THE NEW ANTITRUST

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ABSTRACT

President Biden's 2021 Executive Order on Competition marked a sea change in United States antitrust policy. Years of political activism against excessively concentrated corporate power have culminated in a "New Antitrust" based on robust initiatives to open markets. Critics of the New Antitrust dismiss it as mere populism, calling it an improper politicization of expert agency work. This article meets their challenges, demonstrating that the New Antitrust's intellectual foundations in the methodology of law and political economy ("LPE") are just as strong as its political appeal.

LPE is based on a wide range of social sciences and the humanities, including sociology, political science, and history. LPE broadens the methodological lens beyond the narrow focus on economics that has dominated antitrust policy and case law over the past several decades. This Article demonstrates the critical importance of complementing economic analysis of corporate concentration with interdisciplinary insights into questions of power (via political science), race and social dynamics (via history and sociology), and values (via philosophy). All have a place in understanding and effectively curbing contemporary threats to competition.

The intellectual pluralism of the New Antitrust is already having positive results. Pluralist LPE methods have both sustained and reflected two foundations of the new approaches to antitrust now emerging under the Biden Administration: (1) a neo-Brandeisian emphasis (named after the former Supreme Court Justice Louis Brandeis) on breaking up large firms or preventing suspect mergers and (2) a regulatory emphasis on limiting the power of large firms generally. As a result, competition policymakers are finally addressing the concerns of racial minorities, workers, and vulnerable populations. This Article demonstrates that the New Antitrust has deep intellectual foundations. Its openness to a wider range of academic expertise, beyond that of economists and quantitative analysts, has led to both epistemic and ethical advances in competition policy. The New Antitrust should be an important part of competition law for decades to come.

INTRODUCTION

In the 1960s, Charles Reich hailed a "New Property" to recognize the importance of government largesse.[1] The revitalization of competition policy

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[1] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 735 (1964).

during the Biden administration marks a "New Antitrust," forcing a fundamental rethink of once-venerated nostrums in the field.[2] Years of political activism against exceedingly concentrated corporate power have culminated in dramatic initiatives to open markets in sectors ranging from health care to shipping to internet platforms. The appointments of Lina Khan, Jonathan Kanter, and Tim Wu to top governmental positions sparked a wave of enforcement actions meant to level the playing field between capital and management, on one side, and consumers and workers, on the other.[3]

Yet almost as soon as this approach took hold in U.S. antitrust agencies, critics portrayed it as a politicization of what had been a neutral and technocratic law enforcement process.[4] In editorial after editorial, the *Wall Street Journal* editorial board has accused Federal Trade Commission ("FTC") Chair Lina Khan of improper politicization of enforcement patterns.[5] A steady drumbeat of criticism among scholars has tried to characterize robust antitrust action as lacking intellectual foundations and resulting from populist politics.[6] If this narrative persuades enough judges and members of Congress, the antitrust agencies may abruptly scale back their activities once new agency heads ascend to power.

It is reductive to attribute strict application of competition law against dominant firms to populism. Ideas matter, too.[7] The New Antitrust has both drawn upon and contributed to a larger intellectual movement, Law and Political Economy ("LPE"), which has corrected fundamental misconceptions about the relationship between law and markets.[8] Both supported by and supportive of cutting edge anti-monopoly scholarship, the LPE framework has demonstrated how law constitutes markets and can reconstitute them to pursue a wide range of societal goals.[9] It has also

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[2] Exec. Order No. 14036, 86 Fed. Reg. 36987, 36988–89 (Jul. 9, 2021) (describing the goals of antitrust, beyond economic efficiency, to encompass "preservation of our democratic political and social institutions," as well as national security concerns highlighted by supply chain disruptions and the coronavirus pandemic).

[3] *See, e.g.*, *How to Change 40 Years of Policy in 22 Months: Professor Wu in Washington*, COLUM. L. SCH. (Feb. 8, 2023), https://www.law.columbia.edu/news/archive/how-change-40-years-policy-22-months-professor-wu-washington; Leah Nylen, *FTC's Khan and DOJ's Kanter Beat Back Deals at Fastest Clip in Decades*, BNN BLOOMBERG (Dec. 18, 2023), https://www.bnnbloomberg.ca/ftc-s-khan-and-doj-s-kanter-beat-back-deals-at-fastest-clip-in-decades-1.2013109 [https://perma.cc/CBH6-HGQY].

[4] Frank Pasquale & Jacqueline Green, *Two Politicizations of U.S. Antitrust Law*, 15 BROOK. J. CORP. FIN. & COM. L. 97, 97 (2020) (describing the views of many critics and defending FTC and DOJ actions against large technology firms).

[5] *Wall Street Grumble*, AM. ECON. LIBERTIES PROJECT, https://www.economicliberties.us/the-wall-street-grumble [https://perma.cc/FH94-89XW] (last updated July 27, 2023) (compiling a database of critiques of Khan, including "75 pieces since the beginning of Khan's tenure, all of them intending to undermine the FTC's enforcement actions").

[6] John M. Newman, *Reactionary Antitrust*, 4-2019 CONCURRENCES 66 (2019) (collecting critical responses). *See also* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 745 (2018) ("Populism poses [a] danger in part because today's populism is in many ways animated more by concerns about the political power of large corporations than by concerns about their economic power."). By contrast, political economy approaches generally consider economic analysis that ignores political power to be struthious. *See infra* text accompanying notes 8–11.

[7] *See, e.g.*, Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*, 64 ANTITRUST BULL. 295 (2019) (explaining the relations between ideas and institutions in antitrust enforcement).

[8] For examples of synoptic work summarizing insights derived from LPE theory, *see generally* Angela Harris & James J. Varellas III, *Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1 (2020). For over five years, the LPE Blog based at Yale Law School has hosted dozens of allied scholars commenting on and developing the politico-economic analysis of law. *Id.*

[9] *See generally* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

demonstrated that the bargaining power of economic actors is just as important as markets in determining their relative share of economic output.[10]

The ascension of LPE and the New Antitrust has methodological implications for the U.S. legal academy and doctrinal implications for the U.S. judiciary. Methodologically, the New Antitrust draws on more academic disciplines than mainstream work in the field.[11] While mainstream antitrust scholars have focused narrowly on economic issues, the New Antitrust highlights questions of power and fairness (via political science and philosophy); race and social dynamics (via sociology); and human willpower and cognition (via psychology). All these perspectives are vital to understanding decades of corporate dominance and correcting the failings of long-established antitrust doctrines.

To properly explain the intellectual contributions of the New Antirust, we must first give an account of what came before it. Described in Part I below, Establishment Antitrust began with a noble goal: to make competition policy and enforcement more determinate. Its consequentialist "consumer welfare" standard promised to replace the vagaries of words with the precision of numbers (Section I.A). But this noble aspiration eventually ossified into a hermetic scientism, which mimicked the methods of science without achieving scientific validity. Thanks to a rigid adherence to the consumer welfare standard and related doctrines, Establishment Antitrust failed to recognize growing corporate concentration as a problem (Section I.B). It has also been dangerously short-termist, focused on delivering low prices for present consumers while supply chain vulnerabilities and systemic risk mounted, and many low-income workers' well-being declined.[12]

The New Antitrust is correcting that myopia with a commendable methodological pluralism strongly rooted in LPE's focus on power and inequality.[13] The New Antitrust develops a richer language of policy evaluation (Section II.A).[14] It supplements economic analyses with additional fields of expertise to gain a more holistic view of the harms that flow from corporate concentration (Section II.B). This openness to diverse sources of social scientific insight has, in turn, intellectually underwritten a wider range of enforcement priorities. The New Antitrust recognizes the importance of considering race in markets where an "efficient" transaction may nevertheless further entrench inequality of opportunity (Section III.A)—for example, where a merger of hospitals may relocate critical services far from minority communities. It complements consumer-focused economics with attention to the conditions of production, such as wages and working conditions (Section III.B). Leaders pursuing New Antitrust

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[10] Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297 *passim* (2016).

[11] *See infra* Section II.B.

[12] On problem of concentration and systemic risk, with particular attention to the financial system, see generally Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313 (2010). *See also* Saule T. Omarova & Graham S. Steele, *Banking and Antitrust*, 133 YALE L. J. 1162, 1237 (2024) (documenting the relationship between concentration and systemic risk, while also recommending more ambitious goals for competition policy in banking).

[13] Britton-Purdy et al., *supra* note 9, at 1792.

[14] For an examination of the range of options available in contemporary policy evaluation, see Frank Pasquale, *Power and Knowledge in Policy Evaluation: From Managing Budgets to Analyzing Scenarios*, 86 LAW & CONTEMP. PROBS. 39 (2023).

approaches at the FTC and DOJ have already achieved concrete legal victories that reflect the rigorous doctrinal and empirical scholarship underlying this movement (Section III.C). The article concludes with reflections on a prophetic call for methodological pluralism from the 1970s, marking how long overdue the New Antitrust's course correction has been (Conclusion).

As with all "histories of the present," we recognize the perils inherent in our periodization of competition law and policy. The "old antitrust" may soon return to dominance, rendering the New Antitrust an anomaly. Even if this does occur, we believe that this Article's contribution is significant, as it tracks how New Antitrust scholarship (analyzed in Part II) has already had remarkable impacts on U.S. competition law, policy, and enforcement priorities (described in Part III). Ideas matter, and the New Antitrust has brought together a particularly potent and illuminating set of disciplinary perspectives and normative commitments. That is worth marking and exploring, however well its ideas fare in future administrations.

I. ESTABLISHMENT ANTITRUST'S METHODOLOGY

Before demonstrating the strong intellectual foundations of the New Antitrust, we must first explain what it has reacted against: "Establishment Antitrust," a way of adjudicating disputes over the interpretation of competition law and policy grounded in the theory and practice of economists and lawyers who dominated antitrust policy from the 1970s to the 2010s. The following sections explain Establishment Antitrust's focus on the predicted consequences of mergers and contracts, rather than their character. This intellectual hegemony rested on a shift away from bright-line, per se rules proscribing anticompetitive conduct to a broadly utilitarian economic analysis of conduct's predicted consequences (Section I.A).[15] Though this utilitarian approach was deemed a "consumer welfare" standard, it tended to overlook a broad consideration of impacts affecting consumers for a narrow focus on a few quantifiable or readily extrapolated dimensions of challenged business conduct. This narrow approach often obscured more than it clarified, creating negative consequences of its own (Section I.B). These problematic results of Establishment Antitrust in turn provoked demand for the new methodological approaches described in Part II.

A. THE RISE OF ECONOMISTIC CONSEQUENTIALISM IN ANTITRUST

By the 1960s, a "Chicago School" was seizing on perceived flaws in older approaches to antitrust. Establishment Antitrust was deeply shaped at its origin by many scholars and advocates who taught (in whole or in part) at the University of Chicago, including Aaron Director, Ward Bowman, Robert Bork, John McGee, and Lester Telser.[16] Their work (and that of their

[15] The term "per se" is Latin for "in itself." A per se rule forbids certain conduct, regardless of its consequences. *See* DSM Desotech Inc. v. 3D Sys. Corp., 749 F.3d 1332, 1337 n.1 (Fed. Cir. 2014) (noting that per se rules are applied by courts to actions deemed conclusively anticompetitive and therefore unlawful).

[16] The Chicago School, named for pioneering scholars and activists from the University of Chicago, both inspired and drew inspiration from a broader movement of work—one that extended well beyond the walls of the school. *See* Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L.J. 393, 396 (2020); *see also* Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV.

protégés) long shaped enforcement agendas and judicial decisions.[17] They focused on the overall output of firms rather than market structure, emphasizing economics as the social scientific methodology of most relevance to the interpretation of antitrust laws.[18]

These scholars did not believe Congress intended to legislate permanent features of contract and market structure via competition-promoting laws or ensure the endurance of small- to medium-sized enterprises in all industrial and service sectors.[19] Instead, they believed the chief goal of antitrust was to protect and maximize consumer welfare ("CW"), which may well be best done by massive firms enjoying economies of scale and scope.[20] This is a form of consequentialism, in which decisionmakers prioritize the predicted consequences of action and inaction over the characteristics of the action itself.[21]

CW-focused approaches began to dominate antitrust theory due to a combination of aggressive regulatory reform during the Carter and Reagan administrations and a growing belief that antitrust enforcement was too aggressive.[22] The highly influential antitrust scholar and advocate Robert Bork both consolidated and extended the intellectual case for the CW standard in the late 1970s in his book *The Antitrust Paradox*.[23] In this book, Bork criticized many antitrust enforcement patterns of the mid-twentieth century. He considered the resulting case law indeterminate: it was too difficult for business owners to plan future acquisitions and strategy based on underdeveloped, under-specified doctrine.[24] Bork also believed that bigness was very often a sign of efficiency and success that the government should not discourage.[25] The more market share a firm had, the more consumers had spent their dollar votes—as sovereigns over markets—to

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495, 496–98 (2019); Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 40, 43 (Robert Pitofsky ed., 2008).

