

Darren Bush
Andrew I. Gavil
Spencer Weber Waller
Editors

Harry First

A Global Vision for Competition Law

Liber Amicorum

Adi Ayal, Darren Bush, Stephen Calkins, Michael A. Carrier,
Peter C. Carstensen, Erika M. Douglas, Ariel Ezrachi, Albert A. Foer,
Eleanor M. Fox, Mark Glick, Jamie Ha, Jonathan Jacobson,
Wolfgang Kerber, John B. Kirkwood, Robert H. Lande, Marina Lao,
Ioannis Lianos, Gabriel A. Lozada, Melissa H. Maxman,
Barak D. Richman, Tadashi Shiraishi, Daniel Sokol, Erica Straus,
Maurice E. Stucke, Sean P. Sullivan, Simonetta Vezzoso,
Ronald F. Wick, Diane P. Wood, Angela Huyue Zhang



Concurrences
Antitrust Publications & Events



LOYOLA
UNIVERSITY CHICAGO

Is Antitrust Law, Policy, or Politics?

SEAN P. SULLIVAN*

University of Iowa College of Law

Abstract

Thirty years ago, Harry First posed a simple but provocative question: Is antitrust law or is it policy? Today, I wish to revisit and expand upon that inquiry. Recent events have introduced a third dimension to consider: what if antitrust is politics? I position recent developments – like the resurgence of populist antitrust rhetoric, renewed political interest in antitrust enforcement, and sweeping changes in administrative practices – within antitrust’s historic expression as a shifting combination of law, policy, and politics. From this vantage point, I argue that the recent movement toward political control is cause for concern.

* Professor of Law & Bauma Faculty Fellow in Law, University of Iowa College of Law.

I. Introduction

1. Thirty years ago, Harry First posed a simple but provocative question: Is antitrust *law* or is it *policy*?¹ The question was motivated by developments taking place in antitrust enforcement in the early 1990s. The agencies were making greater use of consent decrees and crafted remedies than ever before.² Broad, forward-looking guidance, particularly in the form of economic commentary, was seen to be crowding out the evolution of antitrust through judicial decisions of litigated cases.³ Changes like these drove Harry to question what exactly antitrust was supposed to be. The depth of this question, and the non-obviousness of its answer, made the work an instant treasure.
2. Harry's argument embraced both positive and normative considerations. The positive considerations were conspicuous and empirical. The question – What *is* antitrust? – demanded a trip to the trenches. What were the agencies doing? How were disputes getting resolved? What was the published record of what was illegal and likely to be opposed? Normative considerations tiptoed more gently into the argument. Harry did not try to answer anything as broad as what antitrust optimally should be. Instead, he tackled a narrow and pragmatic question: Were changes in antitrust enforcement heading in a good direction?
3. In a brief but persuasive analysis, Harry concluded that antitrust was drifting toward regulatory policy.⁴ He cautioned that this change was not costless. It traded concrete precedent and law for abstract expressions of transient policy positions. Harry predicted that the drift toward policy would eventually sap the strength of antitrust.⁵ He recommended a reverse course in the direction of law and legalistic enforcement.⁶
4. Today, I want to revisit Harry's question. Excuses for returning to the subject can be found throughout the changes that have taken place in antitrust over the past decade. The reemergence of populist antitrust rhetoric,⁷ the sudden spike in political attention to antitrust law,⁸ and the sweeping changes that have taken place in administrative practices under the Biden administration⁹ all invite a fresh look at the question: What exactly is antitrust supposed to be?

1 Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9 (1995).

2 *See id.*

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

4 First, *supra* note 1, at 9; *see also* Melamed, *supra* note 1346 at 13.

5 First, *supra* note 1, at 11–12.

6 *Id.* at 12.

7 *See infra* notes 51–54 and accompanying text.

8 *See infra* notes 55–58 and accompanying text.

9 *See infra* notes 59–67 and accompanying text.

