7-2023

# The Good, the Bad, and the Ugly of US Antitrust

Maurice E. Stucke

*Journal of Antitrust Enforcement*, 2023, **11**, 283–292
https://doi.org/10.1093/jaenfo/jnad038
Advance access publication 27 June 2023
**Article**

OXFORD

# The good, the bad, and the ugly of US antitrust

Maurice E. Stucke[1,*]

[1]Douglas A. Blaze Distinguished Professor of Law, University of Tennessee College of Law, Knoxville, TN, USA

*Corresponding author. E-mail: mstucke@utk.edu

## ABSTRACT

This article examines the bad and ugly as the US federal agencies seek to rejuvenate competition. The bad is legislative hiatus to update the antitrust laws for the digital economy. The ugly is when courts push their own economic beliefs, without regard for the congressional intent and aims of the antitrust laws. Regardless of who wins, the rule of law (and those most dependent on the antitrust law) suffer. To correct America's market power problem, the article proposes restoring the constitutional balance, where the courts adjudicate, the legislature legislates, and enforcers enforce.

**KEYWORDS:** Public policy, Platforms, Constitutional matters
**JEL CLASSIFICATIONS:** K21, K42, L40, L41

## I. INTRODUCTION

The Biden Administration began notably with an executive order to promote competition. Why? America has a market power problem, where 'higher prices and lower wages caused by lack of competition are now estimated to cost the median American household $5000 per year'.[1] What caused this problem? One chief culprit was weak antitrust enforcement. So, among other things, the executive order called on the US Department of Justice (DOJ) and Federal Trade Commission (FTC) 'to enforce the antitrust laws vigorously and recognizes that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge'.[2]

The Biden Administration has undertaken many actions to promote competition in the economy.[3] Over a dozen mergers by 2023 were abandoned after the antitrust agencies

[1] US White House, 'Fact Sheet: Executive Order on Promoting Competition in the American Economy' (9 July 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> accessed 12 June 2023.
[2] ibid.
[3] US White House, 'White House Competition Council' <https://www.whitehouse.gov/competition/> accessed 12 June 2023.

challenged them.[4] The agencies have also scored some judicial victories, such as blocking Penguin Random House's proposed acquisition of Simon & Schuster.[5]

> 'When it comes to monopolization', the head of the DOJ's Antitrust Division Jonathan Kanter noted in 2023, 'we have more active litigation and investigations than several prior decades combined."[6]

Indeed, as federal and state antitrust enforcement has rejuvenated, some Wall Street leaders have soured on President Biden. As the *Wall Street Journal* reported, 'his aggressive stance on antitrust enforcement has turned off potential backers whose profits depend on a healthy supply of corporate deals'.[7]

On the other hand, antitrust in the USA has suffered several setbacks, most notably with Big Tech. This article examines the bad and ugly as the US federal agencies seek to rejuvenate competition. The legislative hiatus discussed in Section II would be less problematic if the courts were applying the Sherman, Clayton, and FTC Acts, per the legislative intent, to the cases before them. But as Section III discusses, federal and state antitrust enforcers have suffered recent defeats, most notably in seeking to rein in the data-opolies' abuses. As Section IV addresses, the problem is not the loss per se. Instead, the bigger underlying problem is when courts push their own economic beliefs, without regard for the congressional intent and aims of the antitrust laws. Regardless of who wins, the rule of law (and those most dependent on the antitrust law) suffer. As one US appellate court observed, '[f]ederal courts are not economists, and we should avoid an unnecessary "ramble through the wilds of economic theory"'.[8] Thus, to correct the market power problem, Section V proposes restoring the constitutional balance, where the courts adjudicate, the legislature legislates, and enforcers enforce.

## II. THE BAD

The head of Germany's competition authority noted in 2021 how the antitrust tools were outdated for the digital economy. Andreas Mundt said it is akin to telling the enforcers to climb Mount Everest in leather boots and wool mittens, using hemp rope. Europe is upgrading its competition policies for the digital economy, most notably with the EU's Digital Markets Act, Digital Services Act, Data Act, and Germany's new 'GWB Digitalization Act'.