[17] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 938–39 (1979).

[18] WILLIAM DAVIES, THE LIMITS OF NEOLIBERALISM: AUTHORITY, SOVEREIGNTY AND THE LOGIC OF COMPETITION 86 (Natalie Aguilera, ed., 2017) ("The Chicago fusion of law and economics occurred through persuading lawyers [to focus on] empirical questions of measurable output.").

[19] Thomas A. Piraino Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 350 (2007). By contrast, Harlan Blake and William Jones, professors of law at Columbia Law School, believed that the real issue antitrust was designed to combat was the "abusive behavior of economic giants," which naturally provided assistance and protection to the "little guy," consumers and small businesses. *See* Harry First, *American Express, the Rule of Reason, and the Goals of Antitrust* 7 (N.Y.U. Pub. L. & Legal Theory Rsch. Paper, Working paper No. 19-27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417265 [https://perma.cc/7UNZ-C57U]. Remarkably, two important figures of the New Antitrust also hail from Columbia (Tim Wu and Lina Khan). *See Timothy Wu*, COLUM. L. SCH., https://www.law.columbia.edu/faculty/timothy-wu [https://perma.cc/U6JE-VMFG]; *Lina M. Khan*, FTC, https://www.ftc.gov/about-ftc/commissioners-staff/lina-m-khan [https://perma.cc/NA6M-XCFW].

[20] Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND. 2 (Oct. 2018), https://www2.itif.org/2018-consumer-welfare-standard.pdf [https://perma.cc/QKZ8-9EA5]; First, *supra* note 19, at 5.

[21] Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) ("Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare.").

[22] *See* Kennedy, *supra* note 20, at 2. Maximizing CW should mean lower consumer costs and increased, higher-quality output; however, in practice, it has often fallen short of this mark. *See generally* Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495 (2019).

[23] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[24] *Id.* at 47–51.

[25] *Id.* at 118–19.

elevate the firm. To Bork, antitrust enforcement against powerful firms had a strong whiff of punishing the successful. Just as Bork's conservative confreres opposed steeply progressive income taxes targeting millionaires and billionaires, they too found megafirms to be sympathetic, even heroic actors.[26]

Establishment Antitrust continued to redirect the attention of courts (and later, enforcers) from structure to specific quantifiable outcomes: from analyzing the overall number of competitors and the extent of their competition to projections of outcomes for consumers.[27] Per se condemnation of restricted dealing became disfavored in comparison with rule of reason analysis, which attempted to analyze the relative weight of allegedly pro- and anti-competitive effects from challenged business practices.[28] Today, both the Supreme Court and lower courts routinely use CW as the dominant principle to guide rule of reason analysis, with many directly citing Bork for support of this true goal of antitrust.[29] Seminal to the widespread judicial acceptance of the CW standard, the Supreme Court in *Reiter v. Sonotone Corp.* quoted directly from Bork's *The Antitrust Paradox* to affirm that "Congress designed the Sherman Act as a 'consumer welfare prescription.' "[30]

In sympathetic accounts, the CW standard is praised for bringing certainty and predictability back to antitrust while "adapting to technological changes."[31] Under this standard, antitrust enforcers should only act where there is harm to consumers.[32] Lower courts have often narrowed the approach adumbrated by the Supreme Court, analyzing conduct under the CW standard based on its short-term impact on consumers in the relevant market, with little consideration of long-term market dynamics or quality of

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[26] John Ehrett, *The Bork Paradox*, 5 AM. AFFAIRS 86–98 (Aug. 20, 2021), https://americanaffairsjournal.org/2021/08/the-bork-paradox-and-the-conservative-legal-movement [https://perma.cc/PZ4E-ZH9N].

[27] *Id.*

[28] *See* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 145, 153 (1984). Rule of reason analysis evaluates whether the challenged action raises prices or reduces output within the relevant market. *Id.* at 153–54.

[29] *See* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 474–76 (2012). In the process of overturning precedent that price predation was per se illegal, Bork's work was cited by three major Supreme Court cases: Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 121 n. 17 (1986); Brooke Grp. v. Brown & Williamson Co., 509 U.S. 209, 221, 233 (1993). Direct citations to Bork also appear in Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 739, 758 (1979) (Stevens, J., dissenting) and Atl. Richfield Co. v. U.S. Petroleum Co., 495 U.S. 328, 343 n.13 (1990). Other cases may not mention Bork specifically, or use the term "consumer welfare," but use language that echoes the basic principles of the CW standard. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 22 (1979) ("Many consumers clearly prefer the characteristics and cost advantages of this marketable package. . . . "); Pac. Bell Tel. Co. v. LinkLine Commc'n, Inc., 555 U.S. 438, 451 (2009) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.") (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990)). Additionally, administrative agencies like the FTC and DOJ largely reinterpreted antitrust laws to reflect the CW standard. *See* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479, 480 (2019).

[30] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[31] Jennifer Huddleston, *Antitrust and the Debate Over Data Privacy*, MERCATUS CTR. GEORGE MASON U. 1, 3 (Oct. 18, 2019), https://congress.gov/116/meeting/house/110098/documents/HHRG-116-JU05-20191018-SD008.pdf [https://perma.cc/BZJ2-J6VX].

[32] Christine S. Wilson, Commissioner, FTC, Luncheon Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/35LV-HUFZ].

goods and services.[33] Their methods have subsequently influenced enforcement agencies, even though long-standing principles of administrative law empower these agencies to otherwise interpret the statutes they enforce. For example, the Federal Trade Commission for decades followed a "rule of reason" that concentrated "on quantifiable, short-term harms (from, for example, mergers) and ignore[d] qualitative and longer-term harms in their entirety."[34] Impacts on producers were largely ignored as well, pursuant to the shallow nostrum that antitrust law is supposed to protect competition, not competitors.[35]

B. THE TROUBLING RESULTS OF ECONOMISM

Establishment Antitrust moved beyond its Chicago School roots by the 1980s, with many of its practitioners embracing more sophisticated economic methods.[36] One scholar characterized this transition as a "revolution" in the field, and it has helped Establishment Antitrust practitioners to rebrand and distinguish themselves from Chicago's broader ideological affinities and material alliances.[37] However, the Establishment approach still has deep Chicago roots. Former FTC Chair William Kovacic has observed that any "implication that Chicago and Post-Chicago perspectives have little in common" is misguided and ignores the foundational connections they share.[38] The Chicago School championed a CW goal pursued via economic methodology.[39] The Post-Chicago School did not stray from these core commitments, which marginalized other goals and methods.[40] Yet the economic methods prescribed often failed to promote

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[33] Vaheesan, *supra* note 29, at 487. *See, e.g.*, *Atl. Richfield Co.*, 495 U.S. at 340 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

[34] *See* Sandeep Vaheesan, *Resurrecting "A Comprehensive Chart of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PENN. J. BUS. L. 645, 672, 698 (2017). As Vaheesan explains:

> The original aims of the FTC Act are *not* susceptible to quantification and balancing. How could the FTC balance incommensurable things such as short-term price effects against enhanced corporate power in the political system? The absurdity of this type of balancing is evident on its face. These are qualitative determinations that call for legislative-type judgments, not a futile quantification exercise. The rule of reason compels the FTC to focus its lens narrowly: it must concentrate on quantifiable, short-term harms (from, for example, mergers) and ignore qualitative and longer-term harms in their entirety.

[35] Rebel Oil Co., 51 F.3d at 1433 ("[C]onduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare."). But competition cannot exist if there are no major competitors in a market. And by the time "reduction of competition" demonstrably "harms consumer welfare," it may be difficult or impossible to motivate market entry. *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

[36] *See, e.g.*, Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 225 (1985) ("[A]ntitrust policy is coming increasingly under the influence of a 'post-Chicago' economics . . . .").

[37] Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PENN. L. REV. 2145, 2160–61 (2020). Yoo argues that:

> [T]he post-Chicago School joins the Chicago School in rejecting populist considerations and in accepting the maximization of economic welfare as the sole focus of antitrust… What separates the two schools is not their goals, but their vision of the relevant mechanisms through which economics acts. While the Chicago School placed little emphasis on the game theory revolution that swept through industrial organization and microeconomics during the beginning in the 1970s, the post-Chicago School embraced it.

[38] William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 9 (2007).

[39] Yoo, *supra* note 37, at 2152–53.

[40] *Id.* at 2160 ("[T]he post-Chicago School joins the Chicago School in rejecting populist considerations and in accepting the maximization of economic welfare as the sole focus of antitrust.").

even the narrow CW goal they aimed to reach, as this Section demonstrates. Rigid adherence to them all too often amounted to economism: excess reliance on economic theories and models to the exclusion of other, equally or more valid forms of inquiry.[41]

From the 1970s to the mid-2010s, U.S. antitrust law has featured attorneys' interpretive skills ceding ground to economists' predictions of the consequences of proposed enforcement actions.[42] For those seeking to restrict the scope of knowledge that is relevant to an antitrust case, this was seen as progress: from rhetoric to (the rule of) reason, and from the vagueness of words to the clarity of numbers.[43] However, actual results of this change in regulation and enforcement have been grimly counterproductive. Corporate concentration has risen.[44] Predicted merger efficiencies have often failed to materialize. This Section traces these failures in policy to problems inherent in dominant interpretations of the CW standard. An extraordinary degree of concentration was affirmed over the past several decades. Inaction in the face of merger waves and restrictive contracting practices was rooted in theoretical shortcomings at the core of Establishment Antitrust: a blinkered, short-termist, and methodologically individualistic consequentialism that failed to acknowledge the important social values at the core of antitrust law.

In 1999, Clinton administration Assistant Attorney General for Antitrust Joel Klein declared, "our economy is more competitive today than it has been in a long, long time."[45] Klein's *fin de siècle* triumphalism reflected what he saw as wise enforcement of antitrust law by the relevant federal agencies, and by states long accustomed to following the federal government's lead in competition policy.[46] Whatever the merits of Klein's point of view at the

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[41] Economism is "a theory or viewpoint that attaches decisive or principal importance to economic goals or interests." PHILIP BABCOCK GOVE, ET AL., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 720 (1986). James Y. Kwak and Simon Johnson have also characterized economism as a misguided belief that simple concepts from introductory economics courses explain and describe commercial life so well that they should provide models for reasoning about all policy decisions. JAMES Y. KWAK AND SIMON JOHNSON, ECONOMISM: BAD ECONOMICS AND THE RISE OF INEQUALITY (2018).

[42] Dennis W. Carlton and Ken Heyer, *The Revolution in Antitrust: An Assessment*, 65 ANTITRUST BULLETIN 608, 616 (2020). As the authors explain:

> [A]s for the use of economists by the FTC and DOJ in antitrust matters, both agencies have for decades now each employed dozens of full-time PhD economists, and the number of economists involved in antitrust matters at the federal agencies has grown considerably since 1969. The EPO (subsequently renamed the Economic Analysis Group) has grown to several dozen PhD-level economists, typically from the country's most highly rated economics departments. Similarly, at the FTC, the number of economists employed in antitrust matters has grown considerably. The economists at both agencies are part of most, if not all, antitrust investigative teams, produce their own independent memoranda and recommendations in all merger and civil nonmerger investigations, and engage actively in agency-supported research programs and the development of formal guidelines and other policy initiatives.

[43] Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement* (Dec. 15, 2017), HARV. BUS. L. REV., https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement [https://perma.cc/72FW-BD4Y] ("[S]ome enforcers viewed the political and moral cases for antitrust as insufficiently rigorous and somehow diluting antitrust policy. . . Antitrust's noneconomic goals were jettisoned for an amorphous 'consumer welfare' standard.").

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

[45] John E. Kwoka, Jr., Neal F. Finnegan Distinguished Professor of Economics, Northeastern University, *Does America Have a Monopoly Problem? Examining Concentration and Competition in the U.S. Economy: Hearing Before the Subcomm. On Antitrust, Competition Pol'y & Consumer Rts., S. Comm. On the Judiciary*, 116th Cong. 9, 1 (Mar. 5, 2019) https://www.judiciary.senate.gov/imo/media/doc/Kwoka%20Testimony.pdf [https://perma.cc/85GK-TM8D].

