Antitrust, Transformation, and Enduring Policy Change

William E. Kovacic*

INTRODUCTION

President Joseph Biden's Administration is undertaking the most sweeping transformation of U.S. competition policy since Ronald Reagan became President in 1981.[1] In July 2021, in remarks accompanying the issuance of an Executive Order on Promoting Competition Policy in the American Economy,[2] President Biden presented his rationale for far-reaching change:

> [O]ver time, we've lost the fundamental American idea that true capitalism depends on fair and open competition. Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork and pulled back on enforcing laws to promote competition. We're now forty years into the experiment of letting giant corporations accumulate more and more

* Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London. The author is grateful for comments and suggestions from participants at conferences and workshops held by the European University Institute, the Center for Research in Regulated Industries at the Rutgers Business School, the University of Paris-Dauphine, the Mercatus Center of George Mason University, and the New York University-University of Iowa workshop for this volume. The author also thanks the editorial team of the *Journal of Corporation Law* for their expert guidance.

1. The type and magnitude of policy adjustments undertaken during the Reagan Administration are examined in MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS (1991); Brian R. Cheffins, *History and Turning the Antitrust Page*, 95 BUS. HIST. REV. 805 (2021); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms,* 71 ANTITRUST L.J. 377 (2003).

2. Exec. Order No. 14036, 3 C.F.R. 609, Promoting Competition Policy in the American Economy (2021) [hereinafter EO 14036].

> power. And where—what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents. I believe the experiment failed. We have to get back to an economy that grows from the bottom up and the middle out.[3]

President Biden committed his administration to employ a "whole of government" competition policy program that, among other measures, would apply existing antitrust tools more aggressively to control mergers and dominant firm conduct and enact new legislation to regulate Big Tech.[4]

President Biden's appointments to key policy roles—Lina Khan to chair the Federal Trade Commission (FTC), Jonathan Kanter to lead the Antitrust Division of the Department of Justice (DOJ), and Tim Wu to serve as advisor for competition policy on the National Economic Council—underscored his commitment to redirect antitrust policy.[5] The Biden program is a triumph for an influential community of commentators who, since the early 2000s, have advocated the transformation of U.S. competition policy.[6] Sometimes called "neo-Brandeisians," this community has promoted a "root and branch policy reconstruction" premised on restoring the egalitarian goals framework that anchored U.S. doctrine and policy in earlier times, especially from the late 1930s through the early 1970s.[7] Some Biden appointees (e.g., Khan and Wu) are major architects of the transformation movement's philosophy,[8] and others (e.g., Kanter) have embraced it with enthusiasm.[9] Not only have the transformationalists gained major policy roles in the Biden Administration,

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3. Joseph R. Biden, President of the United States, Remarks at the White House on Signing an Executive Order Promoting Competition in the American Economy (July 9, 2021).

4. EO 14036, *supra* note 2; Rebecca Klar, *Biden Administration Boosts Support for Antitrust Efforts*, HILL (Mar. 29, 2022), https://thehill.com/policy/technology/600270-biden-administration-boosts-support-for-antitrust-efforts [https://perma.cc/GL2W-NR2R].

5. Press Release, Fed. Trade Comm'n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc [https://perma.cc/67V7-MX9E]; *Staff Profile: Assistant Attorney General Jonathan Kanter*, ANTITRUST DIV., DEP'T OF JUST. (June 15, 2021), https://www.justice.gov/atr/staff-profile/meet-assistant-attorney-general [https://perma.cc/KY73-UHT6].

6. William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (2021).

7. Sandeep Vaheesan, *How Robert Bork Fathered the Gilded Age*, PROMARKET (Sept. 5, 2019), https://www.promarket.org/2019/09/05/how-robert-bork-fathered-the-new-gilded-age/#:~:text=Much%20like%20in%20the%20first,corporate%20supremacy%20and%20individual%20powerlessness [https://perma.cc/42GT-WF2W].

8. *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (arguing for a change in antitrust policy, marking Lina Khan's official entrance as a leader of the transformational antitrust movement).

9. The scholarship of Chair Khan and Professor Wu has set out the case for antitrust policy transformation. *See, e.g.*, Lina M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018) (discussing the importance of Congress and enforcers of antitrust law in promoting competition); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (calling for the government to revive Progressive Era philosophies to confront economic inequality).

they also have spurred the development of legislative proposals to regulate large information services platforms and bolster antitrust enforcement.[10]

The transformation movement has achieved considerable success in reshaping the policy landscape—perhaps faster than the movement's leading figures ever imagined possible. The transformationalists have changed the policy debate and achieved power by circumventing a seemingly well-established orthodoxy and formidable institutions that entrenched the orthodoxy.[11] They have inspired scholars to produce a large, new body of commentary that supports the transformation cause.[12] These are extraordinary accomplishments regardless of whether President Biden and his appointees realize their vision of transformative policy change. As an exercise in effective policy advocacy, the transformation movement will command close study and inspire emulation for years to come.

Though remarkable, the accomplishments sketched above are only the first steps in a long, arduous journey. The transformationalists seek not simply to change the conversation about policy but to reshape policy itself. Their success depends heavily on their skill in overcoming a host of policy implementation challenges identified in a public administration literature developed since the early 1970s by scholars associated with Harvard University's Kennedy School of Government.[13] At a high level, good policy implementation requires mastery of what Professor Malcolm Sparrow has called "the regulatory craft"—a host of management techniques that enable agency leaders to translate broad concepts into effective programs.[14] Effectiveness hinges on the ability of policy entrepreneurs to make their reforms "stick" to foster durable policy change.[15] In their formative volume on the use of history by policymakers, Professors Richard Neustadt and Ernest May conclude that effective management of public institutions requires "canny judgments about feasibility—about doability—of contemplated courses of action."[16] Grand policy aspirations wither without effective implementation strategies and stand little chance of traversing the treacherous terrain "between the preferred solution and actual performance of government."[17]

Little of what the transformationalists had done before ascending to power in 2021 had prepared them for the implementation tasks necessary for accomplishing sweeping, durable change. They have learned quickly that there is a world of difference between

10. These proposals are analyzed in depth in Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893 (2022). Before becoming the FTC's Chair in June 2021, Professor Khan had served on the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law. *See* SUBCOMM. ON ANTITRUST, COM. & ADMIN. LAW, HOUSE COMM. ON THE JUDICIARY, MAJORITY STAFF REPORT, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020). She played a central part in the organization of the Subcommittee's hearings in 2019 and 2020 on competition policy and was the principal author of the Subcommittee's majority staff report on competition policy in the digital age. *Id.*

11. Kovacic, *supra* note 6, at 50–61.

12. *Id.*

13. *Id.* at 52.

14. MALCOLM K. SPARROW, THE REGULATORY CRAFT (2000).

15. RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME 270 (1987).

16. *Id.*

17. GRAHAM T. ALLISON, THE ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 268 (1971); *see also* ERIC PATASHNIK, REFORMS AT RISK 3 (2008) ("General interest reforms are frequently adopted with great fanfare, but their success cannot simply be taken for granted . . . . Indeed, sustaining reforms against the threats of reversal and erosion may be even tougher than winning the reforms in the first place.").

advocating for dramatic reforms and accomplishing them in practice. This Article takes stock of the reform measures to date and discusses the policy implementation obstacles that now stand between the transformationalists and the realization of a lasting redirection of competition policy. The Article develops themes addressed in an earlier, tentative treatment of the subject one year into the Biden administration.[18] Several perspectives guide the Article. Many observations draw upon earlier research relating to antitrust policy implementation, including co-authored papers with Professor David Hyman,[19] Professor Alison Jones,[20] and Marc Winerman.[21] The Article also considers experience with two previous major efforts to transform the U.S. competition policy system: the makeover of the FTC in the late 1960s and in the 1970s and the Reagan Administration's antitrust program in the 1980s.[22] Each episode involved attempts to make sweeping changes to the substance and institutional arrangements of the U.S. antitrust system.

I also address the issue of implementation as a former government official with firsthand exposure to the conditions that affect policy change. I was a staff attorney at the FTC from September 1979 through August 1983 and witnessed the tumultuous transition between the Carter and Reagan Administrations. I was the FTC's General Counsel from 2001 through 2004, was a member of the Commission from 2006 to 2011 and chaired the agency from March 2008 to March 2009. From April 2014 through March 2022, I was a Non-Executive Director on the board of the United Kingdom's Competition and Markets Authority (CMA). I do not speak for the CMA or the FTC, but my public sector experiences inform the discussion that follows.

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18. *See generally* William E. Kovacic, *The Durability of the Biden Administration's Competition Policy Reforms*, 29 GEO. MASON L. REV. 945 (2022).

19. William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295 (2016) [hereinafter Kovacic & Hyman, *Consume or Invest*]; David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015) [hereinafter Hyman & Kovacic, *Play This Game*]; David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163 (2013); William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527 (2012).

20. Alison Jones & William E. Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. 227 (2020) [hereinafter Jones & Kovacic, *Implementation Blindside*]; *The Institutions of Antitrust Enforcement: Comments for the U.S. House Judiciary on Possible Competition Policy Reforms: Hearing Before H. Subcomm. on Antitrust, Commercial, and Admin. L. of the H. Comm. on the Judiciary* (Apr. 17, 2020) (prepared remarks by Alison Jones & William E. Kovacic) [hereinafter Jones & Kovacic, *Institutions of Antitrust Enforcement*].

21. Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1939*, 77 ANTITRUST L.J. 701 (2011); Marc Winerman & William E. Kovacic, *Outpost Years for a Start-up Agency: The FTC from 1921–1925*, 72 ANTITRUST L.J. 145 (2010).