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

II. Law, Policy, and Politics

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

1. Law and Legalistic Regulation

7. Harry identifies “legalistic regulatory culture” as focusing on the protection of individuals against harmful acts.¹⁰ Law is “individual-case oriented” in this understanding, as well as “fact bound, and backward looking.”¹¹ In a legalistic approach to regulatory enforcement, substantive law is developed and applied through the litigation of specific disputes, each in a unique factual context. Enforcement standards emerge from the iterative application of precedent to concrete facts, one case at a time.
8. One wrinkle in this definition of legalistic regulation is that it seems to focus on adjudication to the exclusion of legislation. Specific and detailed statutes are also a source of law and would rank as legalistic regulatory culture if they existed in antitrust. Harry's focus on adjudication reflects the obvious point that the brevity and vagueness of the antitrust statutes relegate the development of substantive enforcement standards to adjudication, not legislation.
9. But there are other wrinkles. Law in the common law tradition has never been exclusively about what happened in the past. As soon as precedential effect is given to judicial decisions, those decisions become as much about social policy, and the regulation of future behavior, as about responding to past acts.¹² So, even in a purely adjudicated context, the game is not exclusively about the identification and resolution of past injuries.¹³

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

11 *Id.*

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

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

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

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

2. Policy and Bureaucratic Regulation

11. As a counterpoint to law, Harry identifies “bureaucratic regulatory culture” as focusing on broader policy questions like “how the economy should be structured and run.”¹⁵ This policy-based approach to regulation is “group oriented, theory based, and forward looking.”¹⁶ It is regulatory policy of a technocratic variety. One imagines expert agency staffers debating, promulgating, and enforcing rules and policies in a process of regular communication and cooperation with regulated populations.
12. This definition recalls the distinction between legislation and agency rulemaking.¹⁷ Agencies empowered to develop rules and enforce laws – particularly under vague empowering statutes – inevitably exercise a great deal of regulatory discretion. The need for transparency in the exercise of that discretion motivates forward-looking announcements. Guidance documents, policy statements, and advisories are the bread and butter of bureaucratic regulation.
13. Here, again, we must not overstate the distinction. Bureaucratic regulatory authority arises from empowering legislation and is exercised against a backdrop of political oversight and punctuated judicial review.¹⁸ Even expert and specialized agency staff are constrained to roam within a

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

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

16 *Id.*

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

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

field bounded by statutes and ultra vires review.¹⁹ On the political side, opportunities for manipulation and intrusion into agency policymaking abound.²⁰

14. But, despite these caveats, the identification of bureaucratic policymaking as a distinct mode of regulation is again helpful in thinking about enforcement consequences. Bureaucratic regulatory enforcement is likely to be both broader and narrower than legalistic enforcement. At the broad end, substantive rules and policies are often abstract and forward-looking – think guidance documents and policy statements, for example. At the narrow end, close communication between regulators and regulated parties invites out-of-court resolutions of disputes. Negotiated remedies and consent decrees can be tailored so tightly to individual facts that they leave no generalizable principles behind.²¹
15. Policy-based regulation is also more flexible than law. Opportunities for changing substantive rules and enforcement approaches are more frequent and less constrained than they would be in a legalistic context.²²

3. Politics and Populist Regulation

16. Unexplored in Harry’s formulation – but important for considering current events – is what we might call “political regulatory culture.” Here, substantive laws and enforcement norms arise from political influences, like changing presidential administrations. Regulations reflect the influence of political coalitions and voter interests, not judicial interpretations or technocratic expertise. This description of political regulation overlaps with some articulations of populism.²³ It contemplates the vesting of enforcement authority in non-experts, unconstrained by the moderating influences of precedent or technical rigor, and beholden only to transient coalitions in a democratic context.
17. This definition of political regulation borrows from several literatures. The discontinuous translation of voter preferences into political outcomes is well studied in research on voting and majority rules.²⁴ Studies of populism and movement politics also contribute to understanding political regulation.²⁵

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

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

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

22 Cf. Frederick Schauer, *Why Precedent in Law (And Elsewhere) Is Not Totally (Or Even Substantially) about Analogy*, 3 PERSP. PSYCH. SCI. 454 (2008) (noting that decision-making under the constraint of binding precedent is distinct even from reasoning by analogy outside the common law decision space).

