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Discussions of the politicization of antitrust in the Trump era are remarkably common. Reviewing antitrust policy from 2017 to 2021, critics have accused the Trump Department of Justice (DOJ) and Trump-appointee-chaired Federal Trade Commission (FTC) of populism, deviating from the more technocratic standards that governed agency interventions during the Bush and Obama eras. Critics have applied the broad brush of politicization charges to the administration's handling of a wide variety of topics, ranging from marijuana and media mergers, to automaker acquiescence to state environmental standards, to landmark lawsuits against Google and Facebook. But a more discerning eye is necessary here.

The Trump era in fact saw two very distinctive types of politicization of antitrust: one authoritarian, the other, democratic. In several situations, the President appeared to eagerly use competition law, as he did with so many other levers of governance, to reward his allies and punish his enemies, without respecting extant norms of legal regularity and expert views. This is a classic mark of an authoritarian (and specifically oligarchic and patrimonialist) administration: a single-minded obsession with entrenching one's own political power by reducing the wealth and opportunities of one's actual or perceived enemies, while augmenting that of oneself or one's allies. The law is a mere means to an end in such administrations, to be wielded like a weapon in the pursuit, acquisition, and maintenance of power.

However, at the same time this authoritarian politicization was underway, a second, democratic impulse informed policymakers. At least since the mid-2000s, scholars and activists had warned that the enormous power of large, monopolistic internet platforms was distorting commerce and the public sphere.[1] The FTC almost took action against Google during the Obama Administration, but ultimately closed the critical parts of its investigation without fully explaining itself.[2] This quietism was presented at

[*] Professor of Law, Brooklyn Law School. We wish to offer our sincere thanks to the participants and organizers at the 2019 BJCFL Symposium on Antitrust and Consumer Law, and particularly to Professors Ted Janger and Spencer Waller, and journal leadership including Michael Blackmon and Elizabeth Porfido.

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1. *See* Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1100 (2019); Testimony of Frank Pasquale before the Judiciary Committee of the House of Representatives, *Hearing on Competition on the Internet* (July 15, 2008). As a report of the Judiciary Committee observed at the time, "Recent transactions and near-transactions among Google, Inc., Yahoo, Inc., and Microsoft Corp. had raised a number of concerns regarding their possible anticompetitive effects in such areas as online advertising, online search, and web platform interoperability. The hearing examined the state of competition with respect to competition in these various online markets." Id.

2. RANA FOROOHAR, DON'T BE EVIL: HOW BIG TECH BETRAYED ITS FOUNDING PRINCIPLES—AND ALL OF US (New York: Currency Press, 2019); Frank Pasquale, *Paradoxes of*

the time as a logical outgrowth of objective antitrust policy. However, as the European Commission and other jurisdictions around the world took on U.S. internet giants, American competition agencies' lassitude began to look more like industry capture or protectionism than resolute adherence to objective standards.[3] U.S. think tanks like the Open Markets Institute, the Institute for Local Self-Reliance, the American Economic Liberties Project, and others brought together those harmed by massive internet firms and the experts capable of articulating and theorizing that harm. This is exactly what democratic politics should look like: a bottom-up expression of concern about the power of massive firms, which enriches academic work in the field, and eventually sways key appointees in the Department of Justice and Federal Trade Commission to take action.

Thus, competition law during the Trump Administration was politicized, but in two diametrically opposed ways. This should not be surprising, since politics itself has culminated in some of humanity's highest ideals and some of its worst abuses. To delineate and explore this dichotomy, this article has two main parts. Part I explores authoritarian aspects of Trumpian competition policy. Part II examines the democratization of high technology antitrust evidenced in several Google and Facebook antitrust cases. The conclusion, Part III, explores ways of further promoting democratization of antitrust enforcement priorities, while preventing authoritarian misapplication of the law.

I. TROUBLING POLITICIZATION OF TRUMPIAN COMPETITION POLICY IN THE CANNABIS, MEDIA, AND AUTOMOTIVE SECTORS

Several episodes in merger enforcement during the Trump Administration led to deep concerns about the politicization of investigations into mergers in the media and cannabis industries, and into auto industry agreements to reduce pollution. The most well-developed claims addressed what appeared to many experts to be excessive documentation requirements (Second Requests) for cannabis mergers. An insider's whistleblower complaint contained detailed accusations, leaders in the Department responded, and many experts weighed in on the conflict. Part A below details experts' critiques of the Trump policies here. This politicization will be the subject of Parts A through D below, where we weigh both critiques and defenses of the relevant Department actions, and find the critiques are consistently more compelling. Part E applies the same method to explore the media and auto industry complaints. In sum, an authoritarian politicization is

Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias, HARV. J. OF L. & TECH. 1-2 (Occasional Papers Series, 2013).

3. Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy*, COMP. POL'Y INT'L ANTITRUST CHRON. (May 14, 2017), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2620&context=fac_pubs.

entirely consistent with key decision-making processes in these investigations.

We should note at the outset of this Part that we do not think it necessary to demonstrate complete coincidence between the aims, style, and methods of certain projects of Trumpian antitrust, and the behavior patterns of regimes like 2020s Russia, Venezuela, and Hungary, which may be classed as ideal-typical contemporary authoritarian polities.[4] Rather, we focus on the particular agency at issue (the Department of Justice's Antitrust Division) with respect to particularly noted scenarios. It is not necessary to demonstrate that an administration as a whole is authoritarian, in order to conclude that some aspects of its behavior have authoritarian characteristics, style, or tone. Rather, the key is to make a case that certain contested decisions go beyond the ordinary rough and tumble of political prioritization of agency enforcement decisions, into a realm of legal unreason to the extent they are explicable mainly as an effort to punish enemies and reward friends. This dualism is reminiscent of Carl Schmitt's classic friend/enemy distinction—a division that is not descriptive of politics as such (as Schmitt would have it), but rather, of a particularly destructive and divisive illiberalism characteristic of authoritarian regimes.[5]

A. HOUSE JUDICIARY COMMITTEE INVESTIGATION AND ITS AFTERMATH

Critical revelations of improper practices appeared in June 2020, when John Elias, a member of the Department of Justice (DOJ)'s Antitrust Division (ATR), was subpoenaed to testify before Congress.[6] The subpoena was issued as part of the House Judiciary Committee's (Committee) investigations into whether the DOJ has been improperly politicized under Attorney General (AG) William Barr and the Trump Administration.[7] Elias was subpoenaed to testify because he had issued a whistleblower complaint calling attention to the ATR's issuance of Second Requests to ten cannabis firms who wished to merge.[8] Elias charged that the Second Requests were

4. For a discussion of ideal-typical contemporary authoritarian polities, *see* Larry Diamond, Marc F. Plattner, & Christopher Walker, editors, AUTHORITARIANISM GOES GLOBAL: THE CHALLENGE TO DEMOCRACY (2016).

5. For more analysis on the parallels between Bill Barr's approach to running the Department of Justice and that of the "crown jurist of the Third Reich," *see* Tamsin Shaw, *William Barr: The Carl Schmitt of Our Time,* N.Y. REV. BOOKS (Jan. 15, 2020), https://www.nybooks.com/daily/2020/01/15/william-barr-the-carl-schmitt-of-our-time/.

6. Ciara Linnane, *Attorney General Barr ordered antitrust probes of 10 cannabis mergers, because he dislikes the industry, prosecutor says*, MKT. WATCH (June 26, 2020), https://www.marketwatch.com/story/attorney-general-barr-ordered-antitrust-probes-of-10-cannabis-mergers-because-he-dislikes-the-industry-prosecutor-says-2020-06-24.

7. *Id.*

8. *Testimony of John W. Elias U.S. House Committee on the Judiciary*, JUST SECURITY (June 24, 2020), https://www.justsecurity.org/wp-content/uploads/2020/06/john-w-elias-testimony-

"not bona fide antitrust investigations," yet accounted for "29% of the [ATR]'s full-review merger investigations in the Fiscal Year 2019." [9] Specifically, Elias stated that his supervisors had improperly used their powers in the investigations at issue, directed by Barr, and solely because the AG did not like the cannabis industry.[10] In his testimony, he described how these ten investigations consumed the ATR's resources, "making up nearly a third of all of its cases" that fiscal year, and he stated that even his superordinate, Makan Delrahim, the head of the ATR, "acknowledged at an all-staff meeting that the cannabis industry [was] unpopular 'on the fifth floor,' [in] reference to [AG] Barr's offices."[11] At the Committee hearing, comments from representatives such as Jerold Nadler painted a picture of AG Barr as using the DOJ "as a weapon to serve the president's petty, private interests."[12]

Ryan Goodman, a journalist for *Just Security*, investigated the whistleblower complaint made by Elias and another unnamed whistleblower regarding the ATR.[13] The complaint itself detailed how Barr directed the ATR to open investigations against the cannabis industry, "without sufficient factual basis and 'centered not on antitrust analysis,' but instead due to the [AG's] 'personal dislike of the industry.'"[14] Following that complaint, the DOJ's Office of Professional Responsibility (OPR) issued a rejection letter indicating that it would not open an investigation pursuant to the complaint.[15] Goodman focused his investigation on the OPR's response to the complaint, soliciting assessments of it from eleven leading antitrust experts. [16] Ultimately, Goodman found that "*every one of the eleven* experts was alarmed by the underlying allegations and several were highly critical of the OPR's handling of the matter."[17] Three of those experts explicitly indicated

house-judiciary-committee-june-24-2020.pdf. He also testified regarding an investigation into four automakers who had separately entered into agreements with the state of California. *See id.*

9. Linnane, *supra* note 6 (internal quotations omitted).

10. Nicholas Fandos, Katie Benner & Charlie Savage, *Justice Dept. Officials Outline Claims of Politicization Under Barr*, N.Y. TIMES (updated July 10, 2020), https://www.nytimes.com/2020/06/24/us/politics/justice-department-politicization.html.

11. *Id.* (internal quotations omitted).

12. *Id*.

13. Just Security is supported by New York University School of Law, Open Society Foundations, Atlantic Philanthropies, and others. It serves as an online forum for the "rigorous analysis of U.S. national security law and policy." *About Us*, Just Security (last visited Feb. 8, 2021), https://www.justsecurity.org/about-us/

14. Ryan Goodman, *11 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Barr- and Office of Professional Responsibility's Opinion*, JUST SECURITY (June 26, 2020), https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-barr-including-office-of-professional-responsibilitys-letter/.

15. Memorandum, *U.S. Department of Justice, Office of Professional Responsibility*, JUST SECURITY (June 11, 2020), https://www.justsecurity.org/wp-content/uploads/2020/06/opr-memorandum-from-jeffrey-ragsdale-to-bradley-weinsheimer-june-11-2020.pdf.