22. Useful accounts of the Reagan administration's antitrust efforts include THEODORE P. KOVALEFF, THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE: COMPLETE REPORTS OF THE FIRST 100 YEARS (2016); THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION (James C. Cooper ed. 2013); JAMES C. MILLER III & ROBERT MACKEY, PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION (Bruce Yandle ed. 1987); James F. Ponsoldt, *A Retrospective Examination of the Reagan Years,* 33 ANTITRUST BULL. 201 (1988); Robert H. Lande, *The Rise and (Coming) Fall of Efficiency As the Ruler of Antitrust,* 33 ANTITRUST BULL. 429 (1988).

My time in senior leadership roles at the FTC falls within the period that President Biden and many transformationalists depict as an era of unrelieved policy failure.[23] To my mind, the suggestion that U.S. competition policy has been a wasteland since the early 1980s is manifestly wrong.[24] My aim here is not to debate the performance of the U.S. competition regime, although I discuss how the transformationalists' catastrophe narrative impedes their efforts to wield power effectively. Among other consequences, the catastrophe narrative undermines the morale of DOJ and FTC professional staff whose commitment is essential to the transformation program's success, and it obscures how agency programs undertaken from the late 1970s through 2020 offer valuable lessons about how to carry out the transformation program.

The Article is organized as follows. It first describes the measures a presidential administration can take to carry out an enduring policy transformation. The Article then discusses obstacles that stand in the path of dramatic reforms. The Article concludes with observations about the prospects of success for the Biden administration's transformation program.

I. MEANS OF COMPETITION POLICY TRANSFORMATION

A presidential administration and its appointees can use varied approaches to achieve a lasting regulatory policy transformation.[25] Each of the main devices are sketched below.

Statutory Framework. Perhaps the most important way to accomplish an enduring regulatory policy transformation is to enact legislation that embeds sweeping changes into the law. This is a major aim of legislative proposals to establish a new regulatory framework for Big Tech and to change the standards governing the analysis of mergers and dominant firm behavior.[26]

Jurisprudence. The second most significant instrument for change is to gain judicial interpretations of the law that embrace the administration's policy vision. An essential foundation for desired doctrinal adjustment is to appoint judges who share the

23. *See supra* text accompanying note 4; *see also* Kovacic, *supra* note 6, at 47 (describing critiques of transformation advocates of antitrust policy since the late 1970s).

24. My previous articles summarize my assessment of the work of the FTC from my firsthand perspective at the agency from 2001–04 and 2006–11. *See generally* William E. Kovacic, *Keeping Score*: *Improving the Positive Foundations of Antitrust Policy*, 23 U. PA. J. BUS. L. 49, 56–58 (2020) [hereinafter Kovacic, *Keeping Score*]; William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014) [hereinafter Kovacic, *Politics and Partisanship*]; William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

25. *See* Filippo Lancieri et al., *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 65 ANTITRUST L.J. 441, 463–86 (2023) (discussing tools that can serve to alter antitrust policy); *see also* William E. Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 RSCH. L. & ECON. 173, 176–78 (1989) (examining antitrust enforcement during the Reagan administration); William E. Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration*, 33 ANTITRUST BULL. 467, 467–70 (1988) [hereinafter Kovacic, *Public Choice*] (examining antitrust decision making during the Reagan administration); William E. Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration*, 35 FED. BAR ASS'N NEWS & J. 244 (1988) [hereinafter Kovacic, *Built to Last*] (examining the legacy of antitrust enforcement during the Reagan administration).

26. Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893, 895, 911–19; *see generally* Jones & Kovacic, *Implementation Blindside*, *supra* note 20 (explaining the challenges of Big Tech antitrust enforcement).

administration's policy preferences.[27] The litigation activity of the antitrust enforcement agencies,[28] in prosecuting their own cases and appearing in an amicus capacity in private lawsuits, are further instruments for catalyzing doctrinal change.[29] Agencies also can foster lasting policy adjustments by issuing guidelines that support the adoption by courts of specific policy approaches.[30] An agency also can perform research and issue studies that courts rely upon when interpreting the law.[31]

Agency Appointments. Presidents can place a lasting mark on public policy through their appointment of public agency leadership.[32] In competition law, agency leaders play central roles in formulating the agency's substantive program.[33] A similarly significant contribution of appointees is to imbue their institutions with a culture that supports the attainment of the administration's policy aims—for example, by encouraging the acceptance of norms that encourage greater risk taking in the selection and prosecution of cases or the promulgation of rules.[34]

Guidance. As noted briefly above, agencies can promote lasting changes in the policy framework through the issuance of guidelines that describe how the agency will use its

27. The importance of judicial appointments as means of influencing the direction of antitrust doctrine is analyzed in William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, 7 ANTITRUST, Spring 1993, at 8 [hereinafter Kovacic, *Judicial Appointments*]; William E. Kovacic, *Reagan's Judicial Appointments and Antitrust in the 1990s,* 60 FORDHAM L. REV. 49 (1991) [hereinafter Kovacic, *Antitrust in the 1990s*].

28. In at least two cases since 2000, the Supreme Court has relied upon FTC reports in interpreting the law. *See* cases cited *infra* note 31.

29. *See infra* notes 91–92 and accompanying text (describing the FTC litigation strategy in the 2000s that sought to gain judicial recognition for the agency's methodology for applying the quick look to horizontal restraints cases); Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 628–29 (2001) (discussing the influence of government agency amicus curiae briefs in influencing doctrine).

30. The powerful influence of federal guidelines on judicial analysis of mergers is documented in Hillary Greene, *Guidance Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006). On the impact of FTC reports on Supreme Court jurisprudence involving economic regulation, see William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 920–21 (2009) (discussing the impact of FTC reports involving intellectual property and restrictions on internet sales of wine).

31. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396 (2006) (citing and relying upon FTC studies regarding enforcement of intellectual property rights); Granholm v. Heald, 554 U.S. 460, 466 (2005) (citing and relying upon FTC reports regarding state statutes that restrict interstate sales of wine using the internet).

32. The crucial role of agency appointments in determining agency policy is set out in WILLIAM E. KOVACIC, *Leading a Competition Agency: A Synthesis*, IN GREAT ANTITRUST ENFORCERS—LESSONS FROM REGULATORS 1 (William E. Kovacic ed. 2023) [hereinafter KOVACIC, *Leading a Competition Agency*]; William E. Kovacic, *Formula for Success—A Formula One Approach to Understanding Competition Law System Performance*, in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 312, 321–22 (Damien Gerard & Ioannis Lianos eds. 2019) [hereinafter Kovacic, *Formula for Success*].

33. KOVACIC, *Leading a Competition Agency*, *supra* note 32. Perhaps the most significant responsibility of senior leadership is to define the agency's priorities and to set out the institution's "positive agenda." *See* Timothy J. Muris, *Looking Forward: The Federal Trade and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 360–63 (discussing the presentation by the FTC Chair of the Commission's priorities, and the projects set for achieving them).

34. For example, in response to demands from Congress and various commentators for a transformation of the FTC, the agency's leadership in the late 1960s and early 1970s sought to establish a culture that welcomed more ambitious application of the agency's policy tools. Kovacic, *Keeping Score*, *supra* note 24, at 82–83.

enforcement discretion.[35] Among other contributions, guidelines steer the agency's own staff in the development of policy initiatives and encourage courts to embrace the agencies' favored interpretation of the law. Although agency guidelines in no sense bind the courts, well-reasoned conceptual frameworks are often gradually absorbed into judicial decisions and become the foundation for an evolving legal framework.[36]

Process. An agency can determine the content of policy by adopting procedures that press toward the accomplishment of favored objectives. Means to this end include procedural changes that expedite the issuance of cases and rules, or tightening the scrutiny of activity (e.g., proposed mergers) subject to the agency's oversight.[37]

Reallocation of Policy Tasks Across Government Institutions. One way to promote policy change is to redistribute policy functions across the government.[38] This can involve the creation of new government agencies to carry out specific duties (e.g., the formation of the Consumer Financial Protection Bureau in 2011 or the creation of the FTC in 1914) or to reassign policy mandates among existing government institutions.[39] These adjustments can have the effect of placing enforcement responsibility in the hands of a body more likely to execute the desired policies of Congress or the executive.

Internal Agency Reorganizations. The reorganization of an agency is one way to give more emphasis to favored policy initiatives. Reorganizations can take the form of creating a unit dedicated to dealing with a specific sector (e.g., health care)[40] or a unit assigned to provide new analytical tools to support the agency's operations (e.g., the creation of a data analysis unit).[41]

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35. Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039, 1039–40 (2005); William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5, 5–6 (2000).

36. This pattern is evident in cases in which the courts have embraced concepts set out in the DOJ and FTC horizontal merger guidelines. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 756–78, 813–15, 837–40, 861–62 (4th ed. 2021) (discussing application of the DOJ and FTC's 2010 Horizontal Merger Guidelines by the district court in United States v. H&R Block, Inc., 833 Fed. Supp. 2d 36 (D.D.C. 2011)).

37. Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During This Unprecedented Merger Wave*, FED. TRADE COMM'N. (Sept. 28, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-and-more-rigorous-during-unprecedented-merger-wave [https://perma.cc/9UFQ-4D8Q].

38. David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1451–52 (2013).

39. *Id.* at 1485–1508 (describing the creation and organization of the Consumer Financial Protection Bureau); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) (describing the origins of the FTC and aims that motivated Congress to create a new competition authority to supplement the work of the Justice Department).

