

Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy

The Antitrust Bulletin
2020, Vol. 65(2) 227-255
© The Author(s) 2020



Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/0003603X20912884
journals.sagepub.com/home/abx



Alison Jones* and William E. Kovacic**,**,***

Abstract

For several years, a number of commentators have expressed concern that the U.S. has a growing market power problem. Further that dysfunction in the U.S. antitrust institutions, and their failure to protect competition, has damaged the economy. This Article outlines the principal flaws that this commentary attributes to U.S. antitrust policy (the “crisis in antitrust”), and some of the proposals offered to redirect it and restore it as a central tool of economic control. The paper’s main purpose is not, however, to debate the condition of competition in the US economy or the merits of the measures proposed. Rather, its objective is to identify the magnitude of the implementation challenges that the proposals for a major expansion of the U.S. antitrust program create and the policy implementation challenges that stand between these soaring reform aspirations and their effective realisation in practice. The paper suggests that even though these “implementation” issues are significant, they have been too quickly overlooked in the commentary. In our view the failure to focus on this important matter risks creating a chasm between elevated policy commitments and the capacity of responsible public to produce expected outcomes. The paper consequently acknowledges and addresses this implementation blindside. It analyses the important impediments that are likely, if not carefully addressed, to hamper delivery of the current proposals and proposes ways to overcome them.

Keywords

the objectives of antitrust law, consumer welfare, citizen welfare, antitrust reform proposals, implementation obstacles, public antitrust enforcement

I. Introduction

In June 2016, as the campaign for the U.S. presidency entered its final months, Senator Elizabeth Warren appeared at a conference convened by a Washington, DC, think tank and offered a grim report

* King’s College London, London, United Kingdom

** George Washington University, Washington DC, USA

*** United Kingdom Competition and Markets Authority, United Kingdom

Corresponding Author:

Alison Jones, Professor of Law, King’s College London, London WC2R 2LS, United Kingdom.
Email: alison.jones@kcl.ac.uk

on the state of markets in the United States. “[T]oday, in America,” she observed, “competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.”¹

Senator Warren was not the first to make this critique.² Yet, by giving it prominence, her June 2016 speech helped move competition policy into the mainstream of popular debate.³ Today, her themes resonate in a large and expanding commentary that recounts a growing market power problem in the American economy (especially in its information technology [IT] sector) and dysfunction in its antitrust institutions.⁴ By failing to protect competition, the federal antitrust enforcement agencies and the courts are said to have damaged the economy severely. Commentators give several reasons for the policy default: disregard of the egalitarian aims that motivated adoption of the U.S. antitrust laws in favor of an efficiency-based goals framework;⁵ judicial fidelity to outdated views of industrial organization economics;⁶ and enforcement timidity rooted in the capture by potential prosecutorial targets of the federal enforcement agencies, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC).⁷

The grievances sketched above have led to widespread debate and intensified demands for a redirection of antitrust policy and the application of other policy instruments to increase competition. High on the agenda is an extension of policy to provide greater control of the practices of leading technology companies (or Tech Giants) and dominant firms in other sectors such as agribusiness and pharmaceuticals.

Although there are dramatically different views as to how exactly change should take place (see further Section II below), many proponents of change stress the urgent need for more vigorous and aggressive enforcement of the antitrust laws, especially by the federal agencies. For example, there are calls for the agencies to police future mergers more strictly, perhaps with bans or presumptions against certain mergers (including acquisitions by large incumbent enterprises of promising start-ups); to limit vertical integration; and to arrest exclusionary conduct by dominant companies.

Other suggested means of control include the creation of a new regulatory authority—vested in the antitrust agencies or in a new government body—with power to promulgate rules that would establish

1. Senator Elizabeth Warren, *Reigniting Competition in the American Economy* Keynote Remarks at New America’s Open Markets Program Event (Washington, DC, June 29, 2016), www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.
2. For a notable earlier statement of these concerns, see generally, BARRY LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2010).
3. In the typical week, public figures give countless numbers of speeches at events organized by think tanks in Washington, D.C. Senator Warren’s speech nonetheless immediately attracted attention. See Paul Glastris, *Elizabeth Warren’s Consolidation Speech Could Change the Election*, WASHINGTON MONTHLY, June 30, 2016, www.washingtonmonthly.com/2016/06/30/elizabeth-warrens-consolidation-speech-could-change-the-election/; Brent Kendall, *Elizabeth Warren Says Competition Is ‘Dying’ as She Voices Fears Over Amazon, Apple*, WALL ST. JOURNAL, June 30, 2016. See also Ron Knox, *Elizabeth Warren Is the Perfect Antitrust Crusader for 2020*, SLATE (Jan. 4, 2019), <https://slate.com/news-and-politics/2019/01/elizabeth-warren-2020-antitrust-monopoly-crusader.html>; Rhis Blakely, *Tech Titans, Once the Darlings of U.S. Politics, are Recast as Enemies*, THE LONDON TIMES, September 23, 2017; Rana Foroohar, *Tech ‘Superstars’ Risk a Populist Backlash*, FIN. TIMES, April 26, 2017.
4. See, generally, ARIEL EZRACHI & MAURICE STUCKE, *COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS* (forthcoming 2020); RANA FOROOHAR, *DON’T BE EVIL—THE CASE AGAINST BIG TECH* (2019); THOMAS PHILIPPON, *THE GREAT REVERSAL—HOW AMERICA GAVE UP ON FREE MARKETS* (2019); JONATHAN TEPPER & DENISE HEARN, *THE MYTH OF CAPITALISM—MONOPOLIES AND THE DEATH OF COMPETITION* (2019); MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019).
5. See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710 (2017).
6. See, e.g., JONATHAN B. BAKER, *THE ANTITRUST PARADIGM—RESTORING A COMPETITIVE ECONOMY* (2019); *Collection: Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916 (2018).
7. See, e.g., PHILIPPON, *supra* note 4, at 153–75; TEPPER & HEARN, *supra* note 4, at 162–65.

industry-wide codes of conduct, allow for the restructuring of dominant firms, and/or bar dominant firms from selling their own products on the platforms they own.⁸

Some demand a “root-and-branch” transformation of the antitrust system that would embrace objectives beyond enhancing the welfare of citizens as buyers of goods and services.⁹ The expanded goals framework would seek to protect the interests of small and medium enterprises (SMEs), workers, and local communities, and, in doing so, to safeguard democracy itself. To this end, some suggest that the enforcement agencies should cease devoting resources to “trivial” cases aimed at forestalling efforts by individual entrepreneurs and SMEs to earn suitable wages;¹⁰ instead, agencies should focus single-mindedly on curbing monopoly by, for example, using structural remedies to unwind consummated anticompetitive mergers, to deconcentrate markets, and to prevent future antitrust violations.¹¹

The debate has refocused the spotlight on basic issues about the aims of the U.S. antitrust system: what goal, or goals, should guide the interpretation and enforcement of the antitrust statutes; what are the advantages and disadvantages of adopting a “purist” efficiency-orientation or a multi-faceted goals agenda, regime; and how a multi-dimensional set of objectives, anchored in cases such as *United States v Aluminum Co. of America (Alcoa)*¹² and *Brown Shoe Co. v United States*¹³ (monopolization and merger decisions respectively), could be applied effectively by antitrust agencies in designing an enforcement program and by the courts in resolving individual cases.

The modern critique must be taken seriously. Three Senators that were seeking the Democratic Party’s nomination in the 2020 elections—Senator Elizabeth Warren,¹⁴ Senator Bernie Sanders,¹⁵ and Senator Amy Klobuchar¹⁶—have issued legislative proposals to carry out basic reforms of the U.S. antitrust system. The impulse for a redirection of antitrust policy is not merely partisan. President Donald Trump has voiced his support for closer antitrust scrutiny of leading firms, including Google,

8. E.g., Stigler Centre Committee on *Digital Platforms, Final Report*, 2019 (Stigler Report) proposes establishing of a new digital regulatory agency (also the UK Digital Competition Expert Panel Report, *Unlocking Digital Competition* (March 2019) (Furman Report) speaks of establishing a new digital “unit”). See also e.g. Haley Sweetland Edwards, *Washington Takes on the Threat of Big Tech*, TIME (September 6, 2018), <http://time.com/5388338/de-google-facebook-twitter/> [<https://perma.cc/4V98-W6HN>]; Seth Fiegerman, *Facebook Faces New Regulatory Backlash over Data Privacy*, CNN TECH (June 4, 2018, 1:28 PM), <https://money.cnn.com/2018/06/04/technology/facebook-data-backlash/index.html> [<https://perma.cc/XE66-RK7F>].

9. Sandeep Vaheesan of the Open Markets Institute has used this phrase to describe the need for a far-reaching reform of the U.S. antitrust system. Sandeep Vaheesan, *How Robert Bork Fathered the New Gilded Age*, PROMARKET BLOG (Sept. 5, 2019), <https://promarket.org/how-robert-bork-fathered-the-new-gilded-age/> (“Antitrust law needs root and branch reconstruction.”).

10. See, e.g., Lina Khan, *How to Reboot the FTC*, POLITICO (Apr. 13, 2016), <https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolize-00090> [<https://perma.cc/YLDS62JY>] (calling the FTC “an agency adrift” that is “squandering resources on trivial cases”).

11. Bernie Sanders, *Corporate Accountability and Democracy* (2020), <https://berniesanders.com/issues/corporate-accountability-and-democracy/>; Elizabeth Warren, *How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://edlizabethwarren.com/plans/break-up-big-tech>.

12. 148 F.2d 416 (2d Cir. 1945).

13. 370 U.S. 294, 325 (1962).

14. See Senator Elizabeth Warren, Anti-Monopoly and Competition Restoration Act (December 9, 2019) (draft legislation on file with authors) and e.g. Eric Newcomer & Joshua Brustein, *Elizabeth Warren Is Drafting US Legislation to Reverse Megamergers*, BLOOMBERG (December 4, 2019), <https://www.bloomberg.com/news/articles/2019-12-04/warren-is-drafting-u-s-legislation-to-reverse-mega-mergers>; Lauren Hirsch, *Elizabeth Warren’s Antitrust Bill Would Dramatically Enhance Government Control Over the Biggest US Companies*, CNBC (Dec. 7, 2019), <https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html>.

15. See Sanders, *supra* note 11.

16. See, e.g., S 1812, Consolidation Prevention and Competition Promotion Act of 2017, §5 (Sept. 14, 2017) (provision creating office of consumer advocate within the FTC), <https://www.congress.gov/bill/115th-congress/senate-bill/1812/text>.

Amazon, Facebook, and Apple (GAFA),¹⁷ and Republican legislators such as Senator Josh Hawley have suggested a fundamental retooling of the federal enforcement mechanism.¹⁸ The changing political mood appears to have spurred the public enforcement agencies to expand their programs, using existing policy tools, to address the accumulation and exercise of market power in the tech sector,¹⁹ and the FTC has launched a study, using compulsory process, of acquisitions not subject to the government's premerger notification requirements that were undertaken by Amazon, Alphabet (including Google), Apple, Facebook, and Microsoft from January 1, 2010, through December 31, 2019.²⁰ Regardless of which candidate prevails in the November 2020 presidential election, the U.S. antitrust system seems poised for expansion.