In contrast, antitrust reform in the USA has stalled—even though most Americans support it, and even though, according to the bills' chief sponsors, there were enough legislative

[4] See eg, DOJ, 'Press Release: Attorney General Merrick B. Garland's Statement on Aon and Willis Towers Watson Decision to Terminate Merger Agreement' (26 July 2021) <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-s-statement-aon-and-willis-towers-watson-decision> (accessed 12 June 2023); DOJ, 'Antitrust Division Update Spring 2021' (24 March 2021) <https://www.justice.gov/atr/division-operations/division-update-spring-2021/protecting-nascent-competition-visa-and-plaid-abandon-anticompetitive-merger> (accessed 12 June 2023) (Visa abandoning plans to acquire fintech startup Plaid); Lockheed Martin's abandoning acquisition of Aerojet Rocketdyne <https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet> accessed 12 June 2023; Nvidia Corp abandoning acquisition of Arm Ltd <https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd> accessed 12 June 2023.

[5] DOJ, 'Press Release: Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster' (31 October 2022) <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed> accessed 12 June 2023.

[6] DOJ, 'Press Release: Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at the Second Annual Spring Enforcers Summit' (27 March 2023) <https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-second-annual-spring> accessed 12 June 2023.

[7] Cara Lombardo, 'Wall Street Dreads Biden-Trump Rematch' *Wall Street Journal* (29 May 2023).

[8] *Host Int'l Inc v MarketPlace, PHL, LLC*, 32 F.4th 242, 253 n 13 (3d Cir 2022) (quoting *United States v Topco Assocs, Inc*, 405 US 596, 609 n 10 (1972)).

votes to enact the reforms.[9] For some reason, Congressional leadership never put the bills up for a vote. As Democrat Congressman David Cicilline, who led the bipartisan effort, noted, 'I've never heard a good explanation as to why bills which are wildly popular with the American people didn't get a vote.'[10]

Key in stopping the antitrust reform was the data-opolies' lobbying, which surprised even some members of Congress. As Cicillene remarked, 'I think maybe we didn't fully appreciate just how much they would invest in stopping reforms. If I were to do it all over again, I would spend more time trying to make sure people understood what was at stake in this legislation.'[11]

Nonetheless, Cicilline and his Republican co-sponsor, Ken Buck, were undeterred. In early 2023, they formed the bipartisan Congressional Antitrust Caucus to

> focus on having hearings with American innovators who have been harmed by Big Tech's predatory and anti-competitive practices, continue pushing legislation that is in line with the Department of Justice Antitrust Division efforts including the bipartisan and bicameral Competition and Transparency in Digital Advertising Act, and serve as a brain trust of those who oppose monopolies in the free market because no market is free when monopolies act to unscrupulously eliminate competition.[12]

Unfortunately, as of mid-2023, there does not seem much support among senior Democrat and Republican leadership for antitrust reform. For example, the chair of the US House Judiciary Committee Jim Jordan was examining Big Tech. But his focus in 2023 was on how the data-opolies were coordinating with the federal government to suppress the conservatives' First Amendment-protected speech.[13] As Republican Buck commented, 'Big tech has spent a ton of money in Washington DC and other places . . . The money has had the impact they intended. It has stifled the willingness to go after big tech with antitrust laws.'[14]

## III. THE UGLY

The US antitrust agencies are thus left with the leather boots, wool mittens, and hemp rope to accomplish their mission. But it has not been an easy climb thus far, with some notable setbacks. While every court loss stings, some sting more than others, in terms of weakening the enforcers' ability to redress the market power problem.

Consider when a bi-partisan coalition of 46 states, the District of Columbia, and Guam challenged Meta for its acquisitions of Instagram and WhatsApp and its monopolization. Seventy-five pages of the states' 123-page complaint outlined Meta's campaign to either buy or bury nascent competitive threats. But the case never proceeded to discovery or trial. Instead, Meta was able to dismiss the states' lawsuit at the litigation's onset.