40. Luke M. Froeb & Paul A. Pautler, *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569, 581 (2009).

41. COMPETITION & MKT. AUTH, THE CMA'S DIGITAL MARKETS STRATEGY 9–10 (2019) (discussing development and operation of the Data, Technology, and Analytics unit). The reorganization of an agency also can affect how existing analytical capabilities are applied to the preparation of cases and to conducting research that informs policy making. *See* Luke M. Froeb et al., *Organization Form and Enforcement Innovation*, 85 ANTITRUST L.J. 297, 329–51 (2023).

Budgeting. Vital to the execution of any policy program is the appropriation of funds needed to execute assigned responsibilities.[42] As described below, the realization of the Biden Administration's competition policy goals will require major, sustained increases in resources for the federal antitrust agencies.[43]

Some of the transformation techniques sketched above are more durable than others. Lasting, significant policy adjustments ordinarily are grounded in supportive statutory and doctrinal frameworks. Softer policy tools such as the issuance of guidelines or adjustments in agency processes can make important contributions, but they are more vulnerable to revocation or major revisions. Soft power tools are more readily reversible by future administrations and their appointees, especially in the wake of a regime change.

II. OBSTACLES TO COMPETITION POLICY TRANSFORMATION

To carry out its transformation program, the Biden Administration must overcome a number of obstacles that stand in the way of lasting fundamental change. The discussion below identifies the major impediments.

A. Time

Achieving durable, fundamental policy change often takes a long time.[44] Reformers must establish doctrinal or statutory foundations for their program, change the culture and practice of regulatory authorities, sustain the political support that provides sufficient legal authority and resources to apply it, and gain the appointment of agency leaders and judges who are sympathetic to the reform agenda. Doing these things takes considerable time, and the individual heads of the DOJ Antitrust Division and the FTC ordinarily do not serve long enough to see lasting changes accomplished during their tenure in office.[45] Longer term success often requires the change advocates to win a series of elections and persuade political leadership to sustain support for the program when regime changes take place in the executive branch or when firms subject to bold new agency initiatives approach Congress to restrict the agency's freedom of action.[46] The process of achieving enduring reform is best seen as a long-distance relay event (and an ultra-marathon relay race, at that) and not a sprint.

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42. Kovacic, *Formula for Success*, *supra* note 32, at 319 (discussing the role of political leadership in determining agency budgets).

43. Jones & Kovacic, *Institutions of Antitrust Enforcement*, *supra* note 20 (proposing dramatic increases in the budget for the Department of Justice Antitrust Division and the FTC).

44. For helpful surveys that set out the predicates for policy transformations, see Mark K. McBeth et al., *The Intersection of Narrative Policy Analysis and Policy Change Theory*, 35 POL'Y STUDS. J. 87 (2007); William Lowry, *Potential Focusing Projects and Policy Change*, 34 POL'Y STUDS. J. 313 (2006).

45. By my calculations, since 1933 the average tenure for the Assistant Attorney General for Antitrust is two years and seven months. Since 1950, the average tenure for the Chair of the FTC has been three years and three months.

46. The longer an agency initiative takes to complete, the more vulnerable it is to shifts in the policy preferences of Congress or the White House. Many times in its history the FTC has suffered damaging attacks from Congress when measures that once enjoyed congressional approval lost their political support when congressional preferences changed, especially in response to effective lobbying by commercial targets of FTC action. *See* William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 871 (1989) (discussing "the political feasibility of the FTC's role in light of the agency's relations with Congress").

Earlier attempted competition policy transformations suggest how long it takes to achieve fundamental change. The Reagan Administration's antitrust reform program provides an example. Ronald Reagan and his successor, George H.W. Bush, together had twelve years (from 1981 to 1993) to impart a new vision into the U.S. antitrust system—to change the culture of the public enforcement agencies, to appoint agency leadership, to seek new legislation, and to appoint federal judges. The Reagan and Bush administrations obtained some modifications to the antitrust statutes,[47] but the stated aim of passing major legislation to alter substantive antitrust rules was not attained.[48] The major policy changes achieved between 1981 and 1993 took place through the litigation of cases and the application of soft power tools (e.g., reforms to the DOJ merger guidelines in 1982, 1984, and 1992), the realignment of the federal enforcement program, a reduction in the budgets of the DOJ and the FTC, and sustained efforts—through the appointment of agency leaders and the recruitment of staff personnel—to adjust the culture of the enforcement agencies.[49] However, by 1993, the statutory framework that controlled dominant firm conduct, mergers, and vertical agreements was essentially the same as the framework in place in January 1981.

In fundamental ways, the Reagan-Bush policy changes were reversible. Their permanence depended upon the willingness of future presidents to appoint agency leaders who would sustain, in key respects, policies set in place between 1981 and 1993. The durability of the Reagan-era changes also required the further development of jurisprudence that reflected the Reagan-Bush preferences (and thus cabined the ability of future plaintiffs to pursue more intervention-minded certain theories of liability).

To a large degree, both things happened. On the federal enforcement side, there was variation in the enforcement programs of the federal agencies from 1981 through 2020.[50] Compared to the Reagan and Bush Administrations, the Clinton-era antitrust leadership expanded the enforcement of section 2 of the Sherman Act, with the exemplar being the DOJ's successful prosecution of Microsoft.[51] The federal merger control program achieved a greater number of litigation successes in this period, with the caveat that defendants routinely prevailed in litigated challenges to hospital mergers.[52] With one notable adjustment adopted in 1997, the Clinton enforcement agencies embraced and applied the horizontal merger guidelines promulgated by the DOJ and the FTC in 1992.[53]

The most interesting period is perhaps the two decades beginning in 2001. The FTC continued to bring noteworthy section 2 matters, but the DOJ brought few—none during

47. Major statutory adjustments between 1981 and 1993 included enhancements to the criminal antitrust enforcement regime, relaxation of controls on research and development joint ventures, and measures to improve cooperation and coordination between the United States and other countries. Kovacic, *Built to Last*, *supra* note 25, at 245–46.

48. The Reagan Administration sought, without success, to persuade Congress to amend the Clayton Act to revise standards for merger control. *Id.* at 245.

49. William E. Kovacic, *Public Choice*, *supra* note 25, at 467–70; Kovacic, *Built to Last*, *supra* note 25, at 246–47.

50. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 389 (2003).

51. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

52. Kovacic, *supra* note 50, at 437–42.

53. Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 115 (2002).

the George W. Bush administration and a few arguably insignificant matters during the Obama presidency.[54] The FTC considered, but did not initiate, a case against Google for illegal monopolization in 2011–13.[55] Only during the Trump Administration did the federal agencies take on Big Tech in section 2 lawsuits, with the DOJ's case against Google and the FTC's prosecution of Facebook (Meta).[56] From 1981 through 2020, only during the Clinton Administration did DOJ leaders appointed by Democrats mount significant section 2 cases. Neither federal agency has appeared before the Supreme Court as the plaintiff in a monopolization case since 1973.[57]

The evolution of doctrine from the late 1970s to the present also suggests how long it can take to reshape judicial interpretations that frame the options available to enforcement agencies and private plaintiffs. The merger jurisprudence of the lower federal courts (the Supreme Court last addressed the substantive standards for merger control in 1975)[58] grew increasingly permissive in the 1980s and early 1990s—so much so that the DOJ and the FTC in 1992 revised the government's horizontal merger guidelines to push back against court of appeals decisions that had opened the door to highly concentrative consolidations.[59] By contrast, by the end of the Bush presidency in early 1993, the development in the Supreme Court of doctrine governing dominant firms was up for grabs. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[60] in 1985 and *Eastman Kodak Co. v. Image Technical Services, Inc*.[61] in 1992, the Court seemed to accept a potentially expansive view of conduct that might constitute improper exclusion.[62]

A year after *Kodak*, the Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[63] restated the intervention skepticism toward predatory pricing it had set out in *Matsushita Electrical Industrial. Co. v. Zenith Radio Corp.*[64] in 1986 and retreated from the suggestion in *Kodak* that it reduce its reliance on theoretical propositions and instead follow the facts where they led, including to a more frequent finding of liability.[65] It would

54. *See, e.g.*, Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act,* 90 B.U. L. REV. 1611 (2010) (analyzing the behavior of the Obama Administration's more aggressive usage of section 2); William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 GEO. MASON L. REV. 1157 (2014) (discussing the development of global economic power throughout history).

55. Leah Nylen, *How Washington Fumbled the Future*, POLITICO (Mar. 16, 2021), http://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-Investigation-475573 [https://perma.cc/YU2X-XVCC].

56. Kovacic, *supra* note 6, at 46 & n.3.

57. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

58. The Supreme Court's most recent decision addressing substantive merger standards is *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975). *See also* GAVIL ET AL., *supra* note 36, at 707–19 (discussing absence since 1975 of Supreme Court merger decisions involving substantive merger standards).

59. Jonathan B. Baker, *The Problem with Baker Hughes and Syufy: On the Role of Entry in Merger Analysis*, 65 ANTITRUST L.J. 353, 356 (1997).

60. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603 (1985).

61. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 (1992).

62. *See, e.g.*, Jonathan B. Baker*, Promoting Innovation Competition Through the* Aspen/Kodak *Rule*, 7 GEO. MASON L. REV. 495 (1999) (discussing the value of greater structure in reviewing antitrust monopoly allegations); Robert H. Lande*, Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193 (1993) (explaining the conflict between the Chicago School and post-Chicago School regarding market failures and imperfect information).

63. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224–26 (1993).

64. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–89 (1986).

