

AGAINST EFFORTS TO SIMPLIFY ANTITRUST

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November 2022

Antitrust analysis is famously complex, fact intensive, and time consuming. But should we aspire for it to be otherwise? I offer two cautionary conjectures in opposition to the search for simpler rules. First, I conjecture that efforts to convert vague antitrust standards into clear rules will rarely succeed without abandoning the underlying standards that the rules were meant to simplify. Second, I conjecture that failed efforts at simplifying antitrust law will often have the opposite effect—increasing the apparent complexity and vagueness of this law. If these conjectures are correct, then the search for simpler rules could be not just unproductive but counterproductive in antitrust law.

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I. INTRODUCTION

Frustration with the complexity and vagueness of antitrust law is as old as the law itself.¹ Older if we credit the common law struggles and legislative debates that catalyzed passage of the major antitrust statutes.² The sparse language of the Sherman, Clayton, and FTC Acts concentrates the full weight this body of law onto the points of a few unenlightening words: “restraint of trade,”³ “monopolize,”⁴ “lessen competition,”⁵ “unfair methods of competition.”⁶ Thomas Krattenmaker, Robert Lande, and Steven Salop have said of the Sherman Act that “it is questionable whether a more ambiguous antitrust statute could be devised.”⁷ Section 5’s prohibition on “unfair methods of competition” proves that it could be.⁸

¹ *E.g.*, *N. Sec. Co. v. United States*, 24 S.Ct. 436, 470 (1904) (Holmes, J. dissenting) (“It would seem to me impossible to say that the words ‘every contract in restraint of trade is a crime, punishable with imprisonment,’ would send the members of a partnership between, or a consolidation of, two trading corporations to prison Yet those words would have that effect if this clause of § 1 applies to the defendants here. . . . According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two states it monopolizes a part of the trade among the states. Of course, the statute does not forbid that.”).

² See William F. Dana, *Monopoly under the National Anti-Trust Act*, 7 HARV. L. REV. 338, 355 (1894) (“The Act is necessarily vague, because, in men’s minds, the evil dreaded is vague, and like words, therefore, have been used to express it. The English judges seem to have been clearly conscious of the difficulties ahead when, in *Mogul Steamship Co. v. McGregor*, . . . Fry, J., said: ‘I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on, in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial reasonableness, or of normal prices, or fair freights, to which commercial adventurers, otherwise innocent, were bound to conform.’” (quotation marks omitted)).

³ Sherman Act § 1, 15 U.S.C. § 1 (2006).

⁴ Sherman Act § 2, 15 U.S.C. § 2 (2006).

⁵ *E.g.*, Clayton Act § 7, 15 U.S.C. § 18 (2012).

⁶ Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2006).

⁷ Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 243 (1987).

⁸ See Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 309 (2003) (commenting that even “the vague proscriptions of the Sherman Act are less

Some of the uncertainty surrounding these terms once owed to their use in pursuing multiple, often conflicting, social and political objectives.⁹ Even when focused by the consumer welfare standard,¹⁰ however, assessing whether challenged conduct would unreasonably restrain trade or lessen competition is usually a difficult, time consuming, and fact-intensive task. For decades, the search for shortcuts (rules, presumptions, structured frameworks for decision-making) has thus been a fixture of antitrust law.¹¹

Frederick Schauer hypothesizes that, in situations including antitrust, the interactions of decisionmakers and governed agents can drive convergence between rules and standards.¹² The unpredictability and discomfort of vague standards (think, *unreasonable restraint of trade*) will motivate actors to seek out clearer rules to provide at least some predictability and footholds in the litigation process (think, rules of *per se* illegality).¹³ Clear

vague than a simple prohibition on ‘unfair’ business dealings”); *see also* FTC v. Raladam Co., 283 U.S. 643, 648–50 (1931) (considering what the words “unfair methods of competition” could mean and discussing some of the relevant legislative record).

⁹ Cf. Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 584–89 (2018) (discussing the various objectives that have been pursued during periods of populism); JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 57-61 (2019) (commenting on the past experience of using antitrust law to pursue various social goals); Mathias Dewatripont, Ian Jewitt, & Jean Tirole, *The Economics of Career Concerns, Part II: Application to Missions and Accountability of Government Agencies*, 66 REV. ECON. STUD. 199 (1999) (modeling negative consequences of assigning government agencies fuzzy, unfocused missions).

¹⁰ Ambiguities in the consumer welfare standard are not critical to the following discussion, though they may accentuate concerns about vagueness. *See, e.g.*, Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010) (discussing interpretations of this standard); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016) (discussing how possible alternatives factor into analysis); Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2016) (critiquing the notion of balancing harms and benefits).

¹¹ *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 121 (2018) (“Antitrust cases are complex, and judges depend critically on presumptions and other evidentiary shortcuts.”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984) (“When everything is relevant, nothing is dispositive.”).

¹² Schauer, *supra* note 8, at 311–12.

¹³ *Id.* at 315–19.

rules, in turn, will be chipped and shaded, over years of strategic behavior and the selection of disputes for litigation, into vaguer standards (like *enquiries meet for the case*).¹⁴

Schauer’s hypothesis seems accurate as applied to antitrust law. But I would append two further conjectures in this context. First, efforts to convert vague antitrust standards into clear rules will rarely succeed—at least, not without abandoning the underlying standards that the rules are said to simplify. Second, failed attempts to simplify antitrust law will exacerbate the apparent complexity and vagueness of this law—energizing further efforts to simplify it, which will further obfuscate it, and so on.

If these conjectures are correct, then well-intentioned (but unsuccessful) efforts to clarify antitrust law could be fueling the very discontent that this body of law now faces. It could be better, at least from the perspective of a non-expert audience, for antitrust law to present its difficulty honestly (to be clearly vague) than for antitrust law to hide its difficulty behind appealing but ultimately unsuccessful shortcuts (to be vaguely clear). I would not aspire to prove this hypothesis in the space of only the next few pages, but I will explain the concern.