In this article, we do not debate the condition of competition in the U.S. economy, nor do we assess the substantive merits of the respective measures proposed to correct the market and policy deficiencies identified. Instead, we focus on a less noticed issue—the policy implementation challenges that stand between the soaring reform aspirations and their effective realization in practice. We thus take the reform recommendations—presented in scholarly papers, blue-ribbon studies, and in popular essays—at face value, and ask what legislators and policy makers must do to land them. For example, assuming that more aggressive antitrust enforcement is required, how can an effective program actually be delivered—through winning antitrust cases and securing positive change—and how can it be delivered well?

In our view, these “implementation” issues have tended to be overlooked in the modern critique and to have been too quickly side-lined as technical details to be (easily) addressed once the high-level concepts of a bold antitrust program have been settled.²¹ Implementation is not, however, a simple matter that will necessarily sort itself out once the intellectual architecture is in place. Rather, inattention to implementation challenges invites serious disappointment by creating a chasm between elevated policy commitments and the capacity of responsible public institutions (competition agencies, new regulators, and the courts) to produce expected outcomes. This is the implementation blindside. Unless the blindside is acknowledged and addressed, there is a significant risk that a major reform program will engage considerable resources, public and private, in initiatives that fall well short of their goals. Instead of restoring confidence in the ability of government agencies to enforce antitrust laws effectively, a failed effort might merely reinforce doubts, and cynicism, about the quality of public administration.

This article analyzes important impediments that are likely, if not carefully addressed, to hamper the delivery of the current proposals to expand competition policy significantly and propose ways to overcome them. It commences in Part II by introducing the principal flaws that modern commentary attributes to U.S. antitrust policy (the “crisis in antitrust”), before describing some of the proposals offered to bolster competition, strengthen antitrust policy, and restore its centrality as a tool of

17. See Brian Fung, *Amazon, Facebook And Google Are All Being Looked at For Antitrust Violations, Trump Says*, WASHINGTON POST (Nov. 5, 2018), <https://washingtonpost.com/technology/2018/11/05/amazon-facebook-google-are-all-being-looked-at-for-antitrust-violations-trump-says/>.

18. See, e.g., Josh Hawley, *Overhauling the Federal Trade Commission* (Feb. 10, 2020), <https://www.hawley.senate.gov/sites/default/files/2020-02/Hawley-FTC-Overhaul.pdf> (suggesting, among other reforms, that the FTC be recreated as a unit within the Department of Justice Antitrust Division).

19. See Tim Cross, *Will Big Tech be Broken Up in 2020? A Guide to the Antitrust Cases Facing GAFA*, VIDEO AD NEWS (Dec 12, 2019), <https://videoadnews.com/2019/12/09/will-big-tech-be-broken-up-in-2020-a-guide-to-the-antitrust-cases-facing-gafa/>.

20. Press Release, FTC, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-release/2020/02/ftc-examine-past-acquisitions-large-technology-companies?utm_source=slider.

21. One of us (Kovacic) spent several years in private practice working for aerospace industry clients which had major roles in the U.S. space program in the 1960s. One company official remarked that the essential physics of going to the moon was fairly straightforward. By contrast, the engineering was very difficult.

economic control. It also sketches how the federal and state agencies are responding to demands for more extensive intervention. As already explained, the purpose of this section is not to address the (respective) merits of these policy proposals but to identify the magnitude of the implementation challenges that the proposals for a major expansion of the U.S. antitrust program create.

Part III sets out the chief implementation obstacles that confront efforts to execute bolder antitrust programs, including tougher scrutiny of mergers and dominant firm conduct. We draw parallels between current debates and past ones, including those that influenced enhanced antitrust enforcement (especially by the FTC) in the 1960s and early 1970s and use historical examples to show what might happen if these hurdles are underestimated or ignored in the formulation of bold new initiatives.

Before concluding, Part IV of the article considers what it is likely to take to implement the proposals, and a program of expansion, successfully. It emphasizes measures to ensure that reform commitments properly account for the capacity of the public agencies to execute the commitments successfully. The discussion includes consideration of how antitrust agencies might undertake a more ambitious program with or without receiving new powers or resources from Congress.

II. The Modern Proposals for Change

A. The Crisis in Antitrust

At a high level, the modern critique of U.S. antitrust policy argues (with resemblances to criticism voiced in earlier eras²²) that antitrust shortcomings—including lax federal enforcement and judicial acceptance of permissive antitrust doctrine since the mid-1970s—have contributed significantly to large increases in concentration and the creation, and entrenchment, of market power in many sectors of the economy.²³ These developments are said to have raised prices for consumers, diminished innovation and new business development, and increased business margins and profits.²⁴ Some commentators and politicians go further and emphasize the adverse consequences of these changes on democracy²⁵ and income or economic inequality,²⁶ so laying at antitrust's feet “a myriad of perceived socio-political problems.”²⁷ In these critiques, weak antitrust enforcement is one key element of a larger failure of the government to promote competition to spur growth, to ensure that all citizens enjoy the fruits of prosperity, and to safeguard the sound functioning of the democratic process.

22. Both at the end of the nineteenth century (about the inability of the common law to curb the rising power of the trusts which led to the adoption of the Antitrust Laws) and subsequently in the mid twentieth century (about the negative impact on economic performance and the nation's social and political health caused by the U.S. agencies' failure to use the antitrust laws to halt industrial concentration); see generally, Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947), Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947); CARL KAYSER & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959); and William E. Kovacic, *Competition Policy in Its Broadest Sense*: Michael Pertschuk's Chairmanship of The Federal Trade Commission 1977-1981, 60 WILLIAM & MARY L.R. 1269 (2019).

23. BAKER, *supra* note 6, 20.

24. See generally, Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality, in TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS* (Martin Guzman ed., 2018), JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES* (2015), BAKER, *supra* note 6, 15 and *Anti-Monopoly and Competition Restoration Bill*, *supra* note 14.

25. See TIM WU, *THE CURSE OF BIGNESS—ANTITRUST IN THE GILDED AGE* 138–39 (2018); Barry Lynn, *The Anti-Monopoly Case Against Google: A conversation with Open Markets*, THE VERGE (July 15, 2017), <https://www.theverge.com/2017/9/5/16243868/google-monopoly-antitrust-open-markets-barry-lynn>.

26. See, e.g., Khan, *supra* note 5; Lina Khan & Sandeep Vaheesan, *Market Power and Inequality, The Antitrust Counterrevolution and its Discontent*, 11 HARV. L. & POL'Y REV. 234 (2017); Hal Singer, *While Trump Blames Immigrants for Low Wages, An Alternative Theory Gains Traction Among Economists*, Feb. 1, FORBES, 2018.

27. Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZONA STATE L.J. 293.

Modern critiques often compare the current antitrust system to enforcement policy between the late 1930s and the early 1970s. In this era, courts and enforcement agencies developed strict rules governing collusive agreements among competitors, vertical agreements between manufacturers and distributors, and dominant firm behavior. In addition, with the adoption of the Celler-Kefauver Act in 1950,²⁸ Congress bolstered the Clayton Act's merger control provision,²⁹ which the DOJ and the FTC applied aggressively to challenge business combinations. With encouragement from the Supreme Court, the agencies imposed tough restrictions on horizontal and nonhorizontal mergers.³⁰ Judicial decisions and enforcement policy embraced an egalitarian vision that emphasized the attainment of objectives (such as the preservation of SMEs and democracy) beyond the promotion of economic efficiency.³¹ Public enforcement and jurisprudence formed what Jonathan Baker has called a political bargain that tolerated the development of large firms in return for the assurance, provided by robust antitrust policy, that such firms would not attain or abuse positions of dominance through improper exclusionary tactics, and that rivals would not use mergers or cartels to achieve and exploit market power.³² Among other effects, the political bargain helped forestall the adoption of more intrusive forms of regulatory supervision, such as public utility control of pricing and entry. Largely unchallenged by significant foreign economic rivals, and perhaps facilitated by strong antitrust oversight, the U.S. economy enjoyed extraordinary growth from the end of World War II through the 1960s.

The rising concern articulated in the modern critique is that developments since the mid-1970s have depleted the force of antitrust law. As described below, commentators assign responsibility to various factors, including the Supreme Court's misguided acceptance of the notion that Congress intended the Sherman Act to be an efficiency-oriented "consumer welfare prescription";³³ judicial decisions that narrowed antitrust law's reach; and permissive antitrust enforcement.

I. Repudiation of the True Goals of the Antitrust Statutes. Although proponents for change have different perspectives (*see infra* II.B), some contend that the courts and enforcement agencies were wrong, from the mid-1970s to the present, to abandon the broad vision that Congress had embraced in enacting the Sherman Act in 1890,³⁴ the Clayton Act³⁵ and Federal Trade Commission Act in 1914,³⁶ the Robinson-Patman Act in 1936,³⁷ and the Celler-Kefauver Act in 1950.³⁸ Courts and enforcement agencies have wrongly replaced the original legislative commitment to protect smaller firms from oppression and preserve a democratic political order with a single-minded focus on consumer welfare and efficiency.³⁹ Some argue that the abandonment of antitrust law's original concern about the full

28. P.L. 81-899, 64 Stat. 1125 (1950).

29. 15 U.S.C. § 18.

30. *See, e.g.*, ABA Antitrust Section, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 1-4 (1986).

31. *See supra* notes 13-134 and accompanying text.

32. Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006).

33. This phrase appeared first in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Senator Warren's draft bill, *supra* note 14, specifically states that antitrust laws were not created exclusively to enhance the narrowly defined concept "consumer welfare" as articulated by academics such as Robert Bork, or as described by the Supreme Court of the United States in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), and its progeny.

34. 15 U.S.C. §§ 1-7.

35. 15 U.S.C. §§ 12-27.

36. *See especially* 15 U.S.C. § 45 (declaring unlawful unfair methods of competition).

37. Pub. L. No., 74-692, 49 Stat. 1526 (codified at 15 U.S.C. § 13).

38. Reforming and strengthening the Clayton Act merger provisions, *see especially* now 15 U.S.C. § 18.

39. *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 464-67 (2003) (describing modern acceptance by U.S. federal antitrust agencies of an efficiency-oriented goals framework); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2008 COLUM. BUS. L. REV. 1, 34-35 (2008) (describing contributions of Chicago and Harvard scholars to development of an efficiency-oriented U.S. antitrust goals framework). *See, e.g.*, Khan & Vaheesan,

range of injuries that monopoly inflicts on citizens—not simply as purchasers of goods and services but also as workers, entrepreneurs, shop owners in local communities, and participants in the democratic process—is the chief cause of what has gone wrong with the U.S. antitrust system.⁴⁰

2. *Retrenchment in Antitrust Doctrine.* It also has been argued that guided by a false conception of antitrust's goals, or how its goal (or goals) is to be achieved, the federal courts have raised procedural, evidential, and substantive bars to antitrust actions excessively and gone too far in loosening antitrust restrictions governing vertical agreements, dominant firm behavior, and mergers.⁴¹ Reflecting a deep-seated concern about the hazards of overenforcement, confidence in the ability of markets to renew themselves, and wariness of the U.S. system of private rights of action,⁴² the courts have systematically and incrementally diminished the likelihood that a plaintiff can prevail in antitrust litigation. Not only have these developments discouraged private litigation, but they have also made the federal agencies more risk-averse in deciding whether to challenge dominant enterprises⁴³ or attack mergers, except in cases of unusually high concentration.