16. Goodman, *supra* note 14.

17. *Id.* (emphasis in original).

that the OPR's analysis was flawed, and lacked the power to persuade.[18] Specifically, Jonathan B. Baker, Research Professor of Law at American University, Washington College of Law opined that the "OPR's cursory analysis and conclusions threaten to undermine merger enforcement specifically and antitrust enforcement more broadly."[19] The experts' critiques suggested that the DOJ did not merely advance the President's political aims within the bounds of accepted law, but instead ran roughshod over long-standing and obvious legal constraints on enforcement discretion.

The OPR's letter in response to the whistleblowers' complaint described the whistleblowers' allegations as follows: (1) that the ATR "conduct[ed] pretextual investigations of, and plac[ed] onerous demands on, merging companies in the cannabis industry through the issuance of Second Requests, even though such mergers presented no competitive concerns," and (2) that the "ATR, at the direction of the [AG's] Office, placed these demands on merging cannabis companies in order to slow the growth of the cannabis industry due to the DOJ leadership's animosity toward the industry."[20] First, the ATR denied the allegations, and argued that even if the allegations made were true, that those "alleged facts would not violate any relevant laws, regulations, rules, policies, or guidelines."[21] Then, the OPR agreed with the ATR's interpretation of its own power to issue Second Requests, finding that "ATR's Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines."[22]

Goodman's investigation into the complaint and the OPR's response asked the "highly respected experts" to compare Elias' allegations with the OPR's response letter—and yielded consistent responses. Some themes emerged across the experts' opinions, all of which supported allegations that the ATR had acted in a politicized manner: (1) the firms at issue represented a small market share, and in one proposed merger represented a market share of only 0.35 percent and thus posed minimal risk, if any, to competition, (2) the ATR's actions were violative of its own manual which states that Second Requests should only be issued if serious concerns are first raised about the anticompetitive nature of a transaction, i.e. a threshold concern must be demonstrated, (3) the high volume of Second Requests issued in investigations (ten) was not supported by the ATR's contention that it needed experience in an area of the law in which it was unfamiliar (cannabis), and (4) the OPR's letter reviewed written submissions only from the ATR and

18. *See id.*

19. *Id.* (internal quotations omitted).

20. *Id*.

21. *Id.* This is a truly remarkable assertion of the agency's ability to stand "above the law." It is one thing to assert that a clearly illegal act is non-justiciable or irremediable. It is quite another to claim the right to burden persons and companies with costly investigations based solely on the investigators' animosity, with no proper legal basis.

22. *Id.*

the whistleblowers, rather than interviewing any witnesses who could explain why the ATR opened the investigations and whether there was improper motive.[23]

While the cannabis mergers are perhaps the most salient example of this overt antitrust politicization by the Trump Administration, the cannabis mergers do not represent the only instance where the DOJ seems to have been so crassly motivated that its actions shaded over into the authoritarian hypostatization of one leader and party's agenda, as opposed to democratic expression of popular will be properly respectful of extant legal professional and legal safeguards. In the whistleblower complaint itself, the issue was raised of whether the DOJ had proper motives for examining four automakers who had separately entered into agreements with California. In that case, an irrational enthusiasm for fossil fuel burning seemed far more explanatory than any genuine competitive concerns. Comparably, the DOJ quickly approved a Disney-Fox merger, which stood in contrast to its nearly two-year investigation and failed lawsuit attempting to block the AT&T/Time Warner merger. Had both mergers sailed through, or been blocked, the Trump DOJ could at least assert an ideological consistency. The differential treatment raises the red flag of politicization, grounded in Trump's own increasingly unhinged words and actions.

B. VERY SMALL MARKET SHARES OF TARGETED CANNABIS FIRMS

Typically, red flags are raised in the antitrust context where a merger between two firms would result in a problematically high share of the relevant market, or when there are bona fide monopolization concerns. Elias' testimony indicated that the cannabis mergers involved "low market shares in a fragmented industry," and thus, did not meet the "established criteria" for searching antitrust investigations.[24] High market shares, he testified, are a "key indicator" weighing in favor of issuing Second Requests – and those high market shares are typically in the "double-digit[s]."[25] Michael A. Carrier, a distinguished Professor at Rutgers Law School responded to Goodman's request for expert input by noting that the history of Second Requests demonstrates that only the "most concerning mergers . . . rais[ing] the most competitive concern" receive Second Requests, and are reflected in "high market shares."[26] In this instance, a disproportionate number of Second Requests were issued to proposed mergers that "based on longstanding bipartisan antitrust principles, [did] not threaten competitive harm" due to the firms representing a small post-merger market share. Indeed, two of the targeted firms would become a mere 0.35 percent market share post-

23. *See id.*
24. Testimony of John W. Elias, *supra* note 8.
25. *Id.*
26. Goodman, *supra* note 14.

merger.[27] This strongly suggests an extra-legal basis for the issuance of these Second Requests was AG Barr's dislike for the cannabis industry.[28]

Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law felt similarly. She highlighted the fact that the ATR "undertook full scale reviews of 10 proposed mergers in the cannabis industry, although the mergers were of very small firms in a very fragmented market and there was no way they could create market power."[29] To defend the Trump ATR, its director at the time responded to concerns about market share by stating that "market shares alone, are not a substitute for preliminary investigation into competitive effects."[30] When deciding whether to open the investigation, he said that the ATR faced "matters of first impression," mainly "whether the antitrust laws could or should be applied to protect and promote lower prices and increased output of a substance that is facially illegal under federal law."[31] But these arguments ignore that even if there is some novelty in dealing with the cannabis market, the specific purpose of the merger review is to prevent market power from accumulating. Expansive investigative powers in this context must be grounded in some realistic theory of an antitrust problem, but none appeared to exist here.

As Darren Tucker has observed in empirical research on second requests, "the vast majority of markets for which staff recommended a Second Request were highly concentrated post-merger. Of the 129 markets studied, 121, or 94 percent, exceeded the 1,500/100 concentration screen, and 113, or 88 percent, exceeded the 2,500/200 concentration screen described in Section 5.3 of the 2010 Guidelines."[32] Merger policy did not change enough between the Obama and Trump administrations to merit the type of massive change of approach that could have led to the marijuana investigations, which no Trump Administration official suggested came close to those typical scores based on market share. It is usually "double-digit [market shares] which normally cause[] antitrust concern," not the 0.35% share that was the stakes of one of the mergers that led to a second request.[33]

More speculatively, Delrahim also raised the issue of timing. Due to cannabis' status as a Schedule 1 controlled substance which carries sanctions such as "up to five years in prison and fines up to $1 million" for its growth, marketing, or distribution, Delrahim indicated the ATR felt fear of prosecution under the Controlled Substances Act (CSA) would deter parties

27. *Id.*
28. *Id.*
29. *Id*.
30. *Id.*
31. *Id.*
32. Darren S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC*, 78 ANTITRUST L. J. 591, 601 (2013).
33. Diane Bartz, *Lawmakers split along party lines on Justice Department's pot probes*, REUTERS (June 24, 2020), https://www.reuters.com/article/us-usa-justice-cannabis/lawmakers-split-along-party-lines-on-justice-departments-pot-probes-idUSKBN23V32Z

from cooperating voluntarily with the ATR.[34] This supposedly contributed to the ATR's desire to review cannabis mergers with an eye to potential lack of cooperation in the future.[35] Roger Alford's[36] response echoed Delrahim's contention that cannabis companies were reluctant to provide any information at all for fear of being prosecuted under the CSA.[37] This, Alford said, is not surprising "[g]iven that both the Obama and Trump Administrations made clear that the mass commercialization of the sale and distribution of marijuana could implicate companies in criminal violations under the [CSA]."[38] However, this logic would appear to bootstrap all manner of civil investigative demands of the cannabis industry. Any agency with any speculative interest in potential regulation or administrative adjudication could suddenly demand paperwork in the interest of evidence preservation. Such a broad rationale does not seem capable of universalization in a non-authoritarian context, where there is supposed to be some tangible and proximate relationship between investigative burdens and their actual bases.

Professor Christopher Sprigman has also questioned Delrahim and Alford's contentions that timing and the "reluctance of the parties to hand DOJ information that could potentially be used to prosecute them under federal criminal law" justified the ATR's actions.[39] The DOJ argued their hands were tied—that they had no choice but to issue Second Requests, as the Hart-Scott-Rodino Act (HSR) only gives the DOJ 30 days to issue them.[40] There was a simple fix for this timing problem, Professor Sprigman says:

> If the concern really was the 30-day clock, there is a simple way to handle that. When Antitrust Division lawyers are concerned that the 30-day clock is about to run and they haven't been able to fully assess whether a Second Request makes sense in a particular deal, they will simply call up the parties and ask them to pull their filing and refile later (with any fees for the re-filing waived). Merging parties usually take that deal, because if they don't, a Second Request will almost certainly issue, and the delay opens up a conversation between the parties and the Division about how a Second Request can be avoided. Based on information that's been provided to me by others, the Division did offer a "pull-and-refile" deal to avoid the 30-day clock on the MedMan/PharmaCann deal (i.e., the first of the cannabis

34. Letter from Makan Delrahim, Assistant Att'y Gen., U.S. Dept. Just. Antitrust Div., to Chairman Jerold Nadler & Ranking Member Jim Jordan, Comm. on Judiciary, at 3 (July 1, 2020) https://www.politico.com/f/?id=00000173-0d14-dd78-a9ff-7fb6e2a70000.

35. *Id.* at 4.

36. Roger Alford was the Deputy Assistant AG from 2017 to 2019 under AAG Delrahim.

37. *Id.*

38. *Id.*

39. Christopher Sprigman, *What's Missing in Current and Former Officials' Responses to DOJ Antitrust Whistleblower,* JUST SECURITY (July 16, 2020), https://www.justsecurity.org/71450/whats-missing-in-current-and-former-officials-responses-to-doj-antitrust-whistleblower/.