23 See, e.g., Sheri Berman, *The Causes of Populism in the West*, 24 ANN. REV. OF POL. SCI. 71 (2021).

24 See generally W. D. WALLIS, *THE MATHEMATICS OF ELECTIONS AND VOTING* (2014).

25 See, e.g., Nicola Lacey, *Populism and the Rule of Law*, 15 ANN. REV. OF L. & SOC. SCI. 79, 80-81 (2019) (collecting works that study the recent emergence of populist movements in Europe and North America).

18. Political actors are, of course, responsible for both creating and executing laws in the U.S. constitutional framework, and so it is little wonder that political regulation overlaps both legal and bureaucratic regulation. Bureaucratic agencies are funded, monitored, and often run by politicians and political appointees.²⁶ Judges, too, are appointed and funded through the political process.²⁷ At a philosophical level, all force of law ultimately derives from some degree of public support for legally imposed duties and prohibitions.²⁸
19. But distinguishing political regulation from law and policy is still helpful. The distinction drawn here underlies constitutional separation of powers principles,²⁹ a common justification for which is the need to moderate the changes in law that would result from unconstrained political passions.³⁰ We are also focused on a specific subset of political regulation. Nothing prevents a political body from delegating authority and then stepping back to allow expert agency staff to decide how to exercise that authority – what we would call bureaucratic regulatory culture.³¹ Our concern, here, is the direct assumption of control over enforcement by inexperienced politicians and their immediate appointees.³²
20. If policy is more flexible than law, then politics is more flexible than policy. Apart from constitutional protections and the need to answer to voting bases, political coalitions face the least constraints of all on how they may change rules and redirect enforcement priorities.

26 See *supra* note 20 and accompanying text.

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

28 Cf. KEN BINMORE, *NATURAL JUSTICE* (2011).

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

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

31 In theory, the constitutional nondelegation doctrine limits what authority Congress can delegate to administrative agencies. See Sullivan, *supra* note 18. Many of the principles underlying this doctrine appear equally offended by delegations of lawmaking authority to the judiciary, however. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008). And having rarely doubted their own power to interpret the antitrust statutes, it would be at best awkward for courts to apply this doctrine strictly against the federal antitrust agencies.

32 Cf. Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J. L. & BUS. 1, 8 (2017) (describing populist anti-intellectualism as “the willingness of populists to seek endorsement of low-information audiences, rejection of facts and criticism, common use of conspiracy theories, and targeting of intellectuals as ‘corrupt elites’”).

III. The Law-Policy-Politics Triangle

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

1. Antitrust as Law

22. We need not devote much effort to defending the idea that antitrust is law. Every indication is that it has been seen this way for a very long time. Blackstone's Commentaries, for example, indicate prohibitions on combinations in restraint of trade and monopoly long before the 1800s.³³ The common law antecedents of U.S. antitrust law include decisions like *Mitchel v. Reynolds*,³⁴ decided in 1711, and *Darcy v. Allen*,³⁵ decided in 1602 – though misreadings of the latter seem to have been more influential than the decision itself.³⁶ The eventual codification of antitrust law in the Sherman Act, Clayton Act, and Federal Trade Commission Act cinches the matter.
23. But while antitrust has never lacked the trappings of law, neither has it ever managed to work itself clean of policy tensions or political influence. From the start, it has always been *law and* these other things.

2. Antitrust as Policy

24. Blackstone's recitation of prohibitions on restraints of trade and monopolies places these offenses alongside similarly severe offenses such as "regrating" (which seems to have involved what we now call "retailing"),³⁷ "engrossing" (which similarly seems to have involved bulk purchasing with intent to resell),³⁸ and "forestalling" (which seems to have involved out-of-market purchasing, perhaps with intent to evade price controls).³⁹

33 WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS ch.12, at 158–59 (15th ed., A. Strahan, 1809).

34 24 Eng. Rep. 347 (K.B. 1711).

