

CONTROL CAPTURE AND COMPETITION

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ABSTRACT

This Essay identifies an emerging problem in antitrust law and policy, particularly in the technology industry. Antitrust doctrine aimed at preventing future harms has historically revolved around internal control of firms, i.e., equity acquisition. Deals that are blocked by antitrust law are based on the acquisition of firms and the harm that combined internal control can impose. Thus, mergers and acquisitions trigger regulatory review and can be blocked based on the likely anticompetitive effects. In these deals, the locus of anticompetitive behavior lies in ownership and internal governance. However, one can capture control through various ways without taking ownership and control of internal governance. An emerging problem in antitrust law is external exertion of control through contract: Competition can be stifled, and thus price, non-price, and innovation factors can be controlled or manipulated through the levers of control existing outside of the legal ownership-governance boundary of the firm. Contracts enable all manners of control without internal control of governance; thus, they can achieve the same outcome of anticompetitive behavior. Albeit existing in all kinds of firms and industry sectors, this problem is an emerging phenomenon in high tech and is especially acute there. This Essay reveals a fundamental gap in antitrust law specific to merger control. Analogizing to the basic principle of agency law and corporate law, this Essay argues that the de facto control of another firm, manifesting in anticompetitive results, should trigger merger review. The proper test for enjoining a merger should encompass the various ways in which firms are subject to contractual control capture resulting in behavior and outcomes that are potentially anticompetitive.

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INTRODUCTION

If Microsoft and Nvidia, using their sky high stock valuations, decide to acquire startup companies in acquisitions that raise competition concerns, should these deals be subject to antitrust scrutiny? Clearly yes. The problem is obvious because we see two factors: equity acquisition facilitating anticompetitive results. These two factors constitute the paradigm antitrust case under the antitrust merger control regime.¹ The first is the means via control (*actus*), and the second is the resulting social harm (*injury*).²

1. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2039–48 (2021) (addressing tech acquisitions); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018) (explaining merger control generally).

2. This is not the first time that antitrust has addressed vertical restraints in a technologically fast moving industry. See, e.g., Barak Orbach, *The Paramount Decrees: Lessons for the Future*, 19 ANTITRUST SOURCE, Apr. 2020, at 1.

What happens when market actors achieve the same social harm but without the paradigm actus, an equity acquisition? Suppose a firm manufactures a critical component of a large market sector, such as artificial intelligence (AI) or chips that power such AI products, and it imposes material limitations on all purchasers through contractual arrangements such as tying, bundling, or exclusive dealing so that the broader market exhibits characteristics of an anticompetitive market. In these sorts of transactions, there are no potential coordinated (collusive) or unilateral (monopolistic) effects as part of equity acquisitions, which trigger merger control review under the Hart-Scott-Rodino (HSR) Act of 1976³ and the Clayton Act for stock or asset acquisitions.⁴ Should control capture through contract and anticompetitive results trigger antitrust review? Yes, it should. This Essay offers a framework that antitrust law and policy can use, based on control and economic effects, to better address these concerns while not chilling investment both in tech and non-tech sectors.

We advance a proposition that is both a natural extension of the law and economics of antitrust and yet something quite radical that has profound implications on antitrust merger law and policy: *Equity acquisition is not the only means of control*. Contracts can be structured so that one firm can capture control of another firm or of a market through bilateral action that does not fit the definition of a merger for purposes of antitrust merger law but for which the underlying contract can enable a change of control that should require a mandatory merger filing for government review for competitive effects. Our proposal addresses a gap in the current enforcement paradigm. This gap can be addressed with similar analytical tools without significant administrative burden.

This Essay advances the general principle of what we term “control capture” in antitrust law. Our argument is based on the idea that substance over form should prevail when legal policy is grounded in avoidance of specific bad outcomes.⁵ Firms can be organized in one of two ways—acquisitions of production and control via merger or via contract. Control can be captured internally through equity acquisition (or internal growth) or

3. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a (2018)); see also D. Daniel Sokol, *Debt, Control, and Collusion*, 71 EMORY L.J. 695 (2022) (noting that debt does not constitute a reportable transaction unless it is convertible debt).

4. 15 U.S.C. § 12 (2018).

5. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–467 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”); see *infra* note 9 and accompanying text.

externally through contract.⁶ Such contractual restraints achieve vertical integration without equity ownership.⁷ The form of control should be irrelevant; yet, form governs substance under antitrust doctrines.⁸ For example, the same collusive behavior among different actors violating Sherman Section 1, would be shielded from antitrust liability if it is conducted by a single entity.⁹ Similarly, from an economic perspective, tying is potentially a form of bundling,¹⁰ yet the antitrust doctrines of tying and bundling are distinct.¹¹ Such formalistic approaches to law are not helpful from the standpoint of enforcement against potential anti-competitive behavior and curbing the negative social outcomes of such behavior.

Control capture has particular importance in a vertical setting where firms often choose to acquire capabilities via merger rather than via

6. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 85–96 (1985) (discussing vertical integration and the make versus buy decision). We believe that this framing is particularly salient to the tech context. *See, e.g.*, Frank Nagle, Robert Seamans, & Steven Tadelis, *Transaction Cost Economics in the Digital Economy: A Research Agenda*. 23 STRATEGIC ORG. 351 (2024) (providing a review and a forward looking approach on transaction cost economics on digital issues).

7. Roger D. Blair & David L. Kaserman, *Vertical Integration, Tying, and Antitrust Policy*, 68 AM. ECON. REV. 397 (1978).

8. *Texaco Inc. v. Dagher*, 547 U.S. 1, 2 (2006) (addressing joint ventures in antitrust).

9. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). *Copperweld* and subsequent cases illustrate the basic problem of form over substance. There, *Copperweld* acquired Regal and held it as a subsidiary. Plaintiff challenged the actions of the parent and subsidiary under Section 1 of the Sherman Act. The Court held that the coordinated behavior of a parent and subsidiary falls outside of Section 1. *Id.* at 776. Yet, if the same outcome (*e.g.*, collusion or anticompetitive behavior) is achieved through two independent corporations or the “corporation’s initial acquisition of control [it] will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act.” *Id.* at 777. Another example of the “single entity” doctrine and the instrument of form over substance that undergirds it is Major League Soccer (MLS). MLS, including all teams therein, is operated through a single limited liability company (LLC). *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 53 (1st Cir. 2002). Based on the theory of a single entity and *Copperweld*, the trial court ruled that the activity of a single LLC, “even unilateral activity that tends to restrain trade,” cannot violate Section 1. *Fraser v. Major League Soccer, L.L.C.*, 97 F. Supp. 2d 130, 139 (D. Mass. 2000). The First Circuit was less formalistic in analysis, understanding that MLS and its investors “comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors” and that the extension of *Copperweld* to the complexities of MLS and its contractual arrangements was “debatable.” *Fraser*, 284 F.3d at 58, 59. The court suggested the possibility of “*more flexible rules for interdependent multi-party enterprises . . . [such as] common franchising arrangements and joint ventures that perform specific services for competitors (e.g., a common purchasing entity).*” *Id.* at 58 (emphasis added and closing parenthesis added). For reasons specific to the factual and procedural posture in *Fraser*, the court did not further articulate this line of reasoning. *Id.* at 60–61.

10. David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37, 41 (2005) (“[T]ying is a special case of bundling in which consumers do not have the choice of buying the ‘tied’ product without the ‘tying’ product.”).

11. *Cf.* 8–9 PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* (4th ed. 2024).

contract.¹² If the control occurs via a merger, the Clayton Act governs and there would be merger notification and review. If the control results via contract, antitrust liability could attach largely under Sherman Sections 1 and 2 as well as certain aspects of other antitrust statutes but this change in control would escape merger review. However, the law has long disfavored the idea that *ex ante* merger review process should be used to prevent economic activity that would be functionally equivalent to an acquisition through which acquisition of control may be used to achieve anticompetitive outcomes .

I. AN EMERGING PROBLEM IN ANTITRUST

A. *Antitrust Law's Focus on Equity Rather Than Control*

The problems hypothesized in this Essay are inspired from recent events. Recently, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) began investigating Microsoft and Nvidia for terms for their AI and semiconductors, respectively.¹³ The stakes regarding competition and AI are significant. If the facts are as alleged, such restraints on trade might negatively affect competition in the AI space. However, these sorts of vertical contracts as non-financial investment may not be limited to just tech giants. Indeed, vertical contracting is used across the economy. While antitrust largely uses Sections 1 and 2 of the Sherman Act to address potential anticompetitive effects in both platform industries¹⁴ as well as more traditional industries,¹⁵ one could imagine that some contractual investments are structured to skirt merger law. Because structural conduct is difficult to remedy in antitrust,¹⁶ the best means to

12. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1962 (2018); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 297 (1978).

13. Foo Yun Chee, *Nvidia's Business Practices in EU Antitrust Spotlight, Sources Say*, REUTERS, (Dec. 6, 2024), <https://www.reuters.com/technology/nvidias-business-practices-eu-antitrust-spotlight-sources-say-2024-12-06/> [<https://perma.cc/6FG3-SWTH>]; David McCabe, *U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI*, N.Y. TIMES, (June 5, 2024), <https://www.nytimes.com/2024/06/05/technology/nvidia-microsoft-openai-antitrust-doj-ftc.html> [<https://perma.cc/85TE-GEKP>].

14. Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1517–18 (2022).

15. See, e.g., Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990).

16. Such remedies have been used only sparingly. See *United States v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. 2000), *vacated*, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001); *United*

address anti-competitive behavior based on the acquisition of control may not be *ex post* remedy upon injury but *ex ante* review for potential injury as is the framework for traditional mergers.

Traditionally (and oddly), the framework of merger control in the United States has always focused on the means to the end rather than the end itself. It considers contracts but only in the context of a contract for change of ownership. Two recent merger challenges offer examples. Both merger challenges address an often-analyzed merger concern—a change in ownership impacting contracts. Currently courts analyze this issue only with a change of ownership transaction. Antitrust merger review would not be triggered if the same underlying contracts led to a change in control without a change in ownership.