[46] *Id.*

time, there has been a sea change in attitudes about the results of Establishment Antitrust policy since then.[47] A proliferation of trademarks in various fields hides a grim reality: oligopolies rule many key segments of the U.S. economy.[48] As John Kwoka has observed, between 1999 and 2019:

> [T]he number of major US airlines has gone from 7 to 4. The number of accounting companies has fallen from 8 to 4. The count of car rental companies has fallen even more, from 8 or 9 down to just three–each owning multiple brands. There are now only two pharmacy chains, two sizeable mattress manufacturers, two large brewers. If one dominant tech company was a concern twenty years ago, Microsoft has now been joined by four additional dominant companies, in search, social media, and e-commerce. And these five have collectively acquired more than 600 companies over the past twenty years.[49]

Despite these troubling developments, antitrust policymakers in the 2000s and most of the 2010s rarely stirred to challenge (or even investigate) major trends in consolidation. Occasionally, the enforcement agencies' attention was consumed by such obscure and unlikely targets as ice-skating coaches, church organists, and heir-finding services.[50] Truck drivers were also targeted.[51]

While agencies enjoy a high degree of discretion in their enforcement priorities, these initiatives against small businesses and labor appeared misguided. In many corporate sectors, concentration in the U.S. has risen for decades, with much greater impact on the economy as whole.[52] Many workers and consumers saw wages squeezed and prices raised while owners

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[47] *See, e.g.*, PHILIPPON, *supra* note 44 (discussing a litany of profound problems of lack of competition in the U.S. economy, in industries ranging from air travel to cable television).

[48] This proliferation led to David Barnes's wise policy proposal of "one trademark per source," in part to inform consumers of the common origins of so many products and services that appear to be independent of one another. David W. Barnes, *One Trademark Per Source*, 18 TEX. INTELL. PROP. L.J. 1, 5 (2009) (contending that "[l]imiting suppliers to a single mark is sufficient for source-indicating purposes, enabl[ing] consumers to know what products compete to satisfy their needs, and makes it easier for smaller competitors to supply them, [thus] facilitating competition").

[49] Kwoka, *supra* note 45. For a discussion on similar troubling issues of concentration in the banking industry, *see* Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313 (2010).

[50] Frank A. Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy*, CPI ANTITRUST CHRON., 1, 5 (2017) (collecting examples of obscure enforcement targets). The preoccupation with the margins of the economy was reminiscent of similar problems in tax enforcement: an under-resourced Internal Revenue Service may audit Earned Income Tax Credit recipients more frequently than billionaires, because it is much easier to successfully close a case against a target with few resources. Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, ProPublica, https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax [https://perma.cc/9KJ6-STKB].

[51] Bryce Tuttle, *Gig Workers Should Be Allowed to Organize. The FTC and DOJ Can Help Make That Happen*, THE SLING: ECONOMIC ANALYSIS AND COMPETITION POLICY RESEARCH, https://www.thesling.org/gig-workers-should-be-allowed-to-organize-the-ftc-and-doj-can-help-make-that-happen/ [https://perma.cc/U9FX-YS48] (2024).

[52] *See, e.g.*, Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 698 (2019) ("We find that over the past two decades profitability has risen for firms in those industries sustaining increases in concentration levels. Using various industry definitions, we document a positive correlation between changes in concentration levels and return-on-assets."); Promarket Writers, *"There is Unambiguous Evidence that Concentration is on the Rise and Widespread Over Most Industries,"* PROMARKET (Apr. 27, 2017), https://www.promarket.org/2017/04/27/unambiguous-evidence-concentration-rise-widespread-industries/ [https://perma.cc/63TA-UBRT].

and managers of firms enjoyed extraordinary wealth.[53] Nor have economic shocks slowed this trend considerably. The global financial crisis of 2008 did not impede the growth of the largest banks.[54] The COVID crisis accelerated massive technology firms' plans to exert control over vast swathes of the economy, pushing their CEOs' and top shareholders' wealth to stratospheric levels.[55] Consumer caution about the risk of COVID helped shutter thousands of small businesses, further driving the economic dominance of the largest firms.[56]

This corporate concentration has direct and harmful effects on the lives of most Americans. Fewer larger air carriers mean that flights are less frequent, more packed, and more subject to arbitrary, unfair, consumer-disfavoring rules (often imposed unilaterally via contract without opportunity for bargaining over them).[57] With the industry dominated by four major airlines, the lack of competition stripped away the need for these oligopolists to innovate.[58] This complacency arguably contributed to the disastrous flight cancellations by Southwest Airlines in 2022; why should the industry invest in better computing infrastructure when it has an essentially captive set of consumers in many markets?[59] Shipping cartels are another logistical failure, having significantly contributed to both inflation and goods shortages.[60]

Much of this corporate concentration is directly attributable to lax antitrust enforcement. Consider, for instance, the *laissez-faire* approach to mergers characteristic of presidential administrations from Ronald Reagan

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[53] Most persons support themselves primarily by wages—that is, what they earn from their labor. As capital—the effective ownership of firms—takes more of economic output, less is left for labor or consumers. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1, 18 (Arthur Goldhammer trans., 2014).

[54] Hugh Son, *Banks Nearly Took Down the Economy in 2008. Now The Industry Hopes to Redeem Itself*, CNBC FIN. (Mar. 17, 2020, 2:43 PM), https://www.cnbc.com/2020/03/17/banks-nearly-took-down-the-economy-in-2008-now-the-industry.html [https://perma.cc/EKC9-P6NJ].

[55] Shira Ovide, *How Big Tech Won the Pandemic*, N.Y. TIMES (last updated Oct. 12, 2021), https://www.nytimes.com/2021/04/30/technology/big-tech-pandemic.html [https://perma.cc/2MCN-EABK]; *see, e.g.*, Molly Kinder, Katie Bach & Laura Stateler, *Profits and the Pandemic: As Shareholder Wealth Soared, Workers Were Left Behind*, BROOKINGS (Apr. 21, 2022), https://www.brookings.edu/research/profits-and-the-pandemic-as-shareholder-wealth-soared-workers-were-left-behind/ [https://perma.cc/75SB-9J2R]. Admittedly, wages of the bottom 10% of workers have increased significantly between 2019 and 2023. Elise Gould and Katherine DeCourcy, *Fastest wage growth over the last four years among historically disadvantaged groups*, EPI, https://www.epi.org/publication/swa-wages-2023/ [https://perma.cc/LB4S-G5UM] (Mar. 21, 2024).

[56] Leland D. Crane, Ryan A. Decker, Aaron Flaaen, Adrian Hamis-Puertolas & Christopher Kurz, *Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context*, 72 J. MACROECONOMICS 1, 6–7 (2022).

[57] *See generally* ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020); SALLY HUBBARD, MONOPOLIES SUCK: 7 WAYS BIG CORPORATIONS RULE YOUR LIFE AND HOW TO TAKE BACK CONTROL (2021); GANESH SITARAMAN, WHY FLYING IS MISERABLE: AND HOW TO FIX IT (2023).

[58] *Airlines & Monopoly*, OPEN MKTS. INST. (last visited Sept. 21 2023), https://www.openmarketsinstitute.org/learn/airlines-monopoly [https://perma.cc/9SAV-2GQ2].

[59] While storms certainly played a role in Southwest cancelling more than 60 percent of its flights over the 2022 holidays, union leaders pointed out that "Southwest had been slow to introduce new systems that would help it run its business," and that flight cancellations were exacerbated by "inadequate computer systems that they said had failed to efficiently match crews with flights when cancellations started to accumulate." Isabella Simonetti & Peter Eavis, *Southwest's Debacle, Which Stranded Thousands, to Be Felt for Days*, N.Y. TIMES (last updated Dec. 29, 2022), https://www.nytimes.com/2022/12/27/business/southwest-flights-canceled-travel.html [https://perma.cc/YCG4-2Z4Z].

[60] David Dayen, *Fighting the Inflation Profiteers*, AM. PROSPECT (Nov. 24, 2021), https://prospect.org/economy/fighting-the-inflation-profiteers-biden-kennedy [https://perma.cc/L7ZH-GDDA].

to Donald Trump.[61] There was an implicit bargain at the core of Establishment Antitrust: competition authorities would generally be lenient toward the unilateral conduct of even massive firms, while vigilant against multilateral conduct—e.g., cartels and collusion among firms. However, firms could circumvent the need to form a cartel by either acquiring potential cartel co-conspirators or merging with them. U.S. antitrust authorities do review such mergers for anticompetitive impact, but the review has been lax, under-resourced, and too secretive for the general public to fully understand and influence.[62] By neglecting the long-term impact of mergers, U.S. authorities allowed, and even encouraged, market consolidation—a far more perplexing "antitrust paradox" than what Bork claimed to have exposed in his eponymous book.[63]

Far from commanding this result, relevant law clearly discourages or even forbids it.[64] The language of the Clayton Act itself clearly says antitrust enforcers should "prohibit[] mergers and acquisitions where the effect 'may be substantially to lessen competition, or to tend to create a monopoly.' "[65] However, antitrust agencies from the 1970s into the 2010s were exceedingly permissive.[66] As a result, market concentration has been the overwhelming trend. Once robustly competitive industries have become oligopolistic and even monopolistic.[67]

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[61] *See, e.g.*, Sandeep Vaheesan, *Merger Policy for a Fair Economy*, L. & POL. ECON. PROJECT (Apr. 5, 2022), https://lpeproject.org/blog/merger-policy-for-a-fair-economy/ [https://perma.cc/3VPZ-ZS28] ("Reagan's Department of Justice (DOJ) and Federal Trade Commission (FTC), however, disregarded Congress's judgment and pursued a *pro-merger agenda*, granting extraordinary power to executives and investment bankers to roll up markets through consolidation.") (emphasis added).

[62] On secrecy, *see* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 129 (2018) (calling for a more transparent and democratized merger review process). Law is also tilted against action: if the cash-strapped, understaffed competition agencies cannot muster their resources to stop a merger within 30 days of its being filed, it automatically goes ahead. On laxity, *see generally* JOHN KWOKA, CONTROLLING MERGERS AND MARKET POWER: A PROGRAM FOR REVIVING ANTITRUST IN AMERICA (2020).

[63] John Kwoka, *Squaring the Deal*, MILKEN INST. REV. (Oct. 20, 2017), https://www.milkenreview.org/articles/squaring-the-deal [https://perma.cc/W975-D374]; Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783, 798–99 (2018) ("By contrast, the 1982 Merger Guidelines have a tone which suggests that most mergers are good for the economy."); Pasquale, *supra* note 50, at 2 (on myopic policy that created incentives for contact lens retailers to merge entirely, rather than face legal action for trying to coordinate a response to Google's power over online advertising). *See also* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 422–23 (2020) ("[L]ogically, a procompetition norm alone can never generate the antitrust preference for mergers, or for market concentration, however it arises, over cartels.").

[64] Robert H. Lande, John M. Newman & Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act § 7*, 103 TEX. L. REV. (forthcoming 2024), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769563 [https://perma.cc/3RTH-UCTH]. As the authors explain:

> Section 7 of the Clayton Act is a bedrock of antitrust law. Its text prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly.". . . A rigorous textualist analysis, confirmed by case law and the statute's legislative history, reveals that § 7's second prong bars all mergers that may move a market appreciably towards monopoly.

[65] Kwoka, *supra* note 63. The quoted language is that of Clayton Act § 7. *See* FTC, THE ANTITRUST LAWS (last accessed Aug. 5, 2021) https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/4N42-4YCJ].

[66] Kwoka, *supra* note 63. As Kwoka argues, economic merger analysis is too often missing the forest for the trees, embroiled in the specific economic facts and outcomes of each proposed merger, rather than a more macro-level perspective to understand the merger's effect on market concentration overall. *Id.*

[67] In a statement before the House Judiciary, Kwoka noted that several industries have gone through extreme periods of concentration: "[C]oncentration has been steadily rising and competition declining in a great many sectors of the economy." For instance, he noted that in pharmacy, mattress manufacturing,

If the U.S. economy had been functioning at the competitive levels which Klein suggested it was twenty years ago, new firms would be able to enter markets with more ease than they can now, and small firms would be able to grow faster than they generally do now.[68] No market is without entry barriers, but where dominant firms are underproviding for consumer needs, one would expect a new firm to enter the market, provide for that need, and grow; evidence suggests this is very often not the case. For example, the remarkable inflation of the early 2020s has been attributed in part to "sellers' inflation," a condition triggered by concentration in relevant markets.[69]

Even if Establishment Antitrust had a positive effect from the 1970s to 1990s, it is failing now.[70] One market entry metric, firm startup rates, is particularly concerning—by 2019, firm startup rates had dropped to half of what they were in 1999.[71] The number of public firms has significantly decreased as well, falling to levels not seen since the 1970s despite the rapid growth of the economy.[72] The rise of mergers has contributed to these trends.[73] Mergers also have significant repercussions beyond market consolidation. Kwoka found that mergers have typically raised prices in the affected market by around seven percent.[74] Additionally, typical antitrust remedies have rarely redressed the damage done by such mergers.[75] Despite their promises of innovation toward product quality improvements (perhaps to make up for higher prices), merging firms generally do not increase CW,[76] and often reduce wages.[77]

The FTC has historically challenged mergers that lead to the highest levels of concentration, leaving two to four firms remaining in the relevant market.[78] Guided by Establishment Antitrust's benign view of mergers, the agency has been far more reticent at medium-high levels of market concentration (defined as between five and eight competitors in a market post-merger)—even though such mergers are "still overwhelmingly

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and brewing industries, only two major competitors in each industry dominated. *See* Kwoka, *supra* note 45.