The standard of review for a motion to dismiss is supposed to be deferential to the plaintiff. The court takes as true the well-pleaded facts in the complaint and draws all reasonable

[9] Cristiano Lima and David DiMolfetta, 'The Technology - Cicilline Says Congress's Antitrust Push will Triumph, Even Without Him' *Washington Post* (13 March 2023).
[10] ibid.
[11] ibid.
[12] Rep Ken Buck, 'Press Release: Buck, Cicilline Form New Congressional Antitrust Caucus' (2 February 2023) <https://buck.house.gov/media-center/press-releases/buck-cicilline-form-new-congressional-antitrust-caucus> accessed 12 June 2023.
[13] US House of Representatives Judiciary Committee, 'Press Release: Chairman Jim Jordan Subpoenas Big Tech Executives' (15 February 2023) <https://judiciary.house.gov/media/press-releases/chairman-jim-jordan-subpoenas-big-tech-executives> accessed 12 June 2023.
[14] Emily Birnbaum and Maria Curi, 'Big Tech Antitrust Push in Congress is Blunted by GOP-Led House, Bloomberg' (27 January 2023) <https://www.bloomberg.com/news/articles/2023-01-27/house-republicans-pivot-away-from-big-tech-antitrust-crackdown?leadSource=uverify%20wall> accessed 12 June 2023.

inferences in favor of the plaintiff.[15] As the DC Circuit long ago pointed out, 'a motion to dismiss under [the Federal Rules of Civil Procedure] is merely a decision on pleadings, and for that reason, it is granted sparingly and with caution. This is especially true in antitrust cases'.[16]

That did not happen here. But the DC Circuit compounded the error when its preliminary observation: 'The States' lawsuit is not only odd, but old.'[17] Why odd? Because the DC Circuit opined, 'the States' suit concerns an industry that, even on the States' allegations, has had rapid growth and innovation with no end in sight'.[18] Adding to that, the DC Circuit said that 'courts should proceed cautiously when asked to deem novel products or practices anti-competitive. Many innovations may seem anti-competitive at first but turn out to be the opposite, and the market often corrects even those that are anti-competitive'.[19]

Here, the DC Circuit never provided any empirical evidence for its statements about innovation in the digital economy. Nor did it offer any empirical basis for its conclusion that Facebook's banning seven rivals from its platform 'was a drop in the bucket' of the millions of apps and websites that integrated into Facebook's platform:

> Facebook banning these seven, even if the States' allegations are correct, would not amount to any "continuing harm" to the States' constituents . . . and a court order to Facebook would serve no antitrust purpose . . . . It makes no sense to require Facebook to foreswear a policy that ended in 2018, or to provide Facebook Platform access to a handful of companies which are either defunct or have changed their business model ever since Facebook banned them.[20]

As we explained in our recent book, the evidence shows otherwise: How the big-tech barons are stifling disruptive innovation.[21] It makes perfect economic sense for Facebook to integrate complementary innovations that reinforce its power and its underlying value chain while killing off any disruptive tech pirate. And, as we show, killing off a few disruptive innovators can significantly harm innovation. But the DC Circuit's flawed reasoning points to a greater problem: the courts' rambling through the wilds of economic theory.

## IV. RAMBLING THROUGH THE WILDS OF ECONOMIC THEORY

Congress never encouraged the US courts to ramble through the wilds of economic theory to decide an antitrust case. Between the 1940s and 1960s, the courts interpreted the antitrust laws in light of their 'legislative history and of the particular evils at which the legislation was aimed'.[22]

In hewing to the congressional intent in creating presumptions and per se rules, the Supreme Court observed in 1972:

> Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the

[15] *Frappier v Countrywide Home Loans, Inc*, 750 F.3d 91, 96 (1st Cir 2014).
[16] *KWF Indus, Inc v Am Tel & Tel Co*, 592 F. Supp. 795, 797 (DDC 1984).
[17] *New York v Meta Platforms, Inc*, 66 F.4th 288, 295 (DC Cir 2023).
[18] ibid.
[19] ibid 305.
[20] ibid 306.
[21] Ariel Ezrachi and Maurice E Stucke, *How Big-Tech Barons Smash Innovation – And How to Strike Back* (HarperCollins 2022).
[22] *Apex Hosiery Co v Leader*, 310 US 469, 489 (1940).