In *United States v. AT&T, Inc.*,¹⁷ the government challenged a vertical merger between AT&T and Time Warner. The government was concerned about contractual power that the merged firm would have. It alleged that the merged firm, under a Nash bargaining model, would have greater leverage in its distribution related contracts.¹⁸ It further contended that the proposed merger would lead to price increases for the Time Warner content because the combined firm bargaining leverage would provide the combined AT&T and Time Warner the ability to raise the costs of distribution over its rivals. Such a successful strategy, the government alleged, would allow the merged firm to raise prices to consumers.¹⁹

In a different merger challenge, *United States v. Anthem, Inc.*,²⁰ the Department of Justice challenged contractual based theories of harm regarding a change in ownership of health insurance providers. The merger would have combined the second and third largest sellers of health insurance in the United States. Of concern was that the merged firm would

States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954). Overall, breakup remedies are viewed with suspicion in antitrust. See the recent exposition in the Google search case *United States v. Google*. No. 20-cv-3010, 2025 WL 2523010, at 55 (D.D.C. Sept. 2, 2025), (“[T]he D.C. Circuit has instructed that ‘divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain.’” (citing *Microsoft III*, 253 F.3d at 80; 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 653c (1st ed. 1996) (“The rationale for a ‘structural’ remedy is that injunctive relief is inadequate. Even so, a court-induced restructuring of a firm is attended by many uncertainties.”))).

17. 916 F.3d 1029 (D.C. Cir. 2019).

18. *Id.* at 1036.

19. *Id.* at 1035–36; see Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (exploring the theory that served as the basis for the case).

20. 855 F.3d 345, 349 (D.C. Cir. 2017).

not bring lower prices to consumers through bargaining with its contracts with its hospital counterparties.²¹

These mergers for which there were challenges can be contrasted with control contracts. Companies like Microsoft or Nvidia may evade traditional merger control notification (based on size of person and transaction thresholds) because there is no equity involved in a deal. The deal is instead contractual in nature which is akin to an investment but with contract terms that, if their rights and powers inured from the acquisition of corporate equity securities, raise antitrust merger concerns.

Oddly, the antitrust agencies themselves in the Merger Guidelines recognize that mergers and contracts are functionally equivalent. The Merger Guidelines in their discussion of efficiencies note that the government “will also consider whether any claimed benefits are specific to the merger, or whether they could be instead achieved through contracting or other means.”²² That is, the government recognizes that if the efficiencies of the merger can be achieved via contract, then those efficiencies are not merger specific and cannot be counted as pro-competitive justification. If so, the reverse must also be true. A deal that may have anti-competitive effects as a contract cannot be saved if it were a merger and hence both types of situations should be blocked because neither would lead to efficiencies but might instead lead to potential anti-competitive effects. Kaplow notes this paradox when he asks generally about the efficiencies analysis in mergers:

But doesn't this presume that there is a fundamental difference between activities governed by contracts and what goes on inside of firms? And why does efficiency analysis ignore literature addressing this central question, such as that on the “theory of the firm,” associated with a series of Nobel Prizes? Why have authors in that literature, including those with an interest in competition policy (such as Oliver Williamson), failed to make this application themselves?²³

This gap in antitrust thinking is indeed surprising and far more pernicious to competition than the brief observation by Kaplow suggests. The next Section explains the importance of the gap created by equity-centric control

21. *Id.* at 364–69.

22. U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES § 2.6.B (2023) [hereinafter HMG 2023].

23. Louis Kaplow, *Efficiencies in Merger Analysis*, 83 ANTITRUST L.J. 557, 557–58 (2021).

in antitrust that extends beyond efficiencies to a broader view of potential competitive harm and effects.²⁴

B. Gaps in Equity-Centric Control

In spite of the nomenclature “merger control,” antitrust does not focus on the ultimate fact of control but instead on the method of such control capture (*i.e.*, acquisition of equity). Yet, corporate governance suggests that control need not be based on equity. The literature in law,²⁵ economics,²⁶ strategy,²⁷ marketing,²⁸ and operations suggests that contracts can be used as a form of control in which one party may be able to restrict the decision choices of its counterparty to a contract.

Antitrust also recognizes that contracts may create opportunities to use market power to dictate terms. As Oliver Williamson explained, “although vertical integration commonly yields transaction cost savings, strategic consequences that pose antitrust concerns occasionally arise.”²⁹ These types

24. We note that both merger law under *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990), and conduct law under the rule of reason in *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018), have a similar burden shifting framework that analyze both the procompetitive and anticompetitive effects. One difference is that merger control is itself a quasi-regulatory regime focused on thinking through the various future uncertainties and the potential pro and anticompetitive effects where the magnitude of harms and potential remedies, such as blocking a deal, addressing the difficulty of “unscrambling the eggs”, the possibility of negotiated remedies that might allow some version of the deal to go forward, and deterrence might all play a role in providing an early reach into the make or buy decision relative to conduct remedies. See generally D. Daniel Sokol, *Antitrust Merger Control as a Regulatory Sandbox*, 49 J. CORP. L. 403 (2024); Hovenkamp & Shapiro, *supra* note 1.

25. Matthew Jennejohn, *Braided Agreements and New Frontiers for Relational Contract Theory*, 45 J. CORP. L. 885 (2020); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009).

26. See, e.g., Vianney Dequiedt & David Martimort, *Vertical Contracting with Informational Opportunism*, 105 AM. ECON. REV. 2141 (2015); Daniel S. Nagin, James B. Rebitzer, Seth Sanders & Lowell J. Taylor, *Monitoring, Motivation, and Management: The Determinants of Opportunistic Behavior in a Field Experiment*, 92 AM. ECON. REV. 850 (2002); Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755 (1988).

27. See, e.g., Stephen J. Carson, Anoop Madhok & Tao Wu, *Uncertainty, Opportunism, and Governance: The Effects of Volatility and Ambiguity on Formal and Relational Contracting*, 49 ACAD. MGMT. J. 1058 (2006); Steven S. Lui & Hang-Yue Ngo, *The Role of Trust and Contractual Safeguards on Cooperation in Non-Equity Alliances*, 30 J. MGMT. 471 (2004); Nicholas Argyres, *Evidence on the Role of Firm Capabilities in Vertical Integration Decisions*, 17 STRATEGIC MGMT. J. 129 (1996).

28. Tinglong Dai & Kinshuk Jerath, *Salesforce Contracting Under Uncertain Demand and Supply: Double Moral Hazard and Optimality of Smooth Contracts*, 38 MKTG. SCI. 852 (2019); Desmond (Ho-Fu) Lo, Mrinal Ghosh & Francine Lafontaine, *The Incentive and Selection Roles of Sales Force Compensation Contracts*, 48 J. MRKT. RSCH. 781, 781–98 (2011); Anthony Dukes & Esther Gal-Or, *Negotiations and Exclusivity Contracts for Advertising*, 22 MKTG. SCI. 222 (2003).

29. Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 955 (1979).

of antitrust concerns should invite antitrust *ex ante* merger scrutiny of significant investment via contractual terms that lead to a change of control beyond a traditional merger. While this concern holds generally to all firms and industries, it may be particularly salient in the technology space.³⁰ Control capture is critical in the technology sector because we see a plethora of younger growth companies, continuous industry dynamism, and creative destruction. Thus, contractual control may serve to shape the nature of innovation and the private ordering of anti-competition policies—a principle that fundamentally contravenes public policy. This suggests that asset specificity plays a different role in technology markets, where an asset’s value in a contract may significantly change based on the “outside” option (the contractual option outside of the integration) which would be lower than its specific use.³¹

This discussion of contracts is part of a broader understanding of boundaries of the firm.³² Quite a number of firms choose to internalize the cost of production while others decide to use contracts to manage such production. That is, why do firms choose to integrate via merger versus contract. Coase famously asked, why “does the entrepreneur not organize one less transaction or one more?”³³ The choice is largely a function of the transaction costs of each of these alternatives—internal production (including through merger) or contracting. Williamson also suggested hierarchy. In the digital context, the firm has been inverted with most of the production outside of the firm through its ecosystem and the platform orchestrates behavior across different firms through various contractual mechanisms³⁴ such as Apple’s iPhone orchestrating behavior of apps. This too has been subject to antitrust scrutiny.³⁵

30. Technology issues may suggest a rethink of antitrust assumptions. *See, e.g.*, Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021); Michal S. Gal & Daniel L. Rubinfeld, *Algorithms, AI, and Mergers*, 85 ANTITRUST L.J. 683 (2024); Rebecca Haw Allensworth, *Antitrust’s High-Tech Exceptionalism*, 130 YALE L.J.F. 588 (2021).

31. Michael H. Riordan & Oliver E. Williamson, *Asset Specificity and Economic Organization*, 3 INT’L J. INDUS. ORG. 365 (1985). For an application to technology and law, see Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 S. CAL. L. REV. 785 (2011).

32. *See generally* WILLIAMSON, *supra* note 6; OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996).

33. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 393–94 (1937). For antitrust specific treatment, see Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 71–74 (2012).

34. Geoffrey Parker, Marshall Van Alstyne & Xiaoyue Jiang, *Platform Ecosystems: How Developers Invert the Firm*, 41 *MGMT. INFO. SYS. Q.* 255 (2017).

35. *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 968 (9th Cir. 2023).

Transaction cost economics has long played a role in antitrust.³⁶ Yet, if we take the lessons of transaction cost economics seriously,³⁷ then the current logic of what gets notified via antitrust merger control falls apart. Ironically, Williamson, who served under Donald Turner at in the Department of Justice Antitrust Division and who drafted the 1968 merger guidelines,³⁸ did not anticipate how transaction cost economics might be useful to understand that merger control could also impact contractual arrangements effectuating a change of control under those guidelines. To use his own language, we focused not on the rules of the game but on the play of the game.³⁹ That is, he focused on the existing framework and on optimizing rules based on that framework rather than undertaking a reframing of antitrust based on how actors can behave to privately order proscriptive principles.

In this Essay, we suggest a departure from the existing framework to actually focus on economic effects and to take substance over form more seriously. Antitrust claims to focus on economic analysis and has a long history of the Supreme Court expressly saying so.⁴⁰ However, judges sometimes take arguments of form over substance in antitrust law.⁴¹ For example, judges begin with market definition even though from an economic perspective, it may not be necessary to define the market but instead look at economic effects. The current⁴² and prior⁴³ merger

36. See, e.g., Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953, 963–64 (2014) (Bork “may have been the first author who simultaneously offered transaction cost explanations for partial integration and cited Coase’s *The Nature of the Firm* to support his argument.”); Klein et al., *supra* note 12, at 298 (1978); Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 274 (1987).

37. Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77; Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L., ECON. & ORG. 95, 104 (2002).

38. U.S. DEP’T OF JUSTICE, 1968 MERGER GUIDELINES § 2 (1968), <http://www.justice.gov/atr/hmerger/11247.pdf> [<https://perma.cc/7XAT-UB9N>].

39. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 599 (2000).

40. HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 228–29 (1955) (“[I]n adopting the standard of the common law Congress expected the courts not only to apply a set of somewhat vague doctrines but also in doing so to make use of that ‘certain technique of judicial reasoning’ characteristic of common law courts.” (quoting ALBERT M. KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE 106 (1918))); *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 460–63 (2015).