[68] *Id.* at 2.

[69] Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, Univ. Massachusetts Amherst Econ. Dep't, Working Paper No. 343 (2023) https://doi.org/10.7275/cbv0-gv07 [https://perma.cc/MD75-YL4P] ("the US COVID-19 inflation is predominantly a sellers' inflation that derives from microeconomic origins, namely the ability of firms with market power to hike prices.").

[70] Some commenters would say it was not even working in the 1990s. *See, e.g.*, BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 25–26 (2010) (critiquing Reagan and Clinton era antitrust policy); BARRY C. LYNN, LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE (2020) (intensifying his past critiques of late twentieth century antitrust policy).

[71] Kwoka, *supra* note 45, at 2.

[72] *Id.* at 2–3.

[73] *Id.* at 3.

[74] Kwoka, *supra* note 63.

[75] *Id.*; John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, CPI ANTITRUST CHRON. (2021) ("Current remedies policy does not generally preserve or restore competition in affected markets . . . The problem [with conduct remedies] is that those prohibited acts are in the interest of the firm, which therefore can be predicted to seek workarounds and other methods to avoid or evade the intent of the remedy.").

[76] Oftentimes, mergers have reduced service and product quality and market innovation. Kwoka, *supra* note 63.

[77] *See, e.g.*, José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167, S197 (2022) ("We have shown that concentration is high, and increasing concentration is associated with lower wages.").

[78] *See* Kwoka, *supra* note 45.

anticompetitive."[79] It went from challenging nearly one-third of these mergers in 2003 to challenging zero between 2008 and 2011.[80] In this way, the agency tended to give up the fight before even beginning it.[81]

Even after many mergers did not yield the efficiencies claimed for them (and instead raised consumer prices and eliminated rivals), courts and enforcement agencies continued to rely on the same theoretical assumptions that presuppose economic efficiency via largely laissez-faire approaches to industrial organization.[82] Even worse, *post hoc* antitrust enforcement is surprisingly uncommon in the wake of the negative merger effects documented by Kwoka and other scholars.[83]

President Biden has called upon antitrust enforcers to address these pressing issues.[84] This is an important initiative, but it raises a critical question: how did past competition law authorities allow concentration to progress to this point? One step already noted was the gradual narrowing of effects analysis to economic effects, and then economic effects to effects on output—the double exclusion of other goals and methods described above.[85] The other step, creditable as a matter of legal regularity but devastating to its credibility as a social science of welfare effects, was a resort to certain heuristics or tools of thumb to guide analysis of the likely impact of forms of business conduct. David Shores summarized this method of reasoning as "economic formalism," where "actual economic effect need not be determined on a case-by-case basis because generally applicable economic principles tell us what the effect of a particular practice is."[86] For example, consider above-cost predatory pricing cases, where a dominant firm is accused of reducing prices dramatically (but not below its own costs of production) in order to drive competitors out of business. Courts have exonerated such pricing decisions, based on the reasoning Shores summarizes below:

> [I]n a predatory pricing case, the major premise would be that economic theory teaches that above-cost price cuts are never anticompetitive. The minor premise would be that the challenged price cuts were above cost—that they fit the economic theory of the

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[79] *Id.* at 5–6. Between 2004 and 2007, the FTC challenged 16% of medium-high level concentration mergers. *Id.* at 5.

[80] *Id.* at 5–6.

[81] Marc Jarsulic, Ethan Gurwitz, Kate Bahn & Andy Greene, *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy*, CTR. AM. PROGRESS 13 (June 2016), https://cdn.americanprogress.org/wp-content/uploads/2016/06/28143212/RevivingAntitrust.pdf [https://perma.cc/J7FN-M28L]. As the authors explain:

> Moreover, recent research has shown that there has been a sharp change in the distribution of enforcement toward only the most concentrated industries. . . . The data demonstrates that the FTC has virtually abandoned challenges of mergers where concentration is below the upper threshold. This is the case even as preliminary evidence shows mergers falling below current concentration thresholds can still result in price increases.

[82] *Id.* at 490.

[83] Vaheesan, *supra* note 29, at 487 ("courts and agencies treat antitrust as an irksome encroachment. . . . restrict[ing] antitrust 'intervention' to discrete market failures, generally tied to 'artificial' market power.").

[84] Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2021), https://www.nytimes.com/2021/12/25/business/biden-inflation.html [https://perma.cc/KN63-J3WT].

[85] *See supra* Section I.A.

[86] David F. Shores, *Economic Formalism in Antitrust Decisionmaking*, 68 ALB. L. REV. 1053, 1056 (2005).

> major premise. The conclusion would then follow that the price cuts were procompetitive or benign, and therefore lawful.[87]

It is not difficult to see why this is faulty reasoning, once one considers the empirical literature on past firm conduct.[88] In a given market, it may take substantial time and capital to credibly offer a product and develop a large enough customer base to challenge the dominant competitor. If the dominant firm in the industry menaces would-be rivals by undercutting competitors (by reducing its prices to barely above its costs when a competitor arises), this almost certainly deters investment in competition, thus cementing the dominant firm's status as a monopolist or oligopolist.[89]

To be sure, just as there is a place for some kinds of formalism in law, there may be a few areas where the need for predictability validates the economic formalism critiqued by Shores.[90] Indeed, a strict rule of not permitting mergers of firms with assets over $10 billion, as proposed by Vaheesan and Lande, has its own formalistic qualities.[91] A cure for Establishment Antitrust's laxity may well feature many such new rules to balance the lingering effects of the *laissez-faire* economic formalism critiqued by Shores. Nevertheless, in the many situations where a "rule of reason" remains appropriate, more holistic and comprehensive policy evaluation methods are necessary, as described in Part III below.

In U.S. antitrust policy from the 1970s to the 2010s, narrow forms of economic expertise ascended above other ways of assessing the full range of issues raised by potentially anticompetitive conduct. Both courts and enforcers have adopted the CW standard as their lodestar.[92] This focus has

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[87] *Id.* at 1058.

[88] Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L. J. 81, 82 (2015). As the author elaborates:

> A large body of empirical research has found that predatory pricing can be an attractive anticompetitive strategy. Businesses have employed deep, temporary price cuts to eliminate or discipline rivals and maintain or increase their market power. As a result of successful predation, consumers enjoyed near-term low prices but endured oligopoly and monopoly power in the medium and long run. Studies have found evidence that leading firms in the airline, coffee, oil, shipping, sugar, telecommunications, and tobacco industries, among others, have used predatory pricing to preserve or enhance their market power.

[89] Lina Khan has pointed to a particular episode in Amazon's expansion as a paradigmatic example here. According to Khan, Amazon aimed at undercutting and later acquiring Quidsi and its subsidiary, Diapers.com. After Quidsi rejected an acquisition request from Amazon, Amazon's prices for baby products dropped 30% and continued to undercut Quidsi and Diapers.com as they tried to adjust their prices to match. According to Khan, "After completing its buy-up of a key rival—and seemingly losing hundreds of millions of dollars in the process—Amazon went on to raise prices." *See* Khan, *supra* note 35, at 768–70.

[90] As Frederick Schauer has explained, formalism refers to an interpretive approach which achieves determinacy by "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account." Frederick Schauer*, Formalism*, 97 YALE L.J. 509, 510 (1988). A hypothetical illuminating this process is suggested by Schauer's treatment of an election law case. *Id.*, at 515. A statute may state that a candidate must turn in a petition of nominating signatures to a clerk by 5:00pm on September 1. A candidate may turn up at the clerk's office at 5:01pm after being caught in a traffic jam, and denied access to the ballot. There are all manner of policy and equity reasons for a court to order the filing of petitions valid. However, the formalist will tend to stick to the letter of the law, unless there is some authoritative legal authority that excuses the tardiness of the petition. What formalism loses in fairness and rationality, it may gain in efficiency, providing a rationale for quickly (if harshly and summarily) deciding a dispute without the burden of extended adjudication. *Id.* at 515.

[91] Robert H. Lande & Sandeep Vaheesan, *Ban All Big Mergers. Period*., ATL. (Feb. 25, 2021), https://www.theatlantic.com/ideas/archive/2021/02/ban-all-big-mergers/618131 [https://perma.cc/D3ZG-W8Q4].

[92] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)).

led to myopia, encouraging competition law authorities to ignore experts who have long warned about the threat posed by corporate concentration to economic stability and inclusive prosperity.[93]

This myopia was, in part, temporal, privileging the interests of the present over those of the future, much as neglect of climate change policy for the past several decades has done.[94] It was also a matter of narrowed scope. Determining whether a firm had market power—an inquiry properly encompassing not only economic but also political and ethical inquiry—was boiled down into a narrow concern with output, while "non-commodified values escape[d] the antitrust paradigm entirely."[95] There are many problems with such a narrow analysis. Sandeep Vaheesan, legal director of the Open Markets Institute, has characterized CW as a fundamentally flawed standard:

> Despite being the prevailing wisdom, consumer welfare antitrust rests on a bed of nonsense. First, consumer welfare antitrust is built on false history and a rewriting of legislative intent. Second, it relies on a false conception of the market and submerges the state['s] construction of the economy. Third, it depends on, and is informed by, false assumptions about business conduct. While the third falsehood suggests an analytical renovation and better antitrust economics are sorely needed, the first two falsehoods indicate that empirical improvements are necessary but not enough.[96]

These deep problems are particularly apparent when considering questions of distribution and timing: *which* consumers are affected by challenged conduct, and *when* will the effects occur? For instance, sharp tactics now may reduce prices and maximize output for a few months or years, while driving out of business the competitors who could help ensure competition in the medium- and long-term.[97] A predatory firm may, for example, set prices very low to drive competitors out of business, or flood the market with output for similar effects.[98] This may be marginally efficient in the short run for consumers, but in the long run, the predation denies those same consumers the chance to choose between a number of products and services that could have been improved and diversified over time (or possibly made even cheaper) by diverse producers. This is one dimension of a more general problem for Establishment Antitrust: who is the "consumer" it is serving, and

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[93] *See generally* BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2011); *see generally* BARRY C. LYNN, END OF THE LINE: THE RISE AND COMING FALL OF THE GLOBAL CORPORATION (2005).

[94] *See, e.g.*, Art Markman, *Why People Aren't Motivated to Address Climate Change*, HARV. BUS. REV. (Oct. 11, 2018), https://hbr.org/2018/10/why-people-arent-motivated-to-address-climate-change [https://perma.cc/CQ2M-SK4D].

[95] C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 891–92 (2002).

[96] Vaheesan, *supra* note 88, at 479–80.

[97] This is one reason why venture capitalists will invest in an unprofitable firm for years, so they can eventually corner a given market, raise prices, and reduce wages. *See, e.g.*, Hubert Horan, *Uber's Path of Destruction*, 3 AM. AFFS. (2019). As the author explains:

> Uber's massive subsidies were explicitly anticompetitive—and are ultimately unsustainable—but they made the company enormously popular with passengers who enjoyed not having to pay the full cost of their service. . . . Uber's longer-term goal was to eliminate all meaningful competition and then profit from this quasi-monopoly power.

[98] *Id.*

does this consumer represent only present consumers or future ones as well?[99]

Several legal scholars have marked the importance of time for law. For example, Justin Hughes has argued that judges might wisely consider fair use more likely when an infringement occurs late in the term of a copyright.[100] Yair Listokin has argued that tort, contract, and other private law jurisprudence should consider microeconomics *and* at what point in the business cycle the economy is situated.[101] Jed Rubenfeld has centered temporal concerns in his theory of constitutional interpretation.[102] The time is ripe for more antitrust scholars and enforcers to become more sensitive to the medium- and long-term effects of doctrine.

Modern proponents of the CW standard laud it for providing predictability, efficiency, flexibility, and innovation.[103] Yet, according to current FTC Chair Lina Khan, even if CW is the goal of antitrust, Establishment Antitrust falls short since it fails to take into account the full range of output-centered concerns.[104] Instead, the CW standard has tended to create a strong presumption of validity for restrictive business practices, even where empirical studies show they are likely to lead to higher prices and reduced output.[105] A narrow focus on CW becomes self-defeating as "enforcers risk overlooking the structural weakening of competition until it becomes difficult to address effectively."[106]

But this is only the tip of the iceberg of Establishment Antitrust's problems. The core defect is a narrow vision of the nature of policy evaluation. Salil Mehra has compellingly demonstrated that antitrust must expand the scope of its goals if it is to avoid exacerbating inequality and

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[99] Caron Beaton-Wells, *Antitrust's Neglected Question: Who Is "The Consumer"?*, 65 ANTITRUST BULL. 173, 173 (2020). For more general insights on the difference time makes, *see* Brett Frischmann & Mark P. McKenna, *Intergenerational Progress*, 2011 WIS. L. REV. 123 (2011).

