Do Antitrust Disruptors Make Good Reformers?

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ABSTRACT

Antitrust law is in the early phase of a badly needed correction. The prior correction—commonly known as the Chicago Revolution—established policy distortions and a need for a "Post-Chicago Era." The present correction is likely to follow the same path. The reason is straightforward. Historically, effective antitrust reform messengers have not been pragmatic policy wonks. They have been populists driven by zeal and political cynicism, and some of their policy prescriptions have been flawed. As a result, antitrust law has evolved through a tension between the ability to generate political energy for antitrust reforms and the capacity to develop sound enforcement policies. Reform messengers depict this tension as a façade created by failed technocrats seeking to preserve their power. While this assertion has some truth, it does not imply that populist policy prescriptions are sound. Society—and specifically consumers—pay the price for misguided antitrust policies.

This Article explores two categories of misconceptions that present proposals for antitrust reform present: (1) the rejection of economics in favor of fairness and (2) a populist bipartisan coalition. The antitrust fairness ideal rests on the belief that society should sacrifice low prices, convenience, and efficiency to foster competition. In other words, society should arguably sacrifice the key benefits of competition to protect competition. The bipartisan populist coalition, in turn, rests on a shared instinct that the "enemy of my enemy is my friend." Today, both progressive and Republican populists treat big businesses and corporate executives as enemies of the people but focus on strikingly different sets of grievances. Progressive populists have in mind a peaceful and fair marketplace where small businesses, farmers, workers, and entrepreneurs prosper collaboratively. In contrast, Republican populists hope to block what they consider anti-

DOI: https://doi.org/10.15779/Z383T9D736

*. Robert H. Mundheim Professor of Law & Business, the University of Arizona James E. Rogers College of Law. Many thanks to the participants at the USC/Cambridge Antitrust Workshop, Antitrust Scholars Roundtable at UC Irvine, Temple University's Law, Innovation & Technology Colloquium, the Competition Law Hub's Workshop, as well as workshops at the Hebrew University, Reichman University, Tel Aviv University, and the University of Haifa. I am particularly grateful for comments and suggestions from Dale Collins, Erika Douglas, Michal Gal, Christopher Leslie, Salil Mehra, Vicky Robertson, Danny Sokol, Sean Sullivan, and David Tadmor.

conservative biases of liberal-leaning corporate boards. The alleged biases refer to Corporate America's condemnation of the nativism, denialism, bigotry, and authoritarian tendencies that the Republican Party represents today. It is far from clear that a bipartisan coalition of this kind is likely to protect competition or advance progressive values. However, the willingness of aspiring antitrust reformers to partner with lawmakers who are openly committed to antidemocratic norms sheds light on the qualities of the bipartisan initiatives.

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INTRODUCTION

U.S. antitrust laws have evolved through several enforcement fads triggered by changes in the economy and periodical needs for policy corrections.[1] These fads have rested on political visions that emphasized alleged harms *or* alleged efficiencies—and ignored tradeoffs.[2] Fads focusing on alleged harms have treated many social and economic problems as consequences of anticompetitive conduct that can be mitigated through aggressive antitrust enforcement. Promoters of these fads insist that the protection of fair competition is the ultimate goal of antitrust law, and that fair competition exists only in fragmented markets with many small firms, while big firms are inherently corrupt. In contrast, fads focusing on alleged efficiencies have downplayed the prevalence and costs of anticompetitive conduct, premising that markets tend to correct themselves. Promoters of these fads insist that monopolies are self-destructive because they invite entry and, accordingly, there are very few reasons to intervene in markets to protect competition.

Despite the glaring shortcomings of both lines of fads, they have proved important to the development of antitrust law. A political battle between anti-bigness and anti-government fads in the late 19th century led to the enactment of the Sherman Act. Subsequently, whenever one line of fads shaped doctrines and enforcement policies, its flaws created a need for correction and sowed the seeds for the rise of alternative fads. Today, the U.S. antitrust jurisprudence is captured by anti-government fads that gained popularity in the 1970s and 1980s.[3] This capture was facilitated, in part, by the Republican Party's strategic effectiveness in judicial appointments. A badly needed correction started forming after the Great Recession (2007-9) and began in earnest in 2019.[4]

1. *See* Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439 (2019) [hereinafter Orbach, *Present New Antitrust*]; William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14(1) J. ECON. PERSP. 43 (2000).

2. *See* Barak Orbach, *Antitrust Populism*, 14 NYU J.L. & BUS. 1 (2017); Barak Orbach, *The Durability of Formalism in Antitrust*, 100 IOWA L. REV. 2197 (2015). *See also* Assistant Attorney General Jonathan Kanter, *Antitrust Enforcement: The Road to Recovery* (Keynote Remarks, the University of Chicago Stigler Center, Apr. 21, 2022), https://perma.cc/JF2V-7LL9 ("*Road to Recovery*") (arguing that the emphasis on tradeoffs is undesirable); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (arguing that alleged anticompetitive effects should be ignored because markets tend to self-correct).

3. *See* Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 ANTITRUST L.J. 881 (2014); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L.J. 2253 (2013).

4. In June 2019, the House of Representatives Judiciary Committee initiated an investigation into competition in digital markets. A few weeks later, the Justice Department opened a broad antitrust investigation to examine whether dominant technology companies engaged in anticompetitive conduct. *See* House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (Oct. 2020), https://perma.cc/74YN-WRW2 (hereinafter *House Report*); Brent

In the first decade of this century, a combination of excessively lax financial regulation and reckless practices of financial institutions gave rise to "irrational exuberance," which is "the psychological basis of a speculative bubble."[5] The housing bubble of the 2000s was particularly costly because the inflated real estate prices were funded by massive household debt. The recession followed a liquidity shock caused by the implosion of this bubble. The devastating consequences of the 2008 market crash and the recession sparked a strong political backlash and changes in public attitudes toward big business and government oversight of markets. The Occupy movement of the early 2010s was a notable expression of this backlash and an inspiration for the present anti-bigness fad.[6] In the aftermath of the financial crisis, astute observers noted that the growing animosity toward big business and criticism of the deeply flawed *laissez-faire* ideology would revive the antitrust movement.[7] In 2013, *The Economist* coined the word "techlash," predicting that "tech elite will join bankers and oilmen in public demonology."[8]

In 2019, the federal government and state attorneys general began investigating whether dominant technology companies violated the antitrust laws. In Congress, Democratic lawmakers have propelled a wave of bipartisan antitrust initiatives—investigations, hearings, and bills.[9] These bipartisan initiatives prescribe structural remedies (corporate breakups) and behavioral remedies (duties to deal with all interested parties on fair and equal terms).[10]

Kendall, *Barr Starts New Antitrust Inquiry Into Tech Giants*, WALL ST. J., July 24, 2019, at A1. For the early characteristics of the present correction *see* Orbach, *Present New Antitrust*, *supra* note 1.

5. ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 2 (3d ed. 2015).

6. *See* Maurice E. Stucke, *Occupy Wall Street and Antitrust*, 85 S. CAL. L. REV. POSTSCRIPT 33 (2012); *Person of the Year: The Protester*, TIME, Dec. 26, 2011, at 54–89; SARAH VAN GELDER ED., THIS CHANGES EVERYTHING: OCCUPY WALL STREET AND THE 99% MOVEMENT (2011).

7. *See, e.g.*, Thomas Catan, *Trustbusters Try to Reclaim Decades of Lost Ground*, WALL ST. J., Feb. 1, 2010, at A2; *Return of the Trustbusters*, ECONOMIST, Aug. 29, 2009, at 57; *Technology and Antitrust: Here We Go Again*, ECONOMIST, May 9, 2009, at 69; William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22(2) ANTITRUST 85 (2008).

8. Adrian Wooldridge, *The Coming Tech-lash*, ECONOMIST: WORLD IN 2014 (Nov. 2013), at 34.

9. *See, e.g.*, *House Report*, *supra* note 4; Sen. Amy Klobuchar, *Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech* (Press Release, Oct. 14, 2021), https://perma.cc/SF4K-QRGF ("*Rein in Big Tech*"); Rep. David N. Cicilline, *House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice*" (Press Release, June 11, 2021), https://perma.cc/SXS3-W5MB ("*Anti-Monopoly Agenda*"); Sen. Amy Klobuchar, *Klobuchar, Kennedy, Cicilline, Buck, Durbin, Nadler Release Updated Bipartisan Journalism Bill* (Press Release, Aug. 22, 2022), https://perma.cc/7SAL-USLC; Sen. Mark Warner, *Lawmakers Reintroduce Bipartisan Legislation to Encourage Competition in Social Media* (Press Release, May 25, 2022), https://perma.cc/NMA5-MQMD; Sen. Amy Klobuchar, *Klobuchar, Cotton Introduce Bipartisan Legislation to Protect Competition and Consumer Choice Online* (Press Release, Nov. 5, 2021), https://perma.cc/EE5K-8TU9; Sen. Richard Blumenthal, *Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition* (Press Release, Aug. 11, 2021), https://perma.cc/7BJP-3TYY; Rep. Pramila Jayapal, Jayapal's Landmark Big Tech Legislation Passes House Judiciary Committee (June 24, 2021), https://perma.cc/YG6W-D69W.

10. *See* Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893, 893 (2022) (describing "an emergent bipartisan consensus that Big Tech has grown too powerful and that action must be taken to address its abuse of power.").

Although promoters of the present anti-bigness fad might believe that their assertions are factually and intellectually sound, they are not. For example, their disdain for economics means willingness to sacrifice low prices, convenience, and efficiency. Likewise, their historical narrative that arguably offers support for theories about the virtues of fragmented markets is plainly erroneous and misguided.[11] More broadly, their crusade displays the ordinary qualities of militant populist campaigns. Aspiring reformers are often driven by zeal and political cynicism and ignore nuances that are too tedious for the political arena and public discourse.[12] Historian Richard Hofstadter famously explored this insight in two seminal papers he published in 1964: "*What Happened to the Antitrust Movement?*" and "*The Paranoid Style in American Politics*."[13]

This Article addresses the tension between the political process of antitrust reforms and the substance of desirable reforms. Ideas that tend to generate the political energy needed to deliver reforms are not necessarily nuanced enough for sound public policies, whereas technical policy debates are not exciting enough for political purposes. As a result, thus far, significant antitrust reforms have addressed some problems and created others. This Article aims to reduce the potential costs of forming antitrust reforms by addressing common misconceptions concerning the essence of antitrust law and Big Tech intermediaries.