41. See *supra* note 9 and accompanying text (discussing *Copperweld Corp. v. Indep. Tub Corp.*, 467 U.S. 752 (1984), and *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002)).

42. See HMG 2023, *supra* note 22.

43. U.S. DEP’T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/5A8T-5A5J>].

guidelines make this explicit although modern courts refuse in a merger or conduct context to dispense with market definition.⁴⁴

C. Control Capture Through Contracts

Contracts are investments through a counterparty, but not all contracts are for control. When a firm seeks to invest, it must make a basic decision—make, buy or ally.⁴⁵ The make option focuses on internal resources.⁴⁶ The buy option focuses on mergers and acquisitions, while the ally option focuses on contracting. Ownership is a fully integrated firm. This provides greater protection for specific investments but an alternative is a hierarchy via contractual relationships including various forms of strategic alliance.

In contrast, contracting may be used to leverage intangible resources.⁴⁷ Theoretical work addresses that some firms remain vertically integrated specific to technologically innovative industries.⁴⁸ More generally, strategic alliances create value but the value varies across different dimensions.⁴⁹ This could include knowledge transfers and other sorts of non-financial arrangements between parties.⁵⁰ The rationale for partnering may be because one firm lacks internal resources.⁵¹ In some cases vertical mergers

44. Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

45. Abhishek Borah & Gerard J. Tellis, *Make, Buy, or Ally? Choice of and Payoff from Announcements of Alternate Strategies for Innovations*, 33 MKTG. SCI. 114, 114 (2014).

46. See, e.g., Allan C. Eberhart, William F. Maxwell & Akhtar R. Siddique, *An Examination of Long-Term Abnormal Stock Returns and Operating Performance Following R&D Increases*, 59 J. FIN. 623 (2004).

47. See Enghin Atalay, Ali Hortaçsu & Chad Syverson, *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120 (2014). For specific thoughts about the organization on a tech firm and such allocation of rights, see Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology Intensive Firms*, 157 U. PA. L. REV. 1649 (2009).

48. See Constance E. Helfat & Miguel A. Campo-Rembado, *Integrative Capabilities, Vertical Integration, and Innovation over Successive Technology Lifecycles*, 27 ORG. SCI. 249 (2016).

49. See Mitchell P. Koza & Arie Y. Lewin, *The Co-Evolution of Strategic Alliances*, 9 ORG. SCI. 255 (1998); Bharat N. Anand & Tarun Khanna, *Do Firms Learn to Create Value? The Case of Alliances*, 21 STRATEGIC MGMT. J. 295 (2000); Belén Villalonga & Anita M. McGahan, *The Choice Among Acquisitions, Alliances, and Divestitures*, 26 STRATEGIC MGMT. J. 1183 (2005); Ranjay Gulati, *Alliances and Networks*, 19 STRATEGIC MGMT. J. 293 (1998).

50. Ranjay Gulati, *Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances*, 38 ACAD. MGMT. J. 85, 85 (1995) (identifying an alliance “whereby two or more firms agree to pool their resources to pursue specific market opportunities”); D. Gordon Smith, *The Exit Structure of Strategic Alliances*, 2005 U. ILL. L. REV. 303 (analyzing business alliances).

51. Weijian Shan, *An Empirical Analysis of Organizational Strategies by Entrepreneurial High-Technology Firms*, 11 STRATEGIC MGMT. J. 129 (1990).

may be a better approach than vertical contracting.⁵² However, there are situations in which a vertical contract may be superior to a vertical merger.⁵³

Specific to contracts, larger firms may use contractual terms as a form of investment. Often, smaller counterparties use evidence of such agreements to legitimize their business model to potential investors or customers. This may occur for example in a licensing setting. Such contractual agreements occur both in traditional⁵⁴ and technology based industries.⁵⁵ Further, situations in which boundaries of the firm may be unclear include situations in which there is control because of a minority position, contractual rights in the firm still allowing for the investor to call the shots, or through other types of agreements such as joint R&D, agreements that deal with supply, sourcing, marketing, or distribution.⁵⁶

Thus, if contracting externally is more viable, firms may use contracts to govern relations. Such contractual terms may matter when a firm has monopoly power. As Williamson explained, “although vertical integration commonly yields transaction cost savings, strategic consequences that pose antitrust concerns occasionally arise.”⁵⁷ It is these types of antitrust concerns that should invite antitrust *ex ante* merger scrutiny as the significant investment via contractual terms that lead to a change of control beyond a traditional merger.

While this concern holds generally, there may be specific concerns that make such issues more salient in the technology industry. Contract design

52. See, e.g., Gregory S. Crawford, Robin S. Lee, Michael D. Whinston & Ali Yurukoglu, *The Welfare Effects of Vertical Integration in Multichannel Television Markets*, 86 *ECONOMETRICA* 891, 893–94 (2018) (finding merger efficiencies in the cable industry); Fernando Luco & Guillermo Marshall, *The Competitive Impact of Vertical Integration by Multiproduct Firms*, 110 *AM. ECON. REV.* 2041, 2043 (2020) (finding that vertical integration via merger is superior due to nonintegrated firms increased in price by 1.2 to 1.5 percent, while prices for integrated firm products decreased by 0.8 to 1.2 percent). This is not to suggest that vertical mergers are always pro-competitive. See Simon Loertscher & Leslie M. Marx, *Incomplete Information Bargaining with Applications to Mergers, Investment, and Vertical Integration*, 112 *AM. ECON. REV.* 616, 616 (2022) (“We show that, in this model, there is no basis for the presumption that vertical integration increases equally weighted social surplus, while it is possible that horizontal mergers that appropriately change bargaining weights increase social surplus.”).

53. Robin S. Lee, Michael D. Whinston & Ali Yurukoglu, *Structural Empirical Analysis of Contracting in Vertical Markets*, in 4 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 673 (Kate Ho, Ali Hortaçsu, Alessandro Lizzeri eds., 2021).

54. George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 *NOTRE DAME L. REV.* 955 (2007).

55. Joshua S. Gans & Scott Stern, *Incumbency and R&D Incentives: Licensing the Gale of Creative Destruction*, 9 *J. ECON. & MGMT. STRATEGY* 485 (2000); Oliver Hart & John Moore, *Contracts as Reference Points*, 123 *Q.J. ECON.* 1 (2008).

56. See David T. Robinson & Toby E. Stuart, *Network Effects in the Governance of Strategic Alliances*, 23 *J.L. ECON. & ORG.* 242 (2007); Gilson et al., *supra* note 25; Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 *STAN. L. REV.* 281 (2016).

57. Williamson, *supra* note 29, at 955.

focuses not merely on bargaining power of the two sides but also of asset specificity. Returning to the Microsoft and Nvidia examples, we suggest that assets that are highly relationship-specific can shape the nature of the contractual relationship such that control capture can result. Thus, in a relationship between an upstream and downstream firm will require relationship-specific investments to the downstream firm.

There are myriad reasons why firms may decide to partner via contract or merger rather than go alone. There are many procompetitive reasons that firms partner via contract with others. This may include moving faster on a particular project than a firm could with its own internal resources.⁵⁸ This may focus on identifying the internal capabilities of the firm and its resources.⁵⁹

There may be a specific dynamic in technology settings where the decision to create a contractual alliance rather than a merger may create demand for such relationships.⁶⁰ Because of dynamic features, where the combination of network effects, data driven markets, scale and scope, and complementary assets, these markets have particular salience for antitrust.⁶¹ This is particularly true in the merger context, where many cases have been

58. Ashton Hawk, Jeffrey J. Reuer, & Andrew Garofolo, *The Impact of Firm Speed Capabilities on the Decision to Partner or Go It Alone*, 6 STRATEGY SCI. 191 (2021).

59. Jay B. Barney, *How a Firm's Capabilities Affect Boundary Decisions*, 40 SLOAN MGMT. REV. 137 (1999); Michael A. Hitt, David Ahlstrom, M. Tina Dacin, Edward Levitas & Lilia Svobodina, *The Institutional Effects on Strategic Alliance Partner Selection in Transition Economies: China vs. Russia*, 15 ORG. SCI. 173 (2004).

60. See David J. Teece, *Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy*, 9 J.L. ECON. & POL'Y 97, 107–08 (2012) (“In this sense, cooperation is the handmaiden of competition. This has been recognized historically, as vertical relationships-- integration--were seen to support horizontal competition.”); Ron Adner, Phanish Puranam, & Feng Zhu, *What Is Different About Digital Strategy? From Quantitative to Qualitative Change*, 4 STRATEGIC SCI. 253 (2019).

61. Gal & Rubinfeld, *supra* note 30; D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357 (2018); David Emanuelson & Danielle Drory, *The Potential Chilling Effects of Lowering Standards for Tech M&A Enforcement*, ANTITRUST, Spring 2020, at 14; Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1 (2021).

under review regarding tech acquisitions by both “Big Tech”⁶² as well as other firms.⁶³

Increasingly, there has been work devoted to value creation in mergers.⁶⁴ This includes typologies of mergers⁶⁵ as well as work specific to operational efficiencies,⁶⁶ financial efficiencies,⁶⁷ technological/innovation efficiencies,⁶⁸ and product differentiation.⁶⁹ Overall, these works demonstrate that integration via merger has several potential benefits. Yet,

62. Compare Zhuoxin Li & Ashish Agarwal, *Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram*, 63 *MGMT. SCI.* 3438 (2017) (finding that Facebook's acquisition of Instagram benefitted consumers), and Tiago S. Prado & Johannes M. Bauer, *Big Tech Platform Acquisitions of Start-ups and Venture Capital Funding for Innovation*, 59 *INFO. ECON. & POL'Y*, 2022, art. no. 100973 (finding pro-competitive benefits of big tech acquisitions on venture capital), and Ginger Zhe Jin, Mario Leccese & Liad Wagman, *How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy*, 89 *INT'L J. INDUS. ORG.*, 2023, art. no. 102891, with Yang Pan & Wei-Ling Song, *Tech Giants and New Entry Threats* (June 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4513084 [<https://perma.cc/SJN9-EWGG>] (finding no negative effects of tech acquisitions focusing on patents), and Sai Krishna Kamepalli, Raghuram G. Rajan, & Luigi Zingales, *Kill Zone* (Becker Friedman Inst., Working Paper No. 2020-19, 2021) (showing a negative change in venture capital investment after big tech acquisitions), and Ke Rong, D. Daniel Sokol, Di Zhou & Feng Zhu, *Antitrust Platform Regulation and Entrepreneurship: Evidence from China* (Harv. Bus. Sch. Tech. & Operations Mgmt. Unit, Working Paper No. 24-039, USC CLASS, Rsch. Paper No. 24-16, 2025), <https://ssrn.com/abstract=4697283> [<https://perma.cc/8CKA-VR47>] (finding that antitrust M&A ban of Chinese big tech led to less entry and reduced VC investment).