40. *Id.*

> mergers). So a concern about the 30-day deadline would not be a reason to issue a Second Request in that case.[41]

Professor Sprigman is also skeptical of Delrahim and Alford's contention that the ATR was forced to issue Second Requests because cannabis companies were "unwilling or unable" to provide information that would confirm that the mergers did not threaten competition.[42] Professor Sprigman notes that the parties at issue were represented by "sophisticated antitrust counsel," who knew that the law gives the DOJ power to obtain information and to block mergers completely where necessary.[43] Professor Sprigman also highlighted that cannabis legalization has been around in one form or another since 1996, and that "nothing the merging parties would be likely to give the ATR through the H-S-R process [would be something] that the feds couldn't compel by ordinary criminal process," if they wished.[44]

C. FAILURE TO ARTICULATE A THRESHOLD CONCERN OF ANTICOMPETITIVE RISK BEYOND MARKET SHARE

Concern about present market share may not be necessary to a Second Request; other legitimate concerns may drive such document requests. However, ATR failed to make a convincing case that these other legitimate concerns arose in the context of the cannabis mergers. Several of the experts queried by Goodman noted their suspicion as to whether the ATR had found a threshold concern of anticompetitive practices present before issuing the Second Requests. Multiple experts cited to the ATR's operating manual, noting that the manual itself required a threshold concern of anticompetitive harm to be met before demanding a more searching investigation—and they failed to see such concerns here. One expert, a former ATR attorney, explained that the ATR manual instructs that "Second Requests should be issued only when 'a transaction might raise competitive problems and more information is needed to evaluate it.'"[45] In such an instance, the ATR manual instructs that the Second Request should be "tailor[ed] . . . to the transaction and its possible anticompetitive consequences."[46] Stuart M. Gerson, a former Acting AG of the United States, AAG, and Assistant U.S. Attorney stated that, "[a]s an ethical and substantive matter, it is certainly unacceptable to pursue a second request without reason to believe the underlying transaction might violate the antitrust laws."[47]

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. Goodman, *supra* note 14.
46. *Id.* (internal quotations omitted).
47. *Id.*

Bill Baer,[48] former AAG in charge of the ATR[49] and former director of the Bureau of Competition at the Federal Trade Commission (FTC)[50] echoed the point that the ATR's operating manual demands that before even a preliminary investigation is opened, "the staff must determine whether there is reason to believe there is an antitrust violation worth looking at."[51] Baer recounted that in his experience at the DOJ and FTC, he had never seen a Second Request issued, nor even *recommended*, if there was no demonstration of an "underlying antitrust risk."[52] In this instance regarding the cannabis industry, Baer identified that the OPR's ostensibly exculpatory memo does not indicate whether this threshold inquiry was met—and further questioned the ATR's processes wondering, "[d]id they even ask?"[53]

Similarly, Professor Baker observed that ATR policy "require[s] staff to identify potential theories of competitive harm from a merger, based on a preliminary investigation" before a Second Request can be recommended.[54] Here, Professor Baker observes, the DOJ recommended detailed investigations into ten proposed mergers while it lacked any "plausible theory of competitive harm."[55] Not only did the firms under investigation have "trivial market shares," but in two cases the merging firms "did not even compete." [56] Christopher Sprigman, a Professor of Law at New York University School of Law and former DOJ ATR attorney again cited the manual, which dictates that "*staff* drives the Second Request process . . . Second Requests are issued only where there is some chance that a proposed merger would cause competitive harm in a well-defined antitrust market."[57] Sprigman also raised the concern that the ATR had not, at any time, "formulated a possible theory of how these mergers would harm competition." [58] Douglas Melamed, Professor of the Practice of Law at Stanford Law School framed the issue focusing on pure administrative law:

> Law enforcement agencies may properly use their powers to investigate only if there is a reasonable basis to believe that the investigation will uncover violations of the laws the agencies are authorized to enforce, and

48. Mr. Baer authored his own op-ed about the situation. *See* Bill Baer, *Think the DOJ's Antitrust Division is immune from political meddling? Think again.*, WASH. POST (June 24, 2020), https://www.washingtonpost.com/opinions/2020/06/24/think-dojs-antitrust-division-is-immune-political-meddling-think-again/.

49. Mr. Baer was former assistant AG in charge of the ATR from 2013 to 2016.

50. Mr. Baer was the former director of the Bureau of Competition at the FTC from 1995 to 1999.

51. Goodman, *supra* note 14.

52. *Id*.

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*.

> the scope and burdens of the investigation should be limited to [] those reasonably necessary for that purpose.[59]

Harry First, Charles L. Denison Professor of Law at NYU School of Law, brought attention to the fact that the ATR and FTC make Second Requests very rarely, compromising "just about 2% of all notified mergers in 2018—45 in all."[60] Following the issuance of a Second Request, Professor First said, a challenge to the merger is likely—yet in the cannabis merger investigations the ATR did not challenge a single merger out of ten investigated.[61]

To defend ATR from these critiques, Delrahim repeatedly highlighted the ATR's "lack of experience" with the cannabis industry, noting how industry experience helps the ATR "review transactions more quickly."[62] Alford also echoed Delrahim's statements regarding cannabis mergers being a "matter of first impression in the history of the [DOJ]."[63] Like Delrahim, Alford felt that the ATR's investigatory practices were necessary in relation to the multiple questions implicated in this "first impression" context.[64] Specifically, Delrahim said he "made the judgment call that it was a worthy use of the [ATR]'s resources to review in the most targeted and efficient way possible a wave of similar transactions that followed in quick succession."[65] But the critical question is what was the specific competition law concern that motivated the need to inquire into the market in the first place? That appears unanswered to this day.

Diverse local circumstances may in theory be a reason why one cannabis merger investigation was not a substitute for the subsequent investigations which would follow, because "the sale of cannabis is subject of unique, state-specific regulatory and legal structures; because it cannot be transported across state lines, learning about the industry in one state reveals nothing about the likely competitive effects of a transaction in another."[66] But in at least one case, this argument appeared to be completely inapplicable, as it was reported that "the merging companies operated in different geographies and didn't compete at all."[67] Professor Sprigman expressed skepticism toward Delrahim and Alford's position that the ATR needed to initiate all ten investigations due to the "novel legal question" posed of whether the ATR

59. *Id*.
60. *Id*.
61. *Id*.
62. Letter from Makan Delrahim, *supra* note 34, at 3.
63. Roger Alford, *Regarding Those Marijuana Mergers: A Response to Accusers Who Question the DOJ*, JUST SECURITY (July 13, 2020), https://www.justsecurity.org/71295/regarding-those-marijuana-mergers-a-response-to-accusers-who-question-the-doj/.
64. *Id.*
65. Letter from Makan Delrahim, *supra* note 34.
66. *Id.*
67. Dan Primack, *Whistleblower: Barr Directed Faulty Antitrust Reviews of Marijuana Mergers*, AXIOS (June 24, 2020), https://www.axios.com/whistleblower-barr-directed-faulty-antitrust-reviews-of-marijuana-mergers-e06c14ab-4122-47ce-acb9-6bac6f24d666.html.

should apply antitrust laws at all.[68] Professor Sprigman points to the sheer number of burdensome processes issued (ten) to determine what "seems, frankly, like an academic question."[69] The information that a Second Request yields, Professor Sprigman said, would be unlikely to aid the ATR's decision about "whether to enforce the Clayton Act in these markets."[70]

Furthermore, the antitrust policy question at issue is not entirely novel according to Professor Sprigman.[71] During his time at the ATR, Professor Sprigman sat on a committee tasked with deciding when the ATR would intervene as amicus in private antitrust cases.[72] In one instance, a "series of antitrust actions [were] brought by labor union health funds" against tobacco companies.[73] The ATR ultimately decided not to intervene, "not because [it] thought that the tobacco industry should be immune from the antitrust laws—and[, most notably] [it] did[not] need to issue Second Requests to reach a decision on that question."[74]

Similarly, Professor Sprigman did not find Delrahim and Alford's explanation that the ATR needed to build an understanding of the cannabis industry satisfactory.[75] Like his response to the "novel legal question" issue, Professor Sprigman pointed to the fact that the ATR launched "*ten* merger investigations in the cannabis industry in quick succession."[76] He also addressed the fact that the ATR "did not appear at any time to have formulated a possible theory of how [those] mergers would harm competition, and issuing Second Requests without a theory of possible competitive harm is not how the [ATR] does business," again citing to the ATR manual.[77] Professor Sprigman pointed out that neither Delrahim nor Alford nor any other ATR employee had offered a theory of possible competitive harm that might support the issuance of a Second Request.[78] Nor does it appear that the "novel industry" rationale as proffered, had any limiting principle. It could justify any burdensome fishing expedition—a particularly suspect enterprise given how much genuine concentration of market power was occurring in the U.S. economy.[79]

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68. Sprigman, *supra* note 39.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. On this trend toward concentration, see Gustavo Grullon, Yelena Larkin, Roni Michaely, *Are US industries becoming more concentrated*?, 23 REVIEW OF FINANCE 697, 697 (2019) ("over 75% of US industries have experienced an increase in concentration levels" since the late 1990s); THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (2019).

ATR tried to defend itself by claiming that the Second Requests had not violated "any relevant laws, regulations, rules, policies, or guidelines."[80] But this is closer to gaslighting than good faith argument, since the real question is what laws, regulations, rules, policies, or guidelines would *support* the plethora of Second Requests it authorized. It is black letter administrative law that the burden of proof is on the proponent of an order; certainly some analogous requirement of sound legal foundation applies to a situation like a second request.[81] Simply put, as Professor Sprigman observes, the OPR's exoneration of ATR wrongly suggested that there is nothing wrong with an AG directing Second Requests to be made "even in instances where a merger presents no antitrust concern and the intent is purely to harass companies that the AG dislikes."[82] This, he said, is antithetical to everything he knows about "how antitrust enforcement, merger investigations, and, in particular, the Second Request process, are supposed to work."[83]

D. DISPARATE TREATMENT OF MEDIA MERGERS WITHOUT A CONVINCING POLICY RATIONALE

Nor were the cannabis mergers the only example of such troubling politicization.

Serious concerns were also raised about the ATR's treatment of the AT&T/Time Warner merger that was first announced in 2016. In November 2017, the DOJ sued to block the proposed merger.[84] The DOJ reported that its concern was that the combined company would charge high fees to distribute Time Warner content, generating an "unfair advantage to AT&T-owned DirecTV."[85] Insisting their efforts were in good-faith, one DOJ official said that their investigation had found the merger would harm competition by resulting in higher bills for consumers and stifling innovation.[86] That same DOJ official "denied that ownership of CNN was a factor in the DOJ's thinking," and stated that Trump had no influence over the DOJ's decision to sue.[87] However, during his campaign for the presidency

80. Sprigman, *supra* note 39 (internal quotations omitted).

81. 5 U.S.C. § 556(d) (2015). Animus has been identified by courts as an illegitimate ground for administrative action. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (citing Moreno v. U.S. Dep't of Agriculture, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972) ("[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment" to nutritional assistance guidelines challenged in the case.)).

82. Sprigman, *supra* note 39.

83. *Id.*

84. Steven Overly, *Trump administration sues to block AT&T-Time Warner merger,* POLITICO (Nov. 20, 2017), https://www.politico.com/story/2017/11/20/trump-lawsuit-att-time-warner-merger-250956#:~:text=The%20Justice%20Department%20filed%20a,President%20Donald%20Trump's%20media%20criticism.