The Article is organized as follows. Part I examines the present wave of bipartisan antitrust initiatives and argues that it does not represent a consensus on antitrust policies. Rather, it consists of two conflicting threads of populist grievances. Progressive populists embrace traditional anti-bigness ideas, asserting that antitrust enforcement should establish a peaceful and fair marketplace where small businesses, farmers, workers, and entrepreneurs prosper collaboratively. In contrast, Republican populists seek to reverse trends in capitalism, which they perceive as anti-conservative biases of

11. *See* William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35(3) ANTITRUST 46 (2021) [hereinafter Kovacic, *Root and Branch*]; Brian R. Cheffins, *History and Turning the Antitrust Page*, 95 BUS. HIST. REV. 805 (2021) [hereinafter Cheffins, *History*]. For works that present such historical narrative *see, e.g.*, AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021); MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018).

12. *See* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (rev. ed. 2015).

13. Exec. Order No. 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 14, 2021), https://perma.cc/NCX5-FBTX § 1 ("*Biden's Executive Order*"). *See also* Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy, THE WHITE HOUSE (July 9, 2021), https://perma.cc/K3DW-TA67; Heather Boushey and Helen Knudsen, The Importance of Competition for the American Economy, WHITE HOUSE BLOG (July 9, 2021), https://perma.cc/F27F-5AU9; Richard Hofstadter, *What Happened to the Antitrust Movement? in* THE BUSINESS ESTABLISHMENT 113 (Earl F. Cheit ed. 1964); Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG., Nov. 1964, at 77.

liberal-leaning corporate boards. Part II observes that, throughout the history of trade, it has been assumed that the elimination of impediments to trade—namely, market friction—tends to expand trade and foster competition. The emergence of powerful digital intermediaries, however, illustrates, that the effective elimination of market friction could form winner-take-most markets, which are highly concentrated. The phenomenon, the "friction paradox," requires the development of new antitrust tools. Part III explains the differences between digital platforms and digital ecosystems. Part IV questions the wisdom of efforts to use antitrust enforcement to promote fairness. Part V argues that antitrust populists tend to treat all forms of opportunism as anticompetitive conduct.

I. THE FAIRNESS VISION

A. Misguided Intuitive Appeal

At the heart of all anti-bigness antitrust fads lies the assertion that antitrust laws intend to protect fair competition in order to level the playing field and mitigate inequality. While this argument has an intuitive appeal,[14] its inherent ambiguity makes it impractical. Administrability considerations demand legal standards that draw lines between permissible and impermissible conduct. Fairness standards lack the clarity needed for daily business decisions. For example, market competition is brutal and could be devastating for firms that fail to keep up with rivals. Likewise, competition incentivizes firms to harness efficiencies that could allow them to improve the appeal of their products and services. But economies of scale and scope and the harnessing of network effects give rise to large business enterprises. Are such market realities fair?

Prior variants of the fair competition vision shaped competition policies in the first half of the 20th century and dominated the Supreme Court's antitrust jurisprudence in the third quarter of the 20th century. Contemporary fairness advocates describe these periods as antitrust's golden age.[15] Specifically, they praise old judicial opinions that treat the number of competitors as a definitive proxy for the intensity of market competition, and

14. *See* LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE 'NEW COMPETITION', 1890-1940 (2018); Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84 MOD. L. REV. 230 (2021); Francesco Ducci and Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 ANTITRUST BULL. 79 (2019); Maurits Dolmans, *Fairness and Competition Law: A Fairness Paradox*, CONCURRENCES N° 4-2017, at 30 (2017).

15. *See* Kovacic, *Root and Branch*, *supra* note 11; Cheffins, *History*, *supra* note 11.

state that the protection of competition might require society to sacrifice low prices and efficiency.[16]

To be clear, there is nothing inherently wrong in societal decisions to sacrifice low prices, convenience, and efficiency to preserve and promote fairness and equality.[17] But the idea that antitrust enforcement policies could do that effectively is, at best, impractical. As a starter, the principal benefits of market competition include low prices, quality of service, and efficient allocation of resources. Thus, enforcement policies that combat low prices, convenience, and efficiency would place the antitrust enterprise at war with itself.[18] Second, antitrust remedies are available upon proof of harm to competition, while the protection of fairness and equality, should not depend on the capacity of the government or private plaintiffs to establish such harm.

B. Growing Social Discontent

In recent decades, market concentration in many sectors across the economy and the profitability of many firms have both increased.[19] New classes of massive business enterprises have emerged. Business dynamism has declined.[20] Income and wealth inequality has grown, while the labor share of

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16. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (stating that "[p]ossible economies cannot be used as a defense to illegality [under the antitrust laws]."); United States v. Von's Grocery Co., 384 U.S. 270, 274–76 (1966) (stating that the antitrust laws intend to "preserve competition among a large number of sellers."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (stating that the antitrust laws intend "to promote competition through the protection of viable, small, locally owned business," even when the "maintenance of fragmented industries and markets" results in "higher costs and prices."); United States v. Aluminum Co. Am., 148 F.2d 416, 427 (2d Cir. 1945) (stating that the antitrust laws reflect a preference to preserve "a system of small producers.").

17. *See* OKUN, *supra* note 12.

18. *See, e.g.*, United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911) (stating that the applications of antitrust laws should not excessively compromise liberty of contract and freedom of trade, and, thus, cause the antitrust enterprise "to be at war with itself by annihilating the fundamental right of freedom to trade which . . . [the antitrust statutes were] enacted to preserve.").

19. For trends in market concentration, *see* Esteban Rossi-Hansberg et al., *Diverging Trends in National and Local Concentration*, 35 NBER MACROECONOMICS ANNUAL 115 (2021); Lawrence J. White and Jasper Yang, *What Has Been Happening to Aggregate Concentration in the U.S. Economy in the Twenty-First Century?* 38 CONTEMPORARY ECON. POL'Y 483 (2020); Matias Covarrubias et al., *From Good to Bad Concentration? US Industries over the Past 30 Years*, 34 NBER MACROECONOMICS ANNUAL 1 (2019); Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?* 23 REV. FIN. 697 (2019); *Too Much of a Good Thing*, ECONOMIST, March 26, 2016, at 23. For increases in profitability of certain firms, *see* Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. Econ. 645 (2020); Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33(3) J. ECON. PERSP. 23 (2019); Steven Berry et al., *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33(3) J. ECON. PERSP. 44 (2019).

20. *See* Ufuk Akcigit and Sina T. Ates, *What Happened to U.S. Business Dynamism*, FEDS NOTES (2020), https://perma.cc/AM8U-2XPB; Nicholas Bloom et al., *Are Ideas Getting Harder to Find?*, 110 AM. ECON. REV. 1104 (2020); Ryan A. Decker, *Declining Business Dynamism: What We Know and the Way Forward*, 106(5) AM. ECON. REV. 203 (2017); Ryan Decker et al., *The Role of Entrepreneurship in US Job Creation and Economic Dynamism*, 28(3) J. ECON. PERSP. 3 (2014).

GDP has plummeted.[21] Alongside these economic trends, the frequency and magnitude of large-scale disruptions have soared.[22] These trends have popularized the idea that capitalism has failed.[23]

During the same period, the Supreme Court has crippled the ability of the federal government and states to address social and economic problems such as climate change, economic and racial inequality, gun violence, and threats to democracy. As noted, the Court has also been persistently hostile to antitrust enforcement. Today, the Court's antitrust jurisprudence heavily relies on the presumption that the benefits of antitrust enforcement are slight because markets self-correct quickly.[24] For several decades, the transformation of the Supreme Court's jurisprudence was interpreted as a pro-business bias.[25] In recent years, however, it has become clear that, consciously or subconsciously, the jurisprudence of Justices nominated by Republican Presidents tends to follow the direction of the GOP and, hence, does not always serve business interests.[26]

C. The Collapse of the GOP/Big Business Alliance

An alliance between the Republican Party and Corporate America shaped the evolution of the American legal system for about 150 years. It also dominated the Supreme Court's jurisprudence throughout much of the past 150 years.[27] This old alliance collapsed in recent years. Today, the Republican Party and Corporate America are at odds on environmental, social, economic, and governance issues. We have been witnessing a "widening rift between Republicans and big business."[28]

21. *See* Autor et al., *supra* note 19; U.S. Census Bureau, *Income Inequality*, https://www.census.gov/topics/income-poverty/income-inequality.html; Thomas Piketty and Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1 (2003).

22. The 21st century has witnessed sharp increases in the frequency, magnitude, and costs of large-scale disruptions caused by extreme weather events, wildfires, cyberattacks, political upheavals, pandemics, geopolitical tensions, and wars. For antitrust implications, *see* Barak Orbach, *Antitrust in the Shadow of Market Disruptions*, 34(3) ANTITRUST 32 (2020).

23. *See* Barack Obama, *The Way Ahead*, ECONOMIST, Oct. 8, 2016, at 22.

24. *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414–15 (2004); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

25. *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

26. Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021).

27. *See, e.g.*, Lee Epstein et al., *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 J.L. & POL'Y 33 (2017); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

28. Alex Leary et al., *Republican Party, Big Business Drift Apart*, WALL ST. J., Apr. 30, 2022, at A4. *See also* David A. Hopkins, *Are Republicans and Big Business Headed for a Breakup?* BLOOMBERG (Oct. 20, 2022), https://bloom.bg/3gwhIfv; Peter Coy, *Anti-Woke Businesses Push Back*, N.Y. TIMES, July 3, 2022, at SR11; Gerald F. Seib, *How Corporate America Became a Political Orphan*, WALL ST. J., July 24, 2021, at C1; Peter Coy, *The C-Suite Split from the GOP*, BLOOMBERG BUSINESSWEEK, May 31, 2021, at 32; Evan Halper, *GOP's Hostility Toward Big Business*, L.A. TIMES, May 11, 2021, at A5;

There is a broad consensus in Corporate America that the Republican Party has been drifting toward nativism, denialism, bigotry, and authoritarianism. This trend, corporate executives believe, is bad for business, bad for the economy, and bad for democracy.[29] While the GOP has been drifting in one direction, Corporate America has been moving in the opposite direction. The CEOs of America's largest corporations disavowed the Milton Friedman doctrine and replaced it with "stakeholder capitalism."[30] As understood by corporate leaders, business resilience and long-term profitability considerations require businesses to address the interests of non-shareholder stakeholders, such as the environment, employees, customers, and communities.[31]

Feeling abandoned and betrayed, Republicans now say that "corporate CEOs can't be counted on to defend free markets."[32] They condemn stakeholder capitalism, calling it "woke capitalism" and "cancel culture."[33] Stakeholder capitalism, Republicans argue, represents myopic efforts of corporate executives to appease radical liberals.[34] This line of grievances

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Zack Stanton, *The GOP-Big Business Divorce Goes Deeper Than You Think*, POLITICO (Apr. 15, 2021), https://perma.cc/23W7-YU56.