35 77 Eng. Rep. 1260 (K.B. 1602).

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

37 BLACKSTONE, *supra* note 33, at 158.

38 *Id.*

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

The latter prohibitions sound strange to modern ears, but reflect the depth to which competition policy was once regulated by powerful guilds and local governments. William Letwin summarizes the situation succinctly:

[T]he common law did not always defend freedom of trade and abhor monopoly. For a long time it did quite the opposite: it supported an economic order in which the individual's getting and spending were closely controlled by kings, parliaments, and mayors, statutes and customs, and his opportunities limited by the exclusive powers of guilds, chartered companies, and patentees.⁴⁰

25. Between long apprenticeship requirements, limits on what trades could be practiced where, and prohibitions on buying and selling outside of regulated marketplaces,⁴¹ the early competitive landscape was severely regulated. Entrusting the oversight of these matters to interested parties may not have been the wisest competition policy of all time, but it was competition policy nonetheless, and the laws that empowered these policymakers placed anti-trust's ancestral footing deep into the policy point of the triangle.
26. It has rarely ventured far from that start. In the United States, the Sherman Act had only begun to be enforced in major cases when dissatisfaction with its operation agitated lawmakers into action.⁴² Congress could have responded with specific legislation to correct perceived inadequacies in judicial application of the Sherman Act. It did so to some extent with the passage of the Clayton Act, though creative license is needed to call the provisions of that act "specific legislation." More tellingly, Congress opted to create the Federal Trade Commission (FTC) as an agency empowered to develop and use its expertise to regulate competition in the detail that statutory provisions lacked.⁴³ Subsequent decades saw the growth of expertise and policy-oriented regulatory structures within both the FTC and the Antitrust Division of the Department of Justice (DOJ).
27. A distinguishing feature of policy-oriented antitrust is its adaptability to advances in economic reasoning. Judges, too, can incorporate new thinking into their decisions.⁴⁴ But not at the speed or scope with which policy can be revised and rewritten in a bureaucratic context. This is not always a good thing. The episodic emergence of protectionist agendas

40 Letwin, *supra* note 39, at 355.

41 *See id.* at 364–66.

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

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

44 *See* *Kimble v. Marvel Entm't*, 576 U.S. 446, 461–62 (2015) (reasoning that in antitrust cases "the Court's rulings necessarily turn[] on its understanding of economics" and thus that "to overturn [earlier] decisions in light of sounder economic reasoning [is] to take them on [their] own terms" (internal quotation marks removed)). *See also* Jean-Christophe Roda, *USA: The U.S. Supreme Court refuses to apply the rule of reason, inspired by antitrust law, to patent law in a case related to the payment of post-expiration royalties (Kimble Marvel Entertainment)*, CONCURRENCES no. 3-2015, art. no. 75265.

in U.S. competition policy aptly illustrates the downside risk of policy-oriented regulation.⁴⁵ But often the flexibility of the policy approach is a clear advantage – as when the efficacy of enforcement is increased by the rapid integration of new economic techniques and modes of thinking.

3. Antitrust as Politics

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

The statute of 21 James I, which is often erroneously assumed to have prohibited monopolies was of a political nature and was aimed at abuses of the royal prerogative. The Act itself expressly provides that it shall not be prejudicial to any grant of privilege, power or authority whatsoever theretofore made or confirmed by an act of Parliament, nor was it to be prejudicial to the grants, charters or customs of the City of London or any town. . . .⁴⁶