II. CONJECTURE 1: EFFORTS TO SIMPLIFY RARELY SUCCEED

My first conjecture is that efforts to simplify vague antitrust standards rarely succeed—at least, not without abandoning the underlying standards. Among the many examples that could be used to illustrate this prediction, two well-known cases are the categories of analysis in Section 1 litigation and the structural presumption in Section 7.

A. Categories of Analysis

Start with Section 1, and the struggle to simplify rule of reason analysis. As described by Justice Brandeis in *Chicago Board of Trade*, the rule of reason inquiry (whether a restraint suppresses and destroys competition or merely regulates and promotes it)¹⁵ involves an exhaustive factual

¹⁴ *Id.* at 312–15.

¹⁵ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

review in which nearly anything could be relevant evidence.¹⁶ The substance of rule of reason analysis is more focused today than it was in 1918, but the magnitude of the inquiry in “full-blown rule-of-reason analysis”¹⁷ is still daunting. In summarizing this inquiry, Donald Turner once discussed the difficulty of obtaining relevant facts, of interpreting the facts that can be obtained, and of balancing the conflicting implications of the facts so interpreted:

[E]conomic analysis often indicates that assessment of the net effects of particular conduct requires consideration of several market factors, including short-run and long-run effects. This requirement seems to recommend complex rather than simple rules, but it may be difficult and costly to obtain adequate facts for deciding individual cases where the outcome depends on assessing various market factors as well as on balancing anti-competitive and procompetitive effects.¹⁸

This nuanced and fact-specific inquiry exhibits many of the benefits of vague standards but also several disadvantages. Turner, like others, observes that the rule of reason “suffers from several problems—vagueness, unpredictability, high costs of litigation, and difficulties in obtaining facts.”¹⁹ The rule of reason has likewise been faulted for offering too little guidance to the business community about where the boundaries of permitted conduct lie.²⁰ To these disadvantages, we might add the possibility that, even when all the facts and arguments are considered, the factfinder

¹⁶ *Id.* (“To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.”).

¹⁷ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005).

¹⁸ Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 799 (1987).

¹⁹ *Id.* at 800; *see also* Easterbrook, *supra* note 11, at 12–13 (“Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.”).

²⁰ Easterbrook, *supra* note 19, at 12 (“The [*Chicago Board of Trade*] formulation offers no help to businesses planning their conduct.”).

may remain stunned by the magnitude of the question, unable to decide who to believe and what to predict—much less be able to defend those decisions in any detail.²¹

Per se rules of categorical unreasonableness are presented as a means of addressing these disadvantages of rule of reason analysis. First, *per se* rules are said to increase the predictability of analysis and litigation outcomes.²² Second, *per se* rules are said to promote business certainty and administrative efficiency.²³ Third, *per se* rules are justified as an unusually humble concession that courts are simply unequipped to engage in the kind of difficult economic balancing that the rule of reason demands. The Supreme Court made this final point in *Topco*:

The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.²⁴

²¹ See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (decrying “incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries” as “an inquiry so often wholly fruitless when undertaken”).

²² See, e.g., *id.* (“This principle of *per se* unreasonableness . . . makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned.”); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972) (“Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.”).

²³ *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 344 (1982) (“For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.”); see also *Topco*, 405 U.S. at 609 n.10 (“Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.”); *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 430 (1990) (“The administrative efficiency interests in antitrust regulation are unusually compelling.”).

²⁴ *Topco*, 405 U.S. at 609–10; see also Hovenkamp, *supra* note 11, at 99 (“Antitrust cases in the United States are decided by generalist judges, many of whom lack economics training. Further, facts are often determined by juries, who frequently lack any relevant

All this hornbook antitrust law is consistent with Schauer’s hypothesis that courts and litigants facing vague standards will seek to convert those standards into clear rules.²⁵ But *are* the *per se* rules clearer than the background standard? True, the rule that price fixing is *per se* illegal obviates the need to decide whether price fixing is unreasonable under the rule of reason.²⁶ In place of this inquiry, though, it substitutes the need to decide what counts as price fixing. And, here, efforts to craft vague standards into clear rules meet an opposing force: the tendency of strategic behavior and selective litigation to blunt clear rules into vague standards.²⁷

Even if the federal antitrust agencies exercised untempted wisdom in challenging only the clearest cases of price fixing, the litigation incentives of private plaintiffs would guarantee eventual testing of the limits of what price fixing entailed.²⁸ Pressed for a definition, courts could then proceed in one of two ways. One way would be to adopt arbitrary definitions of price fixing unrelated to the underlying standard. This would protect the predictability and certainty of the *per se* rule but would uncouple it from the background rule-of-reason standard.²⁹ Conduct found to violate this type of *per se* rule might not often—or ever—be found anticompetitive if assessed under the rule of reason. The category would be clear but the justification for holding conduct illegal would not be.

training whatsoever. In such cases increased complexity can produce poorer rather than better outcomes.”).

²⁵ See *supra* note 14 and accompanying text.

²⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (“[P]rice-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”).

²⁷ See *supra* note 13 and accompanying text.

²⁸ See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L. J. 1001, 1049–52 (1986) (discussing the complicated incentives and policy implications of private antitrust litigation); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 247, 252–54 (1985) (similar, with particular attention to the influence of awards of treble damages).

²⁹ *But see* *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894–95 (2007) (rejecting that administrative convenience justifies *per se* rules except when the restraints in question are manifestly anticompetitive); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (“[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing.”).