29. *See* Jeffrey Sonnenfeld, *CEOs Lead America's New Great Awakening*, WALL ST. J., Apr. 16, 2021, at A15; Rebecca Henderson, *Business Can't Take Democracy for Granted*, HARV. BUS. REV. (Jan. 8, 2021), https://perma.cc/LHJ4-RL9K; Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), https://opportunity.businessroundtable.org/ourcommitment (hereinafter *BRT Statement*); U.S. Chamber of Commerce, *U.S. Chamber CEO on Electoral College Vote Counting* (Jan. 4, 2021), https://perma.cc/X993-XV9Q.

30. *BRT Statement*, *supra* note 29; David Benoit, *Top CEOs See a Duty Beyond Shareholders*, WALL ST. J., Aug. 20, 2019, at A1. The so-called Milton Friedman doctrine provides that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud." MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962). A 1970 essay that Milton Friedman published in *The New York Times Magazine* popularized this idea. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES. MAG., Sept. 13, 1970, at SM17. For the rise of the so-called Milton Friedman doctrine *see* Brian R. Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH. U.L. REV. 1607 (2021).

31. *BRT Statement*, *supra* note 29; Alan Murray, *A New Purpose for the Corporation*, FORTUNE, Sept. 2019, at 88; *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism* (Jan. 2022), https://perma.cc/VUW9-Y2QW; *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose* (Jan. 2018), https://perma.cc/6LND-GAWZ.

32. Editorial Board, *Down With Big Business, Again*, WALL ST. J., Apr. 15, 2021, at A16. *See also* Kenneth P. Vogel, *The Hidden Hand Guiding Conservative Causes*, N.Y. TIMES, Oct. 13, 2022, at A1.

33. *See* VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021); Mike Pence, *Republicans Can Stop ESG Political Bias*, WALL ST. J., May 27, 2022, at A15; Marco Rubio, *We Need Corporate Patriotism to Defeat American Marxism*, AM. CONSERVATIVE (Nov. 1, 2021), https://perma.cc/ZC2X-NPJK; Josh Hawley, *The Big Tech Oligarchy Calls Out for Trustbusters*, WALL ST. J., May 1, 2021, at A15; Ted Cruz, *Your Woke Money Is No Good Here*, WALL ST. J., Apr. 29, 2021, at A17; Rick Scott, *Dear Woke Corporate America, Beware of the Backlash That's Coming*, FOX BUSINESS (Apr. 19, 2021), https://perma.cc/N94P-9HSX; Kevin D. Williamson, *Woke Capitalism: A Brief History*, NAT'L REV., July 1, 2021, at 16; John McWhorter, *How 'Woke' Became an Insult*, N.Y. TIMES (Aug. 17, 2021), https://nyti.ms/3UMzZ85; Ross Douthat, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), https://nyti.ms/3N9L0wF.

34. *See* Douthat, *supra* note 33; Editorial Board, *The 'Stakeholder' CEOs*, WALL ST. J., Aug. 20, 2019, at A14.

should not be confused with beliefs that stakeholder capitalism is a disingenuous corporate strategy.[35] The Republican grievances premise that stakeholder capitalism promotes normative values.

Captured by ideological grievances, the Supreme Court is also no longer a reliable ally of Corporate America. The Court's decisions on climate change measures, abortion rights, gun control, voting rights, and other themes conflict with contemporary business paradigms. Further, the decline in the legitimacy of the Supreme Court caused by the zeal and grievances of conservative justices is a source of concern for business leaders. Capitalism prospers only in democratic nations committed to the rule of law in which the public trusts democratic institutions.

D. The Progressive Fairness Vision

Around 2016, the progressive wing of the Democratic Party rediscovered antitrust, or, more precisely, the anti-bigness variant of the U.S. antitrust laws.[36] President Biden's Executive Order 14036, *Promoting Competition in the American Economy*, embraces this vision.[37] It states that, "over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality."[38] The Order thus declares that a "*fair, open, and competitive marketplace* has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers."[39] Notably, the Order does not refer to efficiency. Historically, a "*fair, efficient, and competitive* marketplace" has been considered "a cornerstone of the American economy."[40]

Under the progressive vision of fair competition, Big Tech companies are the 21st century equivalents of the Gilded Age's trusts. The theory is that, for too long, Big Tech monopolies have abused their control over access to

35. *See* Lucian A. Bebchuk and Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); *The Perils of Stakeholderism*, ECONOMIST, Sept. 19, 2020, at 65.

36. *See, e.g.*, Sheelah Kolhatkar, *How Elizabeth Warren Came Up with a Plan to Break Up Big Tech*, NEW YORKER (Aug. 19, 2019), https://perma.cc/5TW8-DTKG; Sen. Elizabeth Warren, *Reigniting Competition in the American Economy*, Keynote Remarks at New America's Open Markets Program (June 29, 2016), https://perma.cc/9AYE-7P56.

37. Exec. Order No. 14036, *supra* note 13. *See also* Remarks by President Biden, *supra* note 13; Boushey and Knudsen, *supra* note 13.

38. Exec. Order No. 14036, *supra* note 37.

39. Exec. Order No. 14036, *supra* note 37 (emphasis added).

40. Exec. Order No. 13725, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy*, 81 Fed. Reg. 23417 (Apr. 20, 2016), https://perma.cc/QAY5-Y894 (emphasis added). *See also* Council Econ. Advisors, *Benefits of Competition and Indicators of Market Power* (Apr. 2016), https://perma.cc/V3U3-NP7B.

markets by picking winners and losers throughout the economy, tilting the playing field in their favor, discriminating among third parties, expanding into new markets, entrenching their monopolies, and exploiting their power in other ways.[41] For example, the U.S. Department of Justice recently stated that American Big Tech companies present "a threat to open markets and competition, with risks for consumers, businesses, innovation, resiliency, global competitiveness, and our democracy."[42] Likewise, FTC Chair Lina Khan stated that "gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power."[43]

After toying with the idea of breaking up Big Tech companies,[44] progressive advocates concluded that mandated fairness and bans on unfairness might restore fair competition in America. As noted, in Congress, Democratic lawmakers have propelled a wave of bipartisan antitrust initiatives—investigations, hearings, and bills.

E. The Republican Fairness Vision

The Republican antitrust fairness vision is strikingly different from the progressive vision. The Republican fairness vision is a byproduct of the suspension of the GOP-big business alliance. Its core thesis is that stakeholder capitalism represents "anti-conservative biases" and "left-leaning corporate cultures."[45] Superficially, Republicans are troubled by content moderation of the powerful digital intermediaries, arguing that it intends to censor, suppress, and marginalize conservative voices. Substantively, however, the alleged unfairness concerns private censorship of hate speech, misinformation, conspiracy theories, and the facilitation of violence.

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41. *See, e.g.*, *House Report*, *supra* note 4, at 6–9.

42. Acting Assistant Attorney General Peter Hyun, letter to the Senate Judiciary Committee, dated March 28, 2022, https://perma.cc/M55W-EQRJ ("*DOJ Supports AICOA*").

43. *See, e.g.*, FTC Chair Lina M. Khan, *Vision and Priorities for the FTC*, Memorandum to Commission Staff and Commissioners (Sept. 22, 2021), https://perma.cc/TE7D-6TA2.

44. *See, e.g.*, Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://perma.cc/7BWV-WT28. *See also* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955 (2020); Menesh S. Patel, *Merger Breakups*, 2020 WISC. L. REV. 975 (2020); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019) (proposing to break up powerful digital intermediaries that are vertically integrated). For the history of corporate breakups see William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989).

45. House Judiciary Committee's Subcommittee on Antitrust, Reining in Big Tech's Censorship of Conservatives*: Republican Staff Report* (Oct. 2020), https://perma.cc/T7KD-XE68. *See also* Rep. Ken Buck, *The Third Way* (Oct. 2020), https://perma.cc/97HL-YTGK. *See also* JOSH HAWLEY, THE TYRANNY OF BIG TECH (2021) (criticizing Big Tech companies for their leftist, anti-conservative bias and arguing that antitrust enforcement should be used to challenge the corporate liberal order); Michael Faulkender and Stephen Miran, *Censorship Is a Consumer Harm*, WALL ST. J., Oct. 12, 2022, at A17.

Simply stated, the Republican backers of the bipartisan antitrust initiatives believe that antitrust enforcement might be used to combat stakeholder capitalism and outlaw the alleged marginalization of conservative voices, including those that spread hate and bigotry and incite violence. This view begs the question of what price society will pay for the bipartisan initiatives.

II. FRICTION AND EFFICIENCY

A. The Friction Paradox

Market friction consists of impediments to trade caused by factors such as transaction costs, imperfect information, uncertainty, regulation, and contracts.

It has long been understood that friction impedes competition because it degrades the ability of market participants to identify opportunities and compare trading partners. What was not broadly understood until relatively recently was that low-friction markets tend to tip toward monopolies and oligopolies.[46] This phenomenon, commonly known as the "winner-take-most dynamics," happens because, absent friction, companies can develop a superior capacity to harness efficiencies.[47] Under such conditions, the first enterprises to acquire a critical mass can persistently grow and entrench their market positions.