3. *Misguided and Timid Federal Enforcement.* The modern critique also argues that U.S. enforcement policy has gone badly astray since the 1970s. For the most part, the DOJ and the FTC are said to have declined to challenge dominant firms and oligopolies;⁴⁴ overlooked the harmful effects of vertical integration;⁴⁵ and allowed mergers that increased concentration or allowed dominant incumbents to absorb smaller firms that may have emerged as major competitive forces.⁴⁶ At the same time, the federal agencies are said to have squandered precious resources on trivial matters (notably, the prosecution of horizontal restraints cases involving small, poorly paid service providers).

For a mixture of all or some of these reasons, an increasing number of advocates are becoming supporters of a more expanded competition policy.

supra note 26, 269–72, 277–79; Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, ROOSEVELT INSTITUTE (Dec. 11, 2017), <http://www.rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory/>.

40. See Wu and Lynn, *supra* note 25.

41. See, e.g., *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007).

42. See, e.g., *Trinko and Twombly*, *supra* note 41.

43. An awareness of how difficult it has become to transit the gauntlet of hostile jurisprudence is reflected by the limited results produced by recent federal enforcement programs. It is noteworthy, for example, that despite a commitment in early 2009 to expand Section 2 enforcement significantly, the Obama Administration's DOJ Antitrust Division brought few section 2 cases (none of them remarkable). See, e.g., Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 18–19 (July 18, 2012). In January 2013, the FTC closed its investigation into Google's conduct related to online searches. Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google's Search Practices (January 3, 2013), https://ftc.gov/system/files/documents/public_statements/295971/13-103/googlesearchstmtofcomm.pdf.

44. See, e.g., Wu, *supra* note 25, at 102–26; *Trustbusting in the 21st Century*, ECONOMIST, Nov. 17, 2018, at 53.

45. See Khan, *supra* note 5, 792–97.

46. See, e.g., Germán Gutiérrez & Thomas Philippon, *You're Paying More in America Than You Would in Europe*, WASH. POST (Aug. 13, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/08/13/middle-class/?utm_term=.619c7f364558 [<https://perma.cc/PBV9-DFWL>]; Steven Pearlstein, *Boeing and Airbus, the New 'Super Duopoly'*, WASH. POST (Apr. 25, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/04/25/boeing-and-airbus-the-new-super-duopoly/?utm_term=.a9f11b4bfe03 [<https://perma.cc/NNB4-SE74>] (discussing the lack of governmental challenges to mergers within the aerospace industry) and discussion of the Lear report, *infra* note 63.

B. The Proposed Cures

The critiques touched on in the section above are varied and result from different policy perspectives. Broadly, advocates for change can be grouped into three categories: (i) do substantially more with the existing antitrust system; (ii) do more with the existing system and enact additional regulatory mechanisms; and (iii) undertake a “root-and-branch” transformation of the U.S. competition policy system.

Although we survey the reform proposals from the broad perspective of each of these groups below, we recognize that this classification scheme is imperfect. For example, all three groups share some policy preferences—such as increasing scrutiny of dominant firm conduct and stiffening merger control. Further, although differences across the groups are detectable with respect to goals, and views differ about whether the consumer welfare standard has betrayed the antitrust laws, the first two groups would continue to emphasize consumer interests in designing policy. In contrast, the “root-and-branch” group would adopt a broader conception of citizen welfare that accounts for the well-being of individuals not only as purchasers of goods and services but also as workers and owners of smaller businesses. Views about the severity of measures needed to correct existing market pathologies also vary across the groups.

1. Do Substantially More with the Existing System. One major group of reform advocates argues that the journey toward better policy does not require the adoption of new statutes, wholly new goals, or the creation of new regulatory institutions. This group would employ a concept of consumer welfare that encompasses effects on prices, quality, and innovation; it would not extend the range of goals to include effects on small businesses or the well-being of workers (except as injured by the exercise of monopsony power).⁴⁷ In their view, the existing framework presents untapped possibilities for a more activist program. The bases for needed improvements would be an evolution in, and the imaginative application of, existing doctrine⁴⁸ and, crucially, a recalibration of error cost analysis,⁴⁹ which today suggests that the hazards of intervening too much to correct certain phenomena (e.g., improper exclusion by dominant firms) exceed the costs of intervening too little. Federal enforcement agencies should be more proactive and change their appetite for risk by bringing more cases in the courts, even if they might fail.⁵⁰ They consequently place the burden on antitrust agencies to be mindful of the threat of underenforcement and to undertake a more ambitious agenda, extending far beyond its current focus, and scrutinizing a wide range of exclusionary or collusive behavior and mergers, including:

- vertical restraints, such as platform MFNs;
- practices of standard-setting organizations that allow owners of standard essential patents to exploit their market power;
- conduct arising in regulated, or recently deregulated, markets;
- refusals to deal, predatory pricing, and other newer forms of monopolization;
- horizontal shareholdings in concentrated product markets; and
- horizontal and vertical mergers, especially through the revival and strengthening of the structural presumption and vigorous scrutiny of acquisitions of start-ups.

47. Arguably, the consumer welfare goal remains a coherent structure for the development of carefully crafted, consistent rules, which can be applied in an objective, evidence-based framework that eliminates protectionism and politically or ideologically driven decision taking.

48. See *Unlocking Antitrust Enforcement*, *supra* note 6.

49. Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 8 (2015).

50. BAKER, *supra* note 6, 3. Arguably enforcement could be focused on areas or cases which are likely to result in the greatest inequality, given the link between market power and widening economic inequality, Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. EQUITABLE GROWTH (Mar. 20, 2017).

2. *Do Substantially More with the Existing System and Create a New Digital Regulator.* The second group largely accepts the agenda described above and would make one notable addition: the creation of a new regulatory body to oversee digital technology giants. As proposed by the Stigler Center report on competition in digital markets,⁵¹ the new regulator would have the power to set rules governing the conduct of leading digital platforms—for example, by imposing nondiscrimination obligations on platforms and even to break them up. This proposal draws upon and extends recommendations made by a United Kingdom advisory panel to create a new “digital markets unit” within the UK government.⁵²

3. *Root-and-Branch Transformation.* The third collection of reform proponents is generally receptive to the proposals of the first two groups, but argues that these measures are seriously incomplete. Advocates of the root-and-branch approach (which include leading political figures such as Senators Bernie Sanders and Elizabeth Warren) contend that more dramatic reform is required to deal with America’s “market power problem,” as monopolies and oligopolies not only raise consumer costs, block entrepreneurship, stunt investment, and retard innovation but also “depress wages and salaries” and “concentrate political power, which they use to win favorable policies and further entrench their dominance.”⁵³ These advocates claim that as today’s market problem resulted from abandonment of antitrust law’s true aims, antitrust must return to its origins embedded in a broader citizen-welfare standard that addresses employment security, wage levels, economic freedom of consumers, the well-being of SMEs, the preservation of democracy, the diffusion of concentrated private and political power, and a wariness of monopoly power in all of its forms.⁵⁴

The root-and-branch program would have two dimensions. The first would have the DOJ and the FTC use existing powers to reorient enforcement in a way that would resemble but expand the enforcement agenda we describe above for the do-more-with-what-exists groups. Secondly, however, because proponents of root-and-branch reform believe that expanded use of existing tools will not suffice to transform the U.S. regime, they contend that legislation is necessary to overcome permissive rules embedded in judicial doctrine and to supplement existing enforcement institutions.⁵⁵

Reorientation of enforcement would require both a curtailment, repudiation, or revision of some existing programs (e.g., advocacy and law enforcement efforts that challenge occupational licensure restrictions or attack efforts by low-wage service providers to raise their fees⁵⁶) and expanding enforcement through:

- challenging individual dominant firms and tight oligopolies, with routine recourse to structural remedies to deconcentrate affected sectors (including the prosecution of new antitrust cases to break up technology firms, including GAFAs);⁵⁷
- using expanded theories to challenge vertical integration by contract or ownership;⁵⁸

51. The Stigler Report, *supra* note 8.

52. The Furman Report, *supra* note 8.

53. Lina Khan, *The Ideological Roots of America’s Market Power Problem*, 127 *YALE L.J.* 960 (2018).

54. *See* Section II.

55. *See, e.g.*, Lina Khan, *The Separation of Platforms and Commerce*, 119 *COLUMBIA L. REV.* 973 (2019).

56. *See, e.g.*, Vaheesan, *supra* note 9.

57. *See, e.g.*, Wu, *supra* note 25, at 127–39; Jonathan Tepper, *We are All Losing Out as Corporate Concentration Grows*, *FIN. TIMES*, Nov. 30, 2018, at 13; Robert Reich, *Break Up Facebook (and while we’re at it, Google, Apple and Amazon)*, *THE GUARDIAN* (Nov. 20, 2018) (“We should break up the hi-tech behemoths, or at least require they make their proprietary technology and data publicly available and share their platforms with smaller companies.”), <https://www.theguardian.org/commentisfree/2018/nov/20/facebook-google-antitrust-laws-gilded-age>; Matt Stoller, *The Return of Monopoly*, *NEW REPUBLIC* (Aug. 10, 2017).

58. *See, e.g.*, Khan, *supra* note 5.

- challenging price discrimination, through the restoration of Robinson-Patman Act enforcement as a core element of federal antitrust policy;⁵⁹
- strictly oppose mergers whose concentrative effect exceeds levels set by the U.S. Department of Justice Merger Guidelines issued in 1968⁶⁰ and adhering to the policy aims set out in Supreme Court decisions such as *Brown Shoe v. United States*;⁶¹
- using potential competition theories to bar leading firms from acquiring smaller, start-up enterprises that could otherwise emerge as strong challengers to incumbent giants and make a broad category of mergers between large firms presumptively unlawful;⁶²
- closely scrutinizing completed mergers, and the conditions attached to them, including efforts to unravel mergers that the federal agencies improvidently cleared or approved subject to inadequate remedies;⁶³
- routine FTC use of Section 5 of the FTC Act to overcome doctrinal limitations imposed by the existing Sherman Act and Clayton Act jurisprudence that embraces a consumer welfare standard and unduly confines the interpretation of these statutes;⁶⁴
- promulgation by the FTC of trade regulation rules to establish codes of behavior applicable on an economy-wide basis.⁶⁵

Such steps are to be facilitated, reinforced, and supplemented by suggested legislative steps, for example:

- the creation of a new competition advocate to survey markets, receive complaints, and make public recommendations for investigations by the FTC and DOJ into possible market exploitation and anticompetitive behavior;⁶⁶
- new legislation banning or limiting information services platforms, or other monopolists, from integrating vertically or selling products in competition with third parties who use their platforms.⁶⁷

59. See Stoller, *supra* note 4. Modern federal enforcement policy has retreated dramatically from high levels of enforcement that prevailed in the 1960s. See D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015). Revival of Robinson-Patman Act enforcement would provide a means to discipline powerful buyers—an important objective of advocates who call for a redirection of U.S. antitrust enforcement.

60. See U.S. Dep't of Justice, 1968 Merger Guidelines, *reprinted in* Trade Reg. Rep. (CCH) ¶ 13,101, 2016 WL 6107271.

61. 370 U.S. 294, 315–23, 322 n. 38 (1961).

62. See, e.g., Michael Kades, *Antitrust Remedies to the Domination of Digital Technologies and the Acquisition of Nascent Competitors*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Nov. 19, 2019), <https://equitablegrowth.org/antitrust-remedies-to-the-domination-of-digital-platform-technologies-and-the-acquisition-of-nascent-competitors/>.