63. See André Hanelt, Sebastian Firk, Björn Hildebrandt, & Lutz M. Kolbe, *Digital M&A, Digital Innovation, and Firm Performance: an Empirical Investigation*, 30 *EUR. J. INFO. SYS.* 3 (2021); Ginger Zhe Jin, Mario Leccese, & Liad Wagman, *M&A and Technological Expansion*, 33 *J. ECON. & MGMT. STRATEGIC* 338 (2024).

64. Jaideep Shenoy, *An Examination of the Efficiency, Foreclosure, and Collusion Rationales for Vertical Takeovers*, 58 *MGMT. SCI.* 1482, 1500 (2012) (“Collectively, our findings indicate that firms use corporate takeovers to expand their vertical boundaries consistent with an efficiency improvement rationale as predicted by the transaction cost economics and property rights theories.”).

65. Emilie R. Feldman & Exequiel Hernandez, *Synergy in Mergers and Acquisitions: Typology, Life Cycles, and Value*, 47 *ACAD. MGMT. REV.* 549 (2022).

66. Vithala R. Rao, Yu Yu & Nita Umashankar, *Anticipated vs. Actual Synergy in Merger Partner Selection and Post-Merger Innovation*, 35 *MKTG. SCI.* 934 (2016); Erik Devos, Palani-Rajan Kadapakkam & Srinivasan Krishnamurthy, *How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies*, 22 *REV. FIN. STUD.* 1179 (2009); Bruno Cassiman, Massimo G. Colombo, Paola Garrone & Reinhilde Veugelers, *The Impact of M&A on the R&D Process: An Empirical Analysis of the Role of Technological- and Market-Relatedness*, 34 *RSCH. POL'Y* 195, 196 (2005); Gautam Ahuja & Riitta Katila, *Technological Acquisitions and the Innovation Performance of Acquiring Firms: A Longitudinal Study*, 22 *STRATEGIC MGMT. J.* 197, 200 (2001).

67. See, e.g., Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 *J. FIN. ECON.* 5 (1983).

68. Luís Cabral, *Merger Policy in Digital Industries*, 54 *INFO. ECON. & POL'Y*, 2021, art. no. 100866.

69. Gerard Hoberg & Gordon Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 *REV. FIN. STUD.* 3773 (2010).

this is not to suggest that mergers may not create anti-competitive effects when contracting is involved.

Contracts can have potential anticompetitive effects that hurt consumers. Let's imagine a simple situation⁷⁰ of foreclosure where a negotiation with upstream monopolist firm A and downstream firm B impacts upstream competitor C because the contract might put B at a competitive disadvantage regarding consumers.

In the merger context, merger cases have addressed this type of concern but only when there is an actual merger, not when control is gained as a contractual matter.⁷¹ This is different than the typical Sherman Section 1 case where there needs to be an agreement in effect (among other factors) or a typical Sherman Section 2 monopolization case that requires exclusionary conduct (among other factors). Antitrust needs to refocus its efforts less on formalistic mechanisms for merger control and more on the sorts of relationships at the boundaries of the firm that led to the exercise of monopoly power.

To better understand the importance of control and contracts from a governance framing, in a control contract situation, the monopolist Firm A is taking the place of the board in Firm B in the decision-making by exerting control. This is akin to what would happen in a merger where there is a change in the control of the firm. Antitrust law does not typically address these sorts of concerns at the merger stage. Rather, antitrust waits until the conduct stage, which is largely reactive rather than proactive. Yet, this is particularly important given the importance of significant types of vertical integration via contract.

Antitrust is not totally immune from such thinking. While we suggest that generally antitrust needs a fundamental rethink, this Essay's broader analytical framework is grounded in antitrust theory and practice in related settings. Antitrust has long dealt with the problem of control capture in the context of mergers. Providing a larger framing for doing so may prevent significant harm from occurring prior to the consummation of the significant contracts.

*United States v. American Airlines Group Inc.*⁷² involved blocking a joint venture between American Airlines and JetBlue that was short of a full

70. One could complicate the situation with non-linear models of pricing such as conditional pricing practices. See generally Bogdan Genchev & Julie Holland Mortimer, *Empirical Evidence on Conditional Pricing Practices: A Review*, 81 ANTITRUST L.J. 343 (2017) (providing a survey of the literature).

71. See, e.g., *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 254 (D.D.C. 2018); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017).

72. *United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209 (1st Cir. 2024).

merger. The airlines agreed to joint operations in Boston and New York and for American to lease some of JetBlue's slots in busy airports that were underutilized.⁷³ The nature of the joint venture was not a financial investment. Rather, it was "codesharing, schedule coordination, revenue sharing, reciprocal loyalty benefits, and joint corporate customer benefits."⁷⁴ The Department of Justice challenged the joint venture under Section 1 of the Sherman Act and undertook a rule of reason analysis and argued that the anti-competitive benefits outweighed the pro-competitive benefits.

After losing at the district court, American Airlines and JetBlue appealed and lost before the First Circuit. The appeal centered on how the economic effects did not support the pro-competitive justifications offered by the parties. So far so good. However, viewed in full context, the decision shows what is wrong with merger law. The case was not brought as a Clayton Act Section 7 case and therefore could not benefit from the structural presumption under *Philadelphia National Bank*⁷⁵ and could not as easily draw from other merger cases. This has made joint venture analysis, which does examine contracts short of merger, untethered from merger analysis and pushes case law forward in a meaningful way to other industries and situations in which contracts lead to a change of control. Further, the lack of internal antitrust coherence means that while the importance of contracts is understood in Section 1 context, this emphasis on economic substance in the decision cannot easily help shape the future of merger law nor can merger law respond easily to similar changes in Section 1 related joint venture law.⁷⁶

73. *Id.* at 217.

74. *Id.*

75. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence . . . showing that the merger is not likely to have such anticompetitive effects."). For academic commentary, see, for example, Sean Sullivan, *What Structural Presumption? Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis*, 42 J. CORP. L. 403 (2016); Peter C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L.J. 219 (2015); George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

76. See generally Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 47 (2018) ("The appropriate use of incipency tests is to prevent certain bad outcomes early when antitrust rules make it difficult or impossible to prevent them later."). Thus, it is the incipency standard in merger law that makes it distinct from the other antitrust statutes and their developments.

II. CONTROL CAPTURE OF FIRMS

A. *Internal and External Control of Firms*

A central concern when thinking about behavior of firms in general is control. Who has it? We tend to think about control of firms from the perspective of internal affairs and governance. Consider the corporation as the prototypical firm. The board has ultimate power to manage the business and affairs.⁷⁷ A controlling shareholder, such as a parent corporation, controls by virtue of equity ownership. All managerial powers derive from these two factors. However, we must acknowledge that control of firms has both internal and external facets.

Firms are controlled externally through various means. Obviously, law controls firms. Firms may be substantively regulated, e.g., financial services, energy, defense, and myriad other regulated industries. Setting aside this obvious source of external control, we see that firms are externally controlled through two principal means.

One means of control is through the market. The market controls the instinct of firms to achieve monopoly, use such power, and thus control the market itself. The market can block control only when the power to dictate terms on the market is fragmented. Fragmented control is a precondition of competition, which is defined by a robust competition to control but never the outcome of control. We normally don't think of antitrust law as a means to enable control. The opposite is true. Antitrust law works conventionally to deny control when control is seen through the lens of internal affairs. However, there can be no doubt that the ultimate end of competition law is to ensure that markets control firms, and not the other way around.⁷⁸ Competition law seeks to ensure that prices are subject to and controlled by market forces.

The second principal means of controlling firms is contracts. Without acquisition of equity resulting in internal control, contract is the principal means of external control in inter-firm relations. Consider the agency relationship in which the agent contracts to do the principal's bidding and generally to be subject to the principal's control.⁷⁹ Although control defines

77. See DEL. CODE ANN. tit. 8, § 141(a) (West 2025).

78. Markets are construed broadly. One facet is the demand side of the consumer market that may affect prices. The focus of this Essay is the supply side of competition among firms.

79. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM L. INST. 2007). Of course, agency is based on an assensual relationship, and a contract is not needed to create a principal-agent relationship. *Id.* cmt. d (“[T]he consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency.”).

the core element in a principal–agent relationship, commercial contracts can always exert some level of external control. For example, a licensing agreement may contain specific terms and conditions of use, and a supply or purchase agreement may contain certain provision or purchase requirements. We do not need to belabor the point that contractual terms bind parties, and legal obligations, such as they are, impose some degree of control.

Contrary to the core assumption of antitrust law, control of firms can be gotten through various means. Accordingly, antitrust law ought to acknowledge the reality and problem of control capture. Control of decision-making within the firm is not strictly limited to the endogenous powers granted to the board and shareholders under corporation law. Control capture can result from contracts in inter-firm dealings, as much as mutual assent among firms in price fixing or other collusion. The core idea of this Essay is simple: *The reality of de facto control should govern legal policy when control is a point of fact, and control is used in ways that thwart the law’s underlying policy.*

We see evidence of the connection between control and legal policy at work in the laws of business firms and agency. In these fields, the substantive reality of control governs rather than the form of law.

B. Control in Laws of Business Firms

Control is the central concept in the laws of firms. If democracy derives its legitimacy from the consent of the governed, then the laws of business firms derive legitimacy from the twin necessities of control and accountability. In the realm of partnerships, control is embedded directly in equity ownership.⁸⁰ In the realm of corporations, Berle and Means famously observed that the separation of ownership and control.⁸¹ This separation is reality for public companies, but control by non-owner managers must still be legitimized. Corporation law envisions a form of abstract control where shareholder control lies in the “fluid aggregation of unaffiliated stockholders.”⁸² Consistent with this idea, shareholders have certain rights

80. See UNIF. P’SHP ACT § 401(h) (UNIF. L. COMM’N 1997 and amended 2013) (providing that partners manage); UNIF. LTD. P’SHP ACT § 406(a) (UNIF. L. COMM’N 2001 and amended 2013) (providing that general partners manage).

81. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 117 (1932) (“[I]n the largest American corporations, a new condition has developed . . . [T]here are no dominant owners, and control is maintained in large measure apart from ownership.”).

82. *Paramount Commc’s, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del. 1994); see *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (same).

that support such notion of control, principally the right to vote on certain matters.⁸³ When the atoms of dispersed financial claims are reconstituted, a controlling shareholder can acquire more direct control similar to that of partners in a partnership.