65. *Brooke Grp. Ltd.*, 509 U.S. at 211.

take much longer for the Court to install key pillars of intervention skepticism into the framework of antitrust jurisprudence governing single firm conduct[66] and other important elements of the antitrust system.[67] If one marks the beginning of the Supreme Court's retrenchment of antitrust doctrine as 1977 with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*.[68] and *Continental T.V. Inc. v. GTE Inc.*,[69] the full realization of a more permissive doctrinal environment arguably is not achieved until forty years later, with two decades of largely pro-defendant decisions capped by *Ohio v. American Express Co*.[70] in 2018. Getting there required the appointment—by both Republicans and Democrats—of Supreme Court Justices (and lower court judges) inclined to view expansive applications of antitrust law with skepticism.

A key question for the transformation movement is: how long will Joseph Biden and future presidents appoint transformation-minded leaders to the federal agencies and appoint federal judges who are receptive to the types of cases the transformationalists will bring? In his judicial appointments through August 2023, President Biden has not employed Ronald Reagan's strategy of elevating academics with expertise in business subjects and economic regulation to the federal bench, especially to the courts of appeals.[71] President Biden has strived to achieve greater diversity in gender, race, and employment backgrounds (e.g., by selecting individuals with experience acting for defendants in the criminal justice system).[72] President Biden has yet to appoint an academic with deep expertise in antitrust law or other fields of business regulation.

Sustained political support over a period of several decades will be essential to achieving the Biden Administration's competition policy transformation program. This confronts transformation advocates with a vexing choice: should they adopt a "big bang" approach that launches large numbers of ambitious measures on the assumption that future elections (indeed, a series of future elections) will keep their team in power? Or should they undertake a more modest set of initiatives (and tone down the portrayal of these steps as a dramatic departure from past practice) to help ensure that basic changes survive regime changes in the future? To pursue the latter approach, incumbent leadership must consider what policies are sustainable in the sense that successor administrations with different (and less intervention-minded) policy preferences might be willing to embrace them. Achieving this inter-temporal consensus requires some moderation of the arguments and policy positions that transformation advocates have advanced to justify fundamental changes, such as acknowledging that some aspects of federal competition policy since 1980 have had redeeming features. Saying so could be seen by transformation advocates outside the

66. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko L.L.P., 540 U.S. 398, 414 (2004); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319–20 (2007); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 452–53 (2009).

67. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

68. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

69. Cont'l T.V. Inc. v. GTE Inc., 433 U.S. 36 (1977).

70. *Am. Express Co.*, 138 S. Ct. at 2285.

71. Binyamin Applebaum, *When Picking Judges, Democrats Need to Stop Ignoring Economics*, N.Y. TIMES (June 1, 2022), http://www.nytimes.com/2022/06/01/opinion/judges-democrats-antitrust.html (on file with the *Journal of Corporation Law*). The Reagan strategy of appointing academic experts in economic regulation to the federal courts of appeals is examined in Kovacic, *Judicial Appointments*, *supra* note 27, at 8.

72. Applebaum*, supra* note 71.

agencies as a betrayal of the cause and elicit retribution, at least in the form of scalding social media rebukes.

B. The Catastrophe Narrative

One foundation for making the case for fundamental policy change is to depict the policy status quo as a catastrophe. Calls for modest, incremental reforms do not inspire the imagination of transformation advocates or rally a larger public. Proposals to remodel a house with some admittedly attractive features—improving the kitchen or expanding the family room—create no sense of urgency for sweeping change. Alternatively, the catastrophe narrative galvanizes action by demanding the demolition and replacement of existing structures.

Past efforts to promote dramatic competition policy reforms often have invoked variants of the catastrophe narrative. In the late 1960s, advocates for a transformation of the FTC portrayed the Commission as a calamitous failure that was obsessed with useless programs and shot through with cowardice and ineptitude from senior leadership down to the ranks of case handlers.[73] In the early 1980s, the Reagan Administration and its cohort of supporting commentators portrayed federal enforcement policy in the post-World War II era as deranged, with particular contempt for ambitious FTC programs developed in the 1970s to respond to the catastrophe narrative of reformers in the late 1960s.[74] In somewhat less acerbic terms, Barack Obama campaigned for the presidency in 2008 by saying that the federal enforcement program of the George W. Bush Administration may have been the weakest since the late 1950s.[75]

In their own ascent to power, the transformationalists have refined and extended the catastrophe narrative state of the art. In the most recent telling, antitrust policy since the late 1970s is said to have been an abject failure.[76] The DOJ and FTC are claimed to have timidly avoided prosecuting serious misconduct and focused on easy, insignificant cases they were certain to win; they fished for minnows and allowed corporate sharks to take command of the seas.[77] More than earlier catastrophe narrators, the transformationalists have asserted that the architects of the disfavored policies were not merely mistaken in their policy judgments. Instead, the failed institutions that produced bad policies were headed by bad people who, the narrative often asserts, are corrupt.[78]

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73. William E. Kovacic, *"Competition Policy in Its Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977–1981*, 69 WM. & MARY L. REV. 1269, 1275–77 (2019); Hyman & Kovacic, *Play This Game, supra* note 19, at 1953–71.

74. Kovacic, *Keeping Score*, *supra* note 24, at 78–79 (recounting criticism of FTC by David Stockman, Reagan's first director of the Office of Management and Budget); Kovacic, *Public Choice*, *supra* note 25, at 470–80 (describing findings and recommendations of the Reagan transition report on the FT); James C. Miller III, *No More "Star Trek Antitrust" at the FTC: The Taming of a Wayward Regulator*, 15 ANTITRUST L. & ECON. REV. 69, 77–79 (1983).

75. Kovacic, *Politics and Partisanship*, *supra* note 24, at 698–700 (discussing Obama's criticism in 2008 of federal antitrust enforcement during the presidency of George W. Bush).

76. Kovacic, *supra* note 6, at 47; Kovacic, *supra* note 73, at 1325–26.

77. Kovacic, *supra* note 6, at 49–50.

78. *Id.* at 50; *see also* Rohit Chopra, Prepared Remarks of CFPB Director Rohit Chopra at the 2023 American Economic Liberties Project Anti-Monopoly Summit (May 4, 2023), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-2023-

These narratives may serve to gain power, but they can have harmful side effects. The very arguments used to acquire power can obstruct its effective use. Several adverse consequences stand out. First, as each reform movement spins out its own catastrophe narrative, the accumulation of disaster stories through the years suggests that the baseline existence of the public institutions is poor performance born out of sloth, stupidity, cowardice, lunacy, and corruption. What are said to be fundamentally deranged institutions have no evident, internal capacity for intelligent reflection and policy adjustment over time. The demented public agencies perform effectively only when presidents appoint the right people to leadership positions. Personalities count for everything, and institutional structures and procedures count for nothing.

This dismal portrayal of public administration destroys the trust and respect that institutions with policy implementation duties must sustain to be effective. It is hard to see why anyone should have confidence in institutions that ordinarily blunder or flee the field, except in rare lucid intervals when enlightened leaders take control. There is little apparent reason to trust a system whose behavior depends on personal whim, detached from the discipline of healthy customs, norms, and processes.[79]

The destruction of an agency's brand is particularly damaging when the agency appears before courts and invokes its expertise as a basis for gaining deference. Courts are unlikely to be inspired to defer to the judgment of agencies so often portrayed as being craven or deranged.

A second adverse side effect of the catastrophe narrative is that it induces new reform leadership to regard the existing agency managers and professional staff as deadbeats or incipient mutineers bent on subverting the reform program. New leaders who espouse a catastrophe narrative can take months to realize that most agency personnel will loyally and creatively carry out a new program.[80] In my time at the FTC in the early 1980s, I saw painful instances in which the irrational suspicions that new leadership showed toward the agency's staff slowed the reform process. In the early months of their tenure, the leadership of the Biden FTC appears to have fallen into the same trap.[81] This condition can be

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american-economic-liberties-project-anti-monopoly-summit [https://perma.cc/52DN-UAKX]. Rohit Chopra served as a member of the FTC from 2017 to 2021. In a May 2023 speech, Chopra gave his view of the condition of the FTC when he arrived at the agency in 2017: "The FTC had fallen into deep decay and disarray over four decades. While there were short spurts of hope, the agency had largely lost its credibility as a regulator and enforcer. Actions by Commissioners and top leadership spanning multiple administrations revealed a disdain for Congress and the rule of law, ignoring laws and statutory directives." *Id.*

79. Good leadership is crucial to the successful operation of a competition agency. Yet a good agency should develop strong internal customs, processes, and norms that guide it toward better performance over time. Success in the race depends heavily on the skills of the driver, but also on the quality of the car and the team that supports it. Kovacic, *Formula for Success*, *supra* note 32.

80. Norman C. Thomas, *Politics, Structure, and Personnel in Administrative Regulation*, 57 VA. L. REV. 1033, 1047 (1971) (finding that the interests of the President are, generally, eventually represented in the priorities of the agency).

81. *See* Leah Nylan, Alex Thompson & Max Tani, *Trouble in Khan's Corner*, POLITICO (Apr. 5, 2022), https://www.politico.com/newsletters/west-wing-playbook/2022/04/05/trouble-inside-the-kingdom-of-khan-00023056 [https://perma.cc/HXD9-DCJ4] (explaining how the arrival of new FTC Chair Lina Khan has been divisive within the agency); Cat Zakrzewski, *Sinking FTC Workplace Ratings Threaten Chair Lina Khan's Agenda*, WASH. POST (July 13, 2022), http://www.washingtonpost.com/technology/2022/07.13/ftc-lina-khan-ratings [https://perma.cc/YTT4-ZRBW] (explaining how a decline in morale at the FTC makes effectuating a new regulatory agenda more difficult).

corrected (the Reagan appointees gradually changed their attitude, and the Biden appointees may do the same), but the time taken to overcome the initial suspicions steals precious time from implementing policy reforms.