The other possibility—and the one the Supreme Court has primarily pursued—is to define the scope of the *per se* categories by reference to the underlying rule-of-reason standard. Thus, in explaining why artists agreeing to set common pricing terms under the blanket music licenses of ASCAP and BMI have not engaged in *per se* illegal price fixing, the Court opined:

As generally used in the antitrust field, “price fixing” is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals’ literal approach does not alone establish that this particular practice is one of those types or that it is “plainly anticompetitive” and very likely without “redeeming virtue.” Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally “price fixing,” but they are not *per se* in violation of the Sherman Act.³⁰

As a term of art, price fixing thus becomes a label applied to conduct that would usually be found to violate the rule of reason if it had been evaluated under that standard. This reasoning extends to all *per se* categories. The Court made this clear in *Leegin*:

Resort to *per se* rules is confined to restraints . . . that would always or almost always tend to restrict competition and decrease output. To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects and lack . . . any redeeming virtue. As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.³¹

All this describes the *per se* categories of analysis, but the same pattern emerges in the evolution of abbreviated analysis under Section 1. To jump

³⁰ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979).

³¹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (internal quotation marks and citations omitted).

rapidly through the steps, once “quick look” cases emerged as a possible third category of analysis,³² the question immediately arose: What facts justified quick look analysis?³³ Again, the answer could have been that quick look cases would be identified by arbitrary definitions based on precedent or administrative convenience. This would have preserved the rule-like character of this category but would also have decoupled it from the background standard. In *California Dental Association*, the Supreme Court rejected that approach—indeed, rejected any sharp delineation of quick-look categories of analysis—in favor of an approach much like the one used in scoping the *per se* rules. Abbreviated inquiry, the Court said, was only appropriate when a confident conclusion could be made about the effect of the challenged restraint without the aid of considerations beyond the scope of the abbreviated inquiry:

[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.³⁴

Put differently, abbreviated inquiry is permissible only when further inquiry would explore issues of little value in evaluating the challenged restraint under the rule of reason.³⁵

³² Nat’l Soc. of Pro. Eng’rs v. United States, 435 U.S. 679, 684 (1978); Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 89 (1984); FTC v. Indiana Fed’n of Dentists, 476 U.S. 447, 451 (1986).

³³ See, e.g., James A. Keyte, *The What It is and How It is Being Applied: The Quick Look Rule of Reason*, 11 ANTITRUST 21 (1997); Jay P. Yancey, Comment, *Is the Quick Look Too Quick: Potential Problems with the Quick Look Analysis of Antitrust Litigation*, 44 U. KAN. L. REV. 671 (1996).

³⁴ *California Dental Ass’n v. FTC*, 526 U.S. 756, 780–81 (1999).

³⁵ See *FTC v. Actavis, Inc.*, 570 U.S. 136, 159–60 (2013) (“As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust

The result, today, is that the struggle to simplify rule of reason analysis in Section 1 has produced a family of different modes of analysis. *Per se* illegality applies to conduct that would always or almost always violate the rule of reason. Abbreviated inquiry may be possible when less than full rule-of-reason study would permit confident predictions under the rule of reason. All other conduct requires full rule-of-reason analysis. The question to ponder is whether this framework simplifies anything.

Do the categories of analysis increase the predictability and decrease the administrative costs of litigation? The clarity of result under a *per se* rule is beyond dispute. And the omission of steps like market definition and market power inquiries in *per se* analysis undoubtedly reduces litigation expenses when these rules apply. But, with *per se* categories defined by reference to how rule of reason inquiry would usually be resolved, the question to ask is whether the *per se* label accomplishes anything that direct reliance on the underlying standard would not. To be concrete, what does the *per se* rule do that award of judgment as a matter of law would not do under direct reliance on the rule of reason? The same could be said of abbreviated modes of analysis. When the appropriate extent of inquiry is defined by reference to how much inquiry the rule of reason would require, what does this categorization accomplish that simple reliance on the underlying standard would not?

Alternatively, perhaps the categories of analysis in Section 1 help litigants to focus their arguments and limit their discovery by enabling them to predict what evidence will be required. This seems doubtful. For the reasons just discussed, direct reliance on the substantive standard would appear to support the same predictions as the relevant categories of analysis in most cases. And while something like *per se* treatment does indeed limit the pretrial information that the parties must consider, this limitation applies only where *per se* treatment is guaranteed to apply. In cases where categorization is in any dispute, the possibility of *per se* treatment may be of little value in limiting discovery or freeing parties from preparing arguments.³⁶

theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.”).

³⁶ See Hovenkamp, *supra* note 11, at 93 (“The problem with this sequence of events is that if there is any reasonable chance that the court will ultimately require the rule of reason,

Finally, consider economic competence concerns. While categorical rules have been promoted as a means of sidestepping vague rule of reason analysis,³⁷ this argument falls flat in a framework that bases categorization decisions upon the likely outcome of evaluation under the rule of reason. The failure is particularly stark in abbreviated analysis under the *California Dental* standard. If the test of appropriate abbreviation is whether evaluation is extensive enough to reach a “confident conclusion about the principal tendency of a restriction,”³⁸ then there is no plausible sense in which the availability of abbreviated inquiry saves courts from needing to master the rule-of-reason inquiry. Similar reasoning applies to *per se* rules that are appropriate only when a court could “predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason.”³⁹

In short, categorical analysis may guide—but does not simplify—application of the rule of reason in Section 1 litigation. This is not to say that the categorical approach produces bad outcomes; simply that the effort to streamline and simplify a vague antitrust standard has failed. Categories of analysis are the illusion of certainty. The doubt and complexity is all still there, only repackaged as problems of categorization.

B. Structural Presumptions

A single observation does not a pattern show, so let’s consider a second instance in which courts have sought to use a doctrinal shortcut to sidestep a vague and complicated antitrust inquiry. In merger litigation under Section 7 of the Clayton Act, the identification of prohibited mergers (those with “probable anticompetitive effect”) generally follows extensive inquiry into the structure, history, and likely future of an industry,⁴⁰ the ability of

the plaintiff has no choice but to proceed through discovery under that rule even if the chance is small. This means that the value of the *per se* rule is lost in a significant number of cases because the plaintiff must do all of the things that rule of reason analysis requires.”).

³⁷ *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972).

³⁸ *California Dental Ass’n*, 526 U.S. at 781.