> law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.[23]

That changed over the past 40 years when the federal courts (notably those adhering to the then-Chicago and Harvard School economic theories) imposed their economic ideologies into the law. Rather than check these jurists, the Supreme Court began quoting them. Moreover, the Court began making important policy tradeoffs in its antitrust decisions. How so? The Court reasoned that the 'general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act', which the Court now instead treated 'as a common-law statute'.[24] Thus, it is ironic that the current Court 'typically greet[s] assertions of extravagant statutory power over the national economy with skepticism', while not displaying any such concern in exercising this power in interpreting the antitrust laws.[25]

One might be unconcerned if the courts' economic ramblings were harmless. But the Supreme Court's and lower courts' policy decisions, which narrowed the scope and force of the antitrust laws, and the ability to bring cases, have contributed to America's market power problem.

For example, the Supreme Court stated that 'Congress designed the Sherman Act as a "consumer welfare prescription"'.[26] This assertion never came from Congress. Instead, it came from a Chicago School jurist,[27] whose claim has been condemned by historians and legal scholars alike.[28] Rather than an objective standard, the consumer welfare standard invites considerable subjectivity—and more to the point, tolerance of anticompetitive practices. After all, under this standard, the courts allow firms, individually or collectively, to reduce competition until consumer welfare is reduced.[29]

The Supreme Court justified eliminating its long prohibition against vertical price-fixing by opining that the antitrust laws' primary purpose is to protect inter-brand competition, not intra-band competition.[30] Here too, the Court's policy statement never came from the antitrust laws, their legislative history, or the particular evils at which the legislation was aimed. Instead, it came from a footnote from an earlier decision, where the Court stated that '[i]nterbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law'.[31] While true for generic products, this statement is false for many differentiated branded goods. Try, for example, negotiating a better price for a BMW with the price of a Cadillac or Mercedes-Benz (inter-brand competition) versus the price of that same BMW offered by another dealer (intra-brand competition).

[23] *United States v Topco Assocs, Inc*, 405 US 596, 610 (1972).
[24] *Leegin Creative Leather Prod, Inc v PSKS, Inc*, 551 US 877, 899 (2007).
[25] *W Virginia v Env't Prot Agency*, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2609 (2022) (internal citation omitted).
[26] *Nat'l Collegiate Athletic Ass'n v Bd of Regents of Univ of Oklahoma*, 468 US 85, 107 (1984) (quoting *Reiter v Sonotone Corp*, 442 US 330, 343 (1979)).
[27] Reiter, 442 US 343 (quoting Robert Bork, *The Antitrust Paradox* 66 (Free Press 1978)).
[28] See eg, US Department of Justice, Antitrust Division, Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture (18 May 2022) <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association> (accessed 12 June 2023) (discussing several problems with the consumer welfare standard). For other problems with the standard, see Marshall Steinbaum and Maurice E Stucke, 'The Effective Competition Standard: A New Standard for Antitrust' (2019) 86 University of Chicago Law Review 595; Barak Orbach, 'How Antitrust Lost Its Goal' (2013) 81 Fordham L Rev 2253; Daniel R Ernst, 'The New Antitrust History' (1990) 35 NYL Sch L Rev 879, 882; Robert H Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1999) 50 Hastings LJ 871, 889.
[29] See eg, *Rebel Oil Co v Atl Richfield Co*, 51 F.3d 1421, 1433 (9th Cir 1995) ('reduction of competition does not invoke the Sherman Act until it harms consumer welfare').
[30] *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877, 890 (2007); see also *Ohio v Am Express Co*, 138 S. Ct. 2274, 2290 (2018) (repeating that the promotion of inter-brand competition 'is the primary purpose of the antitrust laws').
[31] *Continental TV, Inc v GTE Sylvania Inc*, 433 US 36, 52 n 19 (1977).