85. *Id.*

86. *Id.*

87. *Id.*

Trump had said that he would block the merger of CNN and AT&T simply because he despised CNN.[88] Sources familiar with the proposed merger had reported that the DOJ "gave the companies an ultimatum to either sell Time Warner's Turner Broadcasting, which includes CNN . . . or shed satellite television provider DirecTV." [89] DOJ officials gave a different story, indicating the companies *themselves* offered to sell CNN in order to push the deal through. [90] AT&T's CEO Randall Stephenson rejected the DOJ's account, stating his company had no intentions of selling or offering to sell CNN.[91]

Prior to the lawsuit, AT&T felt confident that the government would approve the merger due to its nature as a "vertical" merger, one that does not eliminate a competitor from the market.[92] In October 2016 Delrahim himself, prior to his nomination by Trump, said the merger "did not seem to pose a major antitrust problem." [93] Thus, when the lawsuit was filed, critics questioned why the conservative DOJ would take "what would traditionally be a more liberal position on the merger."[94] The DOJ remained adamant in claiming politics had no role in their decision to file suit, emboldened by an affidavit submitted by Delrahim stating the same.[95]

Ultimately, the DOJ lost its suit in June of 2018 and filed an appeal in July.[96] Though to some, the proceedings reeked of political influence, others like Jonathan Jacobson (chair of the American Bar Association's antitrust division) felt that the ATR acted independently of the White House. [97] Jacobson felt that Delrahim made his decision to sue "based on what he believes," noting that Delrahim has a different fundamental approach to

88. Hadas Gold, *AT&T brings Trump back into Justice Department's antitrust case,* CNN MONEY (Sept. 20, 2018), https://money.cnn.com/2018/09/20/media/att-doj-appeal-brief/index.html; Mr. Trump stated in a speech in 2016 that he would block the deal and tweeted about his distaste for CNN frequently. One such tweet, within weeks of the lawsuit at issue, said that he was "'forced' to watch CNN while in the Philippines and 'again realized how bad, and FAKE, it is. Loser!'" Overly, *supra* note 84. His animus continued throughout his administration, including ham-handed efforts to shame the network for covering his world-historically inept and malevolent mishandling of the COVID-19 pandemic. Axios, *Trump attacks CNN as "dumb b*stards" for continuing to cover pandemic,* AXIOS, Oct. 20, 2020, at https://www.axios.com/trump-attacks-cnn-covid-9342befa-8790-42e6-b6e5-d8472d19ecec.html.

89. Overly, *supra* note 84.

90. *Id.*

91. *Id.*

92. *Id.* There are numerous traditional antitrust articles promoting the efficiencies of vertical mergers. We take no position on their merit; we note only that the decision to block such a merger is inconsistent with the traditional approach.

93. *Id.* (internal quotations omitted)

94. Gold, *supra* note 88.

95. *Id.*

96. Ariel Shapiro, *Why the DOJ keeps going after the AT&T-Time Warner deal*, CNBC (Aug. 6, 2018), https://www.cnbc.com/2018/08/06/why-the-doj-keeps-going-after-the-att-time-warner-deal.html.

97. *Id.*

mergers than leaders from previous administrations.[98] Whereas the Obama Administration made use of behavioral remedies, such as including stipulations in mergers that require or prohibit the acquiring company from taking certain actions, Delrahim fundamentally opposed such remedies and favored divestment.[99]

Defenses of the DOJ lost some of their luster in 2019, when the DOJ lost their appeal in the D.C. Circuit by the decision of a unanimous court.[100] Such a loss is by no means proof of improper politicization; DOJ inevitably loses some cases, and antitrust law is evolving. But it was then reported that Trump had "personally asked a top White House aide to make sure the [DOJ] stopped AT&T from purchasing Time Warner."[101] The report was unearthed by Jane Mayer, an investigative journalist for the *New Yorker*, and she also reported that a few months before the DOJ filed its lawsuit Trump "pressured Gary Cohn, the former director of the National Economic Council, to tell the [DOJ] to block [the] deal."[102] According to Mayer's source, Trump asked both Cohn and then Chief-of-Staff John Kelly to come to his office to express his dismay that a lawsuit hadn't been filed yet.[103] Mayer's source recounted that after the meeting, Cohn told Kelly not to follow through with the request.[104]

The proper degree of discretion of political appointees over the executive branch is a topic of some controversy. The critical distinction is whether the President or his top advisors had a generalizable policy reason for trying to block the AT&T/TimeWarner merger, or merely had an animus against a particular firm or division thereof. It is illegal for a President (or any federal government official) to arrest, prosecute, or litigate against a particular person or firm simply out of a political animus against them.[105] But there may

98. *Id.* (internal quotations omitted).

99. *Id.*

100. Sara Salinas, *AT&T's merger with Time Warner will stand, after DOJ loses its appeal and drops the case*, CNBC (Feb. 26, 2019), https://www.cnbc.com/2019/02/26/appeals-court-upholds-decision-allowing-att-to-buy-time-warner.html.

101. Hadas Gold, *Report: Trump asked Gary Cohn to block AT&T-Time Warner merger,* CNN BUS. (Mar. 4, 2019), https://www.cnn.com/2019/03/04/media/att-time-warner-trump-gary-cohn/index.html.

102. *Id.*

103. *Id.*

104. *Id.*

105. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because [they have] done what the law plainly allows [them] to do is a due process violation of the most basic sort."). Admittedly, animus can be difficult to prove. For example, in the context of the intentional tort of malicious prosecution, plaintiffs must show "'(1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a "stalking horse," and (2) he would not have been prosecuted except for the animus,'" in order to prevail on their claim. United States v. Koh, 199 F.3d 632, 640 (2d Cir. 1999) (quoting United States v. Aviv, 923 F.Supp. 35, 36 (S.D.N.Y. 1996)). Nevertheless, it has been identified by courts as an illegitimate ground for administrative action. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (citing Moreno v. U.S. Dep't of Agriculture, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972) ("[a] purpose to discriminate against hippies cannot, in and of itself

have been a larger political project at work here. Trump and other faux-populist Republicans, like Missouri Senator Joshua Hawley, have continually railed against the media on purely political grounds (accusing them of "liberal bias") and out of a larger policy ideology (claiming to be defending some vision of a level playing field). Given the often abusive and extractive practices of cable and media companies, many Americans likely would want to see government scrutinize their mergers more.

Thus, had the AT&T/TimeWarner merger been the only massive media merger to come to the attention of the Trump DOJ, one could easily remain agnostic as to whether troublingly authoritarian, or authentically democratic, politicization had led to the merger challenge. However, another very large media merger was met with exactly the opposite reaction from the Trumpists—and the critical variables that changed seemed to be the persons set to gain from the merger, and the political commitments of an owner of one of the firms. In 2017, Trump publicly supported a deal for Disney to acquire Fox film, television, and international business units.[106] It was reported that Trump spoke with Rupert Murdoch, owner of Twenty-First Century Fox, Inc. and congratulated him on the deal the day it was announced.[107] Trump's praise for Fox news at the time was publicly recognized, and was almost certainly due to the "favorable coverage" that Murdoch's properties had given him.[108] Though Fox News was not included in the sale, the proposed acquisition would make the Murdoch family "the largest individual shareholders in Disney, increasing their wealth by billions of dollars."[109] In the same report by Mayer which revealed Trump's conversation with Cohn and Kelly, she described how, under Trump, the government "ha[d] consistently furthered Murdoch's business interests, to the detriment of his rivals."[110]

This support from Trump stands in contrast to his animosity toward the AT&T/Time Warner merger which stood to benefit CNN news, which he had publicly rebuked.[111] While the DOJ spent almost two years investigating the AT&T/Time Warner merger, culminating in an unsuccessful lawsuit, the DOJ announced approval for the Disney-Fox deal only six months after the deal itself was announced.[112] Furthermore, the approval "took about half the

and without reference to [some independent] considerations in the public interest, justify the 1971 amendment" to nutritional assistance guidelines challenged in the case.)).

106. Reuters Staff, *Trump supports deal for Disney to acquire Fox film, TV units: White House,* REUTERS (Dec. 14, 2017), https://www.reuters.com/article/us-fox-m-a-disney-trump/trump-supports-deal-for-disney-to-acquire-fox-film-tv-units-white-house-idUSKBN1E82VP.

107. *Id.*

108. *Id.* Though the news channel is also owned by Murdoch, it was not included in the sale. *Id*.

109. The Editorial Board, *The Disney-Fox Deal Sails Through, a Bit Too Easily*, N.Y. TIMES (July 1, 2018), https://www.nytimes.com/2018/07/01/opinion/disney-fox-deal.html.

110. Gold, *supra* note 88 (internal quotations omitted).

111. The Editorial Board, *supra* note 109. *See* Section III-b, *infra*.

112. The Editorial Board, *supra* note 109.

time that regulators usually need" to evaluate deals as large as the Disney-Fox deal ($71 billion).[113] Other comparisons between the AT&T merger and the Disney merger raised red flags supporting political animus. For example, the AT&T merger featured a vertical integration, which tend to be approved "as long as the merging companies agree not to take unfair advantage of their market power."[114] On the other hand, the Disney merger featured a horizontal merger, one which "antitrust regulators and judges are usually much more dubious of."[115]

Following accusations of politicization with regard to the disparate treatment of the AT&T/Time Warner merger and the Disney/Fox merger, the DOJ gave several justifications for their actions. Four main justifications for the stark differences in treatment were offered: (1) the long, onerous process of investigating and suing to block the AT&T/Time Warner merger as compared with the quick, seamless process of rubber stamping the Disney/Fox merger could be explained by antitrust timing principles, (2) AT&T's proposed merger with Time Warner would, indeed, likely harm competition as predicted by well-known antitrust principles, (3) the decision making process was completely apolitical in nature, and (4) AT&T/Time Warner's refusal to participate in divestitures in favor of adopting behavioral conditions did not gel with DOJ leadership's antitrust ideology, whereas Disney/Fox were content to make those favored divestitures.