63. Senator Warren announced that, if elected as President, she would direct the U.S. antitrust agencies to bring cases to unwind a number of acquisitions completed by Amazon, Facebook, and Google, and to require the break-up of the Bayer/Monsanto. Her Anti-Monopoly and Competition Restoration Bill, *supra* note 14, also contemplates the reexamination of deals that the federal agencies failed to challenge. Senator Sanders has promised to “[b]reak up corrupt corporate mergers and monopolies, including reviewing all mergers that have taken place during the Trump Administration and institute new merger guidelines.” Sanders, *supra* note 11. Other candidates for the Democratic Party’s nomination for the presidency have advocated stricter merger controls. These proposals derive support from research that documents extensive acquisition activity by leading technology firms. Lear, *Ex post-Assessment of Merger Control Decisions in Digital Markets* 9 (May 2019) (report prepared for the United Kingdom Competition & Markets Authority; stating that between 2008 and 2018, Google, Facebook, and Amazon acquired 168, 71, and 60 companies, respectively).

64. See Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”*: *The Latent Power of the Federal Trade Commission*, 19 U. PENNSYLVANIA J. BUS. L. 645 (2017).

65. *Id.* at 677–78.

66. See *supra* note 16.

67. See Khan, *supra* note 55.

- making certain conduct presumptively abusive⁶⁸ and the introduction of fines for, and to deter, monopolization offenses;⁶⁹
- new legislation to limit mergers that unfairly consolidate corporate power, in particular through the application of strong presumptions or bans against certain mergers (e.g., large or “megamergers”⁷⁰) or through use of presumptions designed to prevent not only mergers that will increase prices, but those that will reduce wages, cut jobs, lower quality, limit access to services, stifle innovation, or hinder the ability of SMEs to compete. The purpose of the new legislation would be to facilitate successful challenges by agencies and to incentivize companies to be better corporate citizens.

C. Implementing a More Ambitious Enforcement Agenda: The Steps So Far

Demands for stronger competition programs are already inspiring adjustments at the DOJ and the FTC. Over the past two years, the FTC has conducted an extensive set of public hearings to consider how it can meet changes in, and the new demands of the economy.⁷¹ In addition, it has established a Technology Enforcement Division in its Bureau of Competition to lead its enforcement efforts in the high-tech sector.⁷² Both federal agencies have initiated investigations of the Tech Giants, the agencies are in the process of preparing vertical merger guidelines (for the first time since 1984)⁷³ and Digital Guidelines, and the DOJ is conducting a review of leading online platforms to identify practices that create or maintain structural impediments to greater competition.⁷⁴ All of these activities have accompanied the stated commitment of the federal agencies to apply more resources and scrutiny to dominant firms and to mergers involving the acquisition by major incumbents of nascent competitors.⁷⁵ The federal activity is taking place against the backdrop of visible, significant inquiries by state attorneys general, individually and collectively, into the conduct of digital platforms, including Google and other

68. See Anti-Monopoly and Competition Restoration Bill, *supra* note 14.

69. See the Bill introduced in August 2019 by Senator Amy Klobuchar which would authorize the federal antitrust agencies to seek penalties of up to 15% of a company’s total U.S. revenues in the previous year, or 30% of revenues in the relevant aspect of the company’s business. The bill would also require the agencies to develop joint guidelines on the civil penalties they would seek under Sherman Act, § 2 and FTC Act, § 5. Senator Klobuchar has stated that penalties currently available under Sherman Act § 2 have not proven sufficient, on their own, to deter anticompetitive exclusionary conduct, *see also* Harry First, *The Case for Antitrust Civil Penalties* 76 ANTITRUST L. J. 127 (2009) AND Anti-Monopoly and Competition Restoration Bill, *supra* note 14.

70. See Anti-Monopoly and Competition Restoration Bill, *supra* note 14.

71. The agendas, materials, and recordings of the FTC *Hearings on Competition and Consumer Protection in the 21st Century* are collected at <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

72. The FTC initially created a Tech Task Force. Press release, FTC, FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-of-competition-launches-task-force-to-monitor-technology>. This body later was made a permanent unit (Technology Enforcement) of the Bureau of Competition.

73. See Press Release, FTC, FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment>.

74. Press Release, DOJ, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>. *Justice Department Announces Broad Antitrust Review of Big Tech*, WASHINGTON POST (July 23, 2019), <https://www.washingtonpost.com/technology/2019/07/23/justice-department-announces-antitrust-review-big-tech-threatening-facebook-google-with-more-scrutiny/>). The DOJ has also appointed an Associate Deputy Attorney General and Senior Advisor for technology industries.

75. See, e.g., Kiran Stacy & Kadhim Shubber, *Which Antitrust Investigations Should Big Tech Worry About?*, FIN. TIMES (Oct. 28, 2019), <https://www.ft.com/content/abcc5070-f68f-11e9-a79c-bc9acae3b654>.

leading technology firms. It is easy to imagine that the collection of federal and state efforts will lead to the initiation of new cases in 2020.⁷⁶

III. Obstacles to Effective Implementation

The proponents of change have set out a breathtaking agenda for reform. The various papers and reports are powerfully reasoned and argued but devote relatively little attention to the question of how their proposals can be achieved successfully. Rather many of them seem to be predicated on the assumption that any legislative changes required can be introduced rapidly and that the new, more aspiring, program can be driven home straightforwardly by agencies led by courageous leaders and supported by a larger staff that shares the vision for fundamental change.

The discussion below, and history, seems to indicate, however, that more courage and more people will not necessarily overcome the implementation obstacles that stand in the way of a program that requires the rapid prosecution of a large number of complex cases against well-resourced and powerful companies. Indeed, the criticisms levied at the current system, the proposals for more effective enforcement and reform, and the scale of the action being demanded bear some resemblance to those that led to a more re-invigorated and aggressive antitrust enforcement policy in the 1960s and early 1970s. For example, at that time complaints that the FTC was in decay, was obsessed with trivial cases and failing to address matters of economic importance, anticompetitive conduct, and rising concentration,⁷⁷ led the FTC to embark on a new, bold, and astoundingly broad enforcement program.⁷⁸ In an effort to meet criticisms of it as a shambolic and failing institution, the FTC sought to upgrade its processes for policy planning, made concerted efforts to improve its human capital in management and case handling, and sought to improve substantive processes and the quality of its competition and consumer protection analysis.

In the end, FTC's efforts to improve capability proved insufficient to support the expanded enforcement agenda, partly because the Commission failed to formulate an adequate plan to overcome the full range of implementation obstacles. The FTC seriously overreached because it did not grasp, or devise strategies to deal with, the scale and intricacies of its expanded program of cases and trade regulation rules, the ferocious opposition that big cases with huge remedial stakes would provoke from large defendants seeking to avoid divestitures, compulsory licensing, or other measures striking at the heart of their business, and the resources required to deliver good results. The Commission lacked the capacity to run novel shared monopoly cases that sought the break-up of the country's eight leading petroleum refiners and four leading breakfast cereal manufacturers⁷⁹ and simultaneously pursue an abundance of other high stake, difficult matters involving monopolization, distribution practices, and horizontal collaboration. The FTC also overlooked swelling political opposition, stoked by the vigorous lobbying of Congress, that its aggressive litigation program provoked.⁸⁰

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration by arresting anticompetitive behavior of dominant enterprises (through interim and permanent relief) and by blocking mergers that pose incipient threats to competition. It seems clear, however, that such dramatic legislative proposals are

76. Joseph Simons, the FTC Chairman, has said he expects the Commission to conclude its existing inquiries by the end of 2020. As noted earlier, the likely adverse political reaction that the agency will face if its highly publicized investigations in this area yield no cases leads us to believe that the FTC will commence one or more lawsuits involving the Tech Giants.

77. See especially Edward F. Cox et al, *The Nader Report on the Federal Trade Commission* (1969) and the American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission* (1969).

78. Kovacic, *supra* note 22.

79. See *infra* note 100.

80. See Kovacic, *supra* note 22 and William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010).

likely to be fiercely contested through the legislative process and so will take time, and be difficult, to enact. Further, even if armed with a more powerful mandate, the DOJ and the FTC will still have to bring what are likely to be challenging cases applying the new laws (see Section F). The adoption, setting up, and bedding in of new legislation or regulatory structures and bodies is therefore unlikely to happen very quickly and is, consequently, unlikely to meet the demands of those seeking urgent and immediate action now.

These difficulties suggest that for the near future, at least, the agencies will have to achieve successful extensions of policy mainly through launching themselves into a number of lengthy, complex investigations and litigation based on the current regime. This means establishing violations under existing judicial interpretations of the antitrust laws and making a convincing case for the imposition of effective remedies, including structural relief.

The discussion in this section identifies likely impediments to the implementation of ambitious reforms, either through litigation (under the present-day regime) or legislation. These include judicial resistance to broader applications of the Sherman, Clayton, and FTC Acts, the complexities of designing effective remedies, the uncertainty of long-term political support for ambitious reforms and the possibilities for political backlash once agencies begin prosecuting major new cases, and the complications, and resistance, that confronts any effort in the United States to make legislative change.

A. Judicial Resistance to Extensions of Existing Antitrust Doctrine

As noted in Section II.A, judicial decisions since the mid-1970s have reshaped antitrust law; created more permissive substantive standards governing dominant firm conduct, mergers, and vertical restraints; and raised the bar to antitrust claims in a number of ways. This remolding has been facilitated by the Court's conclusion that the Sherman Act constitutes "a special kind of common law offense,"⁸¹ so that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."⁸² This has allowed the statutory commands to be interpreted flexibly and the law to evolve with new circumstances and new wisdom;⁸³ for example, where there is widespread agreement that the previous position is inappropriate or where the theoretical underpinnings of those decisions have been called into question.⁸⁴

The proposed solutions will depend, in the short term at least, on the ability of enforcement agencies to navigate the described jurisprudence to find an antitrust infringement and, in some instances, a further rethinking, refinement, and/or development of doctrine, through softening, modification, or even a reversal of current case law. Although such an evolution could, in theory, result, as it did over the last forty years, from a steady stream of antitrust cases, judicial appointments since 2017 have arguably made such a change in direction unlikely. Rather, it seems more probable that successful prosecution of major antitrust, and especially Section 2 Sherman Act monopolization cases, will remain challenging and may even become more difficult. Cases will be litigated before judges who are ordinarily predisposed to accept the current framework, either by personal preference or by a felt compulsion to abide by forty years of jurisprudence that tells them to do so.⁸⁵ A new president could

81. *Business Electronics Corp v. Sharp Electronics Corp*, 485 U.S. 717, 732 (1988); *see also* *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53, n. 21.

82. *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *State Oil v. Khan*, 522 U.S. 3, 20 (1997).

83. *Business Electronics*, *supra* note 81.

84. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

85. *See* William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1450–51, 1468–69 (1989-90) (describing the widespread acceptance of the consumer welfare framework by the federal judiciary).

gradually change the philosophy of the federal courts by appointing judges sympathetic to the aims of the proposed transformation.⁸⁶ The reorientation of the courts through judicial appointments is, however, likely to take a long time.⁸⁷

Until then, trial judges and the Court of Appeals will be compelled to abide by the existing jurisprudence and will only be at liberty to develop a more flexible approach in the “gaps” or spaces left by Supreme Court opinions—for example, in relation to mergers and rebates—and through creative interpretations of the law. Such cases are, however, likely to be hard fought. Indeed, Judge Lucy Koh’s finding in *Federal Trade Commission v. Qualcomm, Inc.*⁸⁸ that Qualcomm’s licensing practices constituted unlawful monopolization of the market for certain telecommunications chips has provoked hostile attacks, not only from practitioners and academics but also from the DOJ, the U.S. Departments of Defense and Energy, and even one of the FTC’s own members. In a scathing op-ed in the *Wall Street Journal*,⁸⁹ Commissioner Christine Wilson attacked Judge Koh’s “startling new creation” of legal obligations that may trigger a new wave of enforcement actions and undermine intellectual property rights. Commissioner Wilson condemned the judge’s “judicial innovations,” and “alchemy,” through reviving and expanding the Supreme Court’s 1985 opinion in *Aspen Skiing Co v. Aspen Highlands Skiing Corp*⁹⁰ (which she stresses was described by the Supreme Court in *Trinko*⁹¹ as “at or near the outer boundary” of U.S. antitrust law), turning contractual obligations into antitrust claims, and for departing from current federal agency practice, by imposing remedies requiring Qualcomm to negotiate or renegotiate contracts with customers and competitors worldwide. She has thus urged the Ninth Circuit (on appeal), and if necessary the Supreme Court, to assess the wisdom of these sweeping changes and to stay the ruling.⁹²

It seems likely therefore that, at the same time as bringing cases seeking to develop procedural, evidential, and substantive antitrust standards under the existing regime, additional antidotes to the stringencies of existing jurisprudence will be required, including more extensive, and expansive, use of Section 5 FTC Act to plug the gaps created by the narrowing of the scope of Section 2 Sherman Act; and/or the adoption of legislation that directs courts to apply a wider goals framework.

B. Infirmities of Section 5 of the Federal Trade Commission Act

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”⁹³ This section allows the FTC⁹⁴ to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The

86. *Id.* at 1468–69 (noting the impact of President Reagan and President Bush on the acceptance of the consumer welfare framework).

87. *Id.* (noting that presidents typically only appoint approximately 20% to 25% of the federal bench over a four-year period).

88. No. 17-cv-00220 (N.D. Cal. Jan. 17, 2017), <https://www.ftc.gov/enforcement/casesproceedings/141-0199/qualcomm-inc>.

89. Christine Wilson, *A Court’s Dangerous Antitrust Overreach*, WALL STREET JOURNAL (May 28, 2019), <https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055>.

90. 472 U.S. 585 (1985).

91. *Supra* note 41.

92. Wilson, *supra* note 89 (“thereby ensuring that Silicon Valley’s latest innovation does not become an immediate boon to foreign firms that use American technology to sell foreign phones to foreign consumers”).

93. 15 U.S.C. § 45(a).

94. It can only be enforced by the FTC and not e.g. private plaintiffs.

latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.⁹⁵

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC's current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.⁹⁶ The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.⁹⁷

The FTC's record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop "competition policy in its broadest sense."⁹⁸ The agency's Section 5 agenda yielded some successes,⁹⁹ but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.¹⁰⁰ The agency's program elicited powerful legislative backlash from a Congress that once supported FTC's trailblazing initiatives but turned against it as the Commission's efforts to obtain dramatic structural remedies unfolded.¹⁰¹

C. Designing Effective Remedies

Important issues arising for the new enforcement strategy proposed will be what remedies should be sought; how can an order, or decree, be fashioned to ensure that the violation is terminated, that competition on the market is restored, the opportunity for competition is re-established, and that future violations are not committed and deterred; and will a court be likely to impose any such remedy.¹⁰²

The Sherman Act treats infringements of its key commands as crimes attracting severe sanctions, including fines (corporate and individual) and imprisonment. Although since 1980, the DOJ has used criminal prosecutions only to challenge hard-core horizontal cartels,¹⁰³ some antitrust reform proponents are calling for the introduction of fines to sanction illegal monopolization, and

95. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (the Commission has power under section 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of section 3 of the Clayton Act or other provisions of the antitrust laws); *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-95; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (section 5 empowers the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws); N. W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 BOSTON COLLEGE L. REV. 227 (1980).

96. See Kovacic & Winerman, *supra* note 80.

97. *Id.*

98. See Kovacic, *supra* note 22.

99. *In re Xerox* (1975) (consent order).

100. The most notable litigation setbacks were the FTC's shared monopoly cases against the leading U.S. breakfast cereal manufacturers and the eight largest petroleum refiners, *Kellogg Co.*, 99 FTC 8 (1982); *Exxon Corp.*, 98 FTC 453 (1981).

101. William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237 (2015).

102. In concept, the remedies available for violations of the U.S. antitrust laws include criminal penalties, injunctions to block illegal practices, equitable monetary relief, and private damages claims. See William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 U. CONNECTICUT L. REV. 1285 (1999).

103. See William E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from U.S. Experience*, in CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 45 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

some commentators have proposed that the DOJ reconsider its policy of not seeking criminal penalties beyond the Section 1 conspiracy context.¹⁰⁴ For the time being, however, it would appear that existing civil sanctions will remain the tool of choice for DOJ in dealing with antitrust infringements and will be the only set of remedies available to the FTC, which has no mandate to bring criminal cases.

The civil remedial options, which can broadly be grouped into three categories, for the federal agencies, are nonetheless powerful in principle. The first and, perhaps, the most common form of remedy consists of *controls on conduct*. Conduct-related relief ordinarily takes the form of cease and desist orders that forbid certain behavior or, in a smaller number of cases, compel firms to engage in affirmative acts, such as providing a competitor access to an asset needed to compete.

The second major form of remedy is *structural relief* in the form of divestitures or the compulsory licensing of intellectual property that enables a firm to enter a previously monopolized market. The boundary between purely conduct-based and structural remedies is not always clear. A compulsory licensing decree has strong structural features (it directly facilitates new entry) and conduct elements (it may require the owner of the patent to provide the licensee know-how and updates of the patented technology).

The third remedy consists of *civil monetary relief* in the form of disgorgement of ill-gotten gains or the restitution of monopoly overcharges to victims. A number of Supreme Court decisions in monopolization cases in the late 1940s and early 1950s appeared to hold that these forms of recovery are encompassed in the mandate of courts to order equitable remedies to cure antitrust violations. The federal agencies have not used this power expansively, though it would appear to be available to recoup overcharges in Section 2 or other cases.¹⁰⁵

The cures envisaged by many of the advocates of change call for the bold application of the full portfolio of civil remedies, including unwinding past mergers, divestment of assets, restructuring concentrated markets, limiting or reversing vertical integration or through the imposition of licensing obligations. Such advocates thus wish the DOJ and FTC to use the antitrust laws as an effective and simple mechanism for deconcentrating both monopolistic and oligopolistic markets, rapidly introducing new competition into a market; and reversing what they consider to be severe structural problems that have been allowed to develop on the market.¹⁰⁶

Structural remedies, in particular, have always been a real and important part of the antitrust remedial arsenal,¹⁰⁷ not only in merger cases where a violation of the antitrust rules may consist of

104. See *supra* note 69 and accompanying text.

105. The DOJ in recent years has sought to exercise this somewhat dormant power. See *U.S. v. Keyspan, Inc.*, Civ. Action No.: 1:10-CV-01415-WHP (S.D.N.Y., Feb. 2, 2011) (final judgment approving DOJ request for disgorgement under Section 4 of the Clayton Act), <https://www.justice.gov/atr/case-document/final-judgment-115>. Since the late 1990s, the FTC has sought and obtained disgorgement of profits in a number of antitrust cases. See, e.g., Press Release, FTC, Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in *FTC v. AbbVie* (June 29, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling>. The FTC traces its authority to seek disgorgement and restitution for competition offenses to legislation adopted in the 1970s to improve its remedial effectiveness. The scope of this authority, and its application to competition and consumer protection cases, is now the subject of major appellate litigation. See Jennifer Kim, *Is Disgorgement a Penalty in the Antitrust-Enforcement Realm? Exploring Mediation as the FTC's Response to Kokesh in the Context of Reverse Payment Settlements*, 20 CARDOZO J. CONFLICT RESOLUTION 163 (2018).

106. See generally, e.g., William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool of Deconcentration*, 74 IOWA L. REV. 1105 (1989).

107. It is "the most important of antitrust remedies," *United States v. El du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961). Between 1890 and 1939 there were 8 single-firm monopolization cases involving exclusionary practices (that is cases, which did not involve acquisition or maintenance of monopoly power wholly or partly by merger) in which substantial divestment was ordered and 7 cases between 1940-1999, RICHARD A. POSNER, *ANTITRUST LAW* (2001), at 106 (table 5).

an unlawful acquisition of shares or stock¹⁰⁸ but also in Sherman Act cases.¹⁰⁹ In the 1960s the FTC also sought, using its powers under Section 5 FTC Act to deconcentrate the petrol and breakfast cereal markets¹¹⁰ and in 1969 the Neal Report,¹¹¹ commissioned by President Lyndon Johnson, proposed the adoption of laws which would allow oligopolistic industries to be deconcentrated and the condemnation of mergers on markets that were already concentrated.¹¹²

Modern antitrust has, however, had less appetite for the use of antitrust to break up companies. Although the District Court in *United States v. Microsoft Corp.*¹¹³ ordered, at the request of the DOJ, that Microsoft be broken into two parts, the Court of Appeals, despite affirming the violation of section 2, reversed and remanded the finding that Microsoft should be split into two. Setting out a high bar for structural relief, the Court stressed that the lower court had not (1) held a remedies-specific hearing¹¹⁴ or (2) provided adequate reasons for the decreed remedies.¹¹⁵

A number of factors seem responsible for the trend away from structural remedies. First, the change in antitrust thinking that has evolved since the early 1970s, from a belief that antitrust intervention and structural remedies can improve performance¹¹⁶ to the current more laissez-faire one.¹¹⁷ Second, concerns about the effectiveness of previous attempts to deconcentrate industries,¹¹⁸ especially given the length of time that antitrust proceedings take.¹¹⁹ Third, the difficulty involved in constructing and overseeing a structural remedy effectively. Although in cases involving a merger or acquisition it may be relatively easy to structure such a remedy through disentangling assets that were once owned

-
108. It is the preferred remedy for an illegal merger or acquisition as it is simple, relatively easy to administer, and sure, *see* *California v. American Stores*, 495 U.S. 271, 280–81 (1990); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329–31 (1961). Divestiture is also available in cases brought by private litigants under Clayton Act, §16).
109. *See, e.g.*, *Standard Oil Co of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. Aluminum Co of America*, 91 F. Supp. 333 (SDNY 1950); *United States v. First National Bank & Trust*, 376 U.S. 665 (1961); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).
110. *See supra* note 100.
111. Phil C. Neal et al, *Report of the White House Task Force on Antitrust Policy*, 2 ANTITRUST L. & ECON. REV. 11 (1968).
112. The Concentrated Industries Act would have allowed the Attorney General to order divestiture on oligopolistic markets where the four largest firms held market shares exceeding 70%. A change to the merger rules would have allowed for the condemnation of mergers where the four largest firms had market shares exceeding 50%. For a discussion of the Report, *see, e.g.* Herbert Hovenkamp, *The Neal Report and the Crisis in Antitrust* (2009), University of Iowa Legal Studies Research Paper No 09 09.
113. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), *cert denied*, 534 U.S. 952 (2001).
114. The District Court relied on the fact that Microsoft had not conceded that any of its business practices violated the Sherman Act, had continued to do business as it had in the past and had proved untrustworthy; and the government, acting in the public interest, had won the case and thus had some entitlement to a remedy of their choice.
115. It held, relying on *e.g.* *United States v. United Shoe Machinery Co.*, 391 U.S. 244, 250 (1968) and *United States v. Grinnell Co.*, 384 U.S. 563, 577 (1966) that the lower court had not explained how its remedies decree would unfetter the market from anticompetitive conduct, terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remained no practices likely to result in monopolization in the future.
116. Especially during the Warren Court Era (1953-1969), and, *see generally*, E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1962). E. S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* (1957); J. S. BAIN, *BARRIERS TO NEW COMPETITION* (1956); J. S. BAIN, *INDUSTRIAL ORGANIZATION* (1968); Kaysen & Turner, *supra* note 22.
117. *See supra* section II.A.
118. Although evaluating their efficacy is not easy, *but see e.g.* Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951).
119. The evolution in the market situation since the time the proceedings were launched can make the remedy sought inappropriate. Richard Posner notes that the average length of all single firm monopolization cases (between 1890 and 1999) in which substantial divestiture has been decreed is 63 months, R. A. POSNER, *ANTITRUST LAW* 106 (2nd ed, 2001). He also considers that a reason for the poor record of divestiture as an antitrust remedy is that the government's lawyers tend to lose interest in a case at the relief stage and lack training or experience necessary for the reorganization of a complex enterprise.