³⁹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007).

⁴⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962) (“Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger

new competitors to enter a market,⁴¹ the prospect that the merger would increase competition or save an otherwise failing firm,⁴² and other considerations besides these. In short, like the rule of reason in Section 1, analysis of mergers under Section 7 involves an exhaustive factual and economic inquiry in which complexities abound and nearly anything could be relevant evidence.⁴³

Also like the rule of reason standard in Section 1, the breadth and vagueness of this inquiry has long energized efforts to increase the predictability and certainty of merger analysis by adopting clearer rules.⁴⁴ The importance of providing clarity to the business community is a long-running

are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.”).

⁴¹ *Id.* at 322 (including in the relevant context of a merger whether the industry in which it was taking place “had witnessed the ready entry of new competition or the erection of barriers to prospective entrants”).

⁴² *Id.* at 319 (“Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act’s breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market.”).

⁴³ See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010) (describing the principle analytical approach of the federal antitrust agencies in merger review); FED. TRADE COMM’N, MODEL SECOND REQUEST (October 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf [<https://perma.cc/KPW2-5CUZ>] (illustrating the scope of a typical Second Request).

⁴⁴ E.g., Philip Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U. L. REV. 613, 613 (1965) (“Because the stakes in merger policy are so high . . . it is essential to remove the element of guesswork and gamble from merger planning . . . to make the application of the antitrust laws to mergers more certain, more predictable, more incisive, and more prompt.”); see also George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955-1956) (“It would be absurd to expect a thorough investigation of each of the hundreds or thousands of mergers of interstate commerce dimensions that occur each year. One must eliminate the vast majority of mergers from review.”).

theme.⁴⁵ The Supreme Court conceded this and other concerns about the breadth of merger analysis in *Philadelphia National Bank*:

Clearly, [whether the effect of a merger may be substantially to lessen competition] is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded.⁴⁶

For the *Philadelphia National Bank* majority, these deficiencies of the Section 7 standard warranted adoption of shortcuts to assessing legality “in any case in which it is possible, without doing violence to the congressional objective.”⁴⁷ On this reasoning, the Court announced the rule that has become the *structural presumption* in merger analysis:

[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.⁴⁸

⁴⁵ See Stigler, *supra* note 44, at 182 (“A set of rules . . . would serve the double purpose of giving the business community some advance knowledge of public policy toward most mergers, and of achieving the important goals of the legislation.”); see also *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 827 (9th Cir. 1961) (“[T]t is a bit hard to believe that Congress meant that a business concern contemplating merger must undergo a [complicated] struggle to find out whether its plans may or may not be carried out.”).

⁴⁶ *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963) (citations omitted).

⁴⁷ *Id.*

⁴⁸ *Id.* at 363.

In defending the consistency of this rule with the underlying standard, the Court explained that the test “lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress’ design in § 7 to prevent undue concentration.”⁴⁹ It also defended the rule as “fully consonant with economic theory.”⁵⁰

Today, the structural presumption’s pedigree is a topic of occasionally energetic debate.⁵¹ Much could be said about the Court’s logic and to what extent it survived changes in economic theory and antitrust law’s embrace of the consumer welfare standard.⁵² Modern support for the structural presumption rests, however, not on the arguments of past Supreme Court justices, but on the conviction that current incarnations of the structural presumption continue to lighten the burden of proof⁵³ in a way that

⁴⁹ *Id.*

⁵⁰ *Id.*; see also Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L. J. 1511, 1524 (1984) (“[O]ligopoly-based legal norms promised clear rules and quick results. Streamlining the tasks of lawyers and judges, presumptions predicted the prospects of mergers from market shares and market structures, and obviated proof of anti-competitive purpose or effect.”).

⁵¹ See Sean P. Sullivan, *What Structural Presumption?: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis*, 42 J. CORP. L. 403, 405–406 (2016) (collecting critiques and defenses of the wisdom and appropriate weight of the structural presumption).

⁵² See, e.g., Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 276 (2015) (“This evolution to a weaker presumption based on market shares and concentration is consistent with and was likely caused by the parallel evolution of economic analysis. . . . Greater experience with merger investigations and enforcement also resulted in the antitrust agencies more frequently concluding that transactions that increased concentration do not likely result in reduction in competition.”); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2018–20 (2018) (contrasting modern merger analysis, in which market structure is not a freestanding concern of antitrust law, with that of the 1960s, in which it was).

⁵³ See Hovenkamp & Shapiro, *supra* note 52, at 2024 (“Merger analysis is almost always a predictive exercise involving considerable uncertainty. As a result, burdens of proof matter a great deal. The structural presumption . . . has therefore proven essential to effective merger enforcement.”).

streamlines evaluation of merger challenges⁵⁴ without doing violence to the underlying standard.⁵⁵ That is, the value of the structural presumption comes from how it simplifies merger analysis. But does it?

To start, the structural presumption cannot be invoked without market concentration data, and market concentration data cannot be produced without first defining relevant markets. There are usually several ways to draw market boundaries, so tests are needed to select between the options. The Supreme Court has produced many such tests.⁵⁶ Some ask factfinders to struggle through questions of substitutability:⁵⁷ What products are reasonably interchangeable with other products, “price, use and qualities considered?”⁵⁸ Since most goods and services are interchangeable with others at some prices, for some uses, and in some cases—these tests usually end with a shrug.⁵⁹ Other tests direct factfinders to seek tangible evidence of market boundaries: What product characteristics and practical indicia can be used to distinguish products into separate segments?⁶⁰ Unfortunately, this is little more discriminating than the interchangeability approach and lends resulting markets no reliable connection to the competitive effects of mergers.⁶¹

Since the early 1980s, the Hypothetical Monopolist Test has stood as a reliable way of defining relevant markets for assessing some

⁵⁴ See Salop, *supra* note 52, at 298 (predicting “substantial administrative efficiencies to courts from formulating a presumption rather than just treating concentration and market shares as possibly relevant evidence”).