The winner-take-most dynamics, therefore, incentivizes firms that operate in low-friction markets to engage in "blitzscaling."[48] To succeed, first movers in low-friction markets must invest heavily in rapid growth to attain a critical mass. The 2020 Congressional report, *Investigation of Competition in Digital Markets*, describes this strategy as "predatory" because it involves massive investments in "long-term growth at the expense of short-term profitability."[49] Under this approach, aspiring technological disruptors must be profitable from day one. Those who believe that such a legal requirement is fair ignore or downplay its anticipated effects on innovation.

In short, one of the many problems that society is facing in the 21st century is that entrepreneurial efforts to eliminate market friction were

46. *See Technology and Competition: Collusion and Collisions*, ECONOMIST, Feb. 27, 2021, at 49; *The Dust-Up*, ECONOMIST, Feb. 27, 2021, at 9; W. Brian Arthur, *Increasing Returns and the New World of Business*, 74 HARV. BUS. REV. 100 (1996); W. BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (1994).

47. Winner-take most dynamics refer to situations in which marginal costs are negligible, the returns to scale and scope are extreme, and network effects are positive.

48. *See* REID HOFFMAN AND CHRIS YEH, BLITZSCALING: THE LIGHTNING-FAST PATH TO BUILDING MASSIVELY VALUABLE BUSINESSES (2018); John D. Sterman et al., *Getting Big Too Fast: Strategic Dynamics with Increasing Returns and Bounded Rationality*, 53 MGM'T SCI. 683 (2007).

49. *House Report*, *supra* note 4, at 297.

successful. Old textbooks hypothesize that frictionless markets would be perfectly competitive. We now know that low-friction intermediation markets tend to be highly concentrated. This outcome can be called the *friction paradox*: the elimination of market friction is desirable until this goal is accomplished.

B. Alternatives to Direct Market Transactions

Textbook models of perfect competition portray frictionless markets for homogeneous goods in which the return to scale is constant. In such frictionless markets, economic arrangements—such as firms, contracts, intermediaries, and capital investments—do not create efficiencies. In the real world, however, friction and product heterogeneity are ubiquitous, and economic arrangements create efficiencies.[50]

Contracts and integration of activities within firms are common methods that businesses use to eliminate friction and harness efficiencies.[51] For example, retailers typically rely on contracts with suppliers; however, some retailers develop production capacities, and some manufacturers develop retail arms. In their essence, relational contracts and integration are alternatives to market transactions, and, hence, sometimes create antitrust concerns.

Intermediaries, once known as "middlemen," offer another alternative to direct market transactions. They facilitate transactions when direct interactions between transacting parties are costly or not feasible.[52] For example, retailers facilitate trade when direct-to-consumer sales are costly or not possible. Similarly, distributors facilitate trade by delivering products from suppliers to retailers, and delivery service providers facilitate trade by delivering products from sellers to buyers. The desire to cut out the middleman reflects beliefs that intermediaries are opportunistic economic actors.[53]

50. *See, e.g.*, Esteban Rossi-Hansberg et al., *supra* note 19; Avi Goldfarb and Catherine Tucker, *Digital Economics*, 57 J. ECON. LIT. 3 (2019); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

51. *See* Oliver Hart and Bengt Holmstrom, *A Theory of Firm Scope*, 125 Q.J. ECON. 483 (2010); Sanford J. Grossman and Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

52. *See* Barak Orbach, *Middlemen Forever: Competition and Opportunism in the Digital Economy*, CONCURRENCES N° 4-2021, at 30 (Nov. 2021); Daniel F. Spulber, *Market Microstructure and Intermediation*, 10(3) J. ECON. PERSP. 135 (1996); Ariel Rubinstein and Asher Wolinsky, *Middlemen*, 102 Q.J. ECON. 581 (1987).

53. *See infra* Part V.

C. Regulatory Privileges

In the past, powerful intermediaries typically held regulatory privileges that protected them from competition. Corporate charters granted intermediaries—such as bridge, ferry, railroad, utility, and international trade companies—exclusivity rights that established monopolies.[54]

For example, in 1557, Queen Mary of England chartered a trade association of printers, the Worshipful Company of Stationers and Newspaper Makers (the "Stationers' Company"), and granted the company a monopoly over printing in England.[55]

In some instances, monarchs and governments granted companies exclusive rights to develop global supply chains. Such regulatory privileges gave the Dutch East India Company, founded in 1602 and dissolved in 1799, and the English East India Company, founded in 1600 and dissolved in 1858, enormous power over international trade.[56] The East India Companies bought, produced, and captured resources in Southeast Asia, transferred them to western economies, and sold them to merchants in Europe. To carry out their global operations, the East India Companies built large fleets of ships, armed forces to protect their supply lines, factories, distribution centers, and vast bureaucracies. They also developed governance systems to mitigate internal agency problems.[57] The East India Companies were notorious for their exploitations and corruption. However, many of their organizational methods contributed to the development of capitalism.

To counter the power of intermediaries that were protected by regulatory privileges, lawmakers and courts adopted "duties to deal." Contemporary fairness advocates sometimes invoke these old duties to deal to support calls to impose duties to deal on powerful digital intermediaries. However, comparisons between intermediaries whose market positions were protected by regulatory privileges and today's powerful digital intermediaries can be misleading. In the Digital Age, efficiencies and alleged anticompetitive practices—not regulatory privileges—established a small class of powerful digital intermediaries that possess considerable power over access to markets.

54. Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263 (1984).

55. CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY, 1403–1959 (1960).

56. Oscar Gelderblom et al., *The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623*, 73 J. ECON. HIST. 1050 (2013); Ann M. Carlos and Stephen Nicholas, *"Giants of an Earlier Capitalism": The Chartered Trading Companies as Modern Multinationals*, 62 BUS. HIST. REV. 398 (1988).

57. Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J.L. ECON. & ORG. 193 (2017); JONATHAN GS KOPPELL ED., ORIGINS OF SHAREHOLDER ADVOCACY (2011).

III. THE ARCHITECTURE OF DIGITAL GATEKEEPERS

In the early years of the digital economy, digital intermediaries were stand-alone enterprises, such as search engines, online marketplaces, and social media networks. They were called "online platforms." Over time, some digital intermediaries have expanded the scope of their economic activities through internal growth and acquisitions. The term "digital ecosystem" refers to an array of intertwined digital platforms and other lines of business that one company operates. Alphabet, Amazon, Apple, and Meta are the world's most prominent digital ecosystems.

A. Digital Intermediaries

The driving force behind the digital economy has been the ability to eliminate friction and improve efficiencies through the migration of activities from physical to virtual venues.[58] In virtual venues, interacting parties can inexpensively explore opportunities and engage in interactions regardless of their location and at any time.[59] In the 1990s, many people believed that direct-to-consumer business models would dominate the digital economy. Bill Gates famously argued in the mid-1990s that the "electronic marketplace" would be "the ultimate go-between, the universal middleman."[60] He predicted "a new world of low-friction, low-overhead capitalism, in which market information will be plentiful and transaction costs low."[61] This new world, Gates envisioned, would be a "shopper's heaven."[62]

The emergence of the digital economy has indeed resulted in the elimination of many layers of middlemen, most notably brick-and-mortar retailers and jobs that facilitated activities in physical venues, such as bank tellers, travel agents, and insurance agents. This trend was initially celebrated. The hype and effective advocacy popularized beliefs that, despite their size and power, successful digital intermediaries did not act unfairly because competition was arguably just "one click away."[63]

Public attitudes toward powerful digital intermediaries began changing in the second decade of the 21st century. They are now called "digital gatekeepers" and are described as monopolies that control access to markets and abuse their dominant intermediation positions.

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58. *See* Barak Orbach*, Anything, Anytime, Anywhere: Is Antitrust Ready for Flexible Market Arrangements?*, 20(2) ANTITRUST SOURCE 1 (Apr. 2021) [hereinafter Orbach, *Anything*]; Goldfarb and Tucker, *supra* note 50.

59. *See* Orbach, *Anything*, *supra* note 588.

60. BILL GATES, THE ROAD AHEAD 158 (1995).

61. *Id.*

62. *Id.*

63. *See, e.g.*, Thomas Catan, *Google Defends Itself Amid Probe*, WALL ST. J., June 25, 2011, at B1; Amit Singhal, *Competition in an Instant*, WALL ST. J., Sept. 17, 2010, at A19; Bill Gates, *Compete, Don't Delete*, ECONOMIST, June 13, 1998, at 19.

Vocal critics of powerful digital intermediaries compare Big Tech to prior generations of powerful intermediaries that disrupted markets in the 19th and 20th centuries. Historically, the emergence of each generation of efficient intermediaries devastated older generations and small suppliers and inspired opposition movements. For example, the anti-chain store movement of the 1920s and 1930s and the anti-big box movement of the 1990s and early 2000s were opposition forces that followed this pattern.[64] Another famous historical episode of this kind involved the efforts of the street railways in the 1910s to block competition from the jitneys, which were private automobiles that provided transportation services within urban areas.[65] More recently, after "decades" of operating "under a fairly consistent business model,"[66] trade book publishers became concerned that Amazon would disrupt their established business model, "permanently driv[e] down the price they could charge for print versions of the books," or, worse, "allow authors to publish directly with Amazon, cutting out the publishers entirely."[67] To address these fears, five of the six largest publishers agreed to enter a collusion that Apple orchestrated.[68]

Like the elimination of friction, technological disruptions are welcomed until they happen. Technological disruptions always have victims, which, long ago, the Supreme Court described as "small dealers and worthy men . . . who might be unable to readjust themselves to their altered surroundings."[69] As the Court explained, "[i]n any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods."[70] Critics of technological disruptors sometimes conflate the differences between competitive harm and harm caused by disruptions.

B. Digital Platforms

As commonly used, the term *digital platform* (or *online platform*) refers to a specific virtual intermediation service or a company that operates such a service. Virtual intermediation services include online marketplaces, social

64. For the anti-chain store movement, see Daniel Scroop, *The Anti-Chain Store Movement and the Politics of Consumption*, 60 AM. Q. 925 (2008); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005). For the anti-big box store movement, *see* Raffaella Sadun, *Does Planning Regulation Protect Independent Retailers?*, 97 REV. ECON. & STAT. 983 (2015); Emek Basker, The Causes and Consequences of Wal-Mart's Growth, 21(3) J. ECON. PERSP. 177 (Summer 2007); Barry C. Lynn, *Breaking the Chain*, HARPER'S MAG., July 2006, at 29.