separately,¹²⁰ outside of this situation, the question of how and what to divest might be much more speculative, seem much more risky and may in fact be complex and difficult to administer (involving significant restructuring, separation of physical facilities, and allocation of staff from integrated teams).¹²¹ These types of concern make it a challenge to persuade a court that a structural remedy is warranted and will be successful in achieving its objective.¹²²

In the discussion above, we have been addressing the types of remedies that are imposed at the conclusion of a lawsuit. A problem in highly dynamic markets, however, is that the lag between the initiation of a case and a final order on relief may be so great that market circumstances have changed dramatically or the victim of allegedly improper exclusion may have left the market or otherwise lost its opportunity to expand and contest the position of the incumbent dominant firm. In this context, the antitrust cure arrives far too late to protect competition. The relatively slow pace of antitrust investigations and litigation (with appeals that follow an initial decision) has led some observers to doubt the efficacy of antitrust cases as effective policy-making tools in dynamic commercial sectors.

There are at least five possible responses to concerns about the speed of antitrust litigation, particularly matters involving dominant firms. First, agencies could experiment with ways to accelerate investigations, and courts could adopt innovative techniques to shorten the length of trials. In the United States, we perceive that greater integration of effort among the public agencies would permit the more rapid completion of investigations (e.g., by pooling knowledge and focusing more resources on the collection and evaluation of evidence). Courts could use methods tested with success in the DOJ prosecution of Microsoft in the late 1990s to truncate the presentation of evidence. These types of measures have some promise to bring matters to a close more quickly.

Second, the initiation of a lawsuit could be recognized as being, in some important ways, its own remedy; the prosecution of a case by itself causes the firm to change its behavior in ways that give rivals more breathing room to grow. Moreover, the visible presence of the enforcement authority, manifest by its investigations and lawsuits, causes other firms to reconsider tactics that arguably violate the law. Seen in this light, the entry of a final order that specifies remedies may not be necessary for all instances to have the desired chastening effect.

A third response is to experiment more broadly with interim relief that seeks to suspend certain types of exclusionary conduct pending the completion of the full trial.¹²³ Effective interim measures would require the enforcement agency to develop a base of knowledge about the sector that enables it to accurately identify the practices to be enjoined on an interim basis and to give judges a confident basis for intervening in this manner.

A fourth approach would be that the remedies achieved in protracted antitrust litigation may not be so imperfect or untimely as they might appear to be. There have been a number of instances in which the remedy achieved in a monopolization case was rebuked as desperately insufficient when ordered

120. See, e.g., Press release, FTC, Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it>.

121. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), *cert denied*, 534 U.S. 952 (2001), noting the logistical difficulties involved in dissolving unitary company. See also *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953). Judge Wyzanski (“United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.”).

122. The licensing obligation imposed by Judge Koh in *Qualcomm*, *supra* note 88, has (as well as the monopolization finding) been determinedly criticized and is being vigorously contested on appeal.

123. And so to halt potentially anti-competitive conduct pending investigation (on Oct. 16, 2019, the European Commission used such powers in proceedings against *Broadcom* for the first time in 18 years, see https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_6115).

but turned out to have positive competitive consequences.¹²⁴ This is a humbling and difficult aspect of policy making. It may not be easy for an agency to persuade its political overseers—or other external audiences—that the chief benefits of its intervention will emerge in, say, two or three decades. Yet the positive results may take a long time to become apparent.

A fifth technique would be to rely more heavily on *ex-ante* regulation in the form of trade regulation rules that forbid certain practices. A competition authority—most likely the FTC—would use its rulemaking powers to proscribe specific types of conduct (e.g., self-preferencing by dominant information services platforms).

In this article, we do not purport to solve the problems of the remedial design set out above. There is, however, a fairly clear conclusion about how enforcement agencies should go about thinking of remedies. As we note below, there is considerable room for public agencies to design remedies more effectively by systematically examining past experience and collaborating with external researchers to identify superior techniques. In this regard, the FTC's collection of policy tools would appear to make it the ideal focal point for the development of more effective approaches to remedial design.

D. Political Backlash

As we have already indicated, the government's prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President's continuing support. The White House ordinarily does not guide the Antitrust Division's selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.¹²⁵

The second path is to lobby the Congress. The FTC is called an "independent" regulatory agency, but Congress interprets independence in an idiosyncratic way.¹²⁶ Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members' constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC's sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.¹²⁷ If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave

124. Two cases we would include in this category are the break up of the Standard Oil trust mandated in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911) and the patent licensing remedies accepted by settlement in *United States v. Western Elec. Co.*, 1956 Trade Reg. Cas. (CCH) ¶ 68, 246 (D.N.J.1956) (consent decree).

125. On the influence on White House involvement in decision making in antitrust cases at DOJ, see James F. Rill & Stacey L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577 (2014).

126. See William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).

127. See William E. Kovacic, *Congress and the Federal Trade Commission*, 75 ANTITRUST L.J. 869 (1989).

of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

E. Opposition to Legislative Reform

Although statutory reform might at first sight appear to be a direct, effective solution to some of the impediments (such as entrenched judicial resistance to intervention), there are good reasons to expect that powerful business interests will also stoutly oppose any proposals for legislation to expand the reach of the antitrust laws or to create a new digital regulator.¹²⁸ One can envisage the formidable financial and political resources of the affected firms will amass to stymie far-reaching legislative reforms. Legislative steps that threaten the structure, operations, and profitability of the Tech Giants and other leading firms are fraught with political risk. These risks are surmountable, but only by means of a clever strategy that anticipates and blunts political pressure. One element of such a strategy is to mobilize countervailing support from consumer and business interests to sustain an enabling political environment to enact ambitious new laws.

Even if successful, “[l]egislative relief from existing jurisprudential structures might take years to accomplish”;¹²⁹ acts taken under new legislation—even with the establishment of presumptions that improve the litigation position of government plaintiffs—may still be relatively complex and difficult to prosecute. Rulemaking is an alternative to litigation, but it is no easy way out of the problem. On the contrary, promulgation and defense, in litigation, of a major trade regulation rule is liable to take as long as the prosecution of a Section 2 case. It can also be anticipated that a judiciary populated with many regulation skeptics will subject new rules or related measures to demanding scrutiny.

IV. Optimal Implementation Approaches

A. Finding a Path

In Section III, we described the obstacles that are likely to stand in the way of accomplishing a significant reconstruction of U.S. antitrust doctrine and enforcement policy. To some degree, the severity of the obstacles depends on how ambitious the chosen reform program turns out to be. The aims and means of the “do more with what you have” group are challenging enough, but they pale in comparison to the difficulties presented by the proposals of the root-and-branch transformation advocates. The latter group would place greater demands on the implementing institutions through, for example, initiating a larger number of major cases and seeking more powerful structural remedies, and by insisting that the entire program be undertaken quickly and decisively rather than at a more moderate tempo.

Although successful accomplishment and delivery of reforms, more moderate and more ambitious, alike, will require awareness and a realistic assessment of likely implementation obstacles and a conscious effort to develop a strategy to surmount them (it has been seen that history provides sobering examples of failures where similar, significant implementation barriers have not been considered or have been discounted¹³⁰), such barriers are not a formula for timidity or a reason not to undertake change. Rather, understanding them helps guide the design of a successful program. To return to our

128. See Kovacic, *supra* note 22, at 22.

129. *Id.*

130. See *supra* note 80 and accompanying text.

U.S. space program analogy,¹³¹ an indispensable foundation for the ultimate success of the Apollo program was the commitment of National Aeronautics and Space Administration and its contractors to understand the full magnitude of the task before them and to anticipate all hazards that would confront human spaceflight to and from the Moon's surface.¹³² The probing analysis of risks inspired successful efforts to find solutions. Operating in an unforgiving environment where even small errors could be catastrophic, humans landed on the Moon and returned safely to Earth.

This section consequently discusses approaches for navigating the reform implementation challenges. Our most important caution is that the reforms—more dramatic and less sweeping—will require substantial upgrades in the capabilities and performance of the institutions responsible for implementation. The more ambitious the reform, the more urgent is the need to enhance capabilities. Further, the prospects of success for the public agencies (federal and state) are likely to improve if they can formulate a common strategy to overcome identified obstacles. Doing so will demand planned, joined-up, and consensual enforcement by the public enforcement agencies and a forthright self-assessment of existing operations and capabilities—to repair institutional flaws, to temper interagency disagreements, and to acquire the human capital needed to run a new, large collection of difficult antitrust suits.

B. Augmenting the Human Capital of the Enforcement Agencies

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

An enhanced litigation program will therefore go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital—attorneys, economists, technologists, and administrative managers¹³³—to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to raise civil service salaries. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel and (b) attempting to shut the revolving door through which professionals move between the public and private sectors. We discuss all three of these steps below.

131. See *supra* note 21.

132. See generally, CHARLES FISHMAN, *ONE GIANT LEAP—THE IMPOSSIBLE MISSION THAT FLEW US TO THE MOON* (2019).

133. In ensuring that an agency has the institutional capacity to take on these “Goliaths,” agency officials must have the skill set diversity required, especially for those involving the digital economy.

1. Resources and compensation. To accomplish the desired expansion of enforcement, we see a need for more resources.¹³⁴ Nonetheless, budget increases that simply allow the enforcement agencies to hire additional staff, while useful, are not enough. We would use more resources to boost compensation for agency employees. This means taking the antitrust agencies out of the existing civil service pay scale. The need is not simply to hire more people. It is to attract a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that none of the proposals for bold reform mention compensation for civil servants.

Consider two possibilities for compensation reform. The first is to align antitrust salaries to the highest scale paid to the financial service regulators. Here the model would be the scale of salaries paid to employees of the U.S. banking regulatory agencies; the salary scale for these regulatory bodies exceeds the General Schedule federal civil service wage scale by roughly 20%.¹³⁵ A second alternative involves a more dramatic change, perhaps more easily accomplished at the FTC, which is a self-contained agency, than at the DOJ Antitrust Division, which is a relatively small part of a much larger bureaucracy. One might take the FTC's existing budget of about \$330 million per year and triple it, setting the amount at \$1 billion per year and use the increase to raise salaries. We would conduct this experiment for a decade to test whether a major hike in pay would increase the agency's ability to recruit the best talent and keep the talent at home for a significant period of time.

