaments, and mayors, statutes and customs, and his opportunities limited by the exclusive powers of guilds, chartered companies, and patentees.[38]

Between long apprenticeship requirements, limits on what trades could be practiced where, and prohibitions on buying and selling outside of regulated marketplaces,[39] the early competitive landscape was severely regulated. Entrusting the oversight of these matters to interested parties may not have been the wisest competition policy of all time, but it was competition policy nonetheless, and the laws that empowered these policymakers placed antitrust's ancestral footing deep into the policy point of the triangle.

It has rarely ventured far from that start. In the United States, the Sherman Act had only begun to be enforced in major cases when dissatisfaction with its operation agitated lawmakers into action.[40] Congress could have responded with specific legislation to correct perceived inadequacies in judicial application of the Sherman Act.[41] Instead, it opted to create the Federal Trade Commission as an agency empowered to develop and use its expertise to regulate competition in the detail that statutory provisions lacked.[42] Subsequent decades saw the growth of expertise and policy-oriented regulatory structures within both the FTC and the Antitrust Division of the DOJ.

A distinguishing feature of policy-oriented antitrust is its adaptability to advances in economic reasoning. Judges, too, can incorporate new thinking into

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[38] Letwin, *supra* note 37, at 355.

[39] *See id.* at 364-66.

[40] *See, e.g.*, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[41] It did this to some extent with the passage of the Clayton Act, though creative license is needed to call the provisions of that act "specific legislation."

[42] *See* GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE, 16-27, 33-36 (1924) (describing the origins of the FTC).

their decisions.[43] But not at the speed or scope with which policy can be revised and rewritten in a bureaucratic context. This is not always a good thing. The episodic emergence of protectionist policy agendas in the United States illustrates how the flexibility of policy-oriented antitrust can fail to prevent bad ideas from becoming enforcement norms.[44] But often the flexibility of antitrust policy is a clear advantage—as when enforcement efficacy is enhanced by the rapid integration of new economic techniques and modes of thinking.

C. Antitrust as politics

Politics has also been a part of antitrust from the start. The early history of prohibitions on monopolization was not about high prices or economic waste; it was about ensuring that only selected political bodies enjoyed the right to grant monopoly protection to private actors. Edward Adler puts it like this:

> The statute of 21 James I, which is often erroneously assumed to have prohibited monopolies was of a political nature and was aimed at abuses of the royal prerogative. The Act itself expressly provides that it shall not be prejudicial to any grant of privilege, power or authority whatsoever theretofore made or confirmed by an act of

[43] *See* Kimble v. Marvel Entm't, 576 U.S. 446, 461–62 (2015) (reasoning that in antitrust cases "the Court's rulings necessarily turn[] on its understanding of economics" and thus that "to overturn [earlier] decisions in light of sounder economic reasoning [is] to take them on [their] own terms" (internal quotation marks removed)).

[44] Ugly examples include the facilitation of collusion and promulgation of rules designed to dampen competition. *See, e.g.*, Margaret C. Levenstein and Valerie Y. Suslow, *Cartel Bargaining and Monitoring: The Role of Information Sharing*, *in* The Pros and Cons of Information Sharing 43, 62 (Mats Bergman ed., Stockholm: Konkurrensverket 2006) ("During the 1920s the Federal Trade Commission helped many industry associations to form with the express intention of stemming 'cutthroat competition.'").

> Parliament, nor was it to be prejudicial to the grants, charters or customs of the City of London or any town. . . .[45]

Letwin similarly describes early oscillations in the strength of prohibitions on combinations in restraint of trade as mainly explained by shifting political sympathies toward the opposing interests of laborer and employers.[46]

In the United States, the influence of politics on antitrust is even clearer. Each of the major antitrust statutes emerged during a period of intense political focus on business practices and the state of competition. Public interest in antitrust enforcement fueled these legislative exercises, and populist rhetoric plasters the legislative record of each of these statutes. The vagueness of the statutory prohibitions is perhaps explained by the characteristically inconsistent and superficial rhetoric of populist antitrust movements.[47]