65. *See* Ross D. Eckert and George W. Hilton, *The Jitneys*, 15 J.L. & ECON. 293 (1972).

66. United States v. Apple, Inc., 791 F.3d 290, 298 (2d Cir. 2015).

67. *Id.*

68. *Id.* at 339.

69. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

70. *Id.*

media networks, streaming platforms, ridesharing services, app stores, online dating services, and so forth.

When a virtual intermediation service is the principal line of business of a company, it might make sense to describe that company as a platform. However, the term is also used to describe companies that operate multiple intermediation services and operate in complementary lines of business. For example, the 2020 Congressional Report, *Investigation of Competition in Digital Markets*, refers to Alphabet, Amazon, Apple, and Meta as "platforms" and, at the same time, also refers to individual intermediation services that each of these companies operates as "platforms." In this Article, the term "digital platforms" refers only to individual virtual intermediation services.

As noted, digital intermediaries possess a superior capacity to reduce friction and harness efficiencies, including network effects. To attain and improve this capacity, digital intermediaries use big data infrastructures, search engines, matching algorithms, and recommender systems. They persistently collect and update information and employ powerful statistical tools to identify patterns and extract insights, as well as tools that allow individuals and businesses to identify opportunities and interact with other parties. The data infrastructures persistently grow and the analytical tools persistently improve. These technological capacities, however, create concerns regarding the collection and misuse of private information, the ability to influence choices and preferences, and the first-mover advantages.

The key problem is that the existing legal standards were designed for the high-friction markets of the 20th century and do not offer effective measures to address the low-friction markets of the 21st century. For example, current laws that address abuses of the capacity to influence choices typically focus on fraud and misrepresentation. These laws were not designed to address a technological capacity to manipulate preferences. Similarly, the economic models that shaped the development of competition laws premise that preferences are fixed and market friction is a formidable economic constraint. The idea that a return to fairness is a reasonable response to technological disruptions is, at best, naïve.

C. Digital Ecosystems

1. Systems of Magical Gardens

Digital ecosystems are business enterprises that integrate several digital platforms and other lines of business so that each business arm strengthens the others and, together, the arms entrench the market positions of the ecosystem in the relevant economic sectors.

When the benefits generated by digital ecosystems are ignored, they can be portrayed as monster octopuses whose tentacles reach into every industry, strangle freedom, spread misery, and grow endlessly. When the benefits are considered, ecosystems are better described as arrays of magical gardens. The gardens lure people into the ecosystems and surround them with low-hanging fruits and beautiful flowers of the kinds they like. The convenience and temptations intend to persuade people to concentrate their activities within the ecosystem, and, if they must leave for some reason, return as quickly as possible. New business arms ("gardens") intend to improve the value of concentrating activities within the ecosystem and reduce incentives to leave it. This mode of integration—intertwined integration of multiple lines of business—was not feasible in the 20th century.

Many studies of digital intermediaries refer to digital ecosystems as "platforms" and fail to recognize the distinctive features of ecosystems. This misguided approach is a core feature of the antitrust fad that drives pressures to reform enforcement policies.

2. Amazon's Flywheel

To illustrate the complexity of digital ecosystems, consider the architecture of Amazon. The company describes its ecosystem as a "flywheel" whose gears reinforce each other to accelerate the spinning of the flywheel itself.[71] In this business model, Amazon's arms are the gears and acceleration means growth.[72] Amazon Prime, the company's membership program, is "the flypaper on Amazon's flywheel."[73] Critics of the company consider the flywheel model "a metaphor for monopolization."[74] They correctly observe that "momentum in each area of [Amazon's] business drives momentum in others, creating a machine that spins ever faster."[75] In this spirit, the 2020 U.S. Congressional Report, *Investigation of Competition in Digital Markets*, describes Amazon Prime as "[t]he most prominent example of Amazon's use of strategic losses to lock customers into the platform's ecosystem."[76] The condemnation of Amazon Prime by highly-educated privileged intellectuals is intriguing, yet overly academic. In 2022, there were about 153 million Amazon Prime members in the United States (households and businesses).[77]

71. *See* BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON 287–98 (2013).

72. *See, e.g.*, Charles Duhigg, *The Unstoppable Machine*, NEW YORKER, Oct. 21, 2019, at 42.

73. *Relentless.com*, ECONOMIST, June 21, 2014, at 23.

74. Stacy Mitchell, *Don't Let Amazon Get Any Bigger*, N.Y. TIMES, Oct. 9, 2020, at A27.

75. *Id.*

76. *House Report*, *supra* note 4, at 297.

77. Daniela Coppola, *Amazon Prime: Statistics & Facts*, Statista (Nov. 17, 2022), https://www.statista.com/topics/4076/amazon-prime.

Founded in 1994 with an ambitious aspiration to become earth's biggest bookstore,[78] over the past three decades, Amazon has built a massive digital ecosystem.[79] The company went public in May 1997,[80] promising investors that it would focus on the "long term" and the "ability to extend and solidify" its "market leadership position."[81] *Barron's* cautioned investors that "Amazon's business plan can easily be duplicated and that the company could end up down the same rabbit hole occupied by once-hot Internet-access providers."[82] At the time, the winner-take-most dynamics was still an academic hypothesis. In his 1999 letter to shareholders, Jeff Bezos described the company's vision:

> We . . . work hard to grow the number of customers who shop with us, the number of products they purchase, the frequency with which they shop, and the level of satisfaction they have when they do so.
>
> We are working to build a place where customers can find and discover anything they want to buy, anytime, anywhere. . .. So, as we expand our offering, we create a **virtuous cycle** for the whole business. The more frequently customers visit our store, the less time, energy, and marketing investment is required to get them to come back again. In sight, in mind.
>
> . . . To us, operational excellence implies two things: delivering continuous improvement in customer experience and driving productivity, margin, efficiency, and asset velocity across all our businesses.[83]

This vision captures the essence of digital ecosystems.[84] What Bezos once described as a "virtuous cycle" is now known as "Amazon's flywheel." Strategy guru Jim Collins introduced the flywheel metaphor in his 2001 book, *Good to Great*, to explain persistent growth strategies:

> The flywheel image captures the overall feel of what it [is] like inside the companies as they [go] from good to great. No matter how dramatic the end result, the good-to-great transformations never happen in one fell swoop. There [is] no single defining action, no grand program, no one killer innovation, no solitary

78. *See* Makeda Easter and Paresh Dave, *Shelf-Assured*, L.A. TIMES, June 19, 2017, at A8; Karen Southwick, *Jeff Bezos, Amazon.com*, UPSIDE, Oct. 1996, at 29.

79. *See And On the Second Day…*, ECONOMIST, June 20, 2020, at 15; *The Genius of Amazon*, ECONOMIST, June 20, 2020, at 7; *Amazon: Beyond Shopping*, *in Special Report: The New Bazaar*, ECONOMIST, Oct. 28, 2017, at 4; *Primed*, ECONOMIST, March 25, 2017, at 18; *Amazon's Empire*, ECONOMIST, March 25, 2017, at 7; *Relentless.com*, *supra* note 73; *How Far Can Amazon Go?*, ECONOMIST, June 21, 2014, at 11.

80. *A New Page in Competition*, WALL ST. J., May 22, 1997, at B6.

81. Jeff Bezos, *1997 Letter to Shareholders*, https://perma.cc/YEQ2-5KR3. *See also* Amazon Com Inc., Form S-1, at 29 (March 24, 1997), https://perma.cc/QVG3-UB9W (expressing confidence in the company's "ability to establish and maintain long-term relationships with its customers and encourage repeat visits and purchases").

82. Scott Reeves, *Offerings in the Offing: Web's Biggest Bookstore? Don't Make Book On It*, BARRON'S, May 12, 1997, at 57.

83. Jeff Bezos, *1999 Letter to Shareholders*, https://perma.cc/LW6H-U53L (emphasis added).

84. *Taking the Long View*, ECONOMIST, March 3, 2012, at 21.

> lucky break, no wrenching revolution. Good to great comes about by a cumulative process—step by step, action by action, decision by decision, turn by turn of the flywheel—that adds up to sustained and spectacular results.[85]

Collins studied successful 20th century companies, such as Circuit City, Fannie Mae, Gillette, Philip Morris, and Walmart. Their success inspired the flywheel metaphor. Collins' book was an instant best seller.[86] Amazon's leadership realized that Collins' flywheel captured well Bezos' virtuous cycle.[87]

Today, Amazon's flywheel defines the company's identity and corporate culture, and the word "flywheel" is reportedly used "religiously" by insiders.[88] It is the company's most admired and most feared organizational feature.[89] It represents the company's relentless efforts to improve efficiencies, grow, and expand. Its effectiveness has lured consumers, fascinated investors, intimidated actual and potential rivals, and alarmed many observers.[90]

Critics of the company have argued that "Amazon exploits its power in one sector to take over neighboring markets. Each new conquest adds more momentum. The flywheel accelerates."[91] Under this position, expansions of powerful ecosystems are necessarily abuses of economic power that should be banned.

IV. UNFAIRNESS

Assume that anticompetitive conduct is inherently unfair. Does it follow that unfair conduct is inherently anticompetitive? Fair competition advocates seem to believe that unfair conduct is anticompetitive.[92]

A. The Essential Facilities Doctrine

The essential facilities doctrine requires that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory

85. JIM COLLINS, GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP. . .AND OTHERS DON'T 165 (2001). *See also* Adam Bryant, *For This Guru, No Question Is Too Big*, N.Y. TIMES, May 24, 2009, at BU1.

86. Bryant, *supra* note 85.

87. JIM COLLINS, TURNING THE FLYWHEEL: A MONOGRAPH TO ACCOMPANY GOOD TO GREAT 6–8 (2019).

88. BRIAN DUMAINE, BEZONOMICS 11–20 (2020); Duhigg, *supra* note 72.

89. Duhigg, *supra* note 72, at 44.

90. *See, e.g.*, Mitchell, *supra* note 74; *The Genius of Amazon*, *supra* note 79; Duhigg, *supra* note 72, at 44; *Primed*, *supra* note 79; *Relentless.com*, *supra* note 73.