⁵⁵ Cf. Sullivan, *supra* note 51, at 426–27 (discussing the probative value of market concentration evidence in merger review, independent of any “presumption” it supports).

⁵⁶ See Sean P. Sullivan, *Modular Market Definition*, 55 U.C. DAVIS L. REV. 1091, 1098 (2021) (“On what basis do we define markets? A glance at the market definition section of any recent antitrust opinion will reveal several pages of potential tests.”).

⁵⁷ See *id.* at 1099–1102.

⁵⁸ *United States v. E. I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 404 (1956).

⁵⁹ Cf. David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 305–307 (2020) (describing this and related deficiencies of substitutability-based tests).

⁶⁰ See Sullivan, *supra* note 56, at 1102–06.

⁶¹ *Id.* at 1108–09.

anticompetitive effects of mergers.⁶² In brief, the HMT starts with a narrow candidate market drawn around products of the merging firms and close substitutes. The test then asks whether a hypothetical monopolist that controlled all products in the candidate market would find it profitable to impose at least a small price increase on some of those products. If so, the HMT validates that candidate market as a relevant market. If not, the candidate market is expanded to include other substitute products, and the process starts over, iterating until a relevant market is found.⁶³

Relevant markets defined by the hypothetical monopolist test can be helpful in merger review, but the amount of evidence and analysis needed to define markets under this test cuts deep into the promised simplicity of the structural presumption. The economic data needed to operationalize the HMT is complex and elusive.⁶⁴ Indeed, by the time that sufficient information has been gathered to assess relevant markets under the HMT, the record will already embrace much of the complicated analysis that the structural presumption was meant to avoid.⁶⁵ From this uninspiring start, the complexities of the structural presumption continue to mount.

Next, the structure of competition must be assessed within each relevant market. This, too, presents a series of questions. Who are industry participants and should they be defined to include firms that could quickly enter the relevant market?⁶⁶ Is concentration best reflected by the number of significant firms in the relevant market or by the market shares of those

⁶² *Id.* at 1111–15 (noting the poor fit of relevant markets defined by the HMT to theories of harm surrounding the unilateral effects of mergers in differentiated-product markets).

⁶³ See U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § II.A (1982) (providing the first appearance of the HMT in agency guidelines); HORIZONTAL MERGER GUIDELINES, *supra* note 43, § 4.1 (providing the current expression of the test). Looser expressions of the HMT are possible and often better. See, e.g., LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 41 (1977).

⁶⁴ Cf. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963).

⁶⁵ See generally Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 466 (2010) (interrogating whether market definition adds anything to direct assessment of competitive effects once the relevant information has been gathered); Louis Kaplow, *Market Definition Alchemy*, 57 ANTITRUST BULL. 915 (2012) (similar); Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361 (2013) (similar).

⁶⁶ See HORIZONTAL MERGER GUIDELINES, *supra* note 43, § 5.1 (discussing “participants” and “rapid entrants”).

firms?⁶⁷ If shares are used, should they be measured in units sold or dollars earned?⁶⁸ Units produced or capacity available?⁶⁹ The Supreme Court has instructed that market structure should be measured in a way that presents a “proper picture of a company’s future ability to compete.”⁷⁰ Fair enough. But this wafts of running analysis in circles: only after undertaking detailed industry analysis will it be possible to assess the competitive significance of each competitor, so that market structure can be measured, so that the structural presumption can be invoked, so that this shortcut can be relied upon in place of undertaking detailed industry analysis.

This is to say nothing of the rebuttal stage of the structural presumption. What evidence can be used to rebut the presumption?⁷¹ How much evidence is required?⁷² What effect does rebuttal have upon the plaintiff’s case?⁷³ These questions are less settled than one would hope; certainly, less settled than one would hope for a shortcut intended to circumvent complicated legal inquiries.

All these complexities could be avoided through the adoption of arbitrary rules. Market definition would be trivial if markets were simply

⁶⁷ *Cf. id.* § 5.3 para. 4 (discussing reliance on the number of significant competitors).

⁶⁸ *See id.* § 5.2 (discussing share computations).

⁶⁹ *Id.*

⁷⁰ *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974); *see also id.* at 503, 510 (similar).

⁷¹ *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (asserting that “evidence on a variety of factors can rebut a prima facie case” and counting “absence of significant entry barriers,” “the misleading nature of the [market share] statistics,” customer sophistication among the list of factors). *But cf. Sullivan, supra* note 51, at 413–15 (discussing the different consequences of different modes of rebuttal).

⁷² It is often said that defendants must produce weightier evidence to rebut a stronger presumption. *See, e.g., Baker Hughes*, 908 F.2d at 991 (“The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.”). Complexities arise, however, when presumptions are treated as having evidentiary weight. *See Ronald J. Allen, Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 855–59 (1981). Unsurprisingly, this aspect of the burden-shifting framework has caused confusion. *E.g., FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 46 (D.D.C. 2009) (“The courts have not established a clear standard that the merging parties must meet in order to rebut a prima facie case . . .”).

⁷³ *See Sullivan, supra* note 51, at 428–31 (describing the proper effects of different forms of rebuttal).

defined by lookup against North American Industry Classification System (NAICS) codes. Market structure would present far fewer challenges if it did not need to satisfy the *General Dynamics* requirement of reflecting future competitive significance.⁷⁴ The presumption could be treated as compulsory, eliminating rebuttal issues. These changes would, however, divorce the structural presumption from sound analysis under the effects-based inquiry of Section 7.⁷⁵ It is the effort to do justice to the background standard that introduces the complexity.

By now, the pattern is clear enough that we can dispense with a rehashing of points made in the discussion of categories of analysis in Section 1. When properly used and understood, the structural presumption is a useful tool in merger analysis. What it is *not* is a shortcut to complicated merger analysis. The structural presumption is not simple. Each step in the process gives way to labyrinthine sub-questions, answerable only by complicated and fact-intensive analysis if the final result is to stay true to the underlying standard. Another effort to simplify vague antitrust standards ends with little more than repackaged complexity.