More than law and policy, however, the influence of politics in antitrust has changed over the decades. Reasonable people can debate whether antitrust's political salience began to fade in the 1920s, 1960s, or 1980s. Regardless, the distance between antitrust enforcement and politics expanded over the twentieth century. Writing in 2008, Daniel Crane described political interest in antitrust as all but evaporated:

> Since the Chicago School revolution in the 1970s, federal antitrust enforcement has become considerably less democratic and more technocratic. It has become increasingly separated from popular politics, insulated from direct democratic pressures, delegated to industrial-policy specialists, and compartmentalized as a regulatory discipline. Presidents no longer pay it attention, the major political

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[45] *See* Edward A. Adler, *Monopolizing at Common Law and under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 258 (1917).

[46] Letwin, *supra* note 37, at 379–81.

[47] *See* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 585–89 (2018) (discussing the conceptual deficiencies that are typical of movement antitrust rhetoric).

> parties' platforms no longer mention it, and the public does not follow it.[48]

But, as Barak Orbach muses, "the populist style has always been common and is here to stay."[49] The recent reemergence of populist antitrust attitudes in politics illustrates this point precisely.

IV. ANTITRUST TODAY: A POSITIVE APPRAISAL

In 1995, Harry argued that antitrust was drifting toward the policy point of the law-policy-politics triangle. Today, I argue that it is sailing toward the political point. I do not suppose that this is a highly controversial claim, but evidence of the movement toward politics is readily available at any rate.

One place to see this change is in the recent spike in populist antitrust rhetoric and the concomitant jump in public attention to antitrust. Concerns about economic bigness have swept back into the conversation.[50] Magazine articles celebrate the efforts of "anti-monopoly" crusaders and lament each setback in the struggle to control tech giants, self-evidently bad.[51] Commentators bewail lax merger enforcement, which they say emboldens "unprecedented concentrations of economic and political power."[52] The telling point in claims like this is not that

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[48] Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008).

[49] Orbach, *supra* note 30, at 8.

[50] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020).

[51] *E.g.*, Eric Cortellessa, *The White House Is Pushing Congress to Rein in Big Tech Before the GOP Takes Over the House*, TIME (Nov. 18, 2022), https://time.com/6235180/tech-antitrust-bills-white-house-congress.

[52] Open Markets Institute, Comment Letter on Request for Information on Merger Enforcement (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-1123.

they seem to be empirically unsupported,[53] but that empirical support seems not to have been considered important in the first place.

Another way to track movement toward political regulation is in the intensity of political focus on antitrust issues. Antitrust enforcement polls well[54] and is thus a popular talking point for politicians. Are new merger guidelines a credible strategy for combating inflation?[55] No. But that doesn't stop the message from resonating with voters. The flurry of recent bills seeking to revamp antitrust law is a more serious example of political interest in taking control of antitrust. Bills like the American Innovation and Choice Online Act[56] and the Open App Markets Act[57] propose to change antitrust enforcement in fundamental ways—and have, at times, seemed close to becoming law.

Finally, increased political influence over antitrust is easy to spot in executive statements and the actions of agency leaders. Little needs to be said about the political content of presidential remarks instructing the antitrust agencies to abandon the failed experiment of prior decades of enforcement norms.[58] The

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[53] *See, e.g.*, D. Daniel Sokol & Sean P. Sullivan, *Coordinated Effects and the Half-Truth of the Lax Enforcement Narrative*, ANTITRUST CHRON., Jul. 2023 (critiquing the empirical foundation for lax enforcement claims); Nolan McCarty & Sepehr Shahshahani, *Testing Political Antitrust*, 98 N.Y.U. L. REV. 1169 (2023) (testing and failing to find support for claims of a relationship between economic concentration and lobbying power).

[54] *See* Taylor Orth, *Most Americans oppose monopolies and support antitrust laws*, YOUGOV (Nov. 6, 2023), https://today.yougov.com/economy/articles/47798-most-americans-oppose-monopolies-and-support-antitrust-laws.