Control is the critical factor that is at the heart of the core issues of the laws of business firms: power, duty, and liability. All decisions on the firm's business and affairs are the product of control and authority. Laws assign managerial power to certain presumptive persons within the firm, such as partners, members, managers, and directors.⁸⁴ The control of managerial decision-making means that the person incurs duties and liabilities.

The exposure of liability flows from the question of control. Only persons who manage or have managerial authority owe fiduciary duties. Partners, managers, directors, officers, and controlling shareholders owe fiduciary duties.⁸⁵ Limited partners, members of manager-managed limited liability companies, and shareholders generally do not owe fiduciary duties.⁸⁶ They do not have the power of control. The corollary principle is that persons who lack control do not bear liability beyond their investment. Limited partners, members of limited liability companies, and shareholders have limited liability, and generally are not exposed to liability to internal constituents precisely because they do not control the firm.⁸⁷

Even when shareholders are presumptively passive and lack direct legal power, they may bear liability if in fact they exercise control. As a controlling shareholder in fact, they may be liable for breaching their fiduciary duties. Moreover, if they exercise control in a way that abuses the corporate form, they may be liable for the debts and obligations of corporation through the doctrine of veil piercing. Indeed, a person does not even have to be a shareholder in form for veil piercing to apply.⁸⁸

83. See, e.g., DEL. CODE ANN. tit. 8, §§ 212, 242(b), 251(c), 271(a) (West 2025); see also *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (“The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.”).

84. See *supra* notes 77 & 80; UNIF. LTD. LIAB. CO. ACT § 407 (UNIF. L. COMM’N 2006 and amended 2013).

85. See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (holding that controlling shareholder owes fiduciary duties to minority shareholders).

86. See Robert J. Rhee, *A Theory of Calibrated Fiduciary Duties in Firms*, 51 J. CORP. L. 33, 41–54 (2025) (providing overview of management structures of firms and resulting duties bestowed on managers but not passive owners).

87. Andrew Verstein, *Upstream Liability, Entities as Boards, and the Theory of the Firm*, 74 BUS. LAW. 313, 317 (2019).

88. See, e.g., *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1051 (2d Cir. 1997) (“New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an ‘equitable owner’, notwithstanding the fact that the individual is not a shareholder of the corporation.”).

Lastly, in the determination of whether a person is a controlling shareholder, corporation law is not doctrinaire. Clearly, de jure control through ownership of more than 50 percent of shares suffices. However, control ultimately is a point of fact, and a shareholder can be deemed to be a de facto controlling shareholder though she may own less than a majority of shares.⁸⁹

Control and its consequences are at the heart of the laws of business firms. When a person has control, per legal grant or factual circumstance, she incurs duties and liabilities arising from the exercise of managerial authority.

C. *Control in Agency Law*

The law of agency is grounded on the idea of control. Agency is defined as a fiduciary relationship that arises when a principal manifests assent to an agent that the agent shall on the principal's behalf and subject to the principal's control, and the agent manifests assent to act in this capacity.⁹⁰ The role of agency in antitrust law is evident. Suppose a principal firm instructs an agent firm to engage in anticompetitive behavior. While both firms are in a principal-agent relationship, they are separate and distinct in the sense that neither has equity ownership of the other. Nevertheless, both firms would violate antitrust laws.

What happens when facts are muddled by the lack of an explicit agreement, but at the end of the day a court finds that control exists through contractual arrangements and mutual assent? The old agency law chestnut, *A. Gay Jensen Farms Co. v. Cargill, Inc.* illustrates the problem.⁹¹

Warren Seed & Grain Co., a grain elevator, financially failed, and creditor plaintiffs sued Cargill for Warren's debts owed. Contractual arrangements bound Warren and Cargill. Cargill provided credit to Warren and purchased grain from Warren.⁹² Ordinarily, neither a creditor-debtor nor buyer-supplier relationship creates a principal-agent relationship. However, the set of contractual and factual arrangements was unusual. An

89. See, e.g., *Kahn v. Lynch Comm'n Sys.*, 638 A.2d 1110, 1114-15 (Del. 1994) (holding that 43.3 percent constituted de facto control); see also *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) ("[A] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status. For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct." (quotation marks and citations omitted)).

90. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM L. INST. 2007).

91. *A. Gay Jensen Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981) (holding the creditor became a principal due to extensive control over debtor's operations).

92. *Id.* at 288.

agreement provided, among other arrangements, that Cargill a right of first refusal to purchase grain sold by Warren, and that Warren could not make capital improvements in excess of \$5,000, be liable as guarantor on another's indebtedness, encumber its assets, and declare a dividend without Cargill's approval.⁹³ At some point in the relationship, Cargill concluded that Warren "needs very strong paternal guidance."⁹⁴ Based on this belief, Cargill began to take greater control of Warren's operations. Some plaintiffs were led to believe that they were dealing with Cargill or that Warren was acting on Cargill's behalf. Cargill sought to capture control of Warren because Warren was a supplier of grain.⁹⁵ When Warren ceased operations, it owed Cargill \$3.6 million and plaintiffs \$2 million.⁹⁶

The plaintiff argued that Warren was Cargill's agent because Warren's contracts with the plaintiffs were for the benefit and on behalf of Cargill, and thus Cargill as principal was liable for Warren's contracts.⁹⁷ Predictably, Cargill contended that it too was an unpaid creditor, that it never consented to the agency, that it did not exercise control over Warren, and that Warren did not act on behalf of Cargill.⁹⁸ However, agency does not require an explicit agreement. An agency relationship is created when the elements of agency are satisfied: mutual assent for the agent to serve the principal's purpose and to be subject to the principal's control.⁹⁹ Based on the facts, the court reasoned:

By directing Warren to implement its recommendations, Cargill manifested its consent that Warren would be its agent. Warren acted on Cargill's behalf in procuring grain for Cargill as the part of its normal operations which were totally financed by Cargill. Further, an agency relationship was established by Cargill's interference with the internal affairs of Warren, which constituted de facto control of the elevator.¹⁰⁰

93. *Id.*

94. *Id.* at 289.

95. *Id.* Warren shipped 90 percent of its cash grain to Cargill. *Id.*

96. *Id.* at 289–90.

97. *See* RESTATEMENT (THIRD) OF AGENCY §§ 6.01–6.03 (AM L. INST. 2007) (providing that a principal is a party to the contract).

98. *Cargill*, 309 N.W.2d at 290–91.

99. *Id.* at 291; *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM L. INST. 2007) (defining agency as based on mutual assent to the relationship and the principal's control).

100. *Cargill*, 309 N.W.2d at 291. The court reasoned further:

A number of factors indicate Cargill's control over Warren, including the following: (1) Cargill's constant recommendations to Warren by telephone; (2) Cargill's right of first refusal

While *Cargill* is a case on agency, it illustrates a broader point that has implication on antitrust law. Contractual arrangements, even in the staid agricultural industry, can be structured so that one firm can capture control of another firm even though the two firms are separate and distinct. In other words, for the purpose of competition and firm behavior, control can be captured through means other than equity investment. *Cargill* and *Warren* did not explicitly agree to a relationship in which one firm relinquishes control, but the facts were such that the court concluded control capture occurred.¹⁰¹

Control and its consequences are at the heart of agency law. When a person has control, per legal grant or factual circumstance, she may be deemed to be a principal for which she may be liable for the agent's conduct or their joint conduct.

D. Reasons for Contractual Control Capture

The laws of business firms and agency show that control capture does and should engender obligations and liabilities. Equity ownership is not the sine qua non of power, duty, and liability. Directors and officers need not be equityholders. A nonshareholder may have the corporate veil pierced so that he is liable for the debts and obligations of a company in which he holds no equity.¹⁰² Principals and agents are legally distinct, separate persons. Despite these realities, the paradigm of antitrust is based on acquisition of equity instead of control capture, resulting in a large gap in legal policy.¹⁰³

The principal-agent analogy is the most useful model for application to antitrust law. Agency is created from three elements: principal's goal, principal's control, and mutual asset. Each of these elements are present in antitrust consideration. A firm wishes to engage in anticompetitive behavior.

on grain; (3) Warren's inability to enter into mortgages, to purchase stock or to pay dividends without Cargill's approval; (4) Cargill's right of entry onto Warren's premises to carry on periodic checks and audits; (5) Cargill's correspondence and criticism regarding Warren's finances, officers salaries and inventory; (6) Cargill's determination that Warren needed "strong paternal guidance"; (7) Provision of drafts and forms to Warren upon which Cargill's name was imprinted; (8) Financing of all Warren's purchases of grain and operating expenses; and (9) Cargill's power to discontinue the financing of Warren's operations.

Id.

101. *Id.* at 290 ("An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the legal consequences of the relation to follow. The existence of the agency may be proved by circumstantial evidence which shows a course of dealing between the two parties.").

102. See *supra* note 88.

103. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 776-77 (1984) (acknowledging that the Sherman Act may leave a "gap" between control acquired through acquisitions and contracts); *supra* note 9 (discussing *Copperweld*).

It may not be able to do so alone because it does not have the necessary market power or vertical integration. It needs another firm or firms. Their combined action can be in the form of collusion, suggesting firms of approximate equal standing that ought to be competitors. Alternatively, a firm may require the acquiescence or cooperation from another, suggesting a power relation based on control capture. In either case, there is mutual assent between the two firms.

One of us has argued that a specific form of contract—debt contracts—may inure control to the creditors and this control has antitrust implications.¹⁰⁴ Other than specific contractual protections,¹⁰⁵ debt normally does not inure internal control rights to creditors.¹⁰⁶ If, however, creditors can obtain sufficient control of debtors, they can engage in the types of behavior that are prohibited under competition law.¹⁰⁷ In this Essay, we expand this idea to a general principle: Any contractual arrangement that may result in control capture should trigger antitrust merger review.

A firm may have many reasons for preferring contractual control capture over equity acquisition. It may lack the capital to make a whole acquisition. It may achieve the same benefit without a costly acquisition including integration risk. If it can do this without risking capital, the financial returns on contractual control capture are compelling. In other words, the economic calculus of control capture reveals the possibility of a compelling cost–benefit rationale. Under traditional doctrine, firms are bound by the constraint that the benefit of anticompetitive conduct must be greater than the cost of investment capital for an acquisition. Because acquisitions are expensive, firms can seek an alternative path wherein the cost–benefit analysis radically changes: the benefit of anticompetitive conduct must only be greater than the cost of contracting, which is simply minor transaction cost on the whole. The possibility of a cheaper means of control capture is compelling. Because of the incipiency standard under antitrust merger law, it is simply easier to address competitive concerns earlier under merger law.

104. Sokol, *supra* note 3.

105. See COMMENTARIES ON INDENTURES 1–2 (Am. Bar Found. 1971) (stating that the rights of creditors are “largely a matter of contract”).