91. Mitchell, *supra* note 74.

92. *See supra* Part I. *See also* Eric A. Posner and Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUALITY 190 (2022); Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

basis.[93] This doctrine arguably intends to prevent powerful intermediaries from abusing control over access to markets.

Several old opinions of lower courts arguably applied the essential facilities doctrine,[94] although the U.S. Supreme Court has "never recognized such a doctrine."[95] Three Supreme Court's decisions arguably invoke the essential facilities doctrines: *The Terminal Railroad*, *Associated Press*, and *Otter Tail Power*.[96] *The Terminal Railroad* and *Associated Press* examine situations in which a powerful intermediary was controlled by companies that acted in concert to exclude their rivals. Recognizing the significance of those intermediaries to the U.S. economy, the Court refused to dissolve them and ordered that the intermediaries would serve rivals of the controlling companies on fair, reasonable, and non-discriminatory terms.[97] In both cases, the essential facilities were owned by joint ventures, not a single firm. *Otter Tail Power* is the "sole Supreme Court case involving a single firm's control of an essential facility."[98] It has been always interpreted very narrowly by lower courts.[99]

In recent years, several commentators have argued that the essential facilities doctrine should be revived because it could establish fairness in the marketplace. For example, the Congressional report, *Investigation of Competition in Digital Markets*, recommends that "Congress consider revitalizing the 'essential facilities' doctrine, . . . [and] consider overriding judicial decisions that have treated unfavorably [duties to deal]."[100] This recommendation illustrates the qualities of the populist approach to history. It is rich with incorrect statements.

Some of the bipartisan antitrust bills seek to create a statutory duty to deal in the spirit of the essential facilities doctrine: a duty to deal with all interested parties on fair and equal terms. Among other things, this duty would prohibit powerful digital intermediaries from favoring their own products and services and from discriminating among third parties.[101] While these proposals are intriguing, they are inconsistent with the DNA of the U.S.

93. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990).

94. *See, e.g.*, MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983).

95. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

96. *See* United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945); Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).

97. *Terminal Railroad*, 224 U.S. at 412; *Associated Press*, 326 U.S. at 21–22.

98. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 543 (1991).

99. *Id.* at 543.

100. *US Congressional Report*, *supra* note 4, at 399.

101. In July 2022, the European Council approved the *Digital Markets Act* that includes such duties to deal. Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (July 2022) (the "*Digital Markets Act*"); Council of the European Union, *DMA: Council Gives Final Approval to New Rules for Fair competition Online* (Press Release, July 18, 2022), https://perma.cc/AT95-3LA5.

antitrust laws, which focus on the protection of freedom to trade. It is, therefore, important to recognize that the proposed duties to deal entail meaningful jurisprudential changes. To the extent that such jurisprudential changes are desirable and feasible, their facilitation would require much more than broad statements about fairness.

B. Section 5 of the FTC Act

Section 5 prohibits "unfair methods of competition."[102] There is no dispute that Section 5 covers all forms of anticompetitive conduct prohibited by the Sherman and Clayton Acts.[103] But there is considerable disagreement over the question of whether "unfair methods of competition" should cover conduct that might be lawful under the Sherman and Clayton Acts.[104]

In 2015, the FTC declared that "the Commission is less likely to challenge an act or practice as an unfair method of competition . . . if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm."[105] In July 2021, the FTC rescinded this policy stating that it had "constrained the agency's use of its authority to stop anticompetitive business tactics under Section 5 of the FTC Act."[106] It took the agency more than a year to issue an alternative statement, which seeks to expand the scope of unfair methods of competition.[107] Should the Commission attempt to implement its new policy, it will likely discover that, because antitrust is common law, courts rely on precedents, not on experimental administrative ideas.

C. Upstream Markets

As interpreted by courts, competitive harm means harm to consumers, typically in the form of price increases or output reductions. In antitrust parlance, competitive harm means adverse effects on the welfare of consumers. Under this standard, commonly known as the "consumer welfare standard," price increases and inconvenience to consumers are competitive harms.

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102. 15 U.S.C. § 45(a).

103. *See* FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), https://perma.cc/5ZRV-WUYN; FTC Issues Statement of Principles Regarding Enforcement of FTC Act As a Competition Statute (Aug. 13, 2015), https://perma.cc/BKE6-JLAU.

104. *See* Rohit Chopra and Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020); William E. Kovacic and Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010).

105. Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, 80 FED. REG. 57056 (Sept. 21, 2015), https://perma.cc/SH6R-PPGA.

106. *See FTC Rescinds 2015 Policy*, *supra* note 103.

107. Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://perma.cc/9WUH-7G9Q; FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Press Release, Nov. 10, 2022), https://perma.cc/AYL7-UY7B.

Antitrust fairness theories typically identify that low prices, convenience, and efficiency sometimes result in negative upstream effects. Sellers—companies that directly interact with consumers—must find ways to reduce their costs, which, in part, are revenue sources for suppliers and income sources for workers. In other words, price pressures often motivate squeezing upstream suppliers and laying off workers. For example, mergers and acquisitions can have negative effects on labor market competition and positive effects on the quality and prices of products and services.[108] Recently, the DOJ successfully blocked the acquisition of Simon & Schuster by Penguin Random House under the theory that such an acquisition would reduce competition over authors.[109]

Fairness advocates argue that negative upstream effects are unfair. More broadly, the argument is that antitrust enforcement intends to have distributive effects (*e.g.*, preventing wealth transfers from consumers to sellers), and, hence, it should be used to protect suppliers and workers in order to combat inequality.[110] At the same time, fairness advocates also discount the significance of welfare tradeoffs to antitrust analysis. But when the protection of upstream market participants comes at the expense of consumers, the analysis of tradeoff is needed.

In the past, scholars debated whether mergers that produce efficiencies and result in price increases should be treated as anticompetitive.[111] Some have argued that efficiencies might justify price increases.[112] This approach has never been accepted. These days, fairness advocates argue that low prices to consumers might not be desirable when they result in efficiencies. Under this logic, automation is arguably anticompetitive.

Several studies show that, in recent decades, courts and the antitrust agencies were excessively receptive to assertions regarding alleged efficiencies and overly skeptical of concerns regarding negative effects on

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108. *See, e.g.*, José Azar et al., *Labor Market Concentration*, 57 J. HUM. RES. 167 (2022); Elena Prager and Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021); Janet Currie et al., *Cut to the Bone? Hospital Takeovers and Nurse Employment Contracts*, 58 INDUST. & LAB. RELATIONS REV. 471 (2005); William M. Boal and Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LIT. 86 (1997); Reed Abelson, *Doctors Accuse UnitedHealthcare of Using Clout to Steer Away Patients*, N.Y. TIMES, Apr. 2, 2021, at A13 (describing the effects of integration in healthcare industries on independent service providers).

109. United States v. Bertelsmann SE & Co. KGaA, 2022 WL 16949715 (D.D.C. Nov. 15, 2022).

110. *See, e.g.*, Posner and Sunstein, *supra* note 92; Khan and Vaheesan, *supra* note 92.

111. *See, e.g.*, Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

112. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 107–15 (1978); Oliver E. Williamson, *Economies As An Antitrust Defense Revisited*, 125 U. PENN. L. REV. 699 (1977); Oliver E. Williamson, *Economies As An Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

prices, convenience, and availability of products.[113] Anecdotal evidence also illustrates this pattern. For example, in 2010, the Antitrust Division approved the merger of Live Nation and Ticketmaster, which vertically integrated the world's largest concert promoter and the world's largest ticket-selling company.[114] This merger arguably contributed to sharp increases in ticket prices.[115] As noted, in the 1960s, the Supreme Court was willing to block mergers under the theory that the protection of small businesses warranted periodical price increases.[116] Those who romanticize these decisions will be disappointed to discover that 21st century courts believe that competition should result in low prices.

D. Resale Price Maintenance

Fairness theories concerning upstream markets are inspired, in part, by old arguments in favor of resale price maintenance ("RPM"). RPM is the practice whereby manufacturers or distributors dictate retail prices. In 1911, believing that RPM was used to eliminate price competition, the Supreme Court held that the practice was per se unlawful under the antitrust laws.[117] Justice Oliver Wendell Holmes, who considered antitrust law "humbug based on economic ignorance and incompetence,"[118] dissented. He argued that RPM combats "knaves [who] cut reasonable prices for some ulterior purpose of their own."[119] Louis Brandeis also believed that RPM was necessary to protect fairness.[120] He endorsed Justice Holmes' reasoning, and argued that RPM "tended to secure fair prices" and "eliminated the constant haggling about prices, and the unjust discrimination among customers."[121]

113. *See, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); Louis D. Brandeis, *Competition*, AM. L. NEWS, Jan. 1913, at 5.

114. Press Release, U.S. Dep't of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc. (Jan. 25, 2010) (approving the merger under conditions); Ben Sisario, *Justice Dept. Clears Ticketmaster Deal*, N.Y. TIMES, Jan. 26, 2010, at B4.

115. *See* Anne Steele, *Concert-Ticket Prices After Pandemic Spur Appeal to Justice Department*, WALL ST. J., May 15, 2020, at B5; Anne Steele, *Concert-Ticket Prices Rose 55% in a Decade*, WALL. ST. J., Dec. 27, 2019, at A1; Ben Sisario and Graham Bowley, *Roster of Stars Lets Live Nation Flex Ticket Muscles, Rivals Say*, N.Y. TIMES, Apr. 11, 2018, at A1. Concert ticket prices have been increasing persistently since the 1980s. The Live Nation/Ticketmaster merger price effects contributed to the trend. *See* Sara Fisher Ellison, *Internet Technology and Its Role in the Price of Concert Tickets*, 2 ANTITRUST CHRON. 7 (Feb. 2021).

116. *Supra* note **Error! Bookmark not defined.** and accompanying text.

117. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

118. Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Apr. 23, 1910), *in* 1 HOLMES-POLLOCK LETTERS 163. (Mark DeWolfe Howe ed. 1942).

119. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 412 (1911) (Justice Holmes, dissenting).

120. *See* Louis D. Brandeis, *Cutthroat Prices: The Competition That Kills*, HARPER'S WKLY, Nov. 15, 1913, at 10 [hereinafter Brandeis, *Cutthroat Prices*]; Louis D. Brandeis, *On Maintaining Makers' Prices*, HARPER'S WKLY, June 14, 1913, at 6.