[55] Tobias Burns, *White House says new antitrust rules will help fight inflation*, THE HILL (Dec. 18, 2023), https://thehill.com/business/4366250-white-house-new-antitrust-rules-inflation.

[56] S. 2992 (as reported by S. Comm. on the Judiciary, Mar. 2, 2022).

[57] S. 2710 (as reported by S. Comm. on the Judiciary, Feb. 17, 2022).

[58] Press Release, White House, Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse. gov/briefing-room/speeches-remarks/2021/07/09/remarksby-president-biden-at-signing-of-an-executive-order-promoting-competition-in-theamerican-economy.

FTC's subsequent withdrawal of support for the 2020 Vertical Merger Guidelines—barely a year after their publication—is also difficult to read as anything but political influence. The explanation that withdrawal was needed to address "flawed provisions" in the document is otherwise puzzling on its face, since little but the composition of the administration had changed in the intervening months.

Replacement of the 2010 Horizontal Merger Guidelines is a closer call. At more than a decade since publication, the 2010 guidelines had reached an age where they would have been due for revision or replacement even during prior decades of political detachment.[59] But the substance of the 2023 revision, which includes things like the deemphasis of economic theory,[60] rejection of decades of stability in market definition,[61] and substitution of dated judicial rhetoric for empirically grounded predictions about competitive effects,[62] is hard to reconcile with the general stability of law and economic reasoning since 2010. These changes are, however, easily explained by the enforcement interests of the Biden administration and its appointed agency leaders.

Similar shifts can be seen in other aspects of enforcement. The sudden rejection of the consumer welfare standard as a measure of antitrust injuries is not explained by any intervening change in law or economic theory—but is a touchstone of the current populist movement in antitrust.[63] A moratorium on public

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[59] *See, e.g.,* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (April 2, 1992); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (April 8, 1997); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (August 19, 2010).

[60] *See* Eleanor M. Fox, *Awakening Merger Control: The New U.S. Merger Guidelines*, *in* THE 2023 U. S. MERGER GUDELINES: A REVIEW 87 (S. Sullivan, ed., 2024).

[61] *See* Gregory J. Werden, *Market Delineation under the New Merger Guidelines: Gerrymandering Redux*, *in* THE 2023 U. S. MERGER GUDELINES: A REVIEW 173 (S. Sullivan, ed., 2024).

[62] *See* Sean P. Sullivan, *The Evolution (and Devolution) of Market Structure Reasoning*, *in* THE 2023 U. S. MERGER GUDELINES: A REVIEW 149, 167–69 (S. Sullivan, ed., 2024).

[63] *See* Jonathan Kanter, Antitrust Enforcement: The Road to Recovery (Remarks as Prepared for Delivery at University of Chicago Stigler Center, April 21, 2022),

speaking by FTC staff is very nearly the opposite of technocratic policymaking and transparent communication with the public.[64] Withdrawal of policy statements and exercises in novel substantive rulemaking are acts that could be reconciled with policy-oriented antitrust enforcement, but that take on a distinctly political tone in the manner in which they were implemented.[65] The same goes for monopolization suits brought against major tech companies. Even if these challenges are grounded in law and economics, their consistency with the political messaging of the current administration[66] raises disquieting questions about whether these filing were politically motivated.

V. ANTITRUST TODAY: A NORMATIVE CRITIQUE

Writing 30 years ago, Harry concluded his inquiry into the state of antitrust with a warning about the direction things were headed. He cautioned that the drift toward regulatory policy was not costless and he recommended a return to

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https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

[64] Leah Nylen & Betsy Woodruff Swan, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386.

[65] *See, e.g.*, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/final_vmgs_phillips_wilson_dissenting_statement_for_posting.pdf (objecting to the process by which the Commission withdrew support for the 2020 Vertical Merger Guidelines); Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, In the Matter of the Non-Compete Clause Rule (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf (objecting to the process by which the Commission promulgated a blanket rule prohibiting non-compete clauses).