And here again, Americans paid the price. As the economist Jonathan Baker observed, the recent economic findings, post-*Leegin*, 'are consistent with the view that anticompetitive explanations for resale price maintenance tend to predominate over procompetitive explanations'.[32] Resale price maintenance is likely contributing to the higher prices in many sectors of our economy.

But the Court's failures in antitrust go beyond its economic policymaking. Over the past 40 years, the Court has curtailed antitrust's legal presumptions and per se rules, and displaced them with its rule of reason legal standard. 'Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'[33] Despite its label, the rule of reason is not a directive defined ex-ante (such as a speeding limit). Instead, the term embraces antitrust's most vague and open-ended principles, making prospective compliance with its requirements exceedingly difficult.

I criticized that amorphous legal standard over a decade ago.[34] Since then, even the Supreme Court has criticized its own legal standard. '[W]hatever its merits may be for deciding antitrust claims', the Court observed, the 'elaborate inquiry' required under that standard 'produces notoriously high litigation costs and unpredictable results'.[35] Likewise, several justices called the rule of reason 'amorphous'[36] and 'unruly'.[37] As they commented, '[g]ood luck to the district courts that must, when faced with a patent settlement, weigh the "likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances"'.[38]

To make matters worse, there is even less clarity today over the basic aspects of this legal standard. For example, does the rule of reason have three steps or four? Can a defendant justify its anticompetitive restraint with procompetitive benefits in unrelated markets? The Ninth Circuit grappled with these issues in its review of Epic's monopolization and tying claims against Apple.[39]

Indeed, the primary beneficiary of the Court's rule of reason standard is those who can afford it. As one district court recently noted, his was 'not the first major antitrust trial' where the parties 'presented "costly and conflicting . . . economic . . . models" and "incompatible visions of the competitive future"', so that the 'dueling experts "essentially cancel each other out as helpful evidence [that] the Court could comfortably endorse as decidedly affirming one side rather than the other"'.[40] Consider another jurist's bleak assessment of antitrust:

[32] Jonathan B Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019).
[33] Sylvania, 433 US 49.
[34] Maurice E Stucke, 'Does the Rule of Reason Violate the Rule of Law' (2009) 42 UC Davis L Rev 1375.
[35] *Kimble v Marvel Ent, LLC*, 576 US 446, 459 (2015).
[36] *Oneok, Inc v Learjet, Inc*, 575 US 373, 398 (2015) (Scalia, J. dissenting, with Roberts, C.J. joining).
[37] *FTC v Actavis, Inc*, 570 US 136, 173 (2013) (Roberts, C.J., dissenting, with Justices Scalia and Thomas joining).
[38] Actavis, 570 US 173.
[39] Epic, eg, argued that, even if Apple's security and privacy restrictions were procompetitive, they increased competition in an altogether different market, and thus were not legally cognizable under the rule of reason. Noting that the Supreme Court's precedent on this issue was not clear, the Ninth Circuit avoided the issue since Epic did not raise it before the trial court, and thus did not preserve it on appeal. *Epic Games, Inc v Apple, Inc*, 67 F.4th 946, 989 (9th Cir 2023). Ironically, the Supreme Court had the opportunity to clarify this issue recently but did not. In *Nat'l Collegiate Athletic Ass'n v Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141, 2155 (2021), the Court noted that some amici argued that 'competition in input markets is incommensurable with competition in output markets, and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury'. But because the parties did not raise this issue, the Court opted not to clarify its own legal standard. Likewise, it remains unclear whether the rule of reason entails three or four steps. As the Ninth Circuit observed, 'Supreme Court precedent neither requires a fourth step nor disavows it,' and how the Court, in its two most recent Rule of Reason decisions, discussed only three steps. Epic, 67 F.4th 993.
[40] *United States v Am Airlines Grp Inc*, No CV 21-11558-LTS, 2023 WL 3560430, *23 (D Mass 19 May 2023) (quoting *New York v Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187 (SDNY 2020)).