III. CONJECTURE 2: FAILURE TO SIMPLIFY COMPLICATES

As I said before, the previous examples are representative illustrations. Similar unpacking of superficially clarifying labels and heuristics could be performed for the distinction between naked and ancillary restraints,⁷⁶ the identification of exclusionary conduct under Section 2 of the Sherman

⁷⁴ See *supra* note 70.

⁷⁵ Cf. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963) (recommending the adoption of shortcuts where doing so would be possible “without doing violence to the congressional objective”).

⁷⁶ Cf. Thomas B. Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine*, 45 SEATTLE U. L. REV. 587 (2022).

Act,⁷⁷ the use of market shares to identify monopoly power,⁷⁸ the use of terms like “business justification” or “competition on the merits” throughout antitrust law,⁷⁹ the use of modified *per se* rules (and other labels) in tying cases,⁸⁰ and many examples besides these. Efforts to skip or simplify complex economic inquiries rarely find lasting success.

My second conjecture is that failed attempts to simplify antitrust law will often exacerbate the perceived complication and vagueness of this law. If so, and if this motivates policymakers to attempt further simplifications, then failed efforts to simplify antitrust law could spark entropic engines of self-fueling confusion and obfuscation.

A. What Makes Antitrust Complicated?

In *Living with Complexity*, Donald Norman differentiates (in a way that I have not) between systems that are *complex* and systems that are *complicated*.⁸¹ Norman uses the label of *complexity* to refer to features of the world.⁸² Personal computers must handle millions of instructions per

⁷⁷ See PHILIP E. AREEDA, & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 650a at 92 (4th ed. 2015) (describing the “exclusionary conduct” element of a Section 2 monopolization offense as a term of art that encompasses conduct impairing the opportunities of rivals and is not “competition on the merits,” while conceding that “the term ‘exclusionary’ does not accurately capture all kinds of forbidden conduct” and observing that “[s]ome practices, such as mergers, are monopolistic because they are inherently ‘collusive’ rather than exclusionary.”).

⁷⁸ See *supra* note 65 and sources cited therein.

⁷⁹ Cf. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (defining a “pro-competitive justification,” elsewhere referred to as a “legitimate justification,” as “a non-pretextual claim that [challenged conduct is] a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal”); A. Douglas Melamed, *Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. F. 163, 166 (2017) (defining “competition on the merits” as “conduct that on balance increases output”).

⁸⁰ Cf. Hovenkamp, *supra* note 11, at 99 (“[T]he poorly conceived *per se* rules that the Supreme Court adopted for tying arrangements during the 1950s and 1960s . . . produced very high error costs, certainly far higher than any savings in administrative costs gained by use of a *per se* rule.”).

⁸¹ DONALD A. NORMAN, *LIVING WITH COMPLEXITY* 2 (2016).

⁸² *Id.* at 4 (“Complexity is part of the world . . . complexity by itself is neither good nor bad.”).

second to perform the tasks we expect them to perform. Making that happen requires complex engineering, fabrication, and programming. This complexity is unobjectionable. In fact, it is inescapable if we want computers to play the roles they do in our daily lives.

The translation to antitrust is straightforward. The subject of antitrust law is nothing smaller than modern, global commerce: a vast and intricate web of contracts, production technologies, supply chains, distribution and marketing operations, consumption schedules, and investment strategies. Making antitrust useful in regulating commerce requires complex law and complex economics. And much as personal computers are irreducibly complex, there may be few ways to reduce the complexity of antitrust law without impairing its functionality. This reflects not just the intricacy and diversity of the conduct to which antitrust applies, but also the disquieting reality that those whose conduct is governed by antitrust law are acutely aware of its scope and limitations.⁸³ Rules that are easy to state and apply are often easy to evade and twist to unintended ends.

All this is to say that antitrust law is complex and probably must be so. Norman distinguishes this type of natural and desirable complexity from objectionable *complication*. The difference is subtle but important. Where complexity describes the objective intricacy of a system, complication describes the subjective experience and mental state of an observer.⁸⁴ We perceive things as complicated when we lack appropriate conceptual models of how they operate.⁸⁵ Put another way, complication is how we perceive the experience of not understanding how something works.⁸⁶

⁸³ See BAKER, *supra* note 9, at 21 (2019) (“[B]usinesses are taught to exploit gaps in antitrust rules to deter entry and engage in coordinated conduct without running afoul of those rules.”).

⁸⁴ NORMAN, *supra* note 81, at 45 (“Whether something is complicated is in the mind of the beholder.”).

⁸⁵ See *id.* at 34 (“A conceptual model is the underlying belief structure held by a person about how something works.”); *id.* at 40 (“What makes something simple or complex? It’s not the number of dials or controls or how many features it has: It is whether the person using the device has a good conceptual model of how it operates.”).

⁸⁶ See *id.* at 47 (“Simplicity is a mental state, highly coupled with understanding. Something is perceived as simple when its actions, options, and appearance match the person’s conceptual model”).

Norman's thesis is that perceptions of complication and simplicity are the result of design choices. Good design makes complex systems feel simple. Modern cars are an example. Cars are mechanically very complex, yet easy to operate with little training. Conversely, poor design makes simple systems feel complicated. Anyone old enough to have once struggled with a programmable VCR has first-hand experience with a system that was not that complex, yet still managed to be maddeningly complicated.

In the context of consumer electronics, Norman comments that complexity increases "when the design makes it difficult to know what is happening or when controls have multiple meanings depending on context."⁸⁷ This is a dark omen for antitrust law, stuffed as it is with terms of art and doctrines crusted with layers of reinterpretation and changed meaning.