29. Letwin similarly describes early oscillations in the strength of prohibitions on combinations in restraint of trade as mainly explained by shifting political sympathies toward the opposing interests of laborers and employers.⁴⁷
30. In the United States, the influence of politics on antitrust is even clearer. Each of the major antitrust statutes emerged during a period of intense political focus on business practices and the state of competition. Public interest in antitrust enforcement fueled these legislative exercises, and populist rhetoric plasters the legislative record of the antitrust statutes. The vagueness of the statutory prohibitions is perhaps explained by the characteristically inconsistent and superficial rhetoric of populist antitrust movements.⁴⁸
31. More than law and policy, however, the influence of politics in antitrust has changed over the decades. Reasonable people can debate whether antitrust’s political salience began to fade in the 1920s, 1960s, or 1980s. Regardless, the distance between antitrust enforcement and politics expanded over the

45 Ugly examples include the facilitation of collusion and promulgation of rules designed to dampen competition. See, e.g., Margaret C. Levenstein and Valerie Y. Suslow, *Cartel Bargaining and Monitoring: The Role of Information Sharing*, in *THE PROS AND CONS OF INFORMATION SHARING* 43, 62 (Mats Bergman ed., Stockholm: Konkurrensverket 2006) (“During the 1920s the Federal Trade Commission helped many industry associations to form with the express intention of stemming ‘cutthroat competition.’”).

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

47 Letwin, *supra* note 39, at 379–81.

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

twentieth century. Writing in 2008, Daniel Crane described political interest in antitrust as all but evaporated:

Since the Chicago School revolution in the 1970s, federal antitrust enforcement has become considerably less democratic and more technocratic. It has become increasingly separated from popular politics, insulated from direct democratic pressures, delegated to industrial-policy specialists, and compartmentalized as a regulatory discipline. Presidents no longer pay it attention, the major political parties' platforms no longer mention it, and the public does not follow it.⁴⁹

32. But, as Barak Orbach muses, “the populist style has always been common and is here to stay.”⁵⁰ The recent reemergence of populist antitrust attitudes in politics illustrates this point precisely.

IV. Antitrust Today: A Positive Appraisal

33. In 1995, Harry argued that antitrust was drifting toward the policy point of the law-policy-politics triangle. Today, I argue that it is careening toward the political point. I do not suppose that this is a highly controversial claim, but evidence of the hard turn toward politics is readily available at any rate.
34. One place to see this change is in the recent spike in populist antitrust rhetoric and the concomitant jump in public attention to antitrust. Concerns about economic bigness have swept back into the conversation.⁵¹ Magazine articles celebrate the efforts of “anti-monopoly” crusaders and lament each setback in their struggle to control tech giants, self-evidently bad.⁵² Commentators bewail lax merger enforcement, which they say has emboldened “unprecedented concentrations of economic and political power.”⁵³ The telling point in these claims is not that they appear to be empirically unsupported;⁵⁴ it is that empirical support seems not to have been considered important in the first place.

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

50 Orbach, *supra* note 32, at 8.

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

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

53 Open Markets Institute, Comment Letter on Request for Information on Merger Enforcement 3 (Apr. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-1123>.

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

35. Another way to track movement toward political regulation is in the intensity of political focus on antitrust issues. Antitrust enforcement polls well⁵⁵ and is thus a popular talking point for politicians. Are new merger guidelines a credible strategy for combating inflation?⁵⁶ No. But that does not stop the message from resonating with voters. The flurry of recent bills seeking to revamp antitrust law is a more serious example of political interest in taking control of antitrust. Bills like the American Innovation and Choice Online Act⁵⁷ and the Open App Markets Act⁵⁸ propose to change antitrust enforcement in fundamental ways – and have, at times, seemed close to becoming law.
36. Finally, increased political influence over antitrust is easy to spot in executive statements and the actions of agency leaders. Little needs to be said about the political content of presidential remarks instructing the antitrust agencies to abandon the failed experiment of prior decades of enforcement norms.⁵⁹ The FTC’s subsequent withdrawal of support for the 2020 Vertical Merger Guidelines – barely a year after their publication – is also difficult to read as anything other than political influence. The explanation that withdrawal was needed to address “flawed provisions” in the document is otherwise puzzling on its face, since little but the composition of the administration had changed in the intervening months.
37. Replacement of the 2010 Horizontal Merger Guidelines is a closer call. At more than a decade since publication, the 2010 guidelines had reached an age where they would have been due for revision or replacement even during prior decades of political detachment.⁶⁰ But the substance of the 2023 revision, which includes things like a sudden deemphasis of economic theory,⁶¹ rejection of decades of stability in market definition,⁶² and substitution of dated judicial rhetoric for empirically grounded predictions

55 See Taylor Orth, *Most Americans oppose monopolies and support antitrust laws*, YouGov (Nov. 6, 2023), <https://today.yougov.com/economy/articles/47798-most-americans-oppose-monopolies-and-support-antitrust-laws>.