A third side effect involves agency morale. A reform movement that rises to power by condemning the existing public institutions as inept, or worse, will find it difficult to win the hearts and minds of the professional staff whose contributions will be essential to the success of the reform program. In my experience, civil servants are not a frail group. They are accustomed to and can withstand the abrasions that inevitably come with the arrival of a new leadership team. Nonetheless, it is profoundly dispiriting to hear newly arrived leadership say that much of one's work has been a catastrophe. Nor is it edifying to hear political appointees and their external supporters attribute an agency's deficiencies to cowardice and moral dereliction.[82] Leaders from a movement that has damned an agency's personnel, in deeply personal terms, may find it difficult to rally its personnel to strive on their behalf. An agency leader makes a serious mistake by underestimating the ability of the careerists to enable or disable reform.[83] Recall that, in his fabled visit to Lilliput, Gulliver one day woke up to find that he could not move; the diminutive inhabitants had tied him down during the night.[84]

A fourth adverse side effect of the catastrophe narrative is that it blinds the narrator to agency accomplishments that are worth preserving or imitating, if only because such achievements can be useful in advancing the new reform agenda. There is little to gain in studying a wasteland. But what if the supposed wasteland instead has oases (or even expanses) of good policy? The Reagan Administration appointees gradually realized that some FTC programs they inherited made sense, and Reagan appointees ultimately strove to sustain them.[85] In other instances, however, the barely rebuttable presumption that the FTC of the 1970s was deranged led the Reagan-era leadership to dismantle programs that should have been seen as good policy and fully consistent with the Reagan FTC's agenda.[86]

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82. For a notable example of this form of caustic commentary, see JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF CAPITALISM 116 (2018) ("Dozens of industries are so egregiously concentrated, that it begs the question as to what the authorities are doing with their time. We don't know. We know for a fact that workers at the Securities and Exchange Commission spent their time watching porn while the economy crashed during the Financial Crisis. We would have to speculate about the Department of Justice and the Federal Trade Commission.").

83. Some commentators have suggested that all it takes to effectuate basic policy change is forceful leadership. *See* Rana Foroohar, *The Failures of Stakeholder Capitalism*, FIN. TIMES (May 1, 2022), https://www.ft.com/content/f7f76d7c-2d01-4129-b87d-fcc9815e3a77 [https://perma.cc/SSZ6-J26V] ("Big company market power, political power, and the cognitive capture of policymakers is huge, particularly in the US. But it only takes one or two stronger leaders to change things."). This view overlooks other predicates for reform. Without a proficient bureaucracy to implement a reform program, strong leaders are likely to spin their wheels.

84. JONATHAN SWIFT, GULLIVER'S TRAVELS 19 (Open Rd. Integrated Media 2014) (1726).

85. Kovacic, *supra* note 50, at 427–28 (describing support given by the FTC during the Reagan Administration for the completion of horizontal restraints matters begun during the Carter Administration).

86. As an attorney in the Planning Office of the Bureau of Competition from 1979 through 1982, I worked on a project to evaluate the effects of some of the FTC's completed antitrust cases. *See* William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 524–27 (2006) (describing the FTC's antitrust Impact evaluation project). The project yielded assessments of several FTC vertical restraints cases and one monopolization case. *Id.* at 525–26. Plans were underway to assess a merger

The era that President Biden depicts as forty years of failure includes a number of initiatives—cases, public consultations, studies, and rulemaking proceedings—that the Biden appointees might want to study carefully to build their own programs. For example, since the mid-1990s, the FTC has used a broad collection of policy tools and cooperation with other government agencies (essentially precursors to President Biden's "whole of government" competition policy approach) to develop valuable programs. One set of initiatives involved the rights granting system for intellectual property (IP) and the assertion of IP rights to suppress competition improperly.[87] In another program, the Commission used public hearings, studies, reports, and litigation to restore the agency's capacity to challenge anticompetitive hospital mergers and expand the application of competition policy to the health care sector.[88] Through a variety of public consultations, the FTC sought to identify and adopt superior practices applied by competition agencies abroad.[89] The expansion and refinement since the mid-1970s of the DOJ criminal enforcement program against cartels, especially to address bid-rigging in public procurement, is another meaningful illustration of effective policy development over time.[90]

Particularly in the face of an often-skeptical judiciary, the DOJ and the FTC will need all the help they can get in designing cases that succeed in extending the boundaries of antitrust enforcement. Following a setback in 1999 the FTC in the 2000s set about seeking to restore the vitality of the quick look as a tool for evaluating horizontal restraints.[91] This initiative resulted in several favorable court of appeals decisions.[92] In the 2000s, the FTC

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settlement from the 1970s to serve as a prototype for a larger program of merger enforcement impact evaluations. I was the FTC's contractor technical representative on the merger evaluation. In 1982, the leadership of the Bureau of Competition instructed me and the other members of the evaluation team to abandon the project.

87. *See* William E. Kovacic, *Intellectual Property Policy and Competition Policy*, 66 N.Y.U. ANN. SURV. AM. L. 421, 425 (2010) (discussing the effects of changes to the patent system over time); William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319, 321–25 (2006) (granting rights to IP as a measure against suppressing merger disputes).

88. On the development of the FTC's antitrust health care program, see William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861, 865 (2005).

89. For the outcome of these consultations, see William E. Kovacic, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY 32 (2009).

90. Kovacic, *supra* note 1, at 416–25. In rolling out its efforts to prosecute no-poaching arrangements as crimes, the DOJ would have benefitted from studying the case selection strategy that the Department used in the 1970s and 1980s to apply the enhancements in the criminal enforcement regime adopted by Congress in 1974. The DOJ used considerable discipline to look for cases most likely to appeal to juries. Many of these cases involved bid rigging on government procurement tenders, where the misconduct could be depicted to juries as theft of their tax payments to the public treasury. The launch of the no poaching criminal enforcement program has encountered significant resistance from juries and, at times, from judges. Dan Papscun, *Ex-Pratt & Whitney Exec, Others Acquitted in No-Poach Case (1)*, BLOOMBERG L. (Apr. 28, 2023), https://news.bloomberglaw.com/antitrust/ex-pratt-whitney-exec-others-acquitted-in-dojs-no-poach-case [https://perma.cc/6F63-PZL2]. A more careful eye for good cases and more patience in finding good test cases might have served the DOJ's cause more effectively. *See also infra* note 46 and accompanying text (describing lessons learned from roll out of DOJ's more ambitious criminal enforcement program in the 1970s and 1980s).

91. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–71 (1999).

92. Polygram Holding, Inc. v. FTC, 416 F.2d 29, 32 (D.C. Cir. 2005); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 353 (5th Cir. 2008). The significance of this litigation program is analyzed in GAVIL ET AL., *supra* note 36, at 243–85.

used a program of economic studies and litigation, both in the agency's administrative process and in federal court, to restore the effectiveness of its merger enforcement program for hospital mergers.[93] Between 2013 and 2015, the FTC prevailed before the Supreme Court in three consecutive antitrust cases.[94] Though not always successful,[95] the FTC in the past two decades has litigated important monopolization cases, including a successful appeal in *McWane, Inc. v. Federal Trade Commission*.[96]

These FTC initiatives, the victories and the defeats, deserve careful study as the current Commission goes about deciding how to build its own litigation program. This is particularly true where the Commission seeks to use administrative adjudication to establish competition policy norms. The agency's challenge to acquisitions by Hospital Corporation of America in the 1980s is especially informative. Commissioner Terry Calvani's opinion for the FTC is an example of the opinion-writing methodology that is likely to place the agency in the best possible position for success on appeal.[97] The depth and analytical quality of the Calvani opinion probably played a major role in gaining affirmance for the Commission from the court of appeals.[98] Every member of the agency who writes an opinion for the Commission ought to read the Calvani opinion to see how an agency obtains in practice the deference it claims as a matter of law.

The larger point is that it is sensible to recognize that the execution of ambitious extensions of policy can build upon earlier, more cautious applications of an agency's authority, including measures that in some sense may appear to be less dramatic.[99] A good deal of policymaking is the product of incremental accomplishments, sometimes punctuated by major advances in the state of the art. An initial process of gradual policy implementation—a period of testing, evaluation, and refinement—sometimes sets the necessary foundation for bigger steps. After President John F. Kennedy in 1961 declared that the United States by the end of the 1960s should seek to send humans to the surface of the moon and return them safely to earth, the nation progressed toward this goal with a series of incremental measures (e.g., orbital flights of the earth) that built human and technical capabilities.[100] With these foundations in place, the National Aeronautics and Space Administration then took the bold, ambitious decision to send humans to the moon, first to circle the moon and then, in July 1969, to land upon it.[101] The Mercury and Gemini missions were the more modest initial experiments that created the platform for the big steps of Apollo. NASA never belittled the Mercury and Gemini programs as "timid" or

93. Kovacic & Hyman, *Consume or Invest*, *supra* note 19, at 314–18.

94. FTC v. Actavis, Inc., 570 U.S. 136, 160 (2013); FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 227–37 (2013); N. C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 516 (2015).

95. The Commission lost its monopolization case in Rambus, Inc. v. FTC., 522 F.3d 456 (D.C. Cir. 2008).

96. McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015).

97. *In re* Hosp. Corp. of Am., 106 F.T.C. 361 (1985).

98. Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986).

99. The prosecution that resulted in the favorable outcome for the FTC in *McWane* can be seen as an example of how more modest cases can contribute to the development or reinforcement of major pro-enforcement legal principles: small cases can make big law. Andrew I. Gavil, *On the Virtue of "Little" Monopolization Cases*, 11 J. ANTITRUST ENF'T 191 (2023); Kovacic, *Keeping Score*, *supra* note 24, at 66 & n.70.