Delrahim responded to criticism regarding the "speedy approval" of the Disney/Fox merger as compared with the AT&T/Time Warner merger which took a significant amount of time and culminated in a lawsuit and subsequent appeal.[116] While the entire Disney-Fox investigation only took six months, AT&T announced its plan to acquire Time Warner in October 2016 and the DOJ sued to block that merger in November 2017.[117] Delrahim noted that the suit actually came "only eight months after the parties complied with the [DOJ]'s formal requests for information relevant to the transaction," and that AT&T "knew within six months" of producing the relevant documentation that the DOJ had anti-competitive concerns about what it saw.[118] The merging parties have control over the expeditiousness, Delrahim said, explaining that the "timing of their Hart-Scott-Rodino filings, as well as the pace and timing of compliance with the [DOJ]'s information requests"

113. *Id.*
114. *Id.*
115. *Id.*
116. Dade Hayes, *DOJ Antitrust Head: Fox-Disney Deal "A Victory For American Consumers,"* DEADLINE (July 13, 2018), https://deadline.com/2018/07/doj-antitrust-head-calls-fox-disney-deal-victory-for-american-consumers-1202426137/.
117. Makan Delrahim, *A victory for American Consumers,* WASH. TIMES (July 12, 2018), https://m.washingtontimes.com/news/2018/jul/12/how-the-disney-fox-antitrust-settlement-protects-c/?utm_medium=email&utm_source=govdelivery.
118. *Id*.

dictates the pace of the review.[119] As the "largest telecommunications merger in history," Delrahim contended that an objective observer could hardly find this timing to be "outside the norm."[120]

Insisting their efforts during the AT&T/Time Warner merger were in good-faith, one DOJ official said that their investigation had found the merger would harm competition by resulting in higher bills for consumers and stifling innovation.[121] And DOJ and the FTC did promulgate a more general (if modest) rethinking of vertical merger policy by the summer of 2020.[122] By contrast, Daniel Petrocelli, counsel for AT&T during the DOJ suit, argued that the media companies were being "singled out," given the DOJ's adherence to classic consumer harm theories, and the faint case made by them for such consumer harm.[123] Nonetheless, the DOJ claimed that AT&T-Time Warner would have "increased leverage over distribution rivals, ultimately leading to higher carriage fees for Turner content and higher prices for consumers."[124] It further demonstrated that in the past, AT&T and DirecTV had expressed concerns to the FCC about a different vertical merger, intending to show that the two companies had "acknowledged the threat a combination of content and distribution can have to the competitive landscape."[125]

On the witness stand at trial, AT&T executives denied any incentive to raise rivals' costs.[126] The DOJ had also alleged that AT&T-Time Warner "would 'coordinate' with Comcast to try to slow down the threat from emerging streaming distributers, like SlingTV and Hulu," though the DOJ did not seem to have an economic model with which to prove its point.[127] Evident in the DOJ's loss at trial and loss again at the appeals stage, the government "failed to prove that the merger would substantially lessen competition," or that AT&T would endeavor to leverage its ownership of "premium content" to harm rivals.[128] Trial Judge Richard J. Leon of the United States District Court in Washington voiced the thoughts of many

119. *Id*.
120. *Id*.
121. Overly, *supra* note 84.
122. The DOJ and FTC published new vertical merger guidelines which indicated a modest increase in the level of vigilance the agencies would devote to the issue. However, both Democratic commissioners dissented, calling the new guidelines too permissive. *DOJ and FTC Finalize New Vertical Merger Guidelines*, VINSON & ELKINS (July 8, 2020), https://www.velaw.com/insights/doj-and-ftc-finalize-new-vertical-merger-guidelines/.
123. Ted Johnson, *AT&T-Time Warner Trial Puts Spotlight on Antitrust Chief's View of Mergers,* VARIETY (Mar. 15, 2018), https://variety.com/2018/biz/news/att-time-warner-trial-controversy-1202726979/.
124. *Id*.
125. *Id*.
126. *Id*.
127. *Id*.
128. John Brodkin, *Trump administration fails to block AT&T/Time Warner merger,* ARS TECHNICA (June 12, 2018), https://arstechnica.com/tech-policy/2018/06/att-can-buy-time-warner-inc-judge-rules/.

antitrust experts when he said: "the [DOJ]'s attempt to block AT&T's acquisition of Time Warner never made sense on the merits of the case."[129]

To be sure, antitrust law may well need to expand to empower agencies like ATR to more aggressively reviewed mergers like AT&T/Time Warner. And we may never pin down a "smoking gun conversation" or "hot documents" to prove ATR's politicization here. But the actions of Trump himself, especially set in the larger context of its disregard for settled norms and laws, speak for themselves.[130] For example, while one DOJ official denied that "ownership of CNN was a factor in the DOJ's thinking," and stated that Trump had no influence over the DOJ's decision to sue, Trump himself constantly made threats against specific companies that angered him (often simply by reporting on the disastrous consequences of his policies).[131] During his campaign for the presidency Trump had said that he would block the merger of CNN and AT&T simply because he did not like CNN.[132] Delrahim himself had said in 2016 that he "didn't see a major problem with the transaction,"[133] and appeared to change course by 2017.

Nevertheless, Delrahim denied that Trump had ever been involved in the DOJ's operations with regard to the merger.[134] Trump himself contended that it was Delrahim's decision, and not his, to try to block the merger.[135] Yet Rudolph Giuliani, a member of the Trump legal team, stated the President "denied the merger."[136] After that statement, Giuliani attempted to correct himself and say that he "hadn't been properly informed," and that the President had told him directly that "he didn't interfere."[137] Delrahim asserted that the DOJ was merely carrying out its duties of enforcement

129. Andrew Ross Sorkin, *The Political Legacy of a Failed Challenge to the AT&T-Time Warner Deal,* N.Y. TIMES (June 12, 2018), https://www.nytimes.com/2018/06/12/business/dealbook/att-time-warner-legacy.html.

130. For more on this context, see MICHAEL LEWIS, THE FIFTH RISK (Doubleday, 2018); Tamsin Shaw, *William Barr: The Carl Schmitt of Our Time,* NEW YORK REVIEW OF BOOKS, Jan. 15, 2020.

131. Overly, *supra* note 84.

132. Gold, *supra* note 88; Mr. Trump stated in a speech in 2016 that he would block the deal and tweeted about his distaste for CNN frequently. One such tweet, within weeks of the lawsuit at issue, said that he was "'forced' to watch CNN while in the Philippines and 'again realized how bad, and FAKE, it is. Loser!'" Overly, *supra* note 84.

133. Emily Stewart, *The government is suing to block the AT&T-Time Warner deal,* VOX (Nov. 20, 2017), 682262/att-time-warner-deal-doj-sues.

134. Michael J. de la Merced et. al., *Justice Department Says Not So Fast to AT&T's Time Warner Bid,* N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news.

135. Sorkin, *supra* note 129.

136. S.V. Date, *Giuliani Says Cohen Never Spoke With Trump About His Big-Dollar Clients*, HUFFPOST (May 11, 2018), https://www.huffpost.com/entry/trump-giuliani-cohen-corporate-clients_n_5af606e6e4b0e57cd9f979c7?ncid=engmodushpmg00000004. This was in response to accusations that the President's former lawyer may have been improperly influenced by having AT&T as a client.

137. Sorkin, *supra* note 129.

faithfully, without any regard to politics.[138] He felt that a "major PR effort by AT&T" in the case persuaded those "[un]familiar with antitrust law" that politics were in play.[139] Finally, Delrahim brought attention to the fact that he received letters from a number of senators asking him to "block [the] merger or do not do a behavioral remedy," which in Delrahim's eyes amounted to bipartisan criticism about the proposed merger.[140]

Finally, the DOJ felt that the AT&T/Time Warner merger was sufficiently distinct from the Disney/Fox merger in that the former only seemed agreeable to behavioral remedies whereas the latter was willing to make divestitures. Kimmelman noted that Delrahim and other conservatives are notoriously unsupportive of mergers that are approved with behavioral conditions, and "when faced with a problematic transaction . . . favor asset sales, in large part because it washes the government's hands of having to exert oversight to make sure the conditions are followed."[141] The DOJ contended that it had offered AT&T and Time Warner options, such as "[k]eep CNN and Turner Broadcasting but divest another part of AT&T like DirecTV; keep all of AT&T but divest the Turner division, including CNN; or allow partial ownership of Turner."[142] However, according to the DOJ, the companies would only accept behavioral remedies, which consist of promises not to engage in anticompetitive conduct.[143] In contrast, Delrahim said, Disney and Fox were willing to "work cooperatively with the [ATR], offering up the very types of divestitures which the [DOJ] could reasonably expect to achieve through litigation," and attributed the "efficient conclusion after six months of review" to this cooperation.[144]

These are all valid points. Of all the ATR actions discussed in this Part, the challenge to the AT&T/Time Warner merger comes closest to the category of "democratic politicization" we explore in Part II. Nevertheless, there are enough concerning signs of attempted illicit influence by the President that the episode may be part of a pattern of legal expertise subordinated to power politics, and merits further inquiry.

E. RETALIATION AGAINST AUTOMAKERS OVER EFFORTS TO REDUCE VEHICLE GREENHOUSE GAS EMISSIONS

Elias' complaint about the politicization of cannabis mergers also addressed the ATR's initiation of reviews of four major automakers.[145] The

138. Delrahim, *supra* note 117.

139. Eric Johnson, *Full Q&A: Assistant Attorney General Makan Delrahim talks antitrust on Recode Decode,* VOX (Sept. 1, 2018), https://www.vox.com/2018/9/1/17807096/makan-delrahim-antitrust-att-time-warner-donald-trump-kara-swisher-recode-decode.

140. *Id*.

141. Johnson, *supra* note 123.

142. *Id*.

143. Delrahim, *supra* note 117.

144. *Id*.

145. *See* Testimony of John W. Elias, *supra* note 8.

investigations of the automakers were initiated only a day after Trump tweeted that he was "enraged by the news that the [automakers] would adhere to higher fuel emissions standards than the federal government demands."[146] Elias argued that the automakers, which held "less than 30% of the market," were targeted by the Trump Administration because of their agreement with California to "reduce vehicle greenhouse gas emissions."[147] Trump's dismay stemmed from his own plan to allow for increased emissions.[148] California's agreements were with BMW, Ford, Honda and Volkswagen, and were intended to commit the automakers to produce vehicles capable of averaging 50 miles per gallon by 2026.[149] By contrast, Trump's plan asked automakers to attain only 40 miles per gallon by 2026.[150]

The ATR's investigation sought to determine whether the agreement violated competition laws barring collusion.[151] Yet, Elias' testimony described how "[u]nder well-established antitrust precedent, states have wide latitude to regulate."[152] Furthermore, the *Noerr-Pennington* doctrine (which finds its basis in the First Amendment) instructs that companies are free to "collectively lobby the government for regulation."[153] Thus, according to Elias, the agreement should not have raised any antitrust concerns.[154] Elias compared the initiation of the investigation into the automakers with the investigation into the cannabis mergers, showing how its opening paperwork "[did] not include a staff 'recommendation,'" but rather simply stated the ATR wanted to open an investigation.[155] Elias continued, stating that the initiation of the investigation was also "generated by the [ATR's] policy staff, which does not conduct enforcement investigations of this type."[156]

When "news of the investigation became public," Elias said, ATR experts familiar with both the "state action" defense as well as the *Noerr-Pennington* doctrine questioned the ATR's decision to "investigat[e] conduct that appeared to be prompted by a state regulator."[157] According to Elias, AAG Delrahim attempted to deflect these concerns by holding a staff meeting in which he asserted that staff was "not rushed into initiating the investigation."[158] As it turned out, while the "potential antitrust violation