121. Brandeis, *Cutthroat Prices*, *supra* note 120.

But, again, the question that fairness advocates have persistently dodged is whether consumers believe that sacrifices of low prices and convenience are fair.

E. Private Labels

The proliferation of private labels—also known as "store brands"—illustrates why fairness and competition do not necessarily align. Entrepreneurial sellers and established retailers often vertically integrate supply sources by acquiring manufacturing capacities or outsourcing manufacturing to third parties. Goods manufactured for such sellers are called "private labels" because they carry the seller's brand or another name selected by the seller. For example, "Netflix Originals" are shows and movies that Netflix produces in-house or acquires exclusive streaming rights from independent production companies.[122] In many markets, however, private labels are not original, but instead are knockoffs or inexpensive versions of successful and recognized branded products.

Private label items tend to have lower retail prices and higher profit margins than original products. Large retailers, therefore, have strong incentives to develop private labels and aggressively promote them. They often sell their private label items alongside and in competition with the original products. The competition among manufacturers of private label items is, of course, a boon for sellers of private labels.[123] Companies that develop successful original products never welcome competition from private labels. To them, private labels are counterfeits. Pharmaceutical companies feel this way about generic drugs that compete with their brand-name drugs. Nonetheless, despite the perceived unfairness, private labels typically intensify competition.

Amazon marketplace is arguably the world's largest hub for entrepreneurial sellers of private labels. The company has allegedly used data about third-party sellers to develop many lines of profitable private-label items and has arguably optimized its search algorithms to boost its own products.[124] Amazon has also allegedly forced some manufacturers to grant

122. Netflix, How does Netflix License TV Shows and Movies?, https://perma.cc/H8PC-9M4C.

123. *See, e.g.*, Matt Schmitt and Loren Smith, *The Competitive Implications of Private Label Mergers*, 83 ANTITRUST L.J. 621 (2021); Hila Nevo and Roger Van den Bergh, *Private Labels: Challenges for Competition Law and Economics*, 40 WORLD COMPETITION 271 (2017); Chris Doyle and Richard Murgatroyd, *The Role of Private Labels in Antitrust*, 7 J. COMPETITION L. & ECON. 631 (2011); Karsten Hansen et al., *Understanding Store-Brand Purchase Behavior Across Categories*, 25 MKTG. SCI. 75 (2006).

124. *See, e.g.*, Aditya Kalra and Steve Stecklow, *Amazon Copied Products and Rigged Search Results to Promote Its Own Brands, Documents Show*, REUTERS (Oct. 13 2021), https://perma.cc/U6RL-ZM4T; Dana Mattioli, *Amazon Tapped Sellers' Data to Launch Competing Products*, WALL ST. J., Apr. 24, 2020, at A1; Dana Mattioli, *Amazon Search Change Boosts Its Own Products*, WALL ST. J., Sept. 17, 2019, at A1; Julie Creswell, *Amazon the Brand-Buster*, N.Y. TIMES,

the company exclusive rights to sell their branded merchandise and has forced companies to manufacture for Amazon's private label merchandise.[125] Additionally, Amazon has allegedly used similar techniques in its supermarket chain, Whole Foods.[126] Furthermore, Amazon has established itself as a leading advertising platform competing aggressively with Google and Facebook, the world's two largest advertising platforms.[127] The company has allegedly refused to sell advertising services to rival sellers to shield its private label goods from competition.[128]

For fairness advocates, Amazon's aggressive private label strategies epitomize unfair monopolistic wrongdoing.[129] These strategies are ordinarily presented as paradigmatic examples of "self-preferencing." Critics levied similar accusations against the Great Atlantic & Pacific Tea Company (A&P) that pioneered the practice of private labels and used to be the largest U.S. retailer.[130] The condemnation of private labels was also one of the driving forces behind the anti-chain store movement of the 1920s and 1930s and the anti-big box movement of the 1990s and early 2000s.[131] What critics of private labels conveniently ignore is the significant procompetitive and pro-consumer effects of private labels.

V. OPPORTUNISTIC INTERMEDIATION

Louis Brandeis, an intellectual icon of fair competition advocates, loathed intermediaries because the "middleman, even though unnecessary, collects his tribute."[132] Brandeis treated opportunistic intermediation as anticompetitive conduct.

June 24, 2018, at SB1; Leslie Hook and Lindsay Whipp, *Amazon Closes in On Household Names*, FIN. TIMES, July 12, 2016, at 14.

125. *See, e.g.*, Jon Emont, *Amazon Seeks More Brand Control*, WALL ST. J., June 19, 2019, at B1; Annie Gasparro and Laura Stevens, *Amazon Inspires Exclusive Brands*, WALL ST. J., Jan. 26, 2019, at B3.

126. *See, e.g.*, Heather Haddon and Laura Stevens, *It's Amazon Prime Time at Whole Foods*, WALL ST. J., June 18, 2018, at B1; Heather Haddon and Laura Stevens, *Whole Foods Becomes Less Pricey*, WALL ST. J., Sept. 7, 2017, at B3; Nick Wingfield and David Gelles, *Amazon First Act at Whole Foods: Slash Prices*, N.Y. TIMES, June 24, 2018, at SB1.

127. *See, e.g.*, Keach Hagey and Suzanne Vranica, *How Tech's Triopoly Won the Advertising Game*, WALL ST. J., March 20, 2021, at B1; Shane Shifflett et al., *Amazon's Choice' Isn't Endorsement It Seems*, WALL ST. J., Dec. 23, 2019, at A1; Lara O'Reilly and Laura Stevens, *Amazon Emerges as Advertising Giant*, WALL ST. J., Nov. 18, 2018, at A1.

128. Dana Mattioli et al., *Amazon Restricts Ad Buying by Rivals*, WALL ST. J., Sept. 23, 2020, at A1.

129. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

130. *See* MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA (2011).

131. For the anti-chain store movement see Scroop, *supra* note 64; Schragger, *supra* note 64. For the anti-big box store movement, see Sadun, *supra* note 64; Basker, *supra* note 64; Lynn, *supra* note 64.

132. Louis D. Brandeis, *Where the Banker Is Superfluous*, HARPER'S WKLY, Dec. 1913, at 3, 18. *See also* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

A. The Nature of Opportunism

Opportunism, "self-interest seeking with guile,"[133] means exploitation of circumstances in ways that are not necessarily unlawful but are arguably unfair. Numerous legal norms (statutes, regulations, and judicial doctrines) target opportunistic conduct. Examples include fiduciary duties, consumer protection laws, employment laws, environmental laws, child labor laws, and many others. The regulation of opportunism, however, has proved exceptionally challenging because of the fluid nature of the phenomenon.[134] It often occurs when "an actor takes unforeseen advantage of a rule that works under normal circumstances."[135]

Intermediaries tend to be opportunistic because they profit from the existence of friction that reduces the intensity of competitive pressures. Their fees reflect this type of power, and they have strong incentives to maintain the advantages that create the demand for their services.[136]

B. Middlemen Offenses

Unfair conduct of market intermediaries has inspired many laws, addressing the duties and responsibilities of innkeepers, bridge owners, ferry companies, and other parties "affected with a public interest."[137]

Early restraints of trade laws—the predecessors of modern competition laws—targeted attempts of middlemen to corner markets to exact exorbitant prices for necessities.[138] For example, from the 13th to the 16th centuries, the English Parliament enacted a series of statutes criminalizing market intermediation by creating middleman offenses (forestalling, regrating, and engrossing).[139] These laws rested "on the theory that middlemen . . . served no useful purpose,"[140] and "were parasites profiting by the distress of others."[141] Adam Smith criticized England for trying "to hinder as much as

133. OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 255 (1975). *See also* Oliver E. Williamson, *Opportunism and Its Critics*, 14 MANAGERIAL & DECISION ECON. 97 (1993).

134. Henry E. Smith, *Equity As Meta-Law*, 130 YALE L.J. 1050 (2021).

135. *Id.* at 1056.

136. *See, e.g.*, MARINA KRAKOVSKY, THE MIDDLEMAN ECONOMY: HOW BROKERS, AGENTS, DEALERS, AND EVERYDAY MATCHMAKERS CREATE VALUE AND PROFIT (2015); Edna Bonacich, A Theory of Middleman Minorities, 38(5) AM. SOC. REV. 583 (1973); Abba P. Lerner, *The Myth of the Parasitic Middleman: "Productive" and "Unproductive" Labor*, 8 COMMENTARY 45 (1949); *Postscript*, SPECTATOR, Apr. 12, 1845, at 347 (quoting Benjamin Disraeli describing the middleman as a person "who bamboozles one party and plunders the other").

137. *See, e.g.*, Walton H. Hamilton, *Affection With Public Interest*, 39 YALE L.J. 1089 (1930).

138. *See, e.g.*, William L. Letwin, *English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954); Wendell Herbruck, *Forestalling, Regrating and Engrossing*, 27 MICH. L. REV. 365 (1929).

139. Herbruck, *supra* note 138.

140. HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 16 (1955).

141. Letwin, *supra* note 138, at 370.

possible any middleman of any kind from coming in between the grower and the consumer."[142]

Recognizing that the middleman offenses "interfered with the freedom of business instead of promoting it," the English Parliament repealed these offenses in the early 19th century.[143] They were gradually replaced by other laws that sought to protect the public from restraints of trade that tend to increase the cost of living. When the U.S. Congress deliberated the enactment of the Sherman Act, it recognized that the common law of restraints of trade no longer included middlemen offenses and so chose not to adopt such offenses.[144]

C. Anticompetitive Opportunistic Intermediation

The U.S. antitrust laws do not impose restrictions on high prices or high profits. Rather, they prohibit transactions, agreements, and practices that harm or are likely to harm competition. These legal standards apply to intermediaries. For example, courts have condemned intermediaries and manufacturers for intending to block initiatives to cut out the middleman,[145] excluding competition from other intermediaries,[146] intending to block entry of intermediaries,[147] pressuring intermediaries not to deal with rival manufacturers,[148] and colluding to secure favorable RPM from

142. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 265 (1776); *see generally id.* at book iv, ch. 5.

143. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 17–18 (1914).