100. *See* MICHAEL COLLINS, CARRYING THE FIRE: AN ASTRONAUT'S JOURNEYS (1974) (describing essential contributions of the Mercury and Gemini programs to the Apollo moonshots).

101. CHARLES FISHMAN, ONE GIANT LEAP: THE IMPOSSIBLE MISSION THAT FLEW US TO THE MOON (2019); ANDREW CHAIKIN, A MAN ON THE MOON (1994).

"inadequate" compared to the grandeur of Apollo; Mercury and Gemini were understood to be the classrooms in which NASA perfected the techniques necessary for Apollo to succeed.

The DOJ and the FTC can look to their own programs in recent decades to see comparable patterns at work. The evolution of the DOJ criminal enforcement program since 1974 (when Congress elevated the Sherman Act's criminal offense from a misdemeanor to a felony)[102] has featured periods of incremental improvement punctuated by occasional "big bang" policy moves such as the major enhancement of the Division's leniency program in 1993 and 1994.[103] Another notable example is the evolution of the FTC's privacy program, which has relied upon an accumulation of settlements that collectively formed what Professors Daniel Solove and Woodrow Hertzog have called a "common law of privacy."[104] After a period of more incremental policy adjustments, the Commission, in 2003, took a major step to extend the boundaries of its privacy program by promulgating the Do Not Call Rule, which enabled citizens to opt out of receiving certain telemarketing calls.[105] The history of the development and implementation of the Do Not Call Rule—which has yielded both policy success and disappointment—provides valuable insights for an agency now considering a range of rulemaking initiatives dealing with Big Tech.[106] There is no shame for transformation advocates in learning from (and even acknowledging) earlier contributions that can supply valuable foundations for desired policy extensions.

The examples set out above indicate that there is a lot to learn from experience since the late 1970s about how to build and execute ambitious competition policy programs—litigation, preparing reports, convening discussions about emerging policy issues, and preparing trade regulation rules. There is no reason to examine and learn from an earlier era if one regards that experience as barren. The catastrophe narrative denies incumbent antitrust agency leadership an important source of insight about how to carry out their own programs. There is wisdom, not shame, in recognizing how an agency's earlier work created important foundations for the giant steps that incumbent leadership wishes to make today.

C. Unattainable Expectations

The ascent of the transformationalists to positions of power in the Biden Administration has created heroic expectations about what the DOJ and the FTC can accomplish. It is easy for agency leaders to become prisoners of exalted expectations that

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102. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified in various sections of 15 U.S.C.).

103. This progression is analyzed in William E. Kovacic, *A Case for Capping the Dosage: Leniency and Competition Authority Governance*, in ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 123 (Caron Beaton-Wells & Christopher Tran eds. 2015); William E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from US Experience*, in CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 45 (Caron Beaton-Wells & Ariel Ezrachi eds. 2011).

104. *See generally* Daniel J. Solove & Woodrow Hertzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 583 (2014) (detailing the FTC's view on new common law of privacy).

105. Telemarketing Sales Rule, 16 C.F.R. § 310 (2023).

106. *See generally* William E. Kovacic & David A. Hyman, *Regulating Big Tech: Lessons from the FTC's Do Not Call Rule*, 26 VIRGINIA J.L. & TECH. 1 (2022) (detailing the lessons from the FTC's Do Not Call Rule).

they create (or their fan base creates for them).[107] If leaders reach office by promising the universe, they will suffer rebuke if they only deliver Saturn.

Biden appointees have announced ambitious plans for the prosecution of cases, rulemaking, policy studies, and advocacy.[108] Inspired by the appointment of new leaders who disavow lax enforcement and risk aversion, the White House and Congress have besieged the DOJ and the FTC with demands to address a wide range of issues.[109] Some demands from elected officials involve matters of profound economic significance (e.g., inflation,[110] infant formula,[111] and motor fuel prices[112]). Some are quaint (e.g., ensuring that the Washington Commanders professional football franchise properly accounts for certain revenues in dealing with its partner franchises in the National Football League[113]). All demands are pressed upon the antitrust agencies with an urgency that reflects an apparent belief that the emboldened agencies can solve the problems.

High ambition can be a healthy stimulant for efforts that change the policy framework. To have healthy effects, however, this ambition must be tempered by realism. Appointees to public office sometimes find that the grand aims and specific policy agenda they promoted before gaining power can encumber the exercise of said power. The catastrophe

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107. In the late 1960s and early 1970s, a loud chorus of voices (from Congress, the organized bar, advocacy groups, and individual commentators) urged the FTC to embrace an ambitious agency of competition and consumer protection programs. FTC leadership did so with gusto, but with little concern for the capacity of the agency to deliver on its new commitments and for the political feedback effect that brought intense lobbying pressure to bear upon the Congress. The consequences for the agency were damaging and nearly calamitous. Kovacic & Hyman, *Play this Game*, *supra* note 19, at 113.

108. Jonathan Kanter, Assistant Att'y Gen. for Antitrust, Dep't of Just., Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speeches/assistat-attorney-general-jonathan-kanter-delivrs-remarks-new-york-city-bar-association [https://perma.cc/3QUC-HLR2]; Jonathan Kanter, Assistant Att'y Gen. for Antitrust, Dep't of Just.., Remarks as Prepared for the Stigler Center at the University of Chicago (Apr. 21, 2022), https://www.justice.gov/opa/speeches/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-of-Chicago-Stigler [https://perma.cc/PGX7-WEW6]; Lina M. Khan, Chair, Fed. Trade Comm'n, Keynote Remarks of Lina M. Khan, International Competition Network, Berlin (May 6, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20the%20ICN%20Conference%20on%20May%206%2C%202022_final.pdf [https://perma.cc/3E35-UGSU].

109. For example, President Biden's Executive Order on Competition Policy calls for government agencies to pursue 72 specific steps to increase competition in the economy. EO 14036, *supra* note 2. Many of these are directed to the DOJ and the FTC, which the President urged to strengthen merger control and antitrust enforcement generally. Among other matters, the President called for the FTC to take steps to ban noncompetition covenants in employment contracts, to ban occupational licensure, to curb limits upon the ability of purchasers of equipment to make their own repairs, to prohibit pay-for-delay agreements regarding pharmaceuticals, and to use the agency's power to bar unfair methods of competition to adopt rules governing the internet marketplace. *Id.*

110. Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2021), https://www.nytimes.com/2021/12/25/business/biden-Inflation.html (on file with the *Journal of Corporation Law*).

111. Madeleine Ngo, *U.S. Begins Inquiry into Industry's Role in Infant Formula Supply Shortages*, N.Y. TIMES (May 24, 2022), https://www.nytimes.com/2022/05/24/business/ftc-Investigation-baby-formula-Industry.html (on file with the *Journal of Corporation Law*).

112. Brian Dabbs, *Dems Turn to the FTC to Crack Down on Gas-Price Hikes*, NAT'L J. (May 8, 2022), https://www.nationaljournal.com/s/717476/dems-turn-to-the-ftc-to-crack-down-on-gas-price-hikes [https://perma.cc/3SXM-AJJ7].

113. Mark Maske & Nicki Jhabvala*, Congress Details Allegations of Commanders' "Unlawful" Conduct to FTC*, WASH. POST (Apr. 12, 2022), https://www.washingtonpost.com/sports/2022/04/12/washington-commanders-dan-snyder-house-oversight-ftc (on file with the *Journal of Corporation Law*).

narrative suggested that the transformationalists, should they ever attain control, would move quickly to cure every problem with none of the excuses attributed to earlier, failed periods of leadership (e.g., "judicial doctrine is unfavorable" or "we don't have enough resources"). It quickly becomes evident that an agency cannot pursue fifty top priority projects at one time if it is to match its commitments soundly to its capabilities.[114] Five is a more realistic number.

It is also vital (though awkward) to decline to address every concern raised by a legislative committee, a powerful member of Congress, or the president of the United States—especially when the individuals making the request are members of the same party as the agency's appointed leaders. Assigning twenty lawyers and economists to study gasoline prices today is no more likely to find an industry wide cartel than the many earlier studies the FTC has performed.[115] Every person assigned to such an endeavor is one less person available to challenge more mergers or more instances of improper exclusion by dominant firms. The agency can show how its existing programs may have positive contributions to solving immediate problems of pressing concern (e.g., reducing inflation), but it must do its best to persuade lawmakers and executive branch officials that there is nothing that the antitrust agencies can do to push prices down in the near term.

D. Skeptical Courts

As a whole, the Supreme Court and much of the federal judiciary have expressed skepticism toward broad applications of antitrust law and, increasingly, doubts about expansive interpretations of mandates contained in regulatory agency statutes. With notable exceptions (such as the treatment of cartel agreements), antitrust doctrine since the late 1970s has relaxed the limits that govern business behavior.[116] This is most evident in the fields of single firm conduct, merger control, and vertical restraints. This condition poses the most formidable barrier to an expansion of antitrust policy.

There are two ways for the transformationalists to overcome this obstacle. One is to persuade Congress to enact new legislation that expands possible enforcement frontiers by, for example, changing the presumptions that guide the evaluation of mergers and dominant firm conduct.[117] Legislators have introduced a number of measures to accomplish these results. Many of these focus on a relatively small number of information services platforms.[118] These failed to gain congressional approval through the end of the previous Congress, and the current Congress (especially following the Republican takeover of the

114. William E. Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness*, 13 COMPETITION L. REV. 9, 21–23 (2018). The failure to account for agency capabilities when launching major new initiatives was a source of grief for the FTC in the 1970s. Kovacic, *supra* note 73, at 1317–25.

115. Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of Standard Oil: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843, 856–57 (2012) (proposing that additional studies by lawyers and economists will not find information that the FTC could not find on their own).

116. GAVIL ET AL., *supra* note 36, at 81–92.

117. *See supra* notes 48–50 and accompanying text.

118. Lauren Feiner, *Senate Committee Votes to Advance Major Tech Antitrust Bill*, CNBC (Jan. 20, 2022), https://www.cnbc.com/2022/01/20/senate-committeee-votes-advance-major-tech-antitrust-bill.html [https://perma.cc/NCY3-F7K5] (reporting approval by Senate Commerce Committee of American Innovation and Choice Online Act).

House of Representatives in the November 2022 elections) seems unlikely to move the measures forward. Nor does a broader reformulation of doctrine of the type proposed by some committees and individual members of Congress seem attainable during this Congress.[119]

Given uncertainties about the legislative process, it may be the case that the DOJ and the FTC will be forced to achieve their transformation aims through the courts—by prosecuting cases and defending new trade regulation rules. In all matters, the DOJ and FTC leadership have sought to increase the appetite of their agencies for risk-taking and their willingness to lose a larger number of cases to reset doctrinal boundaries and change business attitudes.[120]

The litigation path has proven difficult, but hardly impossible. The DOJ and the FTC have achieved some success in merger litigation,[121] and their tougher position on merger control has caused a number of firms to abandon transactions that might have been approved with conditions during previous administrations.[122] During the Biden Administration, the agencies have litigated and lost several high profile cases that were presented as exemplars of the tougher approach they were taking in merger review, including vertical transactions and deals involving high tech firms.[123] The agencies also have proposed major amendments to the premerger review system[124] and have revised the government's merger guidelines.[125] It is early days in the agencies' expanded merger control efforts. It will take a few more years to have a more confident basis for assessing

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119. Margaret Harding McGill & Ashley Gold, *Tech Antitrust Bills' Big Foe: The Calendar*, AXIOS (May 5, 2022), https://www.axios.com/2022/05/05/tech-antitrust-clock-ticking-senate-congress [https://perma.cc/5ENC-P4VV].

120. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers [https://perma.cc/M8PL-B2JJ] (discussing Lina Khan and Jonathan Kanter's statements on merger guidelines and modern market realities).

121. *See* United States v. Bertelsmann SE & Co. KGaA, 2022 WL 16949715, at *37 (D.D.C. Nov. 15, 2022) (enjoining the merger of the largest and third-largest publishing companies); *see also* Illumina, Inc. v. FTC, No. 23-60167 (5th Cir. Dec. 15, 2023). In *Illumina*, the 5th Circuit largely endorsed the FTC's finding that the vertical acquisition at issue was anticompetitive. The court of appeals remanded the case to the Commission to take the merging parties' remedial proposals into account as a factor that might rebut a prima facie showing of liability rather than considering the proposals in determining the appropriate remedy following a finding of illegality. *Illumina, Inc.*, No. 23-60167.

122. For example, opposition from the FTC and the Department of Defense led Lockheed Martin to abandon its proposed acquisition of Aerojet. Press Release, Lockheed Martin, Lockheed Martin Terminates Agreement to Acquire Aerojet Rocketdyne (Feb. 13, 2022) (on file with author).

123. United States v. UnitedHealth Grp., Inc. 630 F.Supp.3d 118 (D.C. Cir. 2022); United States v. Booz Allen Hamilton, Inc., 2022 WL 16553230 (D. Md. 2022); FTC v. Meta Platforms, Inc., 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023); FTC v. Microsoft Corp., 2023 WL 4443412 (N.D. Cal. July 10, 2023). In *Illumina*, the 5th Circuit generally approved the FTC's assessment of the vertical merger's competitive effects but remanded the case to the Commission to consider the merging parties' remedial proposals as a consideration that might rebut the prima facie case of illegality. *Illumina, Inc.*, No. 23-60167.

124. Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review [https://perma.cc/74GD-8WVT].

125. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/reports/merger-guidelines-2023 [https://perma.cc/SEH8-XUWF].

the Biden administration's program, or to determine the impact on the courts of new merger guidelines.[126]

In the nonmerger enforcement arena, the two agencies are litigating two monopolization cases filed during the last year of the Trump administration (a DOJ case against Google's activity in search[127,] and an FTC case against Meta predicated on the company's acquisition of Instagram and WhatsApp[128]). The DOJ has begun a second monopolization case against Google[129] (regarding ad-serving), and the FTC (along with seventeen states) in September 2023 filed a monopolization case against Amazon.[130] Since the arrival of Lina Khan at the agency, the FTC also has begun monopolization cases against two producers of agricultural chemicals[131] and a case that, among other counts, alleges the illegal monopolization of markets for anesthesiology services in Texas.[132]

Understanding how to build and defend cases and rules successfully means casting aside a major tenet of the catastrophe narrative—that antitrust policy since the late 1970s has been an unmitigated failure.[133] The new generation of cases should be built on the lessons of past litigation programs, including those carried to success during the era President Biden depicts as forty years of failure. Most of these cases will take years to resolve. All have elicited a formidable defense led by an array of first-rate law firms and economic consultancies. As a group, they pose an extraordinary challenge to the agencies' litigation capacity.

E. Capability

As used here, capability refers to the availability of legal authority that the agencies need to carry out projects that promote transformation.[134] The capability issue is most prominent in the case of the FTC. Several actual or latent disabilities stand out. In 2021,

126. Some commentators have breathlessly pointed to the FTC's "losing streak" in merger litigation during the Khan tenure as chair. Press Release, Representative Scott Fitzgerald, Fitzgerald Co-Leads Letter to FTC Chair Lina Khan Regarding Waste of Taxpayer Dollars (July 28, 2023), https://fitzgerald.house.gov/media/press-releases/fitzgerald-co-leads-letter-ftc-chair-lina-khan-regarding-waste-taxpayer [https://perma.cc/JZP9-XLHA]. The Commission has litigated three merger cases that were initiated since Lina Khan became chair in June 2021. FTC v. IQVIA Holdings, Inc., 23 Civ. 06188 (ER) (S.D.N.Y. Dec. 29, 2023); FTC v. Meta Platforms, Inc., 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023); FTC v. Microsoft Corp., 2023 WL 4443412 (N.D. Cal. July 10, 2023). In *Meta* and *Microsoft*, the district court rejected the Commission's motion to enjoin the transactions, though the Commission has appealed the lower court's ruling in the Microsoft/Activision case to the U.S. Court of Appeals for the Ninth Circuit. In *IQVIA*, the district court granted the Commission's motion for a preliminary injunction. Three cases do not constitute a large number of observations.

127. Complaint, United States v. Google LLC, No. 20-cv-3010 (D.D.C. Oct. 20, 2020).

128. Complaint, FTC v. Facebook, Inc., No. 20-cv-3590 (D.D.C. Dec. 9, 2020).

129. Complaint, United States v. Google LLC, No. 23-cv-108 (E.D. Va. Jan 24, 2023).

130. Complaint, FTC v. Amazon.Com, Inc., Case No. 2:23-cv-01495-JHC (W.D. Wash Sept. 26, 2023).

131. Complaint, FTC v. Syngenta Corp., No. 22-cv-828 (M.D.N.C. Sept. 29, 2022); *In re* Crop Protection Prods. Loyalty Program Antitrust Litig., No. 3062, 2023 WL 1811955 (U.S. Jud. Panel on Multidistrict Litig. Feb. 6, 2023).

132. Complaint, FTC v. U.S. Anesthesia Partners, Inc., Case No. 4:23-cv-03510 (S.D. Tex. Sept. 21, 2023).

133. Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*, 64 ANTITRUST BULL. 295, 295 (2019) (concluding that the activist antitrust associated with the New Deal that existed from the late 1930s to the 1960s resulted in far stronger economic performance than have the policies of the Chicago School that have dominated antitrust policy since the 1980s).

134. Kovacic & Hyman, *Consume or Invest*, *supra* note 19, at 299 & n.11.

the Supreme Court concluded that the Commission lacks authority to obtain monetary relief for violations of section 5 of the FTC Act.[135] This severely limits the effectiveness of the agency's consumer protection program which, since the mid-1970s, had persuaded most courts of appeals that section 13(b) of the Act authorized the FTC to obtain disgorgement or restitution to remedy consumer protection misconduct and competition abuses.[136] There is also considerable uncertainty about the continuing vitality of jurisprudence that, in the early 1970s, recognized the ability of the FTC to promulgate substantive competition rules.[137] And there are other indications that the courts may be poised to impose additional limits on the ability of the FTC to exercise its administrative adjudication mandate.[138] Thus, the FTC is in the difficult position of attempting to expand the application of its powers at a moment when the federal courts are minded to resist such initiatives and perhaps to revisit basic questions about the role of administrative agencies in the U.S. system of governance.

Longstanding legislative carve-outs from the FTC's jurisdiction also impede the FTC's ability to reach wrongful behavior in significant economic sectors. Despite repeated requests from the agency for reform, Congress has left in place jurisdictional limitations from that 1914 legislation that curb or eliminate the Commission's authority to address conduct involving banks, common carriers, and not-for-profit institutions, such as universities.[139]

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135. AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

136. M. Sean Royall, *A Watershed Moment? What Comes Next for the FTC in the Wake of AMG*, 35 ANTITRUST 103, 108 (2021).

137. *See generally* Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?* (George Wash. Univ. Pub. L. Research Paper, Paper No. 2021-42, 2021) (concluding that the FTC lacks the power to use notice and comment rulemaking to implement section 5 of the FTC Act); Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277 (2023) (arguing that the FTC lacks authority to engage in legislative rulemaking in antitrust matters). The current enthusiasm for the FTC to use rulemaking to adopt new competition rules relies heavily on *Nat'l Petrol. Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020). In *Petroleum Refiners*, the D.C. Circuit concluded that section 6(g) of the FTC Act, 15 U.S.C. § 45(g), gave the Commission authority to promulgate substantive competition rules. *Nat'l Petrol. Refiners Ass'n*, 482 F.2d at 709.