> Adjudication of antitrust disputes virtually turns the judge into a fortuneteller. Deciding such cases typically calls for a judicial reading of the future. In particular, it asks the court to predict whether the business arrangement or conduct at issue may substantially lessen competition in a given geographical and product market, thus likely to cause price increases and harm consumers. To aid the courts perform that murky function demands a massive enterprise. In most cases, the litigation consumes years at costs running into millions of dollars. In furtherance of their enterprise, the parties to the dispute retain battalions of the most skilled and highest-paid attorneys in the nation. In turn, the lawyers enlist the services of other professionals – engineers, economists, business executives, academics – all brought into the dispute to render expert opinions regarding the potential procompetitive or anti-competitive effects of the transaction.[41]

Thus, outside of those offenses still deemed per se illegal, antitrust litigation is typically a war of attrition, where litigants must finance battalions of expensive lawyers and economic experts, and where the courts are generally left to their own economic beliefs. This sends antitrust further afield from rule of law principles, thereby weakening enforcement and contributing to the market power problem.

Finally, courts are not innately good fortune tellers. Consider, for example, the Sprint-T-Mobile merger, where the Trump administration staked the wallets of millions of Americans on the prospect of DISH becoming a significant competitive constraint on the three remaining mobile network operators.[42] The states sued, arguing that despite the divestitures required under the DOJ consent decree, the T-Mobile/Sprint merger would likely stifle competition in the highly concentrated wireless market, forcing consumers to pay higher wireless prices. The court disagreed, using its 'own tried and tested version of peering into a crystal ball'—basically reading 'what the major players involved in the dispute have credibly said or not said and done or not done, and what they commit to do or not do concerning the merger', which somehow would equip the court 'to interpret whatever formative conduct and decisive events [it] can reasonably foresee as likely to occur'.[43]

Both the Trump administration and the court got it wrong, and Americans again paid the price. Before the T-Mobile/Sprint merger, wireless prices were steadily declining every year for at least a decade.[44] After the merger closed in mid-2020, mobile wireless prices increased suddenly. The average price of mobile services in the last 6 months of 2020 was 4.3 per cent higher than the average price for the first 6 months, and the average price remained elevated in 2021, 2022, and 2023.[45] The price hike is especially troublesome given T-Mobile and Sprint's promise not to increase prices post-merger.

But even if the Court provided greater clarity over its rule of reason legal standard, should the courts be making these important policy trade-offs? In the digital economy, for example, firms gather a lot of data to profile individuals and manipulate behavior. Suppose the data-opoly could show that behavioral advertisers benefit (in getting people to buy things they otherwise would not, at the highest price they are willing to pay). Individuals are harmed in terms of their privacy, autonomy, and well-being. How could any court accurately, objectively, and predictably trade off these incommensurable benefits and harms? Even if they

[41] Deutsche Telekom, 439 F. Supp. 3d 186.

[42] DOJ, 'Press Release: Court Enters Final Judgment in T-Mobile/Sprint Transaction, Order Allows Divestitures to Proceed' (1 April 2020) <https://www.justice.gov/opa/pr/court-enters-final-judgment-t-mobilesprint-transaction> accessed 12 June 2023.

[43] Deutsche Telekom, 439 F. Supp. 3d 187–88.

[44] US Bureau of Labor Statistics, 'Wireless Telephone Services in U.S. City Average, All Urban Consumers, not Seasonally Adjusted' <https://data.bls.gov/timeseries/CUUR0000SEED03?output_view=data> accessed 12 June 2023.

[45] ibid.

could, this would seem to be the responsibility of the more politically accountable legislature, and not some unelected judge, who under the US Constitution is hard to remove.

Americans' confidence in the nation's highest court recently hit a 50-year low.[46] The ethical concerns around some of the justices will likely further erode the public's trust in the Court.[47] But one likely contributing factor is the perceived hypocrisy.[48] Notably, the Court recently overturned its 1973 decision finding a constitutionally protected right to abortion. In doing so, the Court recited the following 'original constitutional proposition': 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies'.[49] But that is exactly what the Court has been doing with its antitrust jurisprudence for the past 40 years.