We see this as a crucial test of the commitment and sincerity of the political leadership that seeks basic change. If fundamental competition policy reforms mean so much to the nation's well-being, then the country will need to pay to achieve it. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in federal service in the expectation of receiving much higher compensation in the private sector at a later time.

2. Respecting Past Achievements. In the United States, there is an unfortunate habit of making the case for major reforms by depicting the existing policy-making institutions as utterly incompetent, slothful, or corrupt.¹³⁶ Reform advocates sometimes appear to believe that any recognition that existing institutions sometimes have done good work undermines the case for fundamental reform. There is a perceived imperative to portray the responsible bodies and their leaders as hopelessly inadequate. Electoral campaigns can sharpen this tendency by leading the opposition party to claim that the incumbent administration's program was an unrelieved failure.

In a striking number of instances, this pattern has emerged in discussions of antitrust policy.¹³⁷ In current discussions about the future of the U.S. antitrust regime, advocates of fundamental reform sometimes portray the federal antitrust enforcement agencies as decrepit—perhaps to underscore the

134. The DOJ is seeking a dramatic increase in its appropriations for antitrust enforcement. See Leah Nylan, *DOJ seeks 71 percent Bump from Congress for Antitrust*, POLITICO (Feb. 20, 2020), <https://www.politico.news/2020/02/10/doj-bump-antitrust-enforcement-1133.40>.

135. See Paul H. Kupiec, *The Money in Banking: Comparing Salaries of Bank and Bank Regulatory Employees*, AM. ENTERPRISE INST. (Apr. 2014), https://www.aei.org/wp-content/uploads/2014/04/-the-money-in-banking-comparing-salaries-of-bank-and-banking-regulatory-employees_17170372690.pdf.

136. See William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Policy*, 79 ANTITRUST L.J. 687, 692–704 (2014).

137. See, e.g., William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L.J. 687, 692–704 (2014).

need for basic change.¹³⁸ The proponents of root-and-branch transformation often suggest that only a complete makeover of the antitrust system will enable antitrust law to fulfill its intended role. The implication is that, because the antitrust system has failed so miserably, there are few, if any, positive lessons to be derived from experience since the retrenchment of U.S. policy began in the late 1970s, and certainly none since 2000.

This style of argument has several potential costs. One danger is that it overlooks genuine accomplishments and, in doing so, ignores experience that suggests how to build successful programs in the future. Consider three examples that deserve close study in building future cases that seek to expand the reach of the antitrust system. The first is the development of the FTC's pharmaceutical and nonpharmaceutical health-care program from the mid-1970s forward; this initiative used the full range of the agency's policy tools—cases, rules, reports, and advocacy—to change doctrine and alter business behavior.¹³⁹ A second example is the FTC's effort over the past two decades to restore the effectiveness of the quick look as an analytical tool in the wake of the Supreme Court's decision in *Federal Trade Commission v. California Dental Association*.¹⁴⁰ A third example is the FTC's successful litigation of three cases before the Supreme Court over the past decade.¹⁴¹

The programs that accounted for these results were not accidental. Each program began with a careful examination of the existing framework of doctrine and policy to identify desired areas of extension. This stock-taking guided the identification of potential candidates for cases and the application of other policy-making tools.¹⁴² Each program built incrementally upon the bipartisan contributions of agency leadership and the sustained commitment of staff across several presidential administrations headed by Democrats and Republicans.

If one assumes (as a number of reform proponents assert) that the FTC was a useless body in the modern era, there would be little purpose in studying these examples, or anything else it did, as there would be nothing useful to learn. The paint-it-black interpretation of modern antitrust history makes the costly error of tossing aside experience that might inform the successful implementation of new reforms.

A second notable cost of the catastrophe narrative, most relevant to the discussion of human capital, is its demoralizing effect on the agency's existing managers and staff. To see one's previous work portrayed as substandard, or worse, tends not to inspire superior effort. It breeds cynicism and distrust, where managers and staff understand that the critique badly distorts what they have done. Proponents of basic change must realize that the success of their program to expand antitrust intervention will require major contributions from existing staff and managers.

138. See, e.g. Jonathan Tepper, *Why Regulators Went Soft on Monopolies*, THE AM. CONSERVATIVE, Jan. 9, 2019, <https://perma.cc/LHR2-NH39> (“Antitrust law is not so much dormant as it is actively sabotaged by the very people who should enforce it. The DOJ and the FTC’s policies today are best described as aggressive do-nothingism.”).

139. These efforts are described in William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The FTC and Intellectual Property*, 30 SEATTLE U.L. REV. 319 (2007) and William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861 (2005).

140. 526 U.S. 756 (1999) and see e.g. the FTC’s approach in the Three Tenors case upheld in *Polygram Holdings, Inc. v. Federal Trade Commission (Three Tenors)*, 416 F.3d 29 (D.C. Cir. 2005).

141. *Federal Trade Commission v. Actavis, Inc.*, 570 U.S. 756 (2013); *Federal Trade Commission v. Phoebe Putney Hospital System, Inc.*, 568 U.S. 216 (2013); *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1117 (2015).

142. See, e.g., William E. Kovacic & David A. Hyman, *Consume or Invest? What Should Agency Leaders Maximize*, 91 WASHINGTON L. REV. 295 (2015) (discussing development of FTC litigation programs involving health care and pharmaceuticals).

3. *Capture and the Revolving Door.* The modern critique of the U.S. system often describes the federal agencies as captured by the business community or beholden to ideas that disfavor robust intervention.¹⁴³ Advocates of change suggest that the execution of their reform program at the federal antitrust agencies will require the appointment of senior managers and new staff who repudiate the consumer welfare standard, or at least embrace a vision for expanded enforcement under the consumer welfare, and embrace the multidimensional conception of the proper goals of competition law. Those already employed by the enforcement agencies as managers and staff will be expected to accept the expanded (goals) framework or they will find their duties reduced and their roles marginalized. New appointees to top leadership positions will not be tainted by substantial previous experience in the private sector, nor will they have spent too much time as civil servants in a government enforcement culture that assumed the primacy of consumer welfare as the aim of antitrust law and accepted norms that tilted toward underenforcement. The concern about compromised motives is also likely to disqualify many academics who, though sympathetic to some expansion of antitrust enforcement, remain excessively beholden to some notion of a consumer (rather than citizen) welfare standard, or have engaged in consulting on behalf of large corporate interests.

One consequence of the acute anxiety about capture is to slam the revolving door shut, or at least to slow the rate at which it spins. We offer two cautions about this approach. First, the modern experience of the FTC raises reasons to question the strength of the theory. For example, if business perspectives dominate the FTC, why did the agency persist in its efforts to challenge reverse payment agreements involving leading pharmaceutical producers?¹⁴⁴ Was it because the pharmaceutical firms weren't as good at lobbying as, say, the information services giants? And what explains the FTC's decision to sue Qualcomm for monopolization early in 2017?¹⁴⁵ Is this simply attributable to the inadequacy of Qualcomm's Washington, DC, lobbyists, or is the capture explanation for the behavior of the federal antitrust agencies not entirely airtight?

Our second caution is that severe restrictions on the revolving door could deny the federal agencies access to skills they will need to carry out a major expansion of antitrust enforcement. Recruiting attorneys, economists, and other specialists from the private sector can give the agencies a vital infusion of talent which, when combined with agency careerists, permit the creation of project teams that can equal the capability of the best teams that the defense can mount in major litigation matters. We also are wary of the idea that an attorney or economist coming from the private sector will discourage effective intervention during the period of public service as a way to pave the road to a better private sector position upon leaving the agency. Rather, there is evidence to suggest that creating a reputation for aggressiveness and toughness as an enforcer increases one's post-agency employment options. More than a few individuals have developed prosperous careers based on piloting businesses through navigational hazards that they helped create while they were senior officials in public agencies.

C. Common Public Enforcement Strategy

The U.S. antitrust system is famous for its decentralization of the power to prosecute, giving many entities—public agencies (at both the federal and state levels), consumers, and businesses—competence to enforce the federal antitrust laws. The federal enforcement regime also coexists with state antitrust laws and with sectoral regulation, at the national and state levels, that includes a competition policy mandate.

143. See, e.g., *Trustbusting in the 21st Century*, *supra* note 44, at 10 (stating that “competition regulators have been captured” and criticizing U.S. revolving door that creates conflicts of interest and warped perspectives on competition policy).

144. See *Actavis*, *supra* note 141.

145. See *supra* notes 88–89 and accompanying text.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is disabled (e.g., due to capture, resource austerity, or corruption).¹⁴⁶ Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. For models of successful interagency cooperation, one might study the successful policy integration that has taken place through the work of the United Kingdom Competition Network and the European Competition Network. In both examples, one can see the mix of organizational structures and personal leadership that enabled agencies collectively to accomplish policy results that would have been unattainable through the work of single agencies operating in isolation.

We doubt the ambitious litigation agenda demanded in the modern reform proposals is attainable if the public agencies adhere to traditional practices that overlook the expansion of outcome and increase in quality that superior interagency cooperation could generate. A suggested program of fuller integration would have the following elements.

1. Development of a Common Strategy. The path toward a major expansion of the existing litigation program will require careful planning that begins with the formulation of a joined-up strategy implemented harmoniously by the DOJ and FTC. The starting point for the common strategy is to map out the existing contours of doctrine, identify the high ground for intervention that modern jurisprudence has established, select projects to reshape doctrine and other elements of antitrust policy, allocate them to the best-placed agency to act and avoid duplication of resources on identical or overlapping investigations.

A second focal point in the analysis of the doctrinal status quo would be to consider how existing precedents can be employed to build successful cases and how doctrinal frontiers can be extended.¹⁴⁷ An important element of this mapping exercise is to understand why the courts have embraced more permissive standards over the past four decades. This assessment would facilitate the preparation of effective arguments to persuade judges to rethink it. Among other effects, we anticipate that this inquiry will reveal how perspectives beyond the modern Chicago School have influenced judicial thinking. In particular, it will demonstrate how a number of jurists have abandoned a multidimensional goals framework in favor of an efficiency orientation out of concern for “administrability” considerations posed by the modern Harvard School of Phillip Areeda and Donald Turner. To gain the support of jurists such as Stephen Breyer (whose antitrust views bear the mark of Areeda’s influence), it will be necessary to show that the restoration of a new antitrust framework, or an egalitarian goals framework, would not lead to unpredictable and inconsistent litigation outcomes as each judge sought to weigh efficiency concerns or efficiency concerns alongside other values, such as preserving opportunities for small enterprises to compete.¹⁴⁸

The third element of common strategy would be lessons derived from the examination of the agencies’ base of experience to determine what combination of policy tools—cases, studies, rules,

146. See William E. Kovacic & David A. Hyman, *Competition Agency Design: What’s on the Menu?*, 8 EUR. COMPETITION J. 527 (2012).

147. The contributors to the Unlocking Antitrust Enforcement symposium published in the Yale Law Review in 2018 suggest a number of ways in which agencies might develop effective cases within the seemingly foreboding doctrinal framework set by the Supreme Court. See *Unlocking Antitrust Enforcement*, *supra* note 6.