144. 21 CONG. REC. 2564–2565 (March 24, 1890). *See also* Theodore W. Dwight, *The Legality of "Trusts"*, 3 POL. SCI. Q. 592 (1888) (arguing that the middleman offenses could not apply to the U.S. trusts).

145. *See, e.g.*, E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (condemning efforts of a trade association of distributors to combat manufacturers' initiatives to develop direct-to-retail arrangements violated the antitrust laws).

146. *See, e.g.*, MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835 (5th Cir. 2015) (condemning a collusion facilitated by two intermediaries intended to block the entry of a new intermediary); United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) (condemning a hub-and-spoke cartel orchestrated by an intermediary); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000) (same); Interstate Circuit v. United States, 306 U.S. 208 (1939) (same); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (condemning a monopolist intermediary's refusal to deal with parties that deal with a rival intermediary); United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912) (condemning a joint venture of rival railroads that excluded competition from other railroads).

147. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (condemning Microsoft's efforts to block internet gateways (web browsers) to protect its dominance in software markets).

148. *See, e.g.*, Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (condemning a collusion of manufacturers to pressure retailers not to deal with rival manufacturers).

manufacturers.[149] Meanwhile, courts have been reluctant to condemn intermediation arrangements that expanded markets by reducing friction.[150]

Several antitrust cases involving intermediaries resulted in patently erroneous decisions. For example, in *Ohio v. American Express* (2018), the Supreme Court refused to condemn the anti-steering practices of an intermediary.[151] The case involved practices of credit card companies requiring sellers not to steer credit card holders toward less expensive payment systems. In contrast, in *Klor's* (1959), the Court incorrectly inferred that an intermediary orchestrated a cartel among suppliers.[152] There, a powerful retailer demanded exclusivity from manufacturers and suppliers to the detriment of its next-door neighbor, a small retailer. To be sure, although the attainment of exclusivity arrangements by intermediaries might violate antitrust laws,[153] it does not necessarily permit an inference of an unlawful conspiracy.

D. Profiteering

While some arrangements that facilitate opportunistic intermediation violate the antitrust laws, not all forms of opportunistic intermediation do. For example, arbitrageurs—such as scalpers, discounters, and profiteers—are intermediaries that exploit situations of excess supply or excess demand. Though many jurisdictions regulate and even ban certain arbitrage practices because of their perceived unfairness, arbitrage practices are not unlawful in and of themselves.

To illustrate, consider profiteering, perhaps the most controversial type of arbitrage-seeking practice. Profiteers exploit demand and supply shocks that result in excess demand or excess supply. Price gouging is a particular type of profiteering that tends to outrage the public and often prompts calls to outlaw the practice. Price gouging happens when a demand or supply shock results in severe excess demand. Extreme weather events, pandemics, wars, and unexpected closure of production facilities are common triggers of such conditions. Some jurisdictions outside the United States treat "excessive pricing" as an anticompetitive and unlawful practice.[154] However,

149. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (condemning a collusion of dealers to secure favorable RPM from a manufacturer).

150. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (refusing to condemn performance-rights organizations); Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918) (refusing to condemn the rules of a commodity exchange).

151. Ohio v. American Express Co., 138 S.Ct. 2274 (2018); Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, COLUM. BUS. L. REV. 35 (2019).

152. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

153. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000), Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

154. *See Symposium: Price Gouging*, 3(2) ANTITRUST CHRON. (2020); Ariel Ezrachi and David Gilo, *Are Excessive Prices Really Self-Correcting?* 5 J. COMPETITION L. & ECON. 249 (2009).

prohibitions against high prices or even allegedly excessive prices are not compatible with the philosophy of U.S. antitrust laws, which presume that the prospects of profit drive the competitive process.

Antitrust law, therefore, prohibits transactions, agreements, and practices that harm or are expected to harm competition. It does not condemn the power to charge high prices when such a capacity is the "consequence of a superior product, business acumen, or historic accident."[155] Specifically, the U.S. Supreme Court has repeatedly emphasized that, "as a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[156] This legal standard has governed the U.S. antitrust laws for more than a century.[157] Simply stated, the U.S. antitrust laws have never prohibited high prices, despite their perceived unfairness.

Nonetheless, assertions that price gouging is the outcome of lax antitrust enforcement and violates antitrust laws have gained traction in recent years. The COVID-19 pandemic triggered both demand and supply shocks that have been exploited by small and large businesses, as well as by many scammers.[158] Russia's war in Ukraine has caused another wave of supply disruptions. These shocks and the costs of governmental responses to the pandemic have resulted in significant inflationary pressures. In addition, there are some indications that price gouging contributed to rising inflation.[159] The described patterns have given rise to assertions that profiteering is an anticompetitive practice.[160]

155. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

156. Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 448 (2009).

157. *See infra* Section V.A.

158. *See, e.g.*, Jack Nicas, *Profiteers and Supply-Chain Bedlam for Masks*, N.Y. TIMES, Apr. 5, 2020, at B1 (reporting about surge of profiteering and scams triggered by the COVID-19 pandemic); Jack Nicas, *'Crazy Money' in a Pandemic, Selling $70 Bottles of Sanitizer*, N.Y. TIMES, March 15, 2020, at A1 (reporting that "Amazon, eBay, Walmart and other online-commerce platforms [were] trying to stop their sellers from making excessive profits from a public health crisis.").

159. *See, e.g.*, Andrew Edgecliffe-Johnson, *USA Inc On the Back Foot As Critics Intensify 'Profiteering' Rhetoric*, FIN. TIMES, June 28, 2022, at 6; Lindsay Owens, *Corporate Profiteering Is the Culprit for Inflation*, N.Y. TIMES, May 9, 2022, at A25; Annie Karni and Clifford Kraus, *Big Oil Deflects Blame for Gas Prices*, N.Y. TIMES, Apr. 7, 2022, at B3.

160. *See, e.g.*, S. 4214, Price Gouging Prevention Act of 2022, 117th Cong., 2d Sess. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/4214/all-info; Press Release, Warren, Baldwin, Schakowsky, Colleagues Introduce Bicameral Legislation to Crack Down on Corporate Price Gouging (May 12, 2022), https://perma.cc/M585-J3D4; S. 3933, Ending Corporate Greed Act, 117th Cong., 2d Sess. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3933; Press Release, Sanders Introduces Legislation to Reinstate the WWII Windfall Profit Tax to Combat Rising Inequality, Inflation, and Corporate Profiteering (Mar. 25, 2022), https://perma.cc/8HSB-8PBM; S.3920, Gas Price Gouging Prevention Act, 117th Cong., 2d Sess. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/3920; Press Release, House Passes Rep. Katie Porter's Legislation to Lower Gas Prices (May 19, 2022), https://perma.cc/PD3N-WMM6. *See also* DePillis, '*Greedflation,' or Do the Old Economic Rules Still Apply?* N.Y. TIMES, June 5, 2022, at BU1; Catherine Rampell, *The Conspiracy Theory Infecting Democrats*, WASH. POST, May 13, 2022, at A21; Hal Singer, *Antitrust Should Be Used to Fight Inflation*, AM. PROSPECT (Feb. 22, 2022), https://perma.cc/WVB7-YN9U; Ben Casselman and Jeanna Smialek, *A Throwback Idea Returns As Inflation Rears Its Head*, N.Y. TIMES, Jan. 17, 2022, at B1; Jeanna Smialek, *As Inflation Rises,*

CONCLUSION

Aspiring reformers often depict criticism of their visions and theories as illegitimate efforts of the failed establishment and corrupt elites to preserve power. This argument is not entirely meritless. For example, in 2007, the Antitrust Modernization Commission concluded that the antitrust enterprise was "up to the task of properly assessing the competitive effects of business conduct in new economy industries," and that there was no need for "new or different rules . . . to address so-called 'new economy' issues."[161] This conclusion was odd in 2007, when it was already known that the antitrust enterprise was captured by a simplistic anti-government vision. Today, with the benefit of hindsight, we know that this conclusion was naïve.

It remains to be seen whether the shared animosity of progressive and Republican populists toward big business will result in bipartisan antitrust reforms. Many liberals are uncomfortable with legislative proposals that might protect hate speech, disinformation, and misinformation.[162] Likewise, many conservatives are uncomfortable with highly interventionist legal standards.[163] What should be clear is that, although zeal and bombastic promises sometimes generate political energy needed to recruit support for reforms, they do not offer guidance for sound policy prescriptions. Hence, thus far, populist antitrust disruptors have failed to develop and implement sound antitrust reforms. For the very same reason, present and future antitrust disruptors are unlikely to become good reformers.

Democrats Pin Blame, N.Y. TIMES, Jan. 5, 2022, at B1; Jim Tankersley and Alan Rappeport, *As Prices Rise, Biden Deploys Antitrust Team*, N.Y. TIMES, Dec. 26, 2021, at A1; Matt Taibbi, *Big Pharma's Covid-19 Profiteers*, ROLLING STONE, Sept. 2020, at 56.

161. ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS ii, 32 (2007).

162. *See, e.g.*, Letter from Senators Schatz, Wyden, Lujan, and Baldwin to Sen. Klobuchar (June 14, 2022), https://perma.cc/2T38-J8SC; Jane Bambauer and Anupam Chander, *Bills Meant to Check Big Tech's Power Could Lead to More Disinformation*, WASH. POST, June 6, 2022, https://perma.cc/Y7NS-CUSN; Brad Stone, *The Bipartisan Big Tech Antitrust Bill Falls Victim to Political Gridlock*, BLOOMBERG, Aug. 22, 2022, https://bloom.bg/3gBnWup; Cecilia Kang and David McCabe, *Tough Road Seen for Bills That Limit Tech Firms*, N.Y. TIMES, June 25, 2021, at B1.

163. *See, e.g.*, Kang and McCabe, *supra* note 162; Editorial Board, *Breaking Big Tech Bad*, WALL ST. J., June 6, 2022, at A16; Robert H. Bork Jr., *Republicans Step Into Amy Klobuchar's Antitrust Trap*, WALL ST. JOURNAL (Jan. 26, 2022), https://on.wsj.com/3TuHkIk; Ryan Tracy and Julie Bykowicz, *McCarthy Opposition Widens GOP Split on Tech Measures*, WALL ST. J., June 17, 2021, at A5 (reporting about the objections of the House Minority Leader).