## V. SO, WHAT SHOULD BE DONE?

Basically, three things: First, the courts must adjudicate, not legislate. Secondly, the legislature must legislate. Thirdly, the enforcers must enforce.

### The courts must adjudicate, not legislate

As Max Planck said, 'A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.' Among younger academics and enforcers, few today adhere to the dated theories of the Chicago and Harvard schools.

But it is not simply about updating the courts' economic beliefs. Returning to the mantra, *courts are not economists*, the courts should cease rambling through the wilds of economic theory altogether. As several justices observed, '[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.'[50] And there are serious costs—to the economy, the rule of law, and to 'the respective roles of the Judiciary and the Congress in regulating the economy'.[51]

Antitrust in the USA need not be an 'unwieldy process', where adjudicating antitrust disputes is a 'judicial reading of the future'—a 'murky function [that] demands a massive enterprise'.[52] Courts can instead return to interpreting the antitrust laws considering their legislative history and the particular evils at which the legislation was aimed. At times, courts still do.[53] But more often, they do not, and the results are unpredictable and potentially deleterious.

Granted the parties may dispute the legislative history and the evils over which the legislation was aimed. At times, this inquiry will not provide sufficient guidance for a particular matter. But for most cases, it will limit the courts' degree of freedom—such as conjecturing that the possession of monopoly power and concomitant charging of monopoly prices are

[46] General Social Survey Data Explorer, 'Trends, Confidence in Supreme Court' <https://gssdataexplorer.norc.org/trends?category=Politics&measure=conjudge> accessed 12 June 2023.

[47] Devin Dwyer, 'All 9 Supreme Court Justices Push Back on Oversight' (*ABC News*, 28 April 2023).

[48] David Leonhardt, 'Supreme Court Criticism' *NY Times* (New York, NY, 22 May 2023).

[49] *Dobbs v Jackson Women's Health Org*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2239 (2022) (quoting *Ferguson v Skrupa*, 372 US 726, 729–30 (1963)).

[50] *Leegin Creative Leather Prod, Inc v PSKS, Inc*, 551 US 877, 917 (2007) (Breyer, J., dissenting).

[51] *Arizona v Maricopa Cnty Med Soc*, 457 US 332, 354 (1982).

[52] *United States v Am Airlines Grp Inc*, No CV 21-11558-LTS, 2023 WL 3560430, at *2 (D Mass 19 May 2023), (quoting Deutsche Telekom, 439 F. Supp. 3d 187)).

[53] See eg, *FTC v Penn State Hershey Med Ctr*, 838 F.3d 327, 347–48 (3d Cir 2016) (expressing skepticism that an efficiencies defense even exists for problematic mergers, citing, inter alia, the legislative intent of the Clayton Act that 'Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in of decentralization').

somehow 'important element[s] of the free-market system',[54] which is doubtful both as an empirical matter and as a matter of political economy.

## The legislature must legislate

It is unacceptable that Congress, which is supposed to be America's most politically responsive branch, is the least responsive to the will of most Americans in updating the antitrust laws. Here, Congress has already conducted extensive hearings on the digital economy, issued well-researched reports, and proposed legislation with sufficient bi-partisan support to be enacted. Thus, Congress can help by updating the antitrust laws with presumptions and rules that are 'clear enough for lawyers to explain them to clients',[55] for the enforcers to enforce more easily, and for the courts to adjudicate.