148. In conversations with some who support the restoration of the egalitarian goals framework, it appears that efforts to reset the goals of the antitrust system will require strong structural presumptions to be devised whose application to dominant firm conduct would facilitate attainment of the pluralistic goals agenda, *see, e.g.*, Anti-Monopoly and Competition Restoration Bill, *supra* note 14. The goals would thus be achieved by applying the presumptions rather than making each goal a factor to be considered in a rule of reason inquiry.

advocacy—offer the best means to effectuate change in the market and to use this experience base to design specific remedies. Since its creation in 1890, the U.S. competition law system has generated a mass of information about the techniques for government intervention. As explained further below, the government’s “big antitrust data” can be mined to shed light on what is likely to work. For example, experience in implementing major structural remedies pursuant to decrees in Section 2 monopolization cases and by legislation such as the Public Utility Holding Company Act of 1935 offer important lessons about how to design and carry out the restructuring of major business enterprises.¹⁴⁹

The study of past experience also reveals that it is a mistake, as part of a reform program, to focus all of an agency’s resources on the prosecution of big cases against big companies to the exclusion of smaller matters. The history of U.S. Section 2 enforcement shows that small cases can make big law by establishing doctrinal principles that support subsequent successful prosecutions of large enterprises.¹⁵⁰

2. Project Selection Methodology. Project selection is the process by which an antitrust agency chooses the tools it will use to accomplish its policy aims. There is growing recognition among antitrust authorities that improvements in the methodology of project selection can strengthen the prospects of success for any single initiative. Adapted for the purpose of executing a major reform program, a good project selection methodology would pose a series of questions about every proposed initiative.¹⁵¹

First, what does the agency expect to achieve if the project succeeds? Will it improve economic conditions, realign doctrine, or both? By defining anticipated gains, the agency can better understand how many resources to commit to a specific measure and make a better informed decision about how much risk to accept. This inquiry also helps focus the agency’s attention, from the earliest days of the project’s preparation, on the design of remedies to cure apparent problems. The consideration of benefits to be attained and the means for realizing them can lead an agency to reflect carefully about whether the proposed project is the best way to solve the problem at hand. In some instances, a different sequence of initiatives may provide the best path to a solution—for example, to begin with a market study, and then bring cases based on the learning from the study.

Second, what risks does the project pose? How will a project failure—such as a litigation defeat—affect the market and the agency? Will the agency be able to sustain political support for its projects, or will the targets of intervention mobilize a political coalition to constrain the agency by, for example, curbing its authority or budget? To succeed, agencies must be mindful of the shifting sands in politics and be prepared with countermeasures to deal with situations where relevant politicians’ interests change and become more sympathetic to commercial interests. Important issues therefore will be whether current political supporters of reform have the staying power to back agencies for the five to ten years it might take to carry out cases successfully, what steps agencies can take to ensure sustained political support and to deal with swings in the political environment and whether financial support from the affected firms may be used to sway, or can be prevented from swaying, the political process and buckle political resolve.

Third, who will carry out the project? Which agency and does that agency have the talent available, or can it acquire needed talent in a timely manner, to perform the project successfully and overcome the opposition it will face where the agency seeks strong remedies for individual firms or entire sectors of the economy? A clear-headed answer to these questions helps avoid the creation of large gaps

149. These possibilities are examined in Kovacic, *supra* note 102.

150. For example, the DOJ’s successful prosecution of monopolization claims against *Otter Tail Power Co v. United States*, 410 U.S. 366 (1973) and *Lorain Journal Co. v. United States*, 342 U.S. 243 (1951) provided key foundations for its monopolization challenges against AT&T, see *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) and Microsoft, *supra* note 113, respectively.

151. This framework resembles the project selection methodology developed and applied by the Competition Markets Authority. For a more elaborate exposition of its ingredients, see William E. Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness*, 13 COMPETITION L. REV. 9 (2018).

between the agency's commitments and its ability to fulfill them in practice. Because it may be better attuned to the agency's capabilities, a more gradual approach to rolling out a reform program may have better prospects for success than the launch of a number of large, complex cases all at the same time. One of the biggest hazards we see especially in the root-and-branch reform agenda is that it entails the rapid commencement of many ambitious projects that will place impossible demands on the capabilities of the antitrust agencies.

Fourth, what will the project cost be in terms of personnel and out-of-pocket expenditures for items such as expert witnesses to support cases? This inquiry helps the agency make a realistic prediction of the resources needed to carry out individual projects and prepare disciplined estimates for future budget requests.

How long will it take the agency to complete the project? This inquiry helps the agency determine whether its anticipated intervention and remedy will occur fast enough to solve an observed problem. If years may pass before the agency obtains a desired remedy at the conclusion of a lawsuit, it may be necessary to consider interim measures to correct the behavior that poses immediate competitive dangers if allowed to continue. By establishing an expected timetable at the outset, the agency equips its leadership with a valuable management tool to track a project's progress.

How does the proposed project fit into the portfolio of the agency's existing projects? If the agency examines each project in isolation, it can lose sight of the overall condition of its program portfolio. A portfolio-wide perspective enables the agency to assess the full range of risks it has assumed and, again, to see that it is achieving a good fit between its commitments and its capabilities.

How will the agency know that the project, if undertaken, is having its desired effects? It is a helpful exercise to identify how an agency's intervention will bring about change in the market. What are the anticipated effects on prices, product quality, new business entry, or other economic conditions? When are these effects likely to become apparent? This exercise helps the agency develop realistic expectations about the magnitude and timing of anticipated benefits. From its past experience, the agency may be aware that some benefits may take years—perhaps decades—to become apparent.

The specification of performance benchmarks also plays a crucial role in facilitating the ex-post evaluation of outcomes. A very basic form of assessment is to compare the agency's assumptions about a project when it begins with the knowledge it gains in the course of implementation. If anticipated performance falls below expectations (perhaps because a significant factor was overlooked), how can the project selection process be improved to account for the factor in the future? Taking careful stock of past measures that worked—and learning lessons from the failures—is a vital way to design new initiatives more effectively.

D. Enabling the FTC to Perform Its Intended Function

A number of the proposals for expansive reform would give the FTC a broader and fuller role in formulating competition policy. Several features of its original design make the Commission an attractive vehicle for carrying out a program of basic reforms. It has been seen that the FTC Act gives the Commission a broad, scalable mandate (Section 5's prohibition on "unfair methods of competition") to prohibit behavior not reached by existing interpretations of the Sherman and Clayton Acts. The agency also has expansive authority to collect information from firms through compulsory processes and to publish reports.¹⁵² The statute also intended that the Commission serve as a special resource to the DOJ and to the courts in formulating remedies in antitrust cases.¹⁵³

152. 15 U.S.C. § 46.

153. 15 U.S.C. § 47 (authorizing the FTC, upon the request of a federal district court, to act as a master in chancery and advise the court about the design and execution of remedies in monopolization cases).

Under the program of greater interagency cooperation we have proposed above, the FTC would use Section 5 of the FTC to seek to extend the boundaries of existing doctrine and to use its information gathering and reporting powers to set the empirical basis for proposed extensions. The starting point for this effort would be to examine the agency's past (and rare) Section 5 litigation successes for lessons about how to gain judicial acceptance for an extension of antitrust doctrine.¹⁵⁴ The Commission also would serve, in effect, as the main public agency resource on remedies. The agency would use its analytical resources and experience in evaluating the effectiveness of antitrust remedies to guide the formulation of remedies in the Sherman Act and Clayton Act cases, in addition to Section 5 cases. The agency would employ the large body of experience that the U.S. system and other systems have collected in the use of structural and behavioral remedies to suggest solutions in specific cases.

We suggest three legislative changes to enable the Commission to fulfill the role we have described above. The first is to relax restrictions that the Government in the Sunshine Act¹⁵⁵ imposes on the ability of commissioners to deliberate together privately to discuss strategy and tactics. Among other consequences, the Sunshine Act severely limits the ability of a quorum of commissioners to discuss and debate matters of agency policy except in meetings open to the public.¹⁵⁶ The policy planning functions that we see as essential to an expanded role cannot be performed at a high level without this reform.¹⁵⁷

A second essential step is to eliminate statutory exemptions that deny the FTC jurisdiction over common carriers, not for profit institutions, and banks. A third reform would confer powers on the FTC to conduct market studies, and obtain information necessary to allow it to carry out its functions, and market investigations in the same way as the UK's Competition and Markets Authority (CMA).¹⁵⁸ For example, Part 4 of the Enterprise Act 2002¹⁵⁹ enables the CMA to investigate markets where it appears that the structure of the market or the conduct of suppliers or customers in the market is harming competition and, where problems are identified, to propose steps to mitigate, remedy, prevent, or overcome them. This would enable the FTC to study sectoral or economy-wide phenomena and to impose remedies regardless of whether the conditions or practices in question violate the antitrust laws.

V. Conclusions

In the United States, as in many other parts of the world, the pressure is on the competition agencies to make 2020, and the new decade, a period of sustained and effective antitrust action, targeting especially the business models of digital platforms. Pending any longer-term more fundamental reforms, many commentators are calling for immediate, rapid, and heightened competition scrutiny of a wide range of practices (including mergers (future and past), business practices of digital firms, restricted

154. One worthy subject of examination is the program that led to the Supreme Court's decision in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). The Commission used an extended program of research and litigation in mounting a successful challenge to a base-point pricing arrangement. The development of the case and the adverse congressional reaction that it received are summarized in William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 567, 625–27 (1982).

155. P.L. 94-409, 90 Stat. 1241 (1976).

156. The Sunshine Act and its requirements are analyzed in Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* (March 10, 2014) (report prepared for the Administrative Conference of the United States), <https://acus.gov/report/final-sunshine-act-report>.

157. The experience that one of us (Kovacic) has had as a nonexecutive director of the CMA has highlighted how the FTC is largely foreclosed from using policy planning and prioritization techniques that are commonly employed to great advantage in other jurisdictions.

158. This possible adjustment to the FTC's authority is discussed in William E. Kovacic, *Commercial Innovation and Innovative Regulatory Agencies: An Enhanced Markets Regime for the United States* (Jan. 2020) (manuscript on file with author).

159. Enterprise Act 200, c.40, Section 4 ("Market Investigations").

distribution and price setting practices) and the use of intrusive remedies to fix antitrust problems going forward.

These demands are imposing formidable expectations on the shoulders of competition agencies. Meeting them will not happen by chance or through a reactive and ad hoc approach. Indeed, without careful planning, an ambitious enforcement program involving a large number of complex litigations being pursued concurrently would risk agency managers and case handlers becoming overrun and the failure of the program. This paper consequently proposes a more tempered, gradual, and joined-up approach to reform, involving carefully constructed and coordinated strategies to overcome anticipated obstacles, painstaking planning and case allocation, and the selection of some initial complementary (but not overlapping) high-profile case prototypes for each agency to pursue before the program is expanded in steps.

Both federal agencies have investigative powers, but we propose that the FTC should make full use of its fact-finding powers to collect information on industries or sectors selected for investigation. Further, that before prosecutions are launched a methodology is followed for selecting appropriate cases for prosecution, taking account of past achievements and failures, the goal(s) to be achieved in bringing the case, the chance of success (especially given current doctrinal limitations), and opportunities for reshaping law and policy, the prospect for achieving those goals through antitrust action and remedies (rather than, for example, advocacy or other mechanisms), which agency is best placed to act, and whether that agency has the tools and staff available to take on the case now (taking account of other agency commitments). Essential to all of the proposals is a need for the agencies to anticipate and account for political backlash and for human capital in the agencies to be augmented. It will only be through recognizing the skills of existing staff and through finding realistic and achievable mechanisms to retain and recruit talented staff that the agencies will have the skill set diversity to take on sophisticated and powerful firms, backed by formidable teams of lawyers and experts.

Authors' Note

The views expressed in this article are the authors' alone.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.