106. Delaware permits creditors to vote, but other statutes do not permit such participation. Compare DEL. CODE ANN. tit. 8, § 221 (West 2025) (permitting creditors “the power to vote in respect to the corporate affairs and management”), with MODEL BUS. CORP. ACT § 7.21(a) (2020) (“Only shares are entitled to vote.”); see also *Eliassen v. Intel Corp.*, 82 F.3d 731, 735 (7th Cir. 1996) (Posner, C.J.) (“A corporate structure in which the bondholders . . . have all the voting rights, and the shareholders . . . have no voting rights, is anomalous.”).

107. Sokol, *supra* note 3, at 707–08 (“Those types of control include the ability to (1) set the price, (2) decide whether to acquire companies, (3) reduce capital expenditures, and (4) replace top management.”).

This reality suggests a model of contractual incubators in which investments in innovative business models are made through contracts rather than through the traditional venture capital equity investment. Such contracts may include option rights on equity upon satisfaction of certain targets or other conditions.

Lastly, given that antitrust law is based on the paradigm of equity acquisition, a firm may wish to exploit the gap in law by capturing control through contract rather than equity precisely because such contractual arrangements will likely avoid antitrust scrutiny.

E. Standard for Control Capture

Control capture is the governing principle, but courts need a workable legal standard to determine it. All contracts create obligations, liabilities generally speaking, and thus impose a level of legal control in the sense that the subject firm must comply with the terms or face legal liability. For the purpose of antitrust, if contractual control capture can lead to liability, what level of control is sufficient to trigger review? We believe that the answer is self-evident. It is the level of control necessary for the controlling firm to create anticompetitive results. The analysis is an inquiry into causation. Upon the observation of injury (*i.e.*, anticompetitive outcome), we should inquire into cause (*actus*). That is, did control capture produce the anticompetitive result?

Control capture is not unidirectional in the sense that one firm is stronger than the other firm in the ordinary terms of size, capital, and market power. Control capture should be seen transactionally. It can result unidirectionally when a stronger firm gains control over the subject firm.¹⁰⁸ Or control capture can be bilateral where two firms contract in mutually symbiotic relationship arising from each's unique vulnerabilities and opportunities.

Of course, fact-based inquiries of control (*vis-à-vis* statutory *fiats*), such as judicial and administrative determinations, always depends on the unique set of facts and circumstances.¹⁰⁹ Reflecting principles seen in the laws of firms and agency, elements of contractual control capture are: (1) contract constitutes all or substantially all of the subject firm's business and financial return; (2) contract leaves the subject firm critically vulnerable to termination or breach; (3) subject firm substantially depends on the

108. This is seen in *A. Gay Jensen Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981), discussed *supra* Section II.C.

109. See *Tornetta v. Musk*, 310 A.3d 430, 500 (Del. Ch. 2024) ("Both general control and transaction-specific control call for a holistic evaluation of sources of influence."); *cf.* DEL. CODE ANN. tit. 8, § 144(e)(2) (West 2025) (defining "controlling stockholder").

controlling firm for financial, managerial, product development or business model support; (4) contract substantially dictates subject firm's operational control of firm; (5) contract explicitly or in reality limits the subject firm's power to seek other customers, strategic partners, or other commercial arrangements. When these elements exist and are used to promote anticompetitive effects, legal policy should consider them problematic.

Lastly, we make explicit two obvious points. First, we do not suggest that control alone would be invalid. Liability inures from harm. Contracts resulting in control capture are not void, but are voidable. Illegality results when control is exercised improperly to facilitate anticompetitive behavior. Second, it is less likely that a single contract between two counterparties could result in anticompetitive consequences on a market. Such a contract could be problematic. The implied size of such market-controlling contract would suggest that two firms hold bilateral monopolies that, when combined, would result in anticompetitive outcomes. The more likely scenario, however, is that a single firm controls a series of contracts with multiple counterparties. In this case, while any single contract may be immaterial, the aggregate of contracts concerning the same subject or product could be considered a whole.¹¹⁰

III. APPLICATION TO ANTITRUST LAW

A. *Control in Antitrust*

Antitrust reaches mergers mostly proactively through the filing of a pre-consummated merger notification to the DOJ and FTC under HSR. The Act requires notification of stock and asset deals. When there is a merger that may have potential anticompetitive effects, government enforcers (and sometimes private plaintiffs) may sue to enjoin the proposed merger under Section 7 of the Clayton Act.¹¹¹ Antitrust has, under HSR, focused on two

110. Contracts often define materiality in terms of "individually or in the aggregate." *See, e.g.,* Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 736 (Del. Ch. 2008) (merger agreement providing that a material adverse change is "any event, change, effect or development that has had or is reasonably expected to have, individually or in the aggregate"). Courts have also developed doctrines that treat separate transactions as a single whole. *See, e.g.,* Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp., 29 A.3d 225, 240 (Del. 2011) (recognizing various tests for "step-transaction" doctrine in which separate transactions are considered a part of a single whole transaction for the purpose of applying successor obligor clause in credit contracts); Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1051–52 (2d Cir. 1982) (aggregating a series of sales in a plan of liquidation as a single transaction for the purpose of the successor obligor clause).

111. *See* 15 U.S.C. § 18. Antitrust merger case law relies in part on a structural presumption. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–63 (1963). Antitrust merger law also uses a burden shifting framework. *See* United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

tests: the size of persons and the size of transactions. The size of the persons threshold addresses the size of the parties (based on parent entities) to the transaction. The size of the transaction is based upon “voting securities” or “assets” beyond the currently set threshold. The HSR rules do not contemplate non-equity transactions as a regular condition for notification for antitrust review. We argue that this formalistic approach to merger control omits actual control that firms might exhibit through non-equity investments. Although the explicit current statutory language (“stock or assets”) does not reach pure contractual control,¹¹² this distinction is out of sorts with the larger spirit of antitrust law, including decades of Supreme Court case law.¹¹³

Antitrust must police against anti-competitive contracts in the merger space. Whereas antitrust for decades has focused on error costs suggesting more concern about possible false positives,¹¹⁴ modern antitrust thought suggests that this assumption should be revisited.¹¹⁵ It is not possible to predict how many of the total number of contracts firms enter into in a given year or how many are problematic. Even if most contracts were benign or even efficient, some number of such contracts would pose a threat. Certainly, it cannot be the case that there are no such problematic contracts.

To make society better off, a closer to optimal approach cannot be to always wait until the conduct stage before intervening in contracts. Early intervention after all is precisely the rationale for the existence of merger law. Thus, society is better off with a policy that is surgical and nuanced with few administrative costs that would allow for antitrust to reach such conduct. In a different merger context, Professors Bryan and Hovenkamp argue, “society may benefit from a policy that permits limited intervention based on reasonably ascertainable evidence, even if this carries some risk of false positives.”¹¹⁶ This certainly should be true in the context of control contracts as well.

112. With some notable exceptions.

113. *Ohio v. Am. Express Co.*, 585 U.S. 529, 542–43, 678 (2018) (“[L]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law[.]” (citing *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 466–67 (1992))). In *American Express*, Justice Thomas meant to address that antitrust as economic law tends to focus on effects rather than on formalistic assumptions.

114. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984) (“If judges tolerate inefficient practices, the wrongly-tolerated practices will disappear under the onslaught of competition. The costs of [false positives] are borne by consumers, who lose the efficient practices and get nothing in return.”).

115. Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1, 7–36 (2015).

116. Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. CHI. L. REV. 331, 334 (2020).

With relatively few but in some ways significant modifications to antitrust law, it would be possible to reach such contracts. Antitrust law requires a change to address the issues that emerge from control contracts. A conceptually coherent approach requires specific changes in statutory language to achieve the goal of economic coherence of examining behavior in its incipiency that might lead to potential anti-competitive effects. The current language of the Clayton Act does not do so.

At present, the Clayton Act requires that “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” The problem is that the act does not foresee the possibility that there may control without an acquisition. The Clayton Act would need to be amended to capture control transactions. This could be done with a change in the text of the act which would not require a merger.

In some ways this would make antitrust merger control harder rather than simpler. But efforts at simplification of antitrust in the merger context regarding the use of the structural presumption has made antitrust harder to enforce rather than easier.¹¹⁷ The change in the language is the first step because no enforcement seems suboptimal relative to some enforcement.

To effectuate a change that addresses control capture, antitrust must have legislative change for both the Clayton Act and HSR Act. Merger law would then apply specifically to such control contracts. This also would allow for the application of Section 1 joint venture related case law to the merger context to develop new merger case law for purely contractual situations that may be vertical.

As this Part will explore, a control capture test would not create additional significant costs because the but for world already exists in both the United Kingdom and European Union with review of such types of contracts. In both jurisdictions, a finding of control is a significant undertaking and is not applied easily. In the US setting, creating a more appropriate framework would aid in better addressing control contracts and would allow for early intervention when antitrust intervention may be warranted.

117. This is not necessarily a problem. See Sean P. Sullivan, *Against Efforts to Simplify Antitrust*, 49 J. CORP. L. 419, 421 (2024).

B. Reporting and Disclosure of Controlling Contracts

1. Tying and Bundling

Tying and bundling are among the reasons that antitrust contractual arrangements deserve scrutiny. Though many such antitrust arrangements may be benign or pro-competitive, bundling and tying present potential competitive problems.

The basic economics of tying are relatively straightforward. When a seller of two products (Product A and Product B) requires a consumer to purchase Product B along with Product A, this practice is referred to as tying. In this case, Product B is the “tied product” and Product A is the “tying product.”¹¹⁸ Antitrust law recognizes the potential anti-competitive effects in both traditional¹¹⁹ and tech¹²⁰ settings.

Tying may be used, in certain settings, to preserve or extend monopoly power in markets that are based on rapid technological change. This, for example, is a common feature in digital platform markets.¹²¹ In such settings, tying may be used to drive competitors out of the market and to block potential entrants.¹²² As such, tying may be effective in particular in settings where a complementary market has network effects.¹²³ As such, tying may allow for the transfer of monopoly power to nascent markets.

In the academic setting, the potentially anti-competitive effects of tying focus on leveraging of the market power from the tying market to the tied market.¹²⁴ The seminal article that articulated this concern is by Whinston, who through game theory modeling suggests that such tying related

118. *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 685 (4th Cir. 2016); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194, 194–96, 198–212 (2002).

119. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 605 (1953); Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 234 (2005) (“[I]n tying, the buyer is forced to buy the tied product as a condition of obtaining the tying product.”); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 425–26 (2009).