Is antitrust law complicated? Consider the how the categories of analysis in Section 1 appear to a non-expert user. The first step is deciding what standard of analysis will be employed to judge legality of the challenged conduct. Some conduct, like price fixing, is *per se* illegal. But price fixing is a term of art, and some things that look like price fixing are not *per se* illegal. Generally, the only way to know that conduct deserves *per se* treatment is to be able to say that it would always or almost always be found to violate the rule of reason. Some conduct gets evaluated under the rule of reason from the outset. Other conduct is evaluated under a flexible standard: roughly, evaluation extensive enough to reach a point where confident evaluation would be possible under the rule of reason.

To the antitrust expert, the previous paragraph is dry and unremarkable. To the outsider, it is surreal. Things that seem like they should be clear and tangible, like "price fixing," turn out to be terms of art given life by the ominous (and apparently immense) rule of reason standard. Abbreviated modes of inquiry are presented as a way of avoiding rule-of-reason analysis, but one cannot predict whether abbreviated inquiry is permissible without predicting how a given type of challenge would fare under the rule of reason. The rule of reason ultimately dictates all outcomes in this framework, yet the user's attention is constantly diverted away from the rule of reason to focus on this categorization question or that one. In short, the framework appears complicated because it does not suggest an appropriate conceptual model.

⁸⁷ *Id.* at 48.

Now consider the structural presumption in Section 7. Merger challenges are permitted to circumvent complex competitive-effects analysis when the concentration of a relevant market is great enough to establish a presumption of illegality. Relevant markets are defined by a variety of tests, with the leading test defining markets by reference to the predicted competitive effects of a hypothetical combination of all competitors in a candidate market.⁸⁸ Market structure is likewise defined by reference to predicted competitive effects—here, shares are assigned to make each competitor’s market share reflect its future competitive significance relative to other competitors. The presumption of illegality can be rebutted, but counterproof requires a weightier showing when the presumption of illegality is particularly strong.

Again, this summary is hornbook law—and, again, it is bristling with opportunities for confusion. As a term of art, no relevant market has any reliable claim of correspondence to market or industry boundaries as they would be recognized by the public.⁸⁹ A person accustomed to hearing news about trends in the manufacturing sector or in Silicon Valley may struggle to suspend disbelief that a relevant market could be as thin as “premium natural and organic supermarkets”⁹⁰ or “high function FMS and HRM [software].”⁹¹ The suggestion that detailed industry study would be needed to measure market shares likewise collides with a layperson’s expectations. The accounting exercise of adding and dividing by the total seems unambiguous to a user not already looking at the exercise through the lens of competitive-effects predictions. And the entire focus of the structural presumption—on market concentration as an evidentiary proxy for the competitive effects of mergers—is a head fake sure to be missed by many, who will instead assume that all the talk about market

⁸⁸ The use of a hypothetical “monopolist” decisionmaker in the HMT is purely a matter of narrative convenience. Alternative articulations could focus on a perfectly orchestrated cartel of all market participants, a trust embracing all market participants, or a zero-integration merger of all market participants.

⁸⁹ See HORIZONTAL MERGER GUIDELINES, *supra* note 43, § 4, para. 9 (“Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term ‘market.’”).

⁹⁰ *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).

⁹¹ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1130 (N.D. Cal. 2004).

concentration reveals an aspiration to stamp out concentration itself.⁹² To the outsider, the disconnect between how the components of the structural presumption seem like they would, and how they actually work, may feel like sitting down, once more, in front of the cursed VCR.

B. Spiraling Complication

Having discussed how efforts to simplify antitrust law often fail to do so, and how failed efforts to simplify antitrust law complicate it by hiding the operation of this law behind false conceptual models, the remaining step in building out my second conjecture is to defend the concern that the antitrust law's perceived complication could drive efforts to simplify it, pulling the law into a downward spiral of obfuscation. Examples of the hypothesized concern can be found in the statements and actions of policymakers and those who influence them.

What are some examples? One—just discussed—is the possibility that confusion about the significance of market structure will motivate efforts to harness its apparent simplicity in increasing the speed and efficiency of antitrust analysis. By executive order, President Biden recently announced his administration's commitment to using antitrust law to combat “the excessive concentration of industry.”⁹³ In public remarks, agency leaders have simplistically conflated rising concentration with falling competition and public harm.⁹⁴ Comments from the agencies suggest an interest in

⁹² Compare Hovenkamp & Shapiro, *supra* note 52, at 2018 (“[M]arket structure has never been a freestanding target of merger policy. Rather, market structure has been a means of tackling merger law’s more fundamental concerns, which are higher prices or reduced output or other consumer harms that result from less competitive market structures.”), with Exec. Order No. 14,036, 86 Fed. Reg. 36,987 § 1 (July 14, 2021) (affirming “that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry”).

⁹³ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 § 1 (July 14, 2021).

⁹⁴ See JONATHAN KANTER, MODERN COMPETITION CHALLENGES REQUIRE MODERN MERGER GUIDELINES 2 (2022) (“[C]oncentrated market structures can harm downstream consumers and upstream workers at the same time that they foster coordination or exclusion in adjacent markets”); PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS 1 (“Oversight of the Enforcement of the Antitrust Laws” Sep. 20, 2022) (“Recent decades have vividly illustrated how Americans lose out when markets become more consolidated and less competitive.”).

reviving Warren-Court style vigilance against perceived trends toward concentration.⁹⁵ And recently proposed legislation seeks to make mergers and other forms of conduct presumptively illegal when undertaken by firms holding more than a fifty percent share of a relevant market.⁹⁶ The goal of simplifying and streamlining enforcement is transparent.⁹⁷

These statements and policy proposals reflect an overreading of structural shortcuts in antitrust analysis. They are based on conceptual models in which market structure relates in simple and consistent ways to market power opportunities. The problems with these conceptual models are not well exposed by current law. To the contrary, they appear to match simple rules like the structural presumption in Section 7 litigation.⁹⁸ The complexity of that presumption is not honestly exposed but hidden in behind-the-scenes tweaks and careful definitions.⁹⁹