[66] *See* Eric Cortellessa, *Biden Calls for Antitrust Laws to Rein in Big Tech After Schumer Blocked Last Effort*, TIME (February 7, 2023), https://time.com/6253755/biden-big-tech-state-of-the-union-2023.

more legalistic enforcement norms.[67] Today, I would like to conclude with a similar warning. The turn toward political control of antitrust harbors more risks than might be apparent. Antitrust should turn back from its rapid course toward politics, while it still can.

I do not mean this warning to sound hyperbolic. Politics has been a part of antitrust from the earliest days of its English-law heritage. Populist sentiments are baked into the legislative history of all the major antitrust statutes. And while the recent spike in political intervention strikes a sharp contrast to antitrust enforcement under, say, the Obama administration, that may be partially because political attention to antitrust was abnormally low in recent decades. In short, my point is not that political control of antitrust is abnormal or even that it is necessarily undesirable.

My point is that movement in the political direction is not costless—and that the costs of recent escalations in political control may be greater than many realize. A few examples will help to illustrate the dangers we are courting.

First, we run the risk of dissipating accumulated trust and confidence in the policy positions of the federal antitrust agencies. This is because the effectiveness of any rule, law, or policy declines when it lacks stable and predictable expression. Policy statements have weight proportionate to their durability; guidelines command reliance when they describe stable and predictable principles and practices. Anything that casts doubt upon the durability and reliability of agency communications diminishes the value of those communications—in a way that may take decades to reverse.

This light casts shadows when trained upon things like the FTC's rushed withdrawal of support for the 2020 Vertical Merger Guidelines. Like all guidelines, the 2020 guidelines had their flaws and areas in need of improvement. But while unceremonious withdrawal may have achieved the short-run goals of agency leaders—eliminating language that failed to align with their ideology and enforcement expectations—the long-run costs of this retraction may be felt for years to come. Confidence in the merger guidelines is appropriately reduced when those guidelines are treated as disposable at will.

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[67] First, *supra* note 1, at 11–12.

Second, we run the risks of increasing substantive uncertainty, vesting too much discretion in short-term political appointees, and decreasing the protective influence of the rule of law in antitrust. A predictable response would say that antitrust is so famously flexible and uncertain that these concerns have little significance in this field. But that gets things precisely backwards. The flexibility and vagueness of the antitrust laws makes substantive stability and predictability more important here than elsewhere. Without strong tethers, discretion over antitrust enforcement becomes tantamount to royal prerogative.

To be blunt, while I suspect that supporters of the Biden administration's antitrust program are quite comfortable entrusting current agency leaders with discretion to rewrite antitrust rules and enforcement norms, I am less sure that they would like to see this same degree of substantive discretion exercised by future administrations of different political persuasion. But the seeds that are planted today will eventually be harvested. If today's agency leaders are free to cast aside past policy statements, guidance documents, and enforcement procedures, then what chance do their own contributions stand of lasting through future administrations? If current enforcement decisions bear even the slightest appearance of being motivated by prejudice or political considerations, what political targeting by future administrations might this precedent eventually come to support?

Finally, increased politicization of antitrust risks decreasing the long-term efficacy of antitrust enforcement. Movements fade; politicians live one election at a time. In past decades, antitrust has been steered against a distant horizon by career staffers with the experience needed to see far into the future. But in a time of intense political control, the relevant time horizon is short, the measure of success is immediate, and the future consequences of exciting strategies are considered a matter of secondary importance, if they are considered at all.

None of this should be taken as a denial that there are good things about the recent political disruption. Nobody could seriously claim that antitrust had ascended to a state of perfection before the recent turmoil. And few would deny that the Biden administration has identified real problems with enforcement or that it has improved antitrust thinking in important ways. But disruption is best embraced in sprints, and the long-run integration of new approaches and ideas is a task better suited to policy-oriented bureaucratic regulation than it is to either

law or political control. It is, in my view, time for quiet confidence and depth to return to antitrust enforcement. The pomp and flash and headlines have done all that they can usefully do.