146. *Id.*
147. Goodman, *supra* note 14.
148. *Id.*
149. Rebecca Beitsch, *DOJ Whistleblower cites Trump tweets as impetus for California emissions probe*, THE HILL (June 23, 2020), https://thehill.com/policy/energy-environment/504160-doj-whistleblower-sites-trump-tweets-as-impetus-for-investigation.
150. *Id.*
151. *Id.*
152. Testimony of John W. Elias, *supra* note 8, at 6.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*

under investigation was premised on a group (competitor-to-competitor) agreement," each of the four automakers had *independently* entered an agreement with California—they had *not* entered as a group.[159]

Delrahim's stated justifications for the ATR's actions partook of theories of expansive executive power that effectively proved too much—it is hard to imagine what type of industry/regulatory cooperation they would not cover. For example, he often repeated the ATR's right "to investigate any appearance of collusive conduct," and the fact that more information was needed at the outset to determine whether there was, in fact, collusion.[160] Delrahim cautioned that "even well-intentioned collusion can still be illegal," and thus the request for more information from the automakers was consistent with ATR duties.[161] Given the scourge of air pollution and anthropogenic climate change, and the simultaneous proliferation of anti-competitive practices in so many other sectors, it is hard to imagine why any rational government agency would devote scarce resources to an inquiry whose most prominent end would be an increase in fossil fuel consumption and all that brings with it (including exacerbation of climate change and serious negative health effects for those exposed to excess pollution). All that is left in response is the formulaic, formalistic assertion that when competitors "agree with each other on how they will act in the marketplace, antitrust law enforcers have stepped in and taken a good, hard look."[162]

Thus, later stonewalling should not be surprising. Sheldon Whitehouse, United States Senator for Rhode Island, attempted to elicit more from Delrahim regarding the basis for the investigations. In September 2019, Whitehouse asked for information regarding the "origins and motivations of the investigation" at a Senate Judiciary Committee hearing.[163] According to a press release issued by Whitehouse's office, Delrahim "deflected [Senator Whitehouse]'s questions and subsequently failed to provide complete written responses to questions," although the investigation was closed in February 2019 and "[ATR] policy clearly permit[ted] Delrahim to disclose his reasons for terminating the investigation."[164]

Following the Committee hearing, Whitehouse wrote a letter to Delrahim requesting supplementary responses to questions that he had not answered at

159. *Id.*

160. Bryan Koenig, *DOJ Antitrust Chief Tells Sens. Carmakers Probe Not 'Political,'* LAW360 (Sept. 17, 2019), https://www.law360.com/articles/1199420.

161. *Id*.

162. Bryan Koenig, *No 'Politicization' of DOJ Probes, Antitrust Chief Says*, LAW 360 (Sept 16, 2019), https://www.law360.com/articles/1199407/no-politicization-of-doj-probes-antitrust-chief-says.

163. Press Release, Senator Sheldon Whitehouse, Whitehouse Presses Antitrust Head for Answers on Politicized Investigation of California Fuel Economy Agreement (June 10, 2020), https://www.whitehouse.senate.gov/news/release/whitehouse-presses-antitrust-head-for-answers-on-politicized-investigation-of-california-fuel-economy-agreement.

164. *Id*.

the hearing. Senator Whitehouse noted that Delrahim did not identify which "office or component" of the ATR had first "raised the idea" to investigate, nor did he answer an inquiry into whether he spoke to the EPA or DOT about the investigation.[165] Apparently, Delrahim also did not respond to a question regarding whether the ATR had taken into consideration the President's tweets regarding the automakers or whether the ATR had even taken any investigatory steps with regard to the automakers *before* the President's first tweet criticizing the automakers was posted.[166] According to Whitehouse's letter, Delrahim also failed to identify the specific types of information reviewed in the case, stating only that the ATR "monitors markets and receives information from new reports, market participants, and third parties."[167]

F. EVIDENCE OF AUTHORITARIAN POLITICIZATION

Experts believed that the ATR treated the cannabis mergers in a politicized way, for the following reasons: (1) the OPR's letter reviewing the whistleblowers' allegations did not interview decision-makers in the investigation process for improper motive, (2) the sheer number of investigations issued could not justify the ATR's contention that it needed more experience in the cannabis industry, (3) the ATR violated its own manual when issuing the Second Requests, and (4) the harm posed to competition was extremely minimal, and (5) the burden on the firms was vastly disproportionate to the harms possibly prevented by potential enforcement actions.[168] The DOJ's responses did little to vindicate their actions or quell the concerns of the experts given their lack of a legal or common sense basis, and could be easily refuted by experts.[169]

Moreover, the cannabis mergers do not represent the only instance where the DOJ seems to have been motivated politically. In the whistleblower complaint itself, the issue was raised of whether the DOJ had proper motives for examining four automakers who had separately entered into agreements with California. In that case, an irrational enthusiasm for fossil fuel burning (compounded by long-standing alliances between fossil fuel interests and the Republican Party) seemed far more explanatory than any genuine competitive concerns. In a similarly Trumpist vein, the DOJ quickly approved a Disney-Fox merger, which stood in contrast to its nearly two-year investigation and failed lawsuit attempting to block the AT&T/Time Warner merger. While a closer call than the automotive and cannabis situations, the differential treatment still raises the red flag of politicization, grounded in Trump's own increasingly unhinged words and actions (calling, for instance,

165. *Id*.
166. *Id*.
167. *Id*.
168. *See* The Editorial Board, *supra* note 109.
169. *See* Sprigman *supra* note 39.

one of the divisions of the firms involved "dumb b*stards," part of his endless stream of invective).

We will of course never be privy to the exact conversations that led to each of the troubling investigations above. Incompetence or caprice may explain as much as the malevolent will to power so common in authoritarian regimes. Nevertheless, the episodes are reminiscent of a scene in *Angels in America,* which fictionally portrays one of Donald Trump's earliest attorneys, Roy Cohn, who had many connections to the right by the 1980s.[170] In one scene of the play, where Cohn is desperately trying to avoid being disbarred in New York, he explains to a young attorney he is mentoring (and trying to corruptly influence), why the young attorney should take a job in the Department of Justice:

> **Roy:** Very fancy lawyers, these disbarment committee lawyers, fancy lawyers with fancy corporate clients and complicated cases. Antitrust suits. Deregulation…Complex cases like these need Justice Department cooperation like flowers need the sun. Wouldn't you say that's an accurate assessment, Martin?
>
> **Martin:** I'm not here, Roy. I'm not hearing any of this.
>
> **Roy:** No. Of course not.
>
> Without the light of the sun…these cases, and the fancy lawyers who represent them, will wither and die.

A well-placed friend, someone in the Justice Department, can turn off the sun. Cast a deep shadow on my behalf. Make them shiver in the cold. If they overstep. They would fear that.[171]

Though the portrayal is fictional, it is exceptionally acute in its suggestion of the type of wink-wink, nod-nod, *sotto voce* deal making and influence that become an all-too-plausible explanation for Trump-era administrative action without adequate or consistent support in law or facts. The corruption of Trump himself is beyond dispute. Martin's "I'm not hearing any of this" is reminiscent of the shreds of plausible deniability cobbled together in so many instances of ATR's responses to the resoundingly consistent and widespread condemnation of its actions from experts. Cohn is largely remembered as one of the most malevolent characters in American history, and has been called a key mentor of Trump's.[172] And there is little doubt that a person of Trump's character would

170. Cohn defended Trump against 1970s Justice Department allegations that Trump's family real estate business discriminated against African-American renters. Bruce Handy, *A Roy Cohn Boomlet: How the Trump Era Gave Us Dueling Documentaries*, VANITY FAIR (Sept. 25, 2019),

171. TONY KUSHNER, ANGELS IN AMERICA 70 (2013).

172. Stuart Miller, *Blame lawyer Roy Cohn for Donald Trump's nasty political tactics, documentary says*, N.Y. DAILY NEWS, Sept. 29, 2019 (Donald Trump "embraced Cohn as a mentor and relied on him as a lawyer for more than a decade starting in the 1970s. Echoes of Cohn's antagonistic style can still be heard in Trump's choleric rally speeches.").

search for, and be particularly pleased by, appointees who acquiesced to a pattern of policies entirely consistent with an authoritarian politicization of core functions of the agencies they served in. This is a type of politicization that future competition law and policy must avoid—and courts should be particularly suspicious of cases in which it arises.

II. DEMOCRATIC ASPECTS OF LATE 2010S ANTITRUST'S POLITICIZATION

The authoritarian politicization of antitrust is not the only competition law story of the Trump era, however. There was simultaneously an increasing willingness of both federal and state antitrust authorities to move beyond a narrow approach to competition policy in order to democratize their understanding of harm and larger social concerns raised by corporate concentration. This is a positive politicization, enabling better responses to pressing public concerns and distributing the type of power that authoritarian antitrust policy aspires to concentrate.

Since the 1960s, attorneys have tended to cede ground to economists and econometricians in antitrust policy. Establishment figures have generally assumed this to be progress, from rhetoric to (the rule of) reason; from the vagueness of words to the clarity of numbers; and from the instability of politics to the stable order of expertise.[173] However, many results of this change in regulation and enforcement have been grimly counterproductive. Concentration has risen.[174] Purported merger efficiencies, "validated" by well-paid quantitative experts, have vanished into thin air[175]—the vaporware of sponsored social science.[176]

Historical trends have exacerbated these problems. The global financial crisis of 2008 only strengthened the largest banks.[177] The financial crisis

173. *See* Frank Pasquale, *Professional Judgment in an Era of Artificial Intelligence and Machine Learning*, 46 (1) BOUNDARY 2 73 (2019) (discussing the connection between neoliberalism and quantification in policy).

174. *See* THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (2019).

175. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 84–86 (2015); JOHN KWOKA, CONTROLLING MERGERS AND MARKET POWER: A PROGRAM FOR REVIVING ANTITRUST IN AMERICA (2020).

176. On the problem of experts influenced by funding sources, *see* PHILIP MIROWSKI, SCIENCE-MART: PRIVATIZING AMERICAN SCIENCE (2011) (discussing sponsored research).