120. Hovenkamp, *supra* note 14, at 1488–89.

121. Jordan Barry & D. Daniel Sokol, *Data Valuation and Law*, 96 S. CAL. L. REV. 1545, 1549–53 (2024).

122. Carlton & Waldman, *supra* note 118.

123. Jay Pil Choi, Doh-Shin Jeon & Michael D. Whinston, *Tying with Network Effects* (Toulouse Sch. of Econ., Working Paper No. 1524, 2025), <https://ideas.repec.org/p/tse/wpaper/129287.html> [<https://perma.cc/Y4AQ-EPRG>].

124. There are numerous pro-competitive justifications for tying. See, e.g., Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 525–26 (2001).

leveraging may create market power.¹²⁵ Such market power in turn leads to the foreclosure of competitors which in turn reduces consumer welfare. This insight has been extended to tech markets related markets where tying behavior can be used to extend the monopoly position through preserving the monopolistic position in the tying market.¹²⁶ In the tech platform setting, the academic literature extends to “platform envelopment.” This strategy uses tying to limit competitors to scale up. Similarly, recent work identifies tying as the strategy to create demand side leverage for a “quasi installed base” advantage in markets that exhibit.¹²⁷

As separate from tying, bundling involves selling two or more distinct products together as a package at a single price.¹²⁸ Bundles come in various forms. In pure bundling, the products are available only as part of the bundle. In mixed bundling, at least some products in the bundle are available separately.¹²⁹ In the tech context, platform bundling may be used as a strategy to overcome entry barriers in markets with strong network effects and high switching costs.¹³⁰ For example, a platform in Market A can bundle its offerings with those of an incumbent platform in Market B, to leverage common user relationships and shared components to enhance its market power.

The academic literature on bundling is also longstanding.¹³¹ In the general context, the anti-competitive rationale for bundling can be found in works such as Nalebuff or Greenlee et al.¹³² Nalebuff suggests that bundling products may allow incumbents to deter potential competitors from market entry because of switching costs. Similarly, Greenlee et al. identify that bundling might lead to higher prices or less innovation through exclusion and thereby an inability to match the pricing by the incumbent firm. The anti-competitive concerns of bundling were operationalized in the law

125. Whinston, *supra* note 15.

126. Carlton & Waldman, *supra* note 118, at 20.

127. Choi et al., *supra* note 123.

128. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922); Whinston, *supra* note 15, at 840, 846.

129. Dennis W. Carlton & Michael Waldman, *Safe Harbors for Quantity Discounts and Bundling*, 15 GEO. MASON L. REV. 1231 (2008); Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423 (2006); Barry Nalebuff, *Exclusionary Bundling*, 50 ANTITRUST BULL. 321 (2005).

130. Thomas Eisenmann, Geoffrey Parker & Marshall Van Alstyne, *Platform Envelopment*, 32 STRATEGIC MGMT. J. 1270 (2011). For an application in law, see Dan Awrey & Joshua Macey, *The Promise and Perils of Open Finance*, 40 YALE J. ON REG. 1, 57–58 (2023).

131. For more pro-competitive justifications see, for example, Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 ANTITRUST L.J. 399 (2008).

132. Patrick Greenlee, David Reitman & David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT’L J. INDUS. ORG. 1132 (2008); Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159 (2004).

review literature by Elhauge.¹³³ In the tech context, bundling might include user-generated content with news from third-party publishers. Depending on the scenario, this might lead to lower publisher profitability or increased publishers' profitability.¹³⁴

2. *Exclusive Dealing*

Exclusive dealing is a type of contractual arrangement in which a seller requires a buyer to only purchase goods or services from the seller. This means that as a result of the exclusivity, the buyer cannot purchase the same goods or services from competitors. Both theoretical and empirical scholarship examine both the pro-competitive and anti-competitive impact of exclusive dealing. Regarding pro-competitive effects, exclusive dealing may prevent competitors from taking advantage of the seller's work through free riding. Such agreements also may increase the durability of supply chains to disruption or from a marketing perspective protect a brand's image.

There are possible anti-competitive effects to exclusive dealing.¹³⁵ This may include blocking rivals from entering the market or making it harder for such rivals to compete.¹³⁶ Recent academic work has examined digital platform specific exclusive dealing.¹³⁷ For example, this may include how exclusive dealing contractual agreements may prevent sellers from using multihoming (using multiple platforms at once) or where a platform offers various deals to sellers to get the sellers to sign exclusive contracts. This in turn makes it more difficult for competing platforms to find sellers for their platforms. When there are few or no sellers available, buyers will not use

133. Elhauge, *supra* note 119.

134. Alexandre de Cornière & Miklos Sarvary, *Social Media and News: Content Bundling and News Quality*, 69 *MGMT. SCI.* 162 (2023).

135. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328, 331–34 (1961); *LePage's Inc. v. 3M*, 324 F.3d 141, 157–59 (3d Cir. 2003); Daniel Francis, *Monopolizing by Conditioning*, 124 *COLUM. L. REV.* 1917, 1961–65 (2024).

136. A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 *ANTITRUST L.J.* 375 (2006); B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 *J. POL. ECON.* 64 (1998); Chiara Fumagalli & Massimo Motta, *Exclusive Dealing and Entry, When Buyers Compete*, 96 *AM. ECON. REV.* 785 (2006); John Simpson & Abraham L. Wickelgren, *Naked Exclusion, Efficient Breach, and Downstream Competition*, 97 *AM. ECON. REV.* 1305 (2007). There also may be pro-competitive rationales for exclusive dealing. *See, e.g.*, Jan B. Heide, Shantanu Dutta & Mark Bergen, *Exclusive Dealing and Business Efficiency: Evidence from Industry Practice*, 41 *J.L. & ECON.* 387 (1998); Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 *ANTITRUST L.J.* 433, 437–65 (2008).

137. *See, e.g.*, Mark Armstrong & Julian Wright, *Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts*, 32 *ECON. THEORY* 353 (2007); Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103 *AM. ECON. REV.* 2960 (2013); Upender Subramanian, Jagmohan S. Raju, & Z. John Zhang, *Exclusive Handset Arrangements in the Wireless Industry: A Competitive Analysis*, 32 *MKTG. SCI.* 246 (2013).

the competing platforms. This strategy has the result of effectively blocking competition to the platform that offers exclusivity.

3. Joint Ventures

Joint ventures are one form of strategic alliance, a situation in which firms pool resources for joint gain.¹³⁸ This gets covered typically under Sherman Act Section 1 which, as mentioned previously, is insufficient because of its *ex post* review of conduct and the difficulty of remedies after the fact. The sort of joint ventures in this context have been horizontal such as those addressed in *Dagher*¹³⁹ (oil & gas) and *American Needle*¹⁴⁰ (professional sports) or even in the merger context such as *American Airlines/JetBlue* as described earlier.¹⁴¹ Sometimes joint ventures may be vertical. In the vertical context, the joint ventures might be created to improve efficiencies through a supply chain that might improve quality and/or reduce cost.¹⁴² Only when fully integrated do such joint ventures present a merger challenge but under the logic of a control contract, even partial integration should trigger such a review.

4. De Facto Exclusivity Contracts via Option Contracts

Options contracts create opportunities to address contingent behavior. For example, a right of first refusal may not be filled but might require exclusivity in the case that it is. In a right of first refusal, a party has the right to buy or supply before any other party.¹⁴³ An options contract as a right of first refusal may serve as a de facto exclusivity agreement. As such, this type of agreement might under certain circumstances create a control contract.¹⁴⁴

138. Gulati, *supra* note 50.

139. *See supra* note 8.

140. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

141. *See supra* Section I.C.

142. Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 897–99 (1985) (“It is possible to challenge a joint venture on the basis of loss of potential competition, but the plaintiff’s burden is a formidable one.”).

143. Marcel Kahan, Shmuel Leshem & Rangarajan K. Sundaram, *First-Purchase Rights: Rights of First Refusal and Rights of First Offer*, 14 AM. L. & ECON. REV. 331 (2012); David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J.L. BUS. & FIN. 1 (1999).

144. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (looking past the term of the contract to the actual economic effects); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005) (“economic realities rather than a formalistic approach must govern review of antitrust activity”).

C. Some Guidance from Other Jurisdictions

Some may be concerned that US antitrust merger control would be moved from an ownership based test to a control based test. This anxiety may be that deal flow of contracts would be slowed down by an extensive pre-clearance regime. However, in practice this concern is not borne out. The control based regime already exists in the EU and UK. In such jurisdictions, cases are quite rare such that the law reaches for the most part only cases of control capture and thus does not create a significant administrative burden. These experiments are useful to showing how a change in US merger control policy would not overwhelm the merger system but would create opportunities to reach control capture.

The European Commission approach focuses on what it terms “decisive influence” when there is no ownership change but there is a joint venture agreement in which the two firms act as a single firm regarding the commercial decisions.¹⁴⁵ Similarly, negative covenants are covered as these also serve to limit the control of one of the trading partners.¹⁴⁶ For example, in a recent case, the Commission identified that an entity with less than 50 percent ownership could still exercise control.¹⁴⁷ Therefore, in exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.”¹⁴⁸ This has rarely been used in case law.¹⁴⁹

Similarly, the United Kingdom’s competition law regime recognizes that control rather than ownership is what determines a competition concern. As such, low levels of ownership or even no ownership may raise competition concerns. Competition concerns arise when there is “material influence” that allows one firm to influence the behavior of the other firm in terms of

145. See Commission Consolidated Jurisdictional Notice Under Council Regulation 139/2004, 2008 O.J. (C 95) 1, 8 (“Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis where for example long term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.”).

146. *Id.*

147. Commission Decision of 19 Jan. 2022 Rejecting Its Jurisdiction Within the Meaning of Articles 1 and 4 of Council Regulation (EC) No. 139/2004, 2023 O.J. (C 23) 23.

148. Commission Notice on the concept of Concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, 1998 O.J. (C 66) 1 at III. 9.

149. See, e.g., Commission Decision Declaring a Concentration to be Compatible with the Common Market (Case No. IV/M. 697 - Lockheed Martin/ Loral Corporation) According to Council Regulation 4064/89, 1996 O.J.C (314) 9.

“the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.”¹⁵⁰ This is largely a fact-specific inquiry.¹⁵¹ The system defines control in a way that is not dissimilar to US case law in the agency or corporate law contexts that suggest that the test is one based on substance over form arguments.¹⁵²

A decisive influence is not the same as a substantial lessening of competition, which is not the same standards as used in the US merger guidelines because the focus in the substantial lessening of competition test is on mergers. However, the same logic applies to contracts, especially given that in the merger context, contracts may be the basis of the substantial lessening concerns.