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

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

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

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

60 See, e.g., U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992); U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (Apr. 8, 1997); U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010).

61 See Eleanor M. Fox, *Awakening Merger Control: The New U.S. Merger Guidelines*, in THE 2023 U.S. MERGER GUIDELINES: A REVIEW 85 (Sean P. Sullivan, ed., 2024).

62 See Gregory J. Werden, *Market Delineation under the New Merger Guidelines: Gerrymandering Redux*, in THE 2023 U.S. MERGER GUIDELINES: A REVIEW 171 (Sean P. Sullivan, ed., 2024).

about competitive effects,⁶³ is hard to reconcile with the general stability of law and economic reasoning since 2010. These changes are, of course, easily explained by the enforcement interests of the Biden administration and its appointed agency leaders.

38. Similar shifts can be seen in other aspects of enforcement. Rejection of the consumer welfare standard is not explained by any intervening change in law or economic theory – but is a touchstone of the current populist movement in antitrust.⁶⁴ A moratorium on public speaking by FTC staff is very nearly the opposite of technocratic policymaking and transparent communication with the public.⁶⁵ Withdrawal of policy statements and exercises in novel substantive rulemaking are acts that could be explained as policy-oriented antitrust enforcement, but that take on political tones when implemented in adversarial and procedurally objectionable ways.⁶⁶ The same goes for monopolization suits brought against major tech companies. Even if these challenges are fully grounded in law and economics, their consistency with the political messaging of the Biden administration⁶⁷ raises questions about political motivation that simply would not arise in a less politicized antitrust regime.

V. Antitrust Today: A Normative Critique

39. Writing 30 years ago, Harry concluded his inquiry into the state of antitrust with a warning about the direction things were headed. He cautioned that the drift toward regulatory policy was not costless, and he recommended a return to more legalistic enforcement norms.⁶⁸ Today, I would like to conclude with a similar warning. The turn toward political control of antitrust harbors more risks than might be apparent. I believe antitrust should turn back from its rapid course toward politics, while it still can.

63 See Sean P. Sullivan, *The Evolution (and Devolution) of Market Structure Reasoning*, in *THE 2023 U.S. MERGER GUIDELINES: A REVIEW* 147, 167–69 (Sean P. Sullivan, ed., 2024).

64 See Jonathan Kanter, *Antitrust Enforcement: The Road to Recovery*, Remarks as Prepared for Delivery at the University of Chicago Stigler Center (Apr. 21, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