[100] Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 781 (2003) (arguing that fair use is temporally correlated to the length in time of a copyright's term, thus justifying the court's likelihood to consider a late-term infringement more likely to be fair); *see also* Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 456–57 (2002) (touching on time's potential impact on the market where the younger a work is, the greater the chance for the market to be affected by its potential use, whereas, conversely, the older the work is, the less likely the market will be affected by the work's exploitation).

[101] *See* YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 20 (2019).

[102] JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 174 (2001) ("There can be no such thing, in constitutionalism as democracy, as a permanently entrenched written constitution. Nor can there even be a single permanently entrenched provision. The very principle that gives the Constitution legitimate authority—the principle of self-government over time—requires that a nation be able to reject any part of a constitution whose commitments are no longer the people's own. Thus, written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-rewriting.").

[103] *See, e.g.*, Elyse Dorsey, *Antitrust in Retrograde: The Consumer Welfare Standard, Socio-Political Goals, and the Future of Enforcement,* GLOB. ANTITRUST INST. REP. ON DIGIT. ECON. 109, 129, 137 (2020) ("The consumer welfare standard's focus on economic insights and teachings also affords the flexibility to introduce new theories and concepts . . . This standard establishes a common language . . . [that] facilities a coherent and consistent framework for analysis and the predictability of outcomes."); Glick, *supra* note 22, at 10; *see also* Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 84 (2018) (arguing that "a consumer welfare standard for antitrust violations is the only manageable one for evaluating practices under the rule of reason").

[104] *See* Khan, *supra* note 35, at 737 (listing product quality, variety, and innovation as examples of consumer interests that the prevailing theory of CW in antitrust fails to adequately factor into the rule of reason analysis). For further accounts of the inadequacy of a purely economic approach, *see generally* Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009 (2013); Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES, July 2013.

[105] *See* Vaheesan, *supra* note 33, at 488–92.

[106] *See* Khan, *supra* note 35, at 738–39.

social exclusion.[107] As the following section demonstrates, there is more at stake in the regulation of industrial structure and corporate size and scope than output maximization. The meta-ethics of policy evaluation must encompass more than consequentialism. A richer language of policy evaluation is the distinctive contribution of the New Antitrust—with important implications for the relative competence of courts and agencies for shaping the future of competition policy.

II. THE NEW ANTITRUST'S METHODOLOGY

Establishment Antitrust's focus on the CW standard is not dictated by the Sherman or Clayton Acts, but has instead resulted from selective judicial and administrative emphases.[108] This narrow focus has been amplified and reinforced in a feedback loop, thanks to courts that have consistently "read down" antitrust statutes (in Daniel A. Crane's memorable phrasing) and enforcers who not only work within these judicial constraints, but try to avoid even the appearance of straying beyond them.[109] These missteps resulted in a naturalization of market forces that are, in fact, contingent.[110] This led to antitrust agencies and courts suppressing the foremost function of the state in antitrust law: to balance labor, capital, and consumer interests while developing robust markets for the production of goods and provision of services.[111]

For practitioners of Establishment Antitrust, what came before their intellectual hegemony was theoretically incoherent, merely reflecting a prejudice against scale in business. To be sure, enforcers and courts of prior antitrust eras made some mistakes. However, addressing those mistakes well requires an approach more capacious than the false precision of Establishment Antitrust's narrowly consequentialist goals and overwhelmingly economistic methods. The next two sections describe the plural methods of the New Antitrust that are informing the work of an iconoclastic new set of antitrust policymakers.

A. A RICHER LANGUAGE OF POLICY EVALUATION

Establishment Antitrust has failed to adequately engage with philosophy and social science beyond the narrow utilitarianism characteristic of economics. Consider first its focus on consumers rather than citizens. From

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[107] Salil K. Mehra, *What Is an Antitrust Problem, Anyway? Toward Antitrust Unlimited*, 68 ANTITRUST BULL. 191, 204 (calling on enforcers to take into account "wage stagnation, income inequality, and racial inequality," in a subtle and compelling recalibration of classic concerns about Type I and Type II errors in the field).

[108] Vaheesan, *supra* note 33, at 484.

[109] Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1208 (2021) ("In the sequel, the courts (often abetted by the antitrust agencies and other antitrust elites) read down the statutes to accomplish less than their texts suggest or Congress meant.").

[110] Vaheesan, *supra* note 33, at 486. Vaheesan convincingly argues that government is meant to establish the rules and conditions by which the market is to function. This function is necessary for a market to exist at all. Antitrust is meant to redistribute power within the economy; this is one of its core functions. *Id.* at 484, 487. For more on the constructed nature of markets, see generally JAMEE MOUDUD, LEGAL AND POLITICAL FOUNDATIONS OF CAPITALISM: THE END OF LAISSEZ FAIRE (forthcoming, 2024); PHILIP MIROWSKI AND EDWARD NIK-KHAH, THE KNOWLEDGE WE HAVE LOST IN INFORMATION: THE HISTORY OF INFORMATION IN MODERN ECONOMICS (2017).

[111] Vaheesan, supra note 33, at 480 (calling for an "antitrust that promotes an equitable economy and protects democratic institutions.").

a narrowly economistic perspective, consumption may be all-important. Yet, from the philosophical perspective of civic republicanism, participating as a citizen is critical to human flourishing.[112] Thus, Zephyr Teachout has advocated a revival of classic antitrust goals of democratizing the economy.[113] Distributed economic power is, *ceteris paribus*, more conducive to a democratic society than concentrated economic power. As Teachout documents, Louis Brandeis famously promoted "regulation to ensure that equality and autonomy were not threatened by big corporations," and largely respected these purposes as goals of regulation when such laws were challenged at the Supreme Court.[114] This Brandeisian worldview deemed substantial mergers and market concentration as inherently suspect.[115]

Teachout's approach to antitrust rests on rich conceptions of freedom and morality.[116] Economic freedom can also enhance political expression which could otherwise be suppressed by market concentration.[117] Market structure has the potential to impact purchasers, citizens, and workers alike, just as much as consumers.[118] So an approach that focuses exclusively on consumers is unduly partial—mistaking a part for the whole.

Complementing the democratic vistas of Teachout's work, Michelle Meagher looks to "stakeholder antitrust" to enhance public participation in competition policymaking.[119] Her internationally comparative work recommends several areas of improvement in U.S. antitrust law based on E.U. law. For one, European law clearly recognizes the plural goals of competition law properly understood.[120] E.U. authorities are also developing

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[112] Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575, 2639 (2013); *see, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) ("[R]econsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom.").

[113] Teachout recalls that antitrust originally served to provide "democratic and civic freedom." Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1081, 1089 (2019).

[114] *Id.* at 1093.

[115] *Id.* at 1095.

[116] *Id.* at 1084. Antitrust can improve the capacity for deliberation in communities by "reshap[ing] the character of rural areas, the funders of civic activities, [and] the potential places for moral conversations to occur." *Id.* at 1084–85.

[117] Teachout provides the example of a business that sells Christmas lights with a message that is pro-equality. In a concentrated market, if the only distributor is a company that is run by anti-equality executives, the seller of Christmas lights has effectively had their political expression silenced by market structures. However, in an unconcentrated market, with many competitors, the seller of Christmas lights can engage in political expression without fear of restriction by anti-equality monopolists or oligopolists. *Id.* at 1108.

[118] *Id.* at 1115.

[119] Consultation of more stakeholders during antitrust policymaking could permit better public oversight and input regarding enforcement priorities and settlement agreements, among other topics. MICHELLE MEAGHER, COMPETITION IS KILLING US: HOW BIG BUSINESS IS HARMING OUR SOCIETY AND PLANET – AND WHAT TO DO ABOUT IT 138–39 (2020).

[120] *Id.* at 134. As the author explains:

> [T]he law in Europe actually already requires—not just allows but positively requires—consideration of many issues beyond price, including sustainable development, protection and improvement of the environment, social exclusion, social justice, equality, social cohesion, rights of the child, cultural heritage, maintaining high levels of employment, education and human health, as well as technical or economic progress.

Of course, the EU can change over time, and the commitments Meagher identified in 2020 may be fading. *See, e.g.*, David Dayen, *Eurocrats on the Brink*, AM. PROSPECT, https://prospect.org/world/2024-04-03-eurocrats-on-the-brink/ [https://perma.cc/F3EL-DG44] (Apr. 3, 2024) (The former chief economist for the European Commission's directorate-general for competition (DG Comp), Tommaso Valletti, "focused in his tenure [2016–2019] on bringing new evidence to the directorate, challenging the established

more expansive and accurate accounts of market power in critical digital markets.[121]

Returning to U.S. competition law, Tim Wu suggests another way of enriching the language of policy evaluation: shifting antitrust analysis away from the amorphous rule of reason standard, and toward per se rules.[122] The rule of reason has been manipulated to allow "complex economic theory to create near-impossible burdens of proof," effectively preventing meaningful discussion of the politico-economic implications of corporate concentration.[123] Notice and comment rulemaking would also catalyze the type of polycentric process that invites a wider range of perspectives on competition policymaking (including those advanced by Meagher and Teachout above).

B. DISCIPLINARY DIVERSITY

Economic analysis must be updated, expanded, and brought into dialogue with other social sciences. Leading New Antitrust scholars have accomplished this goal, applying economic reasoning in light of other disciplines' insights. The comparative advantage for the practitioners of the New Antitrust arises in part from their openness to insights from a broad range of fields in social science, as well as philosophy and the humanities. These disciplines enable policymakers and judges to grasp the full range of problems posed by contested business practices. They also enable more sensitive and precise application of economic analysis.[124]

For example, K. Sabeel Rahman highlights the importance of political science and history in competition policy. His work builds on the observations and analysis of journalists and scholars who "have increasingly argued that we are in a new era of private power and monopoly, as firms in industries from agriculture to food production to finance have concentrated power to shape market dynamics and to influence politics and public policy."[125] In *Democracy Against Domination,* Rahman discusses the broad underlying values at stake in the history of distinctive policy approaches to

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wisdom. But that gradually faded in favor of the same impenetrable language of 'efficiency' and 'competitive processes.' ").

[121] MEAGHER, *supra* note 119, at 137. The E.U. has released guidelines on how to identify "Significant Market Power" in digital markets. Some indicators of power include barriers to entry, size of the company, technological and commercial advantages, ease of access to capital, and vertical integration. *Id.* Additionally, in the U.K., "Lord Tyrie, the Chairman of the Competition and Markets Authority, called for . . . amendments to UK practice in 2019, including greater powers to impose fines, greater access to evidence, and the power to take action to halt potentially harmful conduct before the full resolution of the case." *Id.* at 136.

[122] Tim Wu, *The* American Express *Opinion, Tech Platforms & the Rule of Reason*, 7 J. ANTITRUST ENF'T 117, 118–19 (2019).

[123] *Id.* at 122–23.

[124] *See* GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009) (describing the need to supplement economics with other social sciences); *see* Frank Pasquale, *New Economic Analysis of Law: Beyond Technocracy and Market Design*, 5 CRITICAL ANALYSIS L. 1, 13 (2018). As the author elaborates:

> Rahman debunks another misleading metaphor at the core of technocratic administration of economic systems—the Hayekian characterization of the economy as a spontaneously ordered . . . system. Rahman aims to replace this [*idee fixe*] with a more concrete sense of the structures embedded in legal orders that heavily influence, and sometimes even pre-determine, economic results (ranging from educational attainment to health disparities and beyond).

[125] K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1684 (2018).

antitrust. He observes that during the Progressive Era, many critics of corporate concentration were concerned about the political implications of massive firms capable of influencing both politics and culture. In contrast, during the New Deal era, a distinctively managerialist ethos dominated.[126] Through a rich appreciation of history, Rahman expands the set of living options for antitrust enforcement, demonstrating the vibrancy of multidisciplinary approaches.

Rahman's expansive conception of domination also draws on works of philosophy and political science that rigorously analyze the social and psychological harm generated when one entity enforces its will on others without sufficient recourse or accountability. To be sure, Establishment Antitrust can condemn wage suppression by a monopsonistic employer on purely economic grounds. What it misses, however, are the many ways in which this type of domination undermines the sense of autonomy and efficacy of the dominated and the long-term damage that such alienation inflicts on a community. Those broader effects bring more urgency to efforts to level the playing field. Drawing on political philosophy, Rahman applies the work of Philip Pettit to develop a sophisticated conception of domination that can distinguish it from the ordinary forms of order maintenance necessary in any market economy. Following Pettit, Rahman defines domination as "a condition where one actor possesses the capacity to interfere in the life choices of another arbitrarily, or absent some form of check or control."[127] Rahman explains why such domination is problematic and how oligopolies, monopolies, and monopsonies are particularly prone to generate it.[128]

As Rahman observes, firms are "islands of command" within supposedly free markets, enabling boards and managers to make extraordinary demands of employees, and as they accumulate political power, of communities.[129] Even in competitive markets, such "islands of command" have enormous power over workers' (and some consumers') lives. When only a few options are available, that power becomes even more dramatic. The CW standard is, by and large, blind to these problems, as it was designed and deployed to solve another problem (minimizing cost of output while maximizing its quality and quantity). Thus, even if we discount the many immanent critiques of CW (such as the incommensurability between many forms of quality improvement and cost reduction), there is still a larger issue with making it the touchstone of policy evaluation in antitrust: it is not responsive to a very real problem (domination) identified by political scientists and political

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[126] K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 36 (2016), as Rahman states:

> In the words of Raymond Moley, FDR's antitrust advisor, this managerialist ethos was a pragmatic shift away 'from the nostalgic philosophy of the trust busters,' instead harnessing the efficiencies and powers of big business (and scientific expertise) to promote economic growth and optimal market functioning. Indeed, while Progressive Era discourses critiquing concentrated power as a threat to democracy remained, they were increasingly marginalized.