138. One notable development is *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023), where the Supreme Court unanimously ruled that the respondent in an FTC administrative case can go directly to federal district court to challenge alleged constitutional defects in the Commission's structure or procedures without awaiting the conclusion of the agency's administrative process. *Id.* The decision gives respondents in FTC administrative actions an important tool for delaying the resolution of matters the Commission chooses to prosecute through its internal adjudication mechanism rather than filing suits in federal district court. *See* Keith Klovers, *Three Options for Reforming Part 3: Administrative Litigation at the Federal Trade Commission*, 85 ANTITRUST L.J. 409, 415–24 (2023); Ronald Mann, *Court Approves Early Challenge to Agency Proceedings*, SCOTUSBlog (Apr. 14, 2023), https://www.scotusblog.com/2023/04/supreme-court-approves-early-challenge-to-federal-agency-proceedings/ [https://perma.cc/UGV3-HB48]. In a major victory for the Commission, the 5th Circuit recently rejected a variety of a variety of challenges that the parties to a merger had raised regarding the constitutionality of the structure and procedures of the Commission. Illumina, Inc. v. FTC, No. 23-60167 (5th Cir. Dec. 15, 2023).

139. David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1117, 1133 (2019).

F. Capacity

Capacity refers to whether an agency has the human capital and technical skills needed to carry out its duties effectively. The capacity of the federal antitrust agencies today is deficient in three important ways. The first is a level of appropriations entirely unsuited to the ambitious agenda that the Biden Administration and congressional advocates for transformation have embraced.[140] The second is a civil service compensation scale that denies the DOJ and the FTC the ability to retain experienced, highly skilled professionals (compared to financial services regulators such as the CFPB, which have authority to pay salaries considerably above the basic civil service scale).[141] The third is an inadequate number of computer scientists, engineers, and data analytics specialists whose expertise is essential to enable the agencies to execute their Big Tech agenda and improve agency operations generally.[142]

G. Institutional Parochialism

President Biden's "whole of government" vision for competition policy anticipates a significant integration of policymaking across federal agencies. There is nothing simple or automatic about accomplishing this aim. A basic starting point is the deeper integration of effort—in setting priorities and choosing policy strategies—between the DOJ and the FTC. The new leadership at the federal antitrust agencies have indicated their interest in achieving this level of integration,[143] but AAG Kantor and Chair Khan will have to overcome a number of historical and institutional forces to make this work in practice.[144]

H. Polarization

To many observers (and perhaps even to transformationalists), the ascent of the transformation movement and its success in attaining power was most unexpected. The development surprised both the antitrust "traditionalists," who largely endorse the path that doctrine and enforcement policy have taken since the mid-1970s,[145] and the "expansionists" who support expanded control of mergers and dominant firm conduct but reject the transformationalists' insistence on restoring an egalitarian goals framework that deemphasizes reliance on microeconomic analytical methods, broadens recourse to bright line prohibitions, and preserves opportunities for small and medium enterprises to

140. Jones & Kovacic, *Implementation Blindside*, *supra* note 20, at 248.

141. *Id.* (noting the salary scale for various regulatory bodies).

142. *Id.* (discussing salaries in civil service). My recent conversations with senior DOJ and FTC officials indicate that the agencies have made important progress in building teams of technologists and data analytics specialists.

143. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/federal-trade-commission-justice=department-seek-strengthen-enforcement-against-Illegal-mergers [https://perma.cc/SZ7C-DS3R]; *see also* William E. Kovacic, *Symposium Editor's Essay: Building a Better U.S. Competition Policy Corridor*, 85 ANTITRUST L.J. 217, 221–23 (2023) (discussing steps that the DOJ and the FTC could take to achieve deeper Integration of antitrust policymaking).

144. *See generally* William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097 (2012) (discussing the challenges facing the FTC in antitrust law).

145. Kovacic, *supra* note 6, at 47.

compete.[146] The transformationalists harshly disparage officials who led the federal antitrust agencies during Barack Obama's presidency.[147]

The transformationalists and expansionists share a number of policy preferences, yet antipathy between the two groups may impair efforts to achieve major extensions of U.S. competition policy. A reconciliation between the two groups may be necessary to accomplish basic reforms—to sustain a critical mass of intellectual and political support, and to incorporate the learning of the expansionists into the formulation of effective implementation programs.[148] As Professor Jonathan Baker has suggested in a recent essay,[149] the newly revised federal merger guidelines may reflect an awareness on the part of the DOJ and FTC leadership that policy measures situated on "common ground" occupied by expansionists and transformationalists have the greatest prospect of achieving a durable impact. It seems unlikely that the DOJ and the FTC would have found and moved to the common ground that Professor Baker identifies without the contributions of their chief economists (Susan Athey at the DOJ and Aviv Nevo at the FTC). The appointment of Professor Athey in 2022 and Professor Nevo in 2023 demonstrated a willingness of the agencies' leadership to back away from earlier demands of transformationalist commentators that individuals who had held senior positions with big tech companies or with the Obama-era antitrust agencies were unworthy to serve in the Biden administration antitrust bureaus.[150]

CONCLUSION: PROSPECTS FOR LASTING SUCCESS

The advocates for a basic transformation of U.S. antitrust policy already have accomplished a great deal. They have changed the policy debate in extraordinary ways, focusing new attention on fundamental questions of what aims antitrust policy should seek to achieve and how the antitrust system should carry out a restoration of the egalitarian policy vision that guided jurisprudence and enforcement policy for large segments of the 20th century. The program undertaken by Lina Khan at the FTC and Jonathan Kanter at the DOJ has considerable potential to inspire a new generation of academics, students, and practitioners to take up the transformationalist cause.[151]

No one should underestimate the significance of these developments. Will they provide the basis for lasting policy change? Key transformation proponents occupy top leadership positions in the federal enforcement system. Can they set in motion a

146. *Id.*

147. *Id.* at 47, 49.

148. Jonathan Baker persuasively argues that the failure of the expansionists and the transformationalists to realize their common cause and form a coalition may forestall the accomplishment of key elements of the transformationalist agenda. Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705 (2022).

149. Jonathan B. Baker, *The 2023 Merger Guidelines Strengthen Enforcement by Finding Common Ground*, PROMARKET (forthcoming 2024).

150. Professor Athey spent several years as the senior economist for Microsoft Corporation, and Professor Nevo served for two years as the chief economist for the DOJ Antitrust Division during the Obama presidency.

151. Marcia Brown, *The Next Generation of Law Students Is Obsessed with Lina Khan*, POLITICO (Nov. 6, 2023), https://www.politico.com/news/magazine/2023/11/06/law-students-antitrust-lina-khan-00124240 [https://perma.cc/VR9Q-ZD6G].

transformation of doctrine and enforcement policy that, in the worlds of Ernest May and Richard Neustadt, will "stick?"[152]

Three forces tend to work against the attainment of lasting fundamental change. The first is time. A vital determinant of success is the durability of the commitment of the nation's political leadership to place transformation advocates in senior leadership roles at the DOJ and the FTC, to support new legislation, and to appoint federal judges sympathetic to transformation perspectives. The redirection of the antitrust system began in the federal courts during the late 1970s and accelerated in the Reagan presidency in the 1980s required several decades to set firmly in place. How many transformation-minded presidents will occupy the White House over the next thirty years or so? Over the same period of time, will Congress provide the appropriations, statutory upgrades, and political support necessary for the public agencies to execute the transformation agenda? Are current transformation advocates in the antitrust agencies and the White House taking steps to ensure that their initiatives survive possible regime changes over time? If Congress were to undertake a basic retooling of substantive competition policy principles, might it take the further step of considering whether the existing distribution of prosecutorial authority (including the maintenance of two federal antitrust bodies) requires simplification?[153]

A second, related factor is the time required to effectuate a change in judicial perspectives that welcomes a significant redrawing of antitrust's doctrinal boundaries. Two necessary paths to this adjustment are: (1) the appointment of new judges sympathetic to transformation perspectives; and (2) the persuasion of existing judges to endorse efforts, by government agencies and private litigants, to apply or extend (at least in small steps) the existing doctrinal standards to challenge alleged episodes of anticompetitive conduct. In the shorter term, efforts to bring cases that expand enforcement frontiers will face resistance from a large body of judges who endorse the doctrinal status quo and are skeptical about extensions.

A third obstacle promises to encumber the development of cases and other policy initiatives to overcome resistance to the expansion of competition policy. This is the contempt for government antitrust policymaking which has been expressed since the 1970s by transformation advocates and by President Biden. The depiction of this period as a wasteland may blind the Biden administration and its appointees to techniques—successfully employed by their predecessors to overcome judicial resistance to finding antitrust liability—to extend doctrinal frontiers, and to use non-litigation policy tools to enhance competition policy and strengthen economic performance. The arguments that fueled the transformationalists in their ascent to power may prevent them from attaining their goal of a durable root and branch policy reconstruction.

152. RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS 270 (1986).

153. There is no inevitability to the continuation of the existing dual federal enforcement framework. *See* George Hay & Thomas Turgeon, *Genius or Chaos: The "Big Tech" Antitrust Cases: A Window Into the Complex Procedural Aspects of U.S. Antitrust Law*, 85 ANTITRUST L.J. 375, 403–07 (2023); Kovacic, *supra* note 143, at 221–23.