Regarding a substantial lessening of competition, in *General Dynamics*, the Supreme Court identified that the legal test for purposes of allowing a rebuttal against the structural presumption of the prima facie merger case was based on a finding that “no substantial lessening of competition occurred or was threatened by the acquisition[.]”¹⁵³ Similarly, the Merger Guidelines reference a substantial lessening of competition fourteen times.

In the case of substantial control, the substantial lessening of competition framework would look most like unilateral effects in a merger regarding the potential for downstream foreclosure. As the Merger Guidelines explain relating to foreclosure strategies:

[The merger] could deny rivals access altogether, deny access to some features, degrade its quality, worsen the terms on which rivals can access the related product, limit interoperability, degrade the quality of complements, provide less reliable access, tie up or obstruct routes to market, or delay access to product features, improvements, or information relevant to making efficient use of the product.¹⁵⁴

This sort of approach brings together the framing in Europe and the UK within the US context of a substantial lessening of competition test.

150. MERGERS: GUIDANCE ON THE CMA’S JURISDICTION AND PROCEDURE, U.K. COMPETITION & MKTS. AUTH. ¶4.17 (2025), https://assets.publishing.service.gov.uk/media/677664f96c34906cc84c946d/CMA2_Mergers_-_guidance_on_the_CMA_s_jurisdiction_and_procedure.pdf [<https://perma.cc/YZZ8-SE95>].

151. *Id.* at ¶4.18.

152. *Id.* at ¶4.16 (noting that merger control may be triggered “falling short of outright voting control. Section 26 of the Act distinguishes three levels of interest (in ascending order): (a) material influence; (b) de facto control; and (c) a controlling interest (also known as ‘de jure’, or ‘legal’ control).”)

153. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974).

154. HMG 2023, *supra* note 22, at 2.5.A.

D. How to Develop Case Law

We suggest mandatory notification that would require that the contractual relations get notified in settings where one party is a monopolist and for the other party the contract is material to its operations enough that there is effectively a change in the control of who governs the firm through control contracts. This type of concern has been addressed in both agency and corporate law and can be used in antitrust for similar purposes.

Antitrust would be well served by drawing some initial presumptions as to the sorts of deals that would need to be notified. These would be the sorts of deals in which the contracts are material for a trading partner enough that the contract must be mentioned in an SEC filing or the equivalent for a private firm. The SEC provides guidance on whether a contract is material such that it imposes disclosure obligation, including if a reporting company's business is substantially dependent upon a contract.¹⁵⁵

This materiality standard could be imported into antitrust analysis for which contracts would need to be reported. Additionally, only firms that had market power on the other side of the contract would need to report such a transaction. The next question would be if the other trading partner has market power.¹⁵⁶ Without market power, there is minimal antitrust concern about the contract.¹⁵⁷ In a narrow band of settings, antitrust merger law already examines contracts as a property right and hence reportable under HSR. One prominent example is in the IP licensing setting for pharmaceuticals.¹⁵⁸

Our suggestion should not block the majority of contracts.¹⁵⁹ While there are a number of studies that show anticompetitive effects both in terms of modeling and empirically, Francine Lafontaine & Margaret Slade, summarize: “[O]verall a fairly clear empirical picture emerges. The data appear to be telling us that efficiency considerations overwhelm anticompetitive motives in most contexts. Furthermore, even when we limit

155. 17 C.F.R. § 229.601(b)(1)(ii)(A)–(D) (2025).

156. In the conduct context, see *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459–61 (1986).

157. Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 160 (1984) (“[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power”).

158. Stephen Paul Mahinka & Kathleen M. Sanzo, *New Medicare Act Provides New Competitive Landscape for the Pharmaceutical Industry*, FDLI UPDATE, July/Aug. 2004, at 36.

159. Appropriate screening methodologies, such as those used in Europe and the United Kingdom would be set up in U.S. control review. Perhaps there might be unforeseen difficulties in screening but that it is worth the risk to figure this out given the risk that the select few anticompetitive contracts can cause may be sufficient.

attention to natural monopolies or tight oligopolies, the evidence of anticompetitive harm is not strong.”¹⁶⁰

AI analysis could potentially mitigate the administration cost for a large cost but it is unclear the exact operation of how this might work.¹⁶¹ In principle, such screening for contractual terms that might be problematic is already undertaken.¹⁶² Emerging antitrust issues such as competition in the AI stack via contract is but one application.¹⁶³

E. Ex Ante Incentives and Ex Post Remedies

We began this Essay by identifying an emerging problem in antitrust and competition policy, which is that firms may forego control capture through traditional ownership acquisition and instead achieve the same through contractual control capture without triggering merger control and its incipiency standard. This fundamental gap in antitrust law and policy is most inviting for the obvious reason that the cost–benefit calculus of firm acquisition versus contract control capture weighs heavily in favor of the latter.

Mergers and acquisitions are fundamental transactions, especially so for the types of mergers that are more likely to be successfully challenged. Mergers can be expensive from the perspective of transaction costs, both direct and indirect costs. They can be cumbersome or awkward, raising fundamental questions between two firms: Who will lead? Who will be let go? How will the firms integrate? etc. Mergers can be risky.¹⁶⁴ One need

160. Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 677 (2007); see also Luco & Marshall, *supra* note 52, at 2043 (measuring separately the effects of vertical integration on integrated and nonintegrated firms, finding unintegrated products increased in price by 1.2 to 1.5 percent, while prices for integrated products decreased by 0.8 to 1.2 percent).

161. Increasingly such methods are being used to understand business text. See, e.g., Maryjane R. Rabier, *Acquisition Motives and the Distribution of Acquisition Performance*, 38 STRATEGIC MGMT. J. 2666 (2017); Hoberg & Phillips, *supra* note 69.

162. Elena Revilla & Maria Jesus Saenz, *How AI Is Reshaping Supplier Negotiations*, HARV. BUS. REV. (July 24, 2025), <https://hbr.org/2025/07/how-ai-is-reshaping-supplier-negotiations> [<https://perma.cc/EK7V-NN7X>].

163. John B. Kirkwood, *How Big Tech's AI Startup Alliances Could Harm Competition*, PROMARKET (Aug. 29, 2024), <https://www.promarket.org/2024/08/29/how-big-techs-ai-startup-alliances-could-harm-competition/> [<https://perma.cc/3QYW-NC65>].

164. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227 (2008); Albert H. Choi & Eric Talley, *Appraising the “Merger Price” Appraisal Rule*, 34 J.L. ECON. & ORG. 543 (2018); Sara B. Moeller, Frederik P. Schlingemann & René M. Stulz, *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757 (2005); Jarrad Harford, Mark Humphery-Jenner & Ronan Powell, *The Sources of Value Destruction in Acquisitions by Entrenched Managers*, 106 J. FIN. ECON. 247 (2012); Asli M. Arkan & René M. Stulz, *Corporate Acquisitions, Diversification, and the Firm's Life Cycle*, 71 J. FIN. 139 (2016).

not be a student of mergers and acquisitions to know that many of the best laid plans of managers and owners have been wrecked by incorrect economic calculation poor planning, overoptimism, bad execution, changing market conditions, and plain bad luck.¹⁶⁵ Of course, mergers are reviewed for antitrust concerns, which imposes a substantial transaction risk.

Compare the burdens of a traditional equity acquisition with those of control capture via contract. There are costs of contracting, and post-contract execution the implementation costs of exercising control per contractual terms. However, it is immediately apparent that contracting comes with fewer burdens and risks than equity acquisition, all the while achieving the private benefits of control. We see that the gaping hole in the traditional antitrust framework would incentivize the much lower cost, lower risk strategy of achieving control through contract vis-à-vis traditional equity acquisition.

We also believe that when one hand giveth, the other can taketh. While the remedy for both traditional equity acquisition and contractual control capture is the same—a rescission of the violative contract—the pain associated with this remedy may generally be significantly lesser to untie a contractual control arrangement than to strike down a merger prior to consummation. The simple reason is that the direct cost of a workup to an executed merger agreement and the indirect cost of an unwinding of expectation by all constituents are likely much more costly for the reasons discussed above than the transaction cost of contracting in other kinds of commercial arrangements.¹⁶⁶ Therefore, the policy remedy for our proposal will be less intrusive and correlated to the advantages that market actors may see in seeking a private ordering end-around antitrust policy.

We identify that there is a risk of administrability. We believe that the value of such contracts should be set sufficiently high not to capture too many contracts that would not pose a risk. Further, such merger control should only impact contracts that are long term—a duration of five years or more. We caution against the disproportionate use against certain firms. One way to prevent this is to examine the four corners of the contracts and not look beyond it. The European experience suggests that there would not be a significant administrative burden. However, should such an approach in

165. Ulrike Malmendier & Geoffrey Tate, *CEO Overconfidence and Corporate Investment*, 60 J. FIN. 2661 (2005); Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573, 635–36 (2014).

166. We acknowledge that there is the additional transaction cost of attempting to protect the contract from this potential control challenge.

the United States create delays and business uncertainty, we would recommend various mechanisms to reduce such delays.

CONCLUSION

Merger review is antitrust law's best opportunity to combat anticompetitive control in concentrated markets.¹⁶⁷ We need to understand what antitrust does relatively well and where it can be improved in a way that doesn't upset the balance of increased innovation and higher output from lower prices and higher quality.¹⁶⁸ There are many kinds of behavior in antitrust that we would like to proscribe, but the rules have developed in such a way that we have left an obvious hole in the legal framework. Market actors have seen this vulnerability and are exploiting it through contracting, which may be enforced under Sherman Act Sections 1 and 2 but doing so is insufficient because the behavior may not be captured in its incipiency when it might be easiest to solve and remedy. We need a new framework to address potentially anti-competitive behavior in the form of contractual control capture. Recognizing that control contracts may create anti-competitive effects is the first step to reinvigorating antitrust law in a way that identifies a particular type of control akin to a merger that antitrust has not adequately addressed.

167. See Hovenkamp, *supra* note 76, at 47–48. There has been other work exploring some issues specific to potential anti-competitive activity in the merger space in recent years where conduct remedies seem to be insufficient. See, e.g., Anat Alon-Beck, John Livingstone, Moran Ofir & Miriam Schwartz-Ziv, *Unraveling the Web: Big Tech Directors, SPACs, and Antitrust Evasion Tactics*, 26 U. PA. J. BUS. L. 634 (2024); D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 FLA. L. REV. 265 (2024); Gal & Rubinfeld, *supra* note 30.

168. While the issue of acquiring and non-competes are also contractual issues in antitrust, we do not focus on such issues in this setting as they typically will not be control contracts. On acquires, see John F. Coyle & Gregg D. Polsky, *Acqui-hiring*, 63 DUKE L.J. 281 (2013). On non-competes and antitrust, see Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381 (2020); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143 (2022); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165 (2020).