[127] *Id.* at 81–82 (citing PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997)).

[128] *Id.* at 82.

[129] *Id.* For instance, consider when Amazon successfully coerced the Seattle City Council into repealing a new employee tax they had passed a month prior by threatening to pull operations out of Seattle. *See* Alana Semuels, *How Amazon Helped Kill a Seattle Tax on Business*, ATL. (June 13, 2018), https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/ [https://perma.cc/BL7C-XDY9]

philosophers. European authorities have already recognized this problem and are revising their own competition policy accordingly.[130]

Frank Pasquale's work on the relationship between privacy and antitrust also draws on philosophical and psychological reframing of the problem of data protection in concentrated industries.[131] For example, in the 2013 article "Privacy, Antitrust, and Power," Pasquale questioned prior efforts to conceptualize the privacy concerns at the heart of large technology firm mergers as merely one more aspect of the output that the firms provide.[132] He cited the economic sociology of Lucien Karpik to explore the singular nature of powerful technology firms and the class-informed legal analysis of Michelle Gilman to demonstrate how losses of privacy may differentially affect persons from different social classes, particularly harming those of lower socioeconomic status.[133] Pasquale's work also draws on an empirical article from the computer-human interaction ("CHI") field titled *Why Johnny Can't Opt Out*, which describes in detail many barriers to effective consumer self-protection against overreaching data aggregators.[134]

Understanding the psychology of human-computer interaction is critical to sensible antitrust policy in the platform context. As Robert Shiller has observed, psychological insights can do much to advance economic theory.[135] Psychology can inform economic analyses to allow antitrust agencies to better identify anticompetitive behaviors that may escape conventional scrutiny. Social psychology, for instance, illuminates anticompetitive dimensions of many aspects of dominant search engines' and social networks' recommendations.[136] Facebook's purposeful design to

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[130] Gianclaudio Malgieri & Antonio Davola, *Data-Powerful* 13–14 (Feb. 5, 2022) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4027370 [https://perma.cc/3EAX-77EP] (describing German and Italian authorities' recognition that Facebook's ability to impose increasingly one-sided terms of service on users with respect to data ownership and use reflects market power that would not be possible in a healthy (or well-regulated) market for social networking services). New forms of power also need to be recognized in these fields. For example, Mason Marks introduces *biopower* and *digital biopower* as critical concepts for the digital policy space. Digital biopower is "an unprecedented form of concentrated private influence …. that can be transformed into other forms of influence including market power and political power, making it a source from which other forms of coercive influence spring." Mason Marks, *Biosupremacy: Big Data, Antitrust, and Monopolistic Power over Human Behavior*, 55 U.C. DAVIS L. REV. 513, 517 (2021).

[131] We apologize for the stylistically infelicitous references to a co-author of this article in the third person. We believe it to be less awkward than "as one of us (Pasquale) wrote," or similar designations.

[132] Pasquale, *supra* note 104, at 1021–22 (expressing doubt over the FTC's ability and methodology to act as a watchdog over Google's search engine results given the agency's scant response to inquiries about Google's suspected anticompetitive conduct).

[133] *Id.* at 1013, 1015–16 (citing Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1423 (2012)).

[134] *Id.* at 1015 (citing Pedro G. Leon et al., *Why Johnny Can't Opt Out: A Usability Evaluation of Tools to Limit Online Behavioral Advertising*, CYLAB (revised May 10, 2012), https://www.cylab.cmu.edu/_files/pdfs/tech_reports/CMUCyLab11017.pdf [https://perma.cc/UN3P-QAVP]); *see also* Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERKELEY BUS. L.J. 39 (2019) (citing Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, INT'L WORKSHOP ON PRIVACY ENHANCING TECHS. 2 (2006)). Facebook's deceptive gloss of privacy at its origins was particularly problematic, drawing users into a supposedly privacy-protective service that gradually gathered and used their data in ever more invasive and problematic ways.

[135] Robert J. Shiller, *From Efficient Markets Theory to Behavioral Finance*, 17 J. ECON. PERSPECTIVES 83, 83 (2003) ("Behavioral finance—that is, finance from a broader social science perspective including psychology and sociology—is now one of the most vital research programs, and it stands in sharp contradiction to much of efficient markets theory."); ROBERT J. SHILLER, IRRATIONAL EXUBERANCE xvii, 2, 116 (3d ed. 2006).

[136] Adam Candeub, *Behavioral Economics, Internet Search, and Antitrust*, 9 I/S: J. L. & POL'Y FOR INFO. SOC'Y 407, 407.

increase the time and energy needed to switch away from (or supplement) its own offerings is troublingly anticompetitive when consumer psychology is fully accounted for.[137]

For the antitrust authorities of the Obama administration, the question of whether to allow Google and DoubleClick to merge was focused on the effects of the merger on advertisers (who, some commentators believed, "might jump ship" if Google began "using DoubleClick's relationships to further its own ad network.").[138] Consumers were assumed to have preferences for certain forms of data protection, which they could demand and enact as they wished. However, as Pasquale observed, drawing on the critical theory of David Golumbia, large-scale computational systems tend to centralize power and standardize experience, overriding whatever granular preferences for privacy might be presumed to exist in a neoliberal model of consumer sovereignty.[139]

Consumers cannot negotiate with Facebook or Google as to their terms of service and the use of their data.[140] These massive firms foist an all-or-nothing, take-it-or-leave it, contract of adhesion on users. This situation is not inevitable: either firm could easily offer users more options. But executives' demand for the power accruing to an "all-seeing" firm has foreclosed that possibility for many years. Even worse, as legal analysis based on behavioral economics has demonstrated, users may be habituated to certain services so thoroughly that switching feels burdensome, short-circuiting the normal forms of comparison shopping that can prevail in less complex goods and services.[141]

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[137] SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS.: MAJORITY STAFF REP. & RECOMMENDATIONS 1, 145 (Comm. Print 2020).

[138] Dina Srinivasan explains in detail the bases of this errant prediction. Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55, 91–93 (2020) (quoting commentators). Srinivasan's analysis demonstrates how the lessons of financial market regulation should now be clear to regulators facing Google's dominance of the ad ecosystem, which features exchanges much like the ones regulated for stocks and equities. *Id. passim.* Srinavasan also documents the exaggeration of the potential of exit (i.e., "jumping ship") from abusive adtech. As Srinavasan states, "As inventory management software integrated into back-end billing systems, ['jumping ship' might be compared] to changing engines mid-flight." *Id.*, at 93.

[139] Pasquale, *supra* note 104, at 1024 (drawing on DAVID GOLUMBIA, THE CULTURAL LOGIC OF COMPUTATION (2009)).

[140] For instance, in 2019, the Bundeskartellamt (Germany's Competition Authority) ruled that Facebook's data policy and use of user data "from sources outside of Facebook" which was then combined "with data collected on Facebook[] constitute[d] an abuse of a dominant position on the social network market in the form of exploitative business terms." The terms of Facebook's terms of service were held to be abusively "imposed by a party with superior power" under German law, and any consent was ineffective and involuntary since consent "cannot be assumed if such consent is a prerequisite for using Facebook in the first place." *See* Friso Bostoen, *When Competition Law Met Data Protection: The Bundeskartellamt's Facebook Decision*, LEXXION, Feb. 18, 2019, https://www.lexxion.eu/en/coreblogpost/bundeskartellamt-facebook-decision; Bundeskartellamt, *Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing*, https://www.bundeskartellamt.de
/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v= [https://perma.cc/5CDK-EQYU].

[141] Candeub, *supra* note 136, at 409 (2014). As the author argues:

> If we establish habits and routines to allocate our scarce cognitive resources, these routines–like many other habits–can be quite difficult, i.e., costly, to break, creating high switching costs with possible anti-competitive implications. If Google search provides ways to lower these costs through convenient access to desired internet services such as email, YouTube, or maps, then there could be switching costs that develop as Google use becomes habituated.

Before she became chair of the Federal Trade Commission, Lina Khan's research revealed a broader, more holistic conception of economics beyond the constrained CW standard.[142] According to Khan, CW's limited view ignores, among other things, the health of the market as a whole.[143] She focused on Amazon's anticompetitive business practices, demonstrating just how much power it had relative to the businesses that depend on its platform. By broadening the economic scope to include business and market structure instead of just specific outcomes (price and quality of output), it becomes clear how a dominant company's structure can become anticompetitive; conflicts of interest may arise, market advantages can be cross-leveraged into new markets, and structures qua structures can make predation profitable.[144]

Khan grounds her analysis in a keen understanding of politico-economic dynamics. Antitrust should support reduced prices, but also needs to be cognizant of the costs that unfair business practices can impose on workers, producers, and citizens.[145] Khan's historical analysis of the roots of antitrust legislation demonstrates the fundamentally political nature of antitrust. This political history colored much of federal enforcement in the past, and Khan stresses that concentration in and of itself poses a public threat that requires decentralization and democratization.[146] Disregard for the political motivations underlying the Sherman Act and other antitrust laws contributed to Establishment Antitrust's acquiescence to concentration.[147] Khan instead proposes structural separation (such as restrictions or bans on a platform owner directly competing with businesses reliant on the platform), as an enforcement approach truly reflective of democratic values and economic liberty.[148] The essence of Khan's analysis is a reformed philosophy of antitrust meant to promote liberty and democracy.[149]

Critics of Khan may claim that structural separations risk government picking winners and losers. However, Sanjukta Paul deconstructs the normative assumptions behind such an objection, as she fundamentally rethinks antitrust in a legal realist tradition.[150] For Paul, there is no pre-political, pre-legal, "free" market. Rather, modern economic life is premised on state allocation of "coordination rights:" the latitude to combine persons'

Reference to search history and other data may also be decisive here, giving an enormous advantage to entities that have long monitored the habits and preferences of a very large number of users.

[142] Khan, *supra* note 35, at 716.

[143] *Id.*

[144] *Id.* at 738, 783 ("In other words, pegging anticompetitive harm to high prices and/or lower output—while disregarding the market structure and competitive process that give rise to this market power— restricts intervention to the moment when a company has already acquired sufficient dominance to distort competition.").

[145] *Id.* at 737.

[146] *Id.* at 742 ("Key to this vision was the recognition that excessive concentrations of private power posed a public threat, empowering the interests of a few to steer collective outcomes.").

[147] *Id.*

[148] Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1060 (2019).

[149] Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 965 (2018).

[150] Paul, *supra* note 63, at 378, stating that the pursuit of allocative efficiency has:

> [B]een deployed to attack disfavored forms of economic coordination, both within antitrust and beyond. These include horizontal coordination beyond firm boundaries, democratic market coordination, and labor unions. Meanwhile, a very specific exception to the competitive order has been written into the law for one type of coordination, and one type only: that embodied by the traditionally organized, top-down business firm.

See also Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* CAMBRIDGE HANDBOOK OF LABOUR IN COMPETITION LAW 72, 72 (2022).

efforts and demands. Establishment Antitrust law has tended to give firms more coordination rights than workers. Paul coins the term "firm exemption" to describe lenient treatment towards vertical coordination ("between firms in adjacent markets, such as supplier or distributor relationships") as opposed to horizontal coordination ("between competitor firms [or workers] in the same market").[151] Such coordination rights can be adjusted to address imbalances of power or enable the pursuit of other social ends. By reorienting antitrust in this way, Paul opens up the possibility that favored forms of economic coordination have been accepted, and others simply presumed illegitimate, because of asymmetries of power that rationalize and reify what ought to be contestable valuations of interests.[152]

Paul's "normative reconstruction" shifts the focus of antitrust to limiting domination, to ensure the promotion of democracy and fair competition.[153] Paul's approach informs economic analysis with philosophical reflection and historical context, demonstrating that normative choices are a "key regulatory task" for market construction.[154] Any given configuration of market rules is neither neutral nor natural, and no significant market is self-governing.[155] Past theorists examined whether prices are "fair" or "just," and such inquiry can be part of contemporary competition law and policy as well.[156] Paul advances competition law and policy toward a "normative recovery," both illuminating the ethical foundations of Establishment Antitrust maxims and articulating compelling alternatives.[157]

Humanistic disciplines and interdisciplinary research also help authorities appreciate present dilemmas in a new light, as most social scientists recognize.[158] For example, Tim Wu's historical perspective in *The Master Switch* enabled him to see, long before most other commentators, the

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[151] Paul, supra note 63, at 383.