177. *See A Decade After the Great Recession, Is the Global Financial System Safer?*, WHARTON SCH. U. PA. (Sep. 11, 2018), https://knowledge.wharton.upenn.edu/article/ten-years-great-recession-global-financial-system-safer/ (noting that reforms after the financial crisis "have unquestionably enhanced the capital strength of most banks and reduced their vulnerability to a liquidity crisis"); *see also* Renae Merle, *A guide to the financial crisis–10 years later*, WASH. POST (Sep. 10, 2018), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis—10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html ("[M]any of the country's biggest banks are bigger now than they were before the financial crisis. JPMorgan Chase has $2.5 trillion in assets, compared with $1.5 trillion in 2007. Bank of America has about

caused by COVID-19 is accelerating massive technology firms' plans to control vast swathes of the economy, pushing their CEOs' and top shareholders' wealth to stratospheric levels.[178] Austerity combined with maladministration of the CARES Act have promised to make 2020's GDP collapse an extinction-level event for thousands of small businesses, further driving concentration of economic activity into the largest firms.[179] In this context, constituent demands for more robust protection of small and medium-sized enterprises from the depredations of massive firms were becoming impossible for political appointees to ignore. They were also repeatedly validated in the relevant academic literature. This combination of public voice and a democratization of competition law expertise resulted in a democratic politicization of high technology antitrust.

A. THE HOUSE REPORT'S VISION OF A MORE DEMOCRATIC ECONOMY

As 2020 House of Representatives Antitrust Hearings showed, there is growing political interest in righting economic imbalances and inequalities.[180] Representatives from around the U.S. are not keen on watching local businesses wither and die as they pay higher and higher tributes to Amazon to appear on the firm's "marketplace," or compete against Amazon's self-preferred brands.[181] Nor are other tech giants likely to be portrayed as heroic innovators any longer, as the press gradually witnesses its revenues diverted to monopolistic advertising platforms.

$2.3 trillion in assets, compared with $1.7 trillion in 2007. The assets of Wells Fargo are near $2 trillion, more than double what they were right before the crisis.").

178. "People like Jeff Bezos, Elon Musk, and Steve Ballmer have added tens of billions of dollars to their net worths since the beginning of the calendar year." *See* Theodore Schleifer, *Silicon Valley's richest are getting richer just as the pandemic is getting worse,* VOX (July 21, 2020), https://www.vox.com/recode/2020/7/21/21332166/tech-billionaires-wealth-elon-musk-steve-ballmer-jeff-bezos-pandemic-covid.

179. *See* Emily Flitter, *'I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html ("Researchers at Harvard . . . estimat[e] that nearly 110,000 small businesses . . . decided to shut down permanently."); *see also* James Kwak, *The End of Small Business*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/outlook/2020/07/09/after-covid-19-giant-corporations-chains-may-be-only-ones-left/?arc404=true (explaining how the COVID-fueled economic crisis is "further increasing corporate concentration" as spending is being pushed online where "the e-commerce sector is dominated by so few players.").

180. *See* Sarah Miller, *Last Week's Big Tech Antitrust Hearings Sent an Unmistakable Message: Change Is In the Air for America's Corporate Giants*, THE APPEAL (Aug. 6, 2020), https://theappeal.org/last-weeks-big-tech-antitrust-hearings-sent-an-unmistakable-message-change-is-in-the-air-for-americas-corporate-giants/ ("[T]he committee signaled an unprecedented desire to break with . . . the 197s-era, hands-off antitrust ideology . . . [that] helped bestow these titans of tech with such extraordinary power.").

181. Stacy Mitchell, Ron Knox, & Zach Freed, *Report: Amazon's Monopoly Tollbooth*, INST. FOR LOCAL SELF-RELIANCE 2-3 (July 28, 2020), https://ilsr.org/amazons_tollbooth/.

Many books published recently solidified these intellectual shifts in the field.[182] A comprehensive House Antitrust Subcommittee report (House Report) demonstrated legislative interest in reforming the law.[183] Based on 1.3 million internal documents and communications from massive firms, interviews with more than 240 market participants, and submissions from 38 antitrust experts, the House Report promoted an exceptionally democratized vision of the future of economic development in the U.S. Its recommendations included:

- Structural separations to prohibit platforms from operating in lines of business that depend on or interoperate with the platform;
- Prohibiting platforms from engaging in self-preferencing;
- Requiring platforms to make its services compatible with competing networks to allow for interoperability and data portability;
- Mandating that platforms provide due process before taking action against market participants;
- Establishing a standard to proscribe strategic acquisitions that reduce competition.[184]

As legal theorists like Sabeel Rahman have argued, these are first steps toward an economy where small and medium sized enterprises have a chance to develop some level of autonomy.[185] Without such interventions, economic power becomes more pyramidal rather than distributed.[186] Moreover, looking to the future deployment of AI and robotics in the economy as the most advanced modes of production, it is essential to decentralize control so that professions of domain experts are able to wield power, enabling the labor they represent to co-govern technological deployment.[187]

182. The books include: DAVID DAYEN, MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER (2020); SALLY HUBBARD, MONOPOLIES SUCK: 7 WAYS BIG CORPORATIONS RULE YOUR LIFE AND HOW TO TAKE BACK CONTROL (2020); BARRY C. LYNN, LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS THE WILL OF THE PEOPLE (2020); MATTHEW STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020); MAURICE STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE (2020).

183. *Investigation of Competition in Digital Markets*, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

184. Press Release, House Committee on the Judiciary, Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted By Monopoly Power (Oct. 6, 2020)
https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429.

185. *See* K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2019).

186. FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015).

187. FRANK PASQUALE, NEW LAWS OF ROBOTICS: DEFENDING HUMAN EXPERTISE IN THE AGE OF AI (2020).

An emerging Neo-Brandeisian school of antitrust is promoting forms of competition law that are better for both consumers and producers, and more determinate than the economism of mainstream U.S. antitrust (thus alleviating some of the justified concerns about indeterminacy that dominant approaches have caused). This movement is critical to advancing and improving a U.S. economy which has been justly criticized as uncompetitive and exploitative.[188] While its ideals are still only starting to emerge in Congress and state legislatures, federal agencies have recently proven to be far more active now in enforcing antitrust laws with respect to the largest Silicon Valley firms than they have been in many years. While popular discontent had been brewing for years, the dam finally broke in late 2020, when several important interventions signaled a practical revival of U.S. antitrust law.[189]

B. FTC, DOJ, AND STATE ATTORNEYS GENERAL CONFRONT THE POWER OF LARGE TECHNOLOGY FIRMS

First, the FTC filed one of most devastating antitrust complaints in its history against Facebook.[190] The complaint was bipartisan, signed by the Republican Chairman and two Democratic Commissioners of the FTC. The FTC accused the social networking giant of monopolization. The social network space was contestable in the 2000s: Friendster was displaced by Myspace, and Myspace was in turn dethroned by Facebook.[191] Then Mark Zuckerberg and his upper management team aimed to consolidate their position, the complaint alleges, by eliminating competition:

> Since toppling early rival Myspace and achieving monopoly power, Facebook has turned to playing defense through anticompetitive means. After identifying two significant competitive threats to its dominant position—Instagram and WhatsApp—Facebook moved to squelch those threats by buying the companies, reflecting CEO Mark Zuckerberg's view, expressed in a 2008 email, that "it is better to buy than compete." To further entrench its position, Facebook has also imposed anticompetitive conditions that restricted access to its valuable platform—conditions that Facebook personnel recognized as "anti user[,]" "hypocritical" in light of Facebook's

188. THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 9 (2019).

189. *See* Complaint, FTC v. Facebook, Inc., FTC Matter/File No. 191 0134 (D.D.C. 2020), https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf [hereinafter FTC v. Facebook Complaint]; Complaint, U.S. v. Google (D.D.C. 2020) (No. 1:20-cv-03010), https://www.justice.gov/opa/press-release/file/1328941/download [hereinafter U.S. v. Google Complaint].

190. *See* FTC v. Facebook Complaint, *supra* note 189.

191. Gil Press, *Why Facebook Triumphed Over All Other Social Networks*, FORBES (Apr. 8, 2018), https://www.forbes.com/sites/gilpress/2018/04/08/why-facebook-triumphed-over-all-other-social-networks/?sh=1cf452246e91.

> purported mission of enabling sharing, and a signal that "we're scared that we can't compete on our own merits."[192]

As one commentator noted, Facebook's "buy or bury" approach to potential rivals "harks back to the tactics used by Standard Oil and the railroads at the dawn of the 20th century that were found to be illegal."[193] The FTC also contemplates in the complaint the full scope of remedies necessary to "restore the competition that would exist absent the conduct alleged in the Complaint," including the breakup of Facebook Blue, WhatsApp, and Instagram into independent businesses, "including, to the extent reasonably necessary, the provision of ongoing support or services from Facebook to one or more viable and independent business(es)."[194]

Not to be outdone, the Department of Justice, joined by eleven largely conservative states (Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas), sued Google in November 2020, alleging that Google unlawfully maintains "monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices."[195] The complaint highlighted exclusionary agreements, including what it characterized as "tying arrangements," as an anticompetitive practice used by Google to dominate "distribution channels and block rivals."[196] The central idea behind the suit is that Google is able to lock up the market for search advertising, thereby extracting higher prices for advertisements (and, indirectly, to raise the prices of the goods and services whose sale funds those advertisements).[197] The

192. FTC v. Facebook Complaint, *supra* note 189, at 2.

193. Steve Pearlstein, *Facebook and Google cases are our last chance to save the economy from monopolization*, WASH. POST (Dec. 18, 2020), https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/.

194. FTC v. Facebook Complaint, *supra* note 189, at 51. "Facebook Blue" is what the social network commonly known merely as Facebook, is often called within the firm Facebook itself, to distinguish the flagship social network from the company itself. *Id*. at 2. As of Dec. 1, 2020, Wikipedia lists 88 acquisitions by Facebook. *List of mergers and acquisitions by Facebook*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Facebook (last updated Dec. 31, 2020).

195. *See* U.S. v. Google Complaint, *supra* note 189, at 2. California has asked to be joined to the case as of late December 2020. *California is the first Democratic state to ask to join DOJ lawsuit against Google*, CNBC (Dec. 11, 2020), https://www.cnbc.com/2020/12/11/california-asks-to-join-doj-lawsuit-against-google.html.

196. U.S. v. Google Complaint, *supra* note 189. "Google pays *billions* of dollars each year to distributors—including popular-device manufacturers such as Apple, LG, Motorola, and Samsung; major U.S. wireless carriers such as AT&T, T-Mobile, and Verizon; and browser developers such as Mozilla, Opera, and UCWeb— to secure default status for its general search engine and, in many cases, to specifically prohibit Google's counterparties from dealing with Google's competitors." *Id*.