Another example of recent interest in simplifying the perceived complication of antitrust law can be found in efforts to identify categorical offenses for which detailed factual analysis can be skipped or prohibited,¹⁰⁰ the apparent objective being to mimic some of the perceived simplicity of

⁹⁵ U.S. Dept. of Justice & Fed. Trade Comm’n, Request for Information on Merger Enforcement 2 (Jan. 18, 2022) (“The agencies are particularly interested in aspects of competition the guidelines may underemphasize or neglect, such as . . . non-price elements of competition like innovation, quality, potential competition, or any ‘trend toward concentration.’”); FED. TRADE COMM’N, REMARKS OF CHAIR LINA M. KHAN REGARDING THE REQUEST FOR INFORMATION ON MERGER ENFORCEMENT 3 (Jan. 18, 2022) (asking “how should the guidelines analyze . . . whether there is a ‘trend toward concentration’ in the industry?”). *But cf.* Robert Pitofsky, *The Political Content of Antitrust*, 127 PA. L. REV. 1051, 1071 (1979) (commenting that even those who reject limiting antitrust to economic concerns should find some of the Warren Court’s observations of a trend toward concentration in cases like *Von’s Grocery* a dubious basis for intervention).

⁹⁶ S. 225, 117th Cong. §§ 4, 9 (2021).

⁹⁷ *Id.* § 2(b)(4) (explaining one purpose of the act as being to “establish simple, cost-effective decision rules”).

⁹⁸ *See supra* note 48 and accompanying text.

⁹⁹ *See supra* notes 56–75 and accompanying text.

¹⁰⁰ *See* Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism’s Democracy Paradox*, _ J. CORP. L. _ § II.C.2 (forthcoming 2023) (discussing recent interest in bright-line conduct rules of illegality).

per se rules and abbreviated analysis.¹⁰¹ For example, reasoning that the process of proving harm from platform integration is too difficult and time consuming,¹⁰² Lina Khan has proposed blanket rules to prohibit platforms from competing with their users.¹⁰³ A reformulation of this rule would be to call all such vertical integration *per se* anticompetitive. Apparently launching from a similar conviction that current antitrust enforcement is failing to prevent unfair conduct by digital platforms,¹⁰⁴ recently proposed legislation would make it unlawful for companies designated as “covered platforms” to engage in specific categories of conduct.¹⁰⁵ In some of the prohibited categories of conduct, illegality depends on proof that the conduct would “materially harm competition.”¹⁰⁶ In other categories, the conduct is proscribed without any showing of harm,¹⁰⁷ though the defendant is permitted to prove absence of harm as an affirmative defense.¹⁰⁸

¹⁰¹ See, e.g., Zephyr Teachout, *Why Judges Let Monopolists Off the Hook*, ATLANTIC (Oct. 29, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/antitrust-facebook-congress-sherman-act/620539/> [<https://perma.cc/A4SN-QM5Z>] (“Instead of asking judges to apply impossible standards, the law should spell out and prohibit a specific set of abusive business practices . . . dominant firms should be explicitly banned from predatory pricing, coercive dealing, and exclusive dealing, for example.”).

¹⁰² Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1084 (2019) (“Antitrust remedies would be costlier and take significantly longer, requiring the government or a private party to successfully show anticompetitive conduct and effects stemming from a digital platform’s involvement in multiple markets. Given the enfeebling of antitrust doctrines that police single-firm anticompetitive conduct—and the judicial requirement that remedies be carefully tailored to competitive harm—this path is likely to be significantly more challenging.”).

¹⁰³ See *id.* at 1083–85 (discussing implementation options).

¹⁰⁴ See Amy Klobuchar, *Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech*, U.S. SENATOR AMY KLOBUCHAR (Oct. 14, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/10/klobuchar-grassley-colleagues-to-introduce-bipartisan-legislation-to-rein-in-big-tech> [<https://perma.cc/K7C6-RN9B>] (quoting Senator Grassley for the proposition that “[a]s Big Tech has grown and evolved over the years, our laws have not changed to keep up and ensure these companies are competing fairly”).

¹⁰⁵ S. 2992, 117th Cong. § 3(a) (2022).

¹⁰⁶ E.g., *id.* § 3(a)(1).

¹⁰⁷ E.g., *id.* § 3(a)(5).

¹⁰⁸ *Id.* § 3(b)(2) (describing the referenced affirmative defense).

The latter style of prohibition codifies presumptive illegality within a specified category of conduct.

The inspiration for these policy proposals is a little unclear. If the proposals are based on beliefs that antitrust law's existing *per se* rules and presumptions greatly simplify analysis, then they are misled. Efforts to remain faithful to the underlying standard tend to evaporate promises of simplicity, as previously discussed.¹⁰⁹ If, on the other hand, the proposals are intended as rejections of antitrust law's existing standards in favor of new and different theories of harm, then perceptions of antitrust law's needless overcomplication are likely still a driving force—but with the important difference that the risk of spiraling complication within antitrust law must be upgraded to spiraling complication without it.

IV. CONCLUSION

In moments like the present, when accepted principles of antitrust law are under attack, it may feel tempting to accede to demands for clearer, more impactful enforcement in the form of shortcuts to complex inquiries: rules, presumptions, burden-shifting frameworks. These modest concessions promise simplicity without abandoning the substantive premises of antitrust law. But can the promise be kept?

I worry it cannot. As I have tried to illustrate, efforts to convert vague standards into clear rules have an uninspiring track record in antitrust law. Worse than failing to simplify, past efforts in this direction seem likely to have made antitrust harder to understand than it would be with its vague standards and complex inquiries clearly in view. The troubling implication is that the addition of new shortcuts to complex inquiries may simply set the stage for deeper despair. In the long run, it could be better for antitrust law to be clearly vague than for it to be vaguely clear.

¹⁰⁹ See *supra* notes 26–35 and accompanying text.