[152] *Id.* at 385. Thus, policymakers can reconsider and change coordination rights in order to address pressing problems. Given remarkable levels of income and wealth inequality, mere financial capital formation is a much lower priority for serious policymakers than ensuring inclusive prosperity. For more on the foundations of this Copernican shift in concern, see Frank Pasquale, *Capital's Offense: Laws Entrenchment of Inequality*, BOUNDARY 2 REV., Oct. 1, 2014 (reviewing THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014)).

[153] Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 176, 179 (2021).

[154] *Id.* at 179, 188–90.

[155] *See generally* PHILIP MIROWSKI AND EDWARD NIK-KHAH, THE KNOWLEDGE WE HAVE LOST IN INFORMATION: THE HISTORY OF INFORMATION IN MODERN ECONOMICS (2017).

[156] Paul, *supra* note 153, at 184. *See also* Robert C. Hockett and Roy Kreitner, *Just Prices*, 27 CORNELL J. L. & PUB. POL'Y 771, 772. As the authors state:

> Phenomenologically, we often gaze upon prices as upon brute facts. Set in distant, disorganized, and seemingly unfathomable processes of aggregation, they appear to inhere in market goods, products, services, or financial assets the way weight inheres in a stone, or smoothness in a pebble. Ultimately, however, the price system is an immense engineering project. As much as it shapes our action by marking relative values, it is shaped by our action in promulgating and administering the rules of its operation. And because its operations both reflect and determine so many of the relationships that course through the modern economy, its humanly created rules should bear the scrutiny of sustained reflection.

[157] Paul, *supra* note 153, at 227.

[158] Marion Fourcade, Etienne Ollion & Yann Algan, *The Superiority of Economists*, 29 J. ECON. PERSPS. 89, 95 (2015) ("Economists are the only ones in this group [of social scientists] among whom a (substantial) majority disagree or strongly disagree with the proposition that 'in general, interdisciplinary knowledge is better than knowledge obtained from a single discipline.' "). Ironically, the type of disciplinary chauvinism described by Fourcade, Ollion, and Algan may well have contributed to economists' near-monopolization of perceived expertise on the topic of monopolization, before the New Antitrust made the value of other disciplinary perspectives clear.

epochal stakes of internet firms' structuring of communication online.[159] Like Western Union or AT&T before it, Google was not simply another firm among many jostling for customers. Rather, it was fated to structure key relationships among buyers and sellers in the economy, with ample opportunities for self-dealing. This type of power merits the deep and precautionary analysis embedded in the "principle of separation" sketched at the end of *The Master Switch*.[160] This "separations principle" was later brilliantly developed by Lina Khan through her own historical analysis of the parallels between large technology and large finance firms.[161] As Pasquale has argued, the firms that decide what is "funded and found" have quasi-governmental roles and must be commensurately accountable.[162]

III. CONSEQUENCES OF THE NEW ANTITRUST

While Establishment Antitrust may have at first corrected for excesses in application of per se rules, it is now impeding necessary advances in competition policy. The present age of corporate concentration dramatically reaffirms the old proviso that past performance is no guarantee of future results. The purposes of competition policy are necessarily diverse, and as Maurice Stucke argues, "competition policy cannot be reduced meaningfully to a single goal. . . . [but instead] must recognize the existence of multiple goals and values."[163] Antitrust can and should address a broad range of social issues.[164] Racial justice, workers' rights, income inequality, and campaign finance inequities should be considered as factors in the administration of modern antitrust law, which was premised on congressional condemnation of the multidimensionally excessive power of excessively large firms.[165]

Part II demonstrated the New Antitrust's own multidimensionality, showcasing the diversity of its methodological approaches. This part explores key consequences of this methodological pluralism. By broadening the methodological lens, New Antitrust scholarship identifies subjects of concern of competition policy beyond abstract consumer interests. For example, sociological and historical awareness demands an antitrust that takes race into account (Section III.A). Consider a potential merger of a hospital in an area with a large minority population into a hospital complex located miles away in a city with an overwhelmingly white population. While Establishment Antitrust would be hard-pressed to recognize the racial dimensions of merger review here, proponents of the New Antitrust have advanced concern for racial equality within the evaluative frameworks developed in Part II.

They have also demonstrated how existing antitrust law gives authorities wide latitude to consider labor interests, particularly when firms reach monopsonistic or near-monopsonistic size in relevant markets for workers

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[159] TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2011).

[160] *Id.*

[161] Khan, *supra* note 148, at 1041.

[162] FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 56–58, 212–16 (2016) (contending that Silicon Valley and Wall Street firms pose significant threats to privacy and fairness through the commodification of information).

[163] Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 999 (2008).

[164] Dani Kritter, *Antitrust as Antiracist*, CAL. L. REV. BLOG (Mar. 2021), https://www.californialawreview.org/online/antitrust-as-antiracist [https://perma.cc/9S3G-FZGU].

[165] *Id.*

(Section III.B). Given its grounding in politico-economic methods, the New Antitrust embraces ongoing regulation of industries as a complement to (rather than a substitute for) merger conditions and structural remedies. Sensitivity to concerns about race and labor conditions, as well as openness to ongoing regulatory interventions to preserve competition, distinguish the New Antitrust as uniquely capable of addressing twenty-first-century competition policy. The rigor of the New Antitrust has also supported concrete enforcement efforts to level the economic playing field. (Section III.C.).

A. THE CRITICAL IMPORTANCE OF RACIAL EQUITY

Establishment Antitrust's focus on CW has occluded competition policy's downstream effects and broader social implications. Antitrust has developed as a "race-neutral" field; but in that very ostensible neutrality lies a failure to take affirmative steps to address the many forms of racial inequality that weaken the contemporary U.S. economy and divide its polity. It will be difficult to remedy long-standing forms of racial inequality without addressing them directly when competition policymakers develop enforcement priorities.

Before becoming Deputy Director of the FTC, John Mark Newman wisely worried that antitrust "might ossify, placing more weight on assigning categorical labels than on assessing actual effects and narrowing the analytical lens until concentrated power—antitrust law's *raison d'e^tre*—becomes largely irrelevant."[166] He crystallized this concern in a thoughtful analysis of *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n* (hereinafter, *SCTLA*).[167] In *SCTLA*, the Trial Lawyers Association of the District of Columbia coordinated a strike among court-appointed lawyers to advocate for higher wages, which had been stagnant for sixteen years despite extraordinarily high rates of inflation.[168] The strike was immediately successful, and the downstream implications for redressing structural racism were commendable, since nearly ninety percent of cases for indigent defendants were hired out of the pool of court-appointed lawyers.[169] However, the FTC (reflecting the agency's long-standing suspicion of professional associations) soon brought an antitrust challenge to the strike.[170] A majority of the Supreme Court held the strike *per se* illegal as a price-fixing agreement, "a 'naked restraint' on price and output"[171] For the majority, "[t]he fact that the strike benefited indigent defendants, many of whom were people of color who had endured decades of structural racism,

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[166] John Mark Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384, 392–93 (2021).

[167] F.T.C. v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990) [hereinafter *SCTLA*].

[168] Newman notes that during this lawsuit, over 70% of residents identified as Black. Newman, *supra* note 166, at 389.

[169] *Id.* at 389–90.

[170] *Id.* For a skeptical perspective on the FTC's own skepticism toward professional associations and occupational licensure (given available evidence), *see* Sandeep Vaheesan & Frank A. Pasquale, *The Politics of Professionalism*, 14 ANN. REV. L. & SOC. SCI. 309 (2018).

[171] *Id.* at 422. Remarkably, even if the defendant lawyers were faced with monopsonistically-imposed depressed wages, the price-fixing agreement/group boycott would have been held anticompetitive since the rates would not have increased but for the coordination of the lawyers. Essentially, in the face of under-compensated attorneys performing a necessary public service and negatively affected indigent defendants, the court threw up their hands: "it is not our task to pass upon the social utility or political wisdom of price-fixing agreements." *SCTLA*, 493 U.S. at 421–22 (1990).

was irrelevant."[172] Such struthious inattention to the effects of enforcement is deeply troubling.

Race and antitrust are intertwined.[173] As Joshua P. Davis, Eric L. Cramer, Reginald L. Streater, and Mark R. Suter have argued, systemic racism is "about power and its abuse. So is antitrust law. Moreover, antitrust may be able to fill gaps left by antidiscrimination law."[174] If focused only on abstract measures of CW, firms may easily prioritize dominant groups to the detriment of minorities.[175] Ignoring these differences simply perpetuates inequity.[176] It also shirks responsibility for addressing the ways in which past governments helped create an unfair economic playing field. In the labor context, unions were allowed to exclude minorities and immigrants from joining their ranks, and legislation like the Davis-Bacon Act disincentivized employers from hiring nonunionized minorities.[177] In housing, homeowners and real estate agents have colluded to charge supercompetitive prices and refused to sell or rent homes to racial minorities.[178] Reform of labor and real estate law, both over time and in the present, can only partially unwind this past discrimination's cumulative, compounding impacts. Other forms of economic regulation, including antitrust, must play some role in addressing their long-term consequences.

Disparate racial impacts that result from purposeful economic activity and insufficient antitrust enforcement continue today. For instance, consider employer restrictions on employees. Where rivals outright agree to not poach employees from one another, they artificially limit the economic mobility of workers and effectively decrease wages. Because the employer knows the worker cannot seek employment at a rival employer, it has increased its leverage to lower its workers' wages.[179] As Capers and Day explain, "because of how labor restraints are distributed, they disproportionately harm low-income workers, who in turn are disproportionately people of color."[180] Under classic antitrust doctrine, noncompete contracts may be completely valid, but the effects of said contracts disproportionately impact members of minority groups.[181] Post-employment restrictions are especially harmful to marginalized groups, as they increase the power and influence of firms and drive down future earnings. The FTC's recently issued final rule banning noncompete contracts entirely is a commendable step in the right direction, as the impact will not only be overwhelmingly positive for workers

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[172] Newman, *supra* note 166, at 390.

[173] Nicol Turner Lee & Caitlin Chin, *The Debate on Antitrust Reform Should Incorporate Racial Equality*, BROOKINGS: TECHTANK (July 8, 2021), https://www.brookings.edu/blog/techtank/2021/07/08/the-debate-on-antitrust-reform-should-incorporate-racial-equity [https://perma.cc/843M-EJ3A].

[174] Joshua P. Davis. Eric L. Cramer, Reginald L. Streater & Mark R. Suter, *Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic 'ISMS')*, 66 ANTITRUST BULL. 359, 359 (2021).

[175] Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 527–28 (2023).

[176] Lee & Chin, *supra* note 173. Consider the effects of *SCTLA*, where those primarily harmed were the members of the Trial Lawyers Association who would not receive wage increases for their work, but their downstream clients, indigent defendants (primarily people of color) take on a disproportionate amount of that harm. *See* Newman, *supra* note 166, at 387.

[177] Capers & Day. *supra* note 175, at 530–31.

[178] *Id.* at 531–32.

[179] *Id.* at 533–34.

[180] *Id.*, at 534.

[181] Lee & Chin, *supra* note 173.

across the country, but also is likely to disproportionately benefit marginalized communities.[182]

The business interests of minority-owned small businesses are also put at risk by excess mergers.[183] Merged firms can use market power to buy rivals or drive them out of business, raising entry barriers and startup costs, which can be especially burdensome for many already-pressed minority business owners.[184] Bank mergers have eliminated many smaller local banks, resulting in minority communities being offered less credit and at worse rates.[185] Ultra-concentrated prison markets see states outsourcing to private companies "with the promise of monopolistic control," creating labor monopsonies that prey on populations with zero bargaining power, further exacerbating carceral harms that have disproportionately fallen on minority communities.[186]

In healthcare, increased consolidation has led to inflated medical and pharmaceutical costs, which again have disproportionate impacts on people of color to the extent they are overrepresented among the under- and uninsured.[187] Increased costs impose a substantial barrier to meaningful healthcare access, a problem that was further exacerbated during the COVID-19 pandemic.[188] Thus, a race-conscious antitrust would consider, when prioritizing enforcement actions, opportunities to reduce health disparities by directly promoting competition in healthcare markets, or by including merger conditions that require merging hospitals to demonstrate they are not harming marginalized communities.