197. *See* Brent Kendall & Rob Copeland, *Justice Department Hits Google With Antitrust Lawsuit,* WALL ST. J. (Oct. 20, 2020), https://www.wsj.com/articles/justice-department-to-file-long-awaited-antitrust-suit-against-google-11603195203.

illicit profits thereby generated allow Google to pay off entities that could ensure more competition.[198]

Antitrust experts suggest this way of modelling the entire apparatus is a particularly effective way of ensuring intermediaries and middlemen can extract more value from advertisers (and thus consumers) generally.[199] Imagine, for instance, a more competitive search ecology, where several search engines vied for advertisers, users, and prime space afforded by OS vendors, wireless carriers, and browser developers. In that scenario, advertisers and users would have more choices. Advertisers could shop around for better search advertising deals. Users might find a more robustly comprehensive and more privacy-protective search engine. Instead, in the current situation, the dominant search engine (Google) and the OS vendors, wireless carriers, and browser developers (where it is found) appear to be in a symbiotic relationship, in order to take advantage of advertisers and consumers. The more Google can extract from users and advertisers, the more it can pay bonuses to OS vendors, wireless carriers, and browser developers.

It is not only OS vendors, wireless carriers, and browser developers that Google appears to be working with in exclusionary ways to stop competition. The Texas Attorney General (along with several other states) has released an explosive (albeit redacted) complaint alleging something akin to bid-rigging in the relationship between Facebook and Google.[200] The complaint alleges:

> Facebook curtailed its involvement with header bidding in return for Google giving Facebook information, speed, and other advantages in the auctions that Google runs for publishers' mobile app advertising inventory each month in the United States. In these auctions, Facebook and Google compete head-to-head as bidders. Google's internal codename for this agreement, signed at the highest-level, was…a twist on the character name from *Star Wars*. The parties [are] literally manipulating the auction . . . .[201]

198. *See id*. ("The government alleged that Google uses billions of dollars collected from advertisements on its platform to pay for mobile-phone manufacturers, carriers and browsers . . . to maintain Google as their preset, default search engine, creating a self-reinforcing cycle of dominance.").

199. ARIEL EZRACHI & MAURICE STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016). This book includes several modeling scenarios for predation, drawing on ecological metaphors.

200. Complaint, Texas v. Google LLC (E.D. Tex. 2020) (No. 1:20-cv-03010), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216%20COMPLAINT_REDACTED.pdf [hereinafter Texas v. Google Complaint]; see John Newman @johnmarknewman (Dec. 16, 2020, 4:16 PM), https://twitter.com/johnmarknewman/status/1339318630211710976 (discussing bid rigging); *see also Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look For*, U.S. DEPT. OF JUSTICE, https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes (last updated June 25, 2015).

201. Texas v. Google Complaint, *supra* note 200, at 6.

A former advertising executive, Dina Srinavasan, informed the complaint with her industry experience and rigorous legal analysis.[202] The complaint directly ties the alleged misbehavior to potential consumer harms. As the complaint alleges, "Google now uses its immense market power to extract a very high tax [on] the ad dollars otherwise flowing to the countless online publishers and content producers like online newspapers, cooking websites, and blogs who survive by selling advertisements on their websites and apps. These costs invariably are passed onto the advertisers themselves and then to American consumers."[203] The Texas lawsuit has alleged unfair exclusionary contracts; as Shoshana Wodinsky explains, it alleges that "Google's tools for advertisers mandate that any people trying to buy ad space across the vast Google Display Network exclusively use Google's exchange to do so—even if third-party exchanges were offering access to identical ad space" for less.[204]

Another state-led lawsuit featured an even wider array of support than the Texas case. Colorado Attorney General Phil Weiser (an expert on technology law with a distinguished scholarly record) now leads a 46-state antitrust lawsuit against Google. The complaint's allegations went beyond the U.S. Department of Justice-led case, and were stark:

> Google, one of the largest companies in the world, has methodically undertaken actions to entrench and reinforce its general search services and search-related advertising monopolies by stifling competition. As the gateway to the internet, Google has systematically degraded the ability of other companies to access consumers. In doing so, just as Microsoft improperly maintained its monopoly through conduct directed at Netscape, Google has improperly maintained and extended its search-related monopolies through exclusionary conduct that has harmed consumers, advertisers, and the competitive process itself. Google, moreover, cannot establish business justifications or procompetitive benefits sufficient to justify its exclusionary conduct in any relevant market.[205]

The complaint specifically alleges three tactics. First, the complaint alleges that Google "uses its massive financial resources to limit the number of consumers who use a Google competitor," focusing in particular on its

202. Daisuke Wakabayashi, *The Antitrust Case Against Big Tech, Shaped by Tech Industry Exiles*, N.Y. TIMES (Dec. 20, 2020), https://www.nytimes.com/2020/12/20/technology/antitrust-case-google-facebook.html; *see* Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should lean on the Principles of Financial Market Regulation*, 25 STAN. TECH. L. REV. 55 (2020); *see* Dina Srinivasan, *The Antitrust Case Against Facebook*, 16(1) BERKELEY BUS. L. J. (2019).

203. Texas v. Google Complaint, *supra* note 200, at 7.

204. Shoshana Wodinsky, *How Google Ruined the Internet (According to Texas)*, GIZMODO (Dec. 17, 2020), https://gizmodo.com/how-google-ruined-the-internet-according-to-texas-184590 2795.

205. Complaint, Colorado v. Google, (D.D.C. 2020), https://assets.documentcloud.org/ documents/20431671/colorado-v-google.pdf.

massive annual payments to Apple to make Google the default search engines on iPhones.[206] Alphabet, Google's parent company, of course owns the main rival OS to that of Apple in the U.S. mobile phone duopoly, Android.[207] Put the two together, add in the type of self-reinforcing data advantages that have been accumulating since the 2000s, and Google has a very effective chokepoint on much of the internet. Second, Google operates its s Search Ads 360 exchange (SA360), the "single largest such tool used by advertisers—to severely limit the tool's interoperability with a competitor, thereby disadvantaging SA360 advertisers."[208] Third, "Google throttles consumers from bypassing its general search engine and going directly to their chosen destination, especially when those destinations threaten Google's monopoly power."[209] This third point is dramatically illustrated in the Complaint, as it shows how much of the typical search page is now plastered with Google advertising and leads, as opposed to the less biased organic results that delighted consumers when Google was less monopolistic, and actually had to worry about competition.[210]

Each of these cases reflect over a decade of academic work and activism to bring the harms of large internet firms to the attention of antitrust authorities. Experts may disagree as to their ultimate merits. But they clearly do not reflect the self-serving, authoritarian agenda of an autocratic regime trying to punish its political enemies and helps its friends. Diverse states, ranging from California to Mississippi, backed various lawsuits. The FTC Complaint against Facebook was bipartisan. And the Trump Administration and its conservative allies have put together extraordinarily powerful digital political machines via Facebook and Google's YouTube.

These often bipartisan complaints reflect a form of cooperation all-too-rare in today's politics: Democratic and Republican politicians who have heard concerns about large technology firms from experts, civil society advocates, and their constituents, and who are acting responsively to this confluence of the critical wings of activist publics, and the activist wings of critical publics.[211] This democratic politicization, properly constrained by norms of legal regularity and deference to experts, is exactly the type of democratization necessary to revitalize competition law and policy in the 21st century.

206. Complaint at 7, Colorado v. Google, (D.D.C. 2020), https://assets.documentcloud.org/documents/20431671/colorado-v-google.pdf [hereinafter Colorado v. Google Complaint].

207. Alejandro Alba, *A list – from A to Z – of all the companies, brands Google's alphabet currently owns*, N.Y. DAILY NEWS (Aug. 11, 2015), https://www.nydailynews.com/news/world/z-list-brands-companies-google-alphabet-owns-article-1.2321981.

208. Colorado v. Google Complaint, *supra* note 205, at 8.

209. *Id*.

210. *Id.* at 13-14.

211. The language of "critical" and "activist" publics is drawn from NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY (1994).

III. CONCLUSION: TWO FACES OF POLITICS IN ANTITRUST

A new social science of optimal corporate size is necessary—and it will need to be informed by popular concern about concentration in the economy. As this new social science is built and applied, we must bear in mind Maurice Stucke's still-relevant critiques of mainstream approaches to antitrust:

> Prevailing competition advocacy glosses over four fundamental questions: First, what is competition? Second, what are the goals of a competition policy? Third, how does one achieve, if one can, the objectives of such desired competition? Fourth, how does one know if the economy is progressing toward these goals?[212]

After surveying considerable diversity of opinion on the definition of "competition," Stucke argues that it cannot be an "end in itself," but might better be thought of as "a policy tool to achieve broader government objectives for the economy."[213] These objectives include much more than gross measures of "consumer welfare" or "wealth maximization."[214] The goals of competition policy are necessarily diverse, and Stucke suggests that it is deeply unwise to try to subordinate all its objectives to one overriding end:

> Other than for an idealist, competition policy cannot be reduced meaningfully to a single goal. It is the essence of the economic problem that the making of an economic plan involves the choice between conflicting or competing ends–different needs of different people. Competition officials, ultimately, must recognize the existence of multiple goals and values.[215]

To overcome short-termism, we not only need better social science, but also better political discussions, asking voters for more engaged attention to the ways in which the economy is not serving labor and consumers, and how it might do better. Political demands by, say, newspapers for more ad revenue for their struggling industry, or by content moderators for better wages, or by marketplace sellers for more fair terms from the platform they operate on, are exactly the type of concerns that antitrust policy ought to address. When these demands filter up, in a bottom-up manner from constituents, and via independent researchers, they are exactly the type of political influence that a democratic system of government is supposed to reflect. Moreover, in the instances of democratic politicization of antitrust that have been surveyed in this article, all were procedurally regular and well within the bounds of precedent and agency practice. This democratization of the politics of antitrust is very promising.

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212. Maurice E. Stucke, *Better Competition Advocacy*, 82(3) ST. JOHN'S L. REV. 951, 953 (2008).

213. *Id.* at 988 (internal quotations omitted).

214. *See id.*

215. *Id.* at 999 (internal quotations omitted).Stucke's views reflect classic analyses of incommensurability. *See* DOUGLAS KYSAR, REGULATING FROM NOWHERE (2006).

However, the politics of antitrust must not be based on a mere personal animus against certain persons or firms, however popular the exponent of that animus, lest competition agencies become tools of authoritarians. However well-grounded the ATR approach to the AT&T/Time Warner merger may have been, Trump's attacks on CNN, directly in the context of the merger, were reminiscent of autocrats' aspirations to control the media by any means at hand. Nor were ATR's efforts to burden cannabis firms an authentic reflection of what antitrust law demands. Even if the cause were more popular, multiple experts observed that it lacked grounding in legal authorities for second requests. Legal regularity, politics, and expertise are the foundations of the administrative state, and none can be ignored.[216] Neither authoritarian approaches to politics, nor the politicization unconstrained by legal regularity and expertise which they permit and promote, should be a part of competition law and policy.

216. Peter H. Schuck, *Multi-Culturalism Redux: Science, Law, and Politics*, 11 YALE L. & POL'Y REV. 1 (1993).