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

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

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

68 First, *supra* note 1, at 11–12.

40. I do not mean this warning to sound hyperbolic. Politics has been a part of antitrust from the earliest days of its English law heritage. Populist sentiments are baked into the legislative history of all the major antitrust statutes. And while the recent spike in political intervention strikes a sharp contrast to antitrust enforcement under, say, the Obama administration, that may be because political attention to antitrust was abnormally low in recent decades. In short, my point is not that political control of antitrust is abnormal or even that it is necessarily undesirable.
41. My point is that movement in the political direction is not costless – and that the costs of recent escalations in political control may be greater than many realize. A few examples will help to illustrate the dangers we are courting.
42. First, we run the risk of dissipating accumulated trust and confidence in the policy positions of the federal antitrust agencies. This is because the effectiveness of any rule, law, or policy declines when it lacks stable and predictable expression. Policy statements have weight proportionate to their durability. Guidelines command respect and reliance when they describe stable and predictable principles and practices. Anything that casts doubt upon the durability and reliability of agency communications diminishes the value of those communications – in a way that may take decades to reverse.
43. This light casts shadows when trained upon things like the FTC’s rushed withdrawal of support for the 2020 Vertical Merger Guidelines. Like all guidelines, the 2020 guidelines had flaws and areas in need of improvement. But while unceremonious withdrawal may have achieved the short-run goals of agency leaders – eliminating language that failed to align with their ideology and enforcement expectations – the long-run costs of this retraction may be felt for years to come. Confidence in the merger guidelines declines – and *should* decline – when those guidelines are treated as disposable at will.
44. Second, we run the parallel risks of increasing substantive uncertainty, vesting too much discretion in short-term political appointees, and decreasing the protective influence of the rule of law in antitrust. A predictable response would say that antitrust is so famously flexible and uncertain that these concerns have little significance in this field. But that gets things precisely backward. The flexibility and vagueness of antitrust law make substantive stability and predictability more important here than elsewhere. Without strong tethers, discretion over antitrust enforcement becomes tantamount to royal prerogative.
45. To be blunt, while I suspect that supporters of the Biden administration’s antitrust program have felt quite comfortable entrusting the Biden administration’s agency leaders with discretion to rewrite antitrust rules and enforcement norms, I am less sure that they would like to see this

same degree of substantive discretion exercised by future administrations of different political persuasion. But seeds that are planted today will grow tomorrow. And if today's agency leaders are free to cast aside past policy statements, guidance documents, and enforcement procedures, then what chance do their own contributions stand of lasting through future administrations? If current enforcement decisions bear even the slightest appearance of being motivated by prior prejudice or political considerations, then what politically motivated targeting by future presidential administrations might this precedent one day come to support?

46. Finally, increased politicization of antitrust risks decreasing the long-term efficacy of antitrust enforcement. Movements fade; politicians live one election at a time. In past decades, antitrust has been steered against a distant horizon by career staffers with the experience needed to see far into the future. But in a time of intense political control, the relevant time horizon is short, the measure of success is immediate, and the future consequences of exciting strategies are considered a matter of secondary importance, if they are considered at all.
47. None of this should be taken as a denial that there are good things about the recent political disruption. Nobody could seriously claim that antitrust had ascended to a state of perfection before the recent turmoil. And few would deny that the Biden administration has identified real problems with enforcement or that it has improved antitrust thinking in important ways. But disruption is best embraced in sprints, and the long-run integration of new approaches and ideas is a task better suited to policy-oriented bureaucratic regulation than it is to either law or political control. It is, in my view, time for quiet confidence and depth to return to antitrust enforcement. The pomp and flash and headlines have done all that they can usefully do.

Darren Bush
Andrew I. Gavil
Spencer Weber Waller
Editors

Harry First

A Global Vision for Competition Law

Liber Amicorum

This *Liber Amicorum* celebrates the remarkable career and lasting influence of Harry First—a scholar, mentor, and leader in competition law. In 21 insightful essays, distinguished academics and practitioners reflect on Harry’s contributions and the pressing challenges in antitrust law and policy today.

The volume begins with personal tributes, revealing Harry’s role as a mensch, mentor, and visionary in the field. It then explores foundational questions in antitrust, from the impact of megamergers to the evolving intersection of law, policy, and politics. A deep dive into statutory interpretation follows, shedding light on key debates circling around the FTC Act, the Clayton Act, and market definition. The final section concludes with major players, including Microsoft, Apple, and the pharmaceutical industry, examining their role in shaping competition law.

Together, these chapters provide a rich mosaic of Harry’s many accomplishments and interests and the qualities that make him a very special person, teacher, scholar, enforcer, lawyer, and friend. Spanning history, policy, and enforcement, this collection is both a tribute to Harry First’s extraordinary legacy and a thought-provoking exploration of the future of antitrust law.

Concurrences

Antitrust Publications & Events



LOYOLA
UNIVERSITY CHICAGO



230 € - 240 \$ - 190 £