Consider, for example, the Platform Competition and Opportunity Act of 2021.[56] In response to the concerns of the data-opolies' acquiring nascent competitive threats and the difficulties under the current legal framework to challenge these mergers, the bill, inter alia:

- does away with assessing market power by defining markets—a 'lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets'[57]—and like the DMA, provides clearer criteria as to which dominant firms the stricter rules would apply.
- creates a strong presumption that acquisitions by these dominant platforms are illegal.
- shifts the burden to the merging parties to overcome this presumption.
- eschews any vague efficiencies defense and limits the justifications to three exceptions.[58]
- increases the evidentiary standard to overcome this presumption (the merging parties must provide 'clear and convincing evidence').
- requires greater transparency, whereby the FTC and DOJ would have to 'jointly issue guidelines outlining policies and practices, relating to agency enforcement of this Act, with the goal of promoting transparency and deterring violations',[59] and update their guidelines 'to reflect current agency policies and practices' at least every 4 years.[60]

Likewise, the Senate's proposed American Innovation and Choice Online Act would curb the DC Circuit's and other courts' rambling through the wilds of economic theory by preventing the data-opolies' discriminatory conduct. The conduct specified in the bill would be presumptively illegal unless the defendant establishes one of the narrow affirmative defenses with clear and convincing evidence.[61]

## The enforcers should enforce

As we have seen, broadly defined enforcement power can be a blessing and a curse. The blessing is that the agency can close the gap between industry practices and enforcement. But one curse is the courts, in lagging behind the agencies, will often have different, and

[54] *Pac Bell Tel Co v linkLine Commc'ns Inc*, 555 US 438, 454–55 (2009) (quoting *Verizon Commc'ns Inc v L Offs of Curtis V Trinko*, LLP, 540 US 398, 407 (2004)).
[55] linkLine, 555 US 453.
[56] H.R.3826, 117th Congress (2021–2022) <https://www.congress.gov/bill/117th-congress/house-bill/3826/text> accessed 12 June 2023.
[57] Leegin, 551 US 917 (Breyer, J, dissenting).
[58] s 2(b) of the proposed Act.
[59] s 6 of the Act.
[60] ibid.
[61] S.2992, 117th Congress (2021–2022) <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text> accessed 12 June 2023.

conflicting economic views, of unreasonableness. As the agency's losses mount, its willingness to use its broadly defined enforcement power wanes.

Another problem is that a particular administration can selectively enforce a vague, broadly defined legal standard to achieve its political (or personal) ends. Antitrust enforcement can be ideological and highly politicized. The federal agencies have tremendous discretion when, if at all, and on whom to focus their pervasive prosecutorial antitrust powers. It is naïve to view the agencies as beyond political pressure. For example, President Lyndon B Johnson permitted a merger between two Houston banks in exchange for favorable coverage in the *Houston Chronicle*.[62] President Richard Nixon used the antitrust laws as a sword of Damocles against the media networks and thwarted the antitrust litigation against campaign contributor International Telephone & Telegraph Corp. The ITT scandal led to the criminal conviction of an Attorney General, part of the articles of impeachment against Nixon, and the Tunney Act, which requires a federal district court to find the DOJ consent decrees in the public interest.[63]

A third problem with vague antitrust standards is that a particular administration can abdicate through inaction its obligation to execute faithfully the laws. Under the rule of reason, for example, liability depends upon case-specific facts, which are unknown to the public. Given this informational asymmetry, the public entrusts the Executive Branch to faithfully execute the laws. It thus remains difficult to appraise whether the agencies made the right call, especially when they do not systematically examine the consequences of their earlier decisions. By the time the competitive effects of their decisions manifest, the political appointees have left. And again, Americans pay the price.

## VI. CONCLUSION

Although antitrust enforcement has increased, America's market power problem remains. Companies, like Coca-Cola and Pepsi, have pushed along price increases to boost profits.[64] The big-tech barons continue to dominate, and will likely continue doing so with their advantages in artificial intelligence. To fix the market power problem, the courts must recognize, as they once did, the respective roles of the Judiciary and the Congress in regulating the economy, Congress must do its job in updating the antitrust laws, and the agencies, not only now, but with future administrations, must take care that these laws are faithfully executed.

[62] Michael R Beschloss, 'Taking Charge: The Johnson White House Tapes 1963-64' 141–42 (1997).
[63] Stucke, Rule of Reason, 1449–50.
[64] Isabella Simonetti, 'Coca-Cola Keeps Raising Prices, Driving Profits Higher' *NY Times* (New York, NY, 25 October 2022).