Scholars are now developing the legal tools and tests necessary to generalize such antiracist approaches. Hiba Hafiz has "propose[d] a suite of reforms as first steps to integrating analysis of race into antitrust enforcement, from market definition and merger review analyses to assessments of the anticompetitive effects and procompetitive benefits of firm conduct."[189] Dani Kritter argues that Section 7 of the Clayton Act should be interpreted to consider racial disparities as potential indicators of anticompetitive practices.[190] For example, in the healthcare industry, this would require antitrust enforcement officials to critically examine the effects

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[182] Press Release, FTC, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/RK4N-QVJN].

[183] Lee & Chin, *supra* note 173 ("[T]he rising number of mergers and acquisitions across the overall U.S. economy may contribute to declining startup rates, particularly affecting diverse entrepreneurs who face outsized challenges to raising capital and accessing credit for their ventures.").

[184] The authors note that "diverse entrepreneurs . . . face outsized challenges to raising capital and accessing credit for their ventures." *Id.*

[185] Capers & Day, *supra* note 175, at 535 (thanks to mergers, "banking behemoths have emerged, and local banks have dissolved . . . [As a result, banks that remain] in low-income neighborhoods offer less credit at higher prices; second, check-cashing stores and payday lenders have filled the void of shuttered banks; and third, the underbanked population has exploded.").

[186] *Id.* at 536–37.

[187] Kritter, *supra* note 164.

[188] *Id.*; Shameek Rakshit, Matthew McGough, Krutika Amin & Cynthia Cox, *How Does Cost Affect Access to Care?*, PETERSON-KFF HEALTH SYS. TRACKER (Jan. 30, 2023), https://www.healthsystemtracker.org/chart-collection/cost-affect-access-care [https://perma.cc/7839-ZW4L]. Black families tend to spend significantly more on healthcare costs. Kritter, *supra* note 164. Those who are in poorer health typically go without healthcare at even higher rates. Rakshit et al., *supra* note 188. Over half of the 30 million uninsured Americans are people of color. Kritter, *supra* note 164. Events like the COVID-19 pandemic compound these trends–minority groups were significantly more likely to be impacted by the pandemic and require medical attention. *Id.*

[189] Hiba Hafiz, *Antitrust and Race*, 100 WASH. U. L. REV. 1471, 1471 (2023).

[190] Kritter, *supra* note 164.

of a merger, such as healthcare costs and insurance premiums, across racial groups, to identify and potentially mitigate disparate impacts.[191] Specific practices that impact marginalized communities, like no-poach clauses, should also be critically scrutinized through this lens. Combatting structural racism should not be a mere incidental benefit of antitrust enforcement. Rather, it should be a direct goal of enforcement agencies.

Broad principles supported by New Antitrust scholarship should also create more room for antiracist initiatives. John Mark Newman offers four such principles: (1) do not rely on distinctions of horizontality versus verticality; (2) place less of an emphasis on the categorization of conduct (price fixing, e.g.); (3) accept a wider variety of evidence as proof of harm; and (4) recenter antitrust analyses on concentrated power.[192] Adherence to the first two principles would have helped the FTC refrain from targeting cooperative efforts like those in *SCTLA*. Furthermore, refocusing enforcement efforts towards anticompetitive concentration would avoid "otherwise-puzzling decisions," such as the FTC's challenges to laws supporting Uber drivers (who were themselves organizing to gain some traction against platforms' monopolistic tendencies).[193]

Bennett Capers and Greg Day have argued for shifting from a "consumer welfare" to a "community welfare" approach that scrutinizes, *inter alia,* how market structures impose unfair costs on minority groups.[194] Antitrust can identify structural racism as both a cause and effect of "inefficient allocation of resources."[195] Adopting a community welfare theory of antitrust would encourage courts to examine how harms are distributed across various stakeholders.[196] In practice, potentially anticompetitive economic activity that unevenly distributes benefits to majority groups and harms to minority groups should be analyzed under a less forgiving "quick look" standard that places the onus on the defendant to show they have not harmed consumers and/or labor.[197] By disaggregating the analysis of benefits and harms to discern how they are distributed among groups, antitrust can more effectively tackle economic activity that has traditionally escaped scrutiny, to the detriment of minority populations.

The New Antitrust, pioneered by scholars, is now having an impact in government and NGOs. They increasingly consider structural racism in their analyses.[198] FTC Commissioner Rebecca Kelly Slaughter has called for

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[191] *Id.*

[192] Newman, *supra* note 166, at 393–94. Focusing on the horizontal nature of the Trial Lawyers Association in *SCTLA* led to harmful downstream effects on indigent defendants. Similarly, labeling the transaction as "price fixing" all but doomed the defense. Indeed, the *SCTLA* majority appeared to pursue what Ezrachi and Stucke would deem a "competition overdose:" unwisely penalizing collective, cooperative action in service of an inapposite ideal of rivalry. MAURICE E. STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS (2020).

[193] Newman, *supra* note 166, at 394; *see also* Cheryl Miller, *FTC and Uber Align to Stop New Seattle Law for Ride-Hail Drivers*, LAW.COM (Nov. 6, 2017), https://www.law.com/therecorder/2017/11/06/ftc-and-uber-align-to-stop-new-seattle-law-for-ride-hail-drivers [https://perma.cc/4LMZ-MCCR] ("The [FTC] is siding with Uber . . . in a fight to block a Seattle law that would allow ride-hailing drivers to collectively bargain.").

[194] *See,* Capers & Day, *supra* note 175, at 528–29, 572.

[195] *Id.* at 566.

[196] *Id.* at 572.

[197] *Id.* at 573.

[198] FTC Commissioner Rebecca Kelly Slaughter, in her discussion on why antitrust should take race into account, notes the explicitly "value-neutral" history of antitrust: "[O]ne thing I have always found

antitrust reform to "right the wrongs of systemic racism" through strict antitrust enforcement in those concentrated industries that most affect marginalized groups.[199] This means enforcement decisions should expressly take into account racial inequity flowing from past FTC actions.[200] Now Legal Director of the Open Markets Institute, Sandeep Vaheesan makes similar calls for reform, arguing antitrust enforcers like the FTC should refrain from intervention that is likely to disproportionately harm people of color.[201] More federal and state competition law enforcers and advocates are likely to advance such positions as the New Antitrust gains adherents and influence.

B. RETHINKING THE ROLE OF LABOR IN COMPETITION POLICY

A competition policy focused only on CW risks entrenching exploitative and unfair labor practices. This is particularly evident when the topic of concern expands beyond monopolistic production of goods and services, to monopolistic buyer power (also called monopsony) in labor markets. The question of worker welfare has become especially acute in an era of monopolizing firms. The New Antitrust's engagement with both classical and contemporary social science has helped provide rigorous academic foundations for a new centering of labor's concerns in competition policy.

As Albert O. Hirschman argued in his classic *Exit, Voice, and Loyalty*, the ability of a member of an organization to leave (exit) the organization is a critical limit on how much the organization can exploit or mistreat the person.[202] In Hirschman's telling, while the opportunity to voice one's perspective is a foundation of legitimate political systems, the exit option is one foundation of fair economies.[203] To gain fair remuneration for their labor, most workers need to be able credibly threaten to exit their current employer, and do the same or similar work for other firms. Robust wage growth depends on competition among firms not just for consumers, but also for workers.

As businesses grew and markets became more concentrated, many workers who drove such growth saw their bargaining power shrink while

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really perplexing about the sort of current conventional wisdom around antitrust is that it is generally treated as a value-neutral endeavor. Like that it both can be and should be value-neutral." *See* Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html [https://perma.cc/5FYG-CRJT]; *see also* Commissioner Rebecca Kelly Slaughter, *Antitrust at a Precipice*, GCR INTERACTIVE: WOMEN IN ANTITRUST 3 (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf [https://perma.cc/88FR-9MV5] ("To me, objections that I have heard start with what I view to be a faulty premise: that antitrust can and should be value-neutral, and therefore social problems like racism do not have a role in antitrust enforcement.").

[199] Rosa M. Morales, *"Competition Policy In Its Broadest Sense": Can Antitrust Enforcement Be A Tool To Combat Systemic Racism?*, 31 COMPETITION 173, 177 (2021) ("In September 2020, FTC Commissioner Rebecca Slaughter joined [calls] for systemic reform through a series of tweets challenging antitrust enforcers to 'get creative and bold' to combat structural inequality . . . . [and] 'right the wrongs of systemic racism.' ").

[200] Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, THE APPEAL (Sept. 16, 2020), https://theappeal.org/how-antitrust-perpetuates-structural-racism https://theappeal.org/how-antitrust-perpetuates-structural-racism/ [https://perma.cc/4PAR-DWZ3].

[201] Especially where the intervention is "on behalf of powerful employers against workers." *Id.*

[202] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[203] *Id.* at 19, 30. Of course, in some scenarios, there is significant worker input into the governance of the firm, making the "voice" option plausible there, too. And some persons do exit their state or nation to seek a more agreeable political order. *Id.* at 29.

that of their employers grew.[204] For decades, worker productivity increased while the median wage hardly changed, and labor's share of the national income decreased.[205] Workers who attempt to organize have often been frustrated by various obstacles, thanks both to unfavorable law and corporate deployment of union-busting tactics.[206] Many large corporations—particularly tech companies like Amazon, Facebook, Uber, etc.—possess far more resources than labor organizers,[207] and amplified their power via both contracts and political influence.[208]

New Antitrust theories have helped competition law authorities recognize and begin to redress these imbalances. Recall Sanjukta Paul's reframing of antitrust as the allocation of economic coordination rights.[209] This characterization "means that private decisions to engage in economic coordination are always subject to public approval, which antitrust law grants either expressly or tacitly."[210] When antitrust law permits firms to grow ever larger, while deterring workers from joining together to demand higher wages and better working conditions by deeming such action cartelization, it is stacking the deck against labor and in favor of capital.

Paul notes that contemporary antitrust has allowed for, and perhaps even encouraged, centralized, concentrated power among firms as the "preferred form of economic coordination."[211] Many of the largest firms are not successful merely because they are more efficient; rather, they occupy privileged positions as intermediaries between firms and consumers, or between workers and consumers. Their self-reinforcing gains in market share are too often assumed to be natural and good. Meanwhile, efforts by smaller firms or labor to work together to keep up are condemned.[212] Freedom of contract is assumed to be sacrosanct, leading to blatantly anti-competitive practices like the "noncompete" contracts required of workers that were discussed in Section III.A. Sandeep Vaheesan and Matthew Buck have directly criticized noncompetes as "contracts of dispossession," further

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[204] Marshall Steinbaum, *Antitrust, The Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45 (2019); Hiba Hafiz, *The Labor Justice System*, L. & POL. ECON. PROJECT (November 2, 2021), https://lpeproject.org/blog/the-labor-justice-system [https://perma.cc/D39N-UWHW.]; Hiba Hafiz, *Labor's Antitrust Paradox*, 86 U. CHI. L. REV. 381, 382, explaining the role of antitrust in combating inequality:

> Growing inequality, the decline in labor's share of national income, and increasing evidence of labor-market concentration and employer buyer power are all subjects of national attention, eliciting wide-ranging proposals for legal reform. . . . Labor antitrust promises an effective attack because agency discretion and judicial enforcement can police labor markets without substantial amendments to existing law.

[205] Steinbaum, *supra* note 204.

[206] Brian Callaci, *It's Time for Labor to Embrace Antimonopoly*, FORGE (Apr. 13, 2021), https://forgeorganizing.org/article/its-time-labor-embrace-antimonopoly [https://perma.cc/NSG5-N963].

[207] In California, for example, labor unions were outspent by a magnitude of ten times by mega-corporations like Uber, Lyft, and Doordash. These companies poured money into efforts to overturn legislation that would have changed the classification of gig workers to benefit the individual drivers who currently lack employment rights under the law. *Id.*

[208] Employers rely on barriers to entry, collusion, and "labor market frictions" (e.g., costs, information asymmetries), all of which allow them to offer lower wages, turn a blind eye to hazards in the work place, and more. Hafiz, *supra* note 204.

[209] Paul, *supra* note 63, at 380.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 388.

laying an intellectual foundation for enforcement action against them and rulemaking generally proscribing them.[213]

While labor advocates had long decried noncompetes, theories like Paul's, Vaheesan's, and Buck's crystallized the asymmetry of power at the heart of such unfair arrangements. The FTC has taken heed. The agency has brought complaints against firms deploying noncompete agreements to restrict their workers' future employment opportunities. It has entered consent orders with several companies for using restrictive noncompete agreements.[214] For example, one firm prevented hourly-wage security guards from working with any competitor within a one-hundred-mile radius of the employee's primary job site and included a $100,000 liquidated damages clause for any employee who violated the non-compete agreement.[215] There was no competitive rationale to justify such an agreement, such as protection of trade secrets. By liberating these workers to take on reasonable employment opportunities closer to home, the agency both improved their welfare and those of consumers purchasing goods and services at the firms where they can now work.

The FTC's efforts extend beyond mere piecemeal enforcement action. By proposing a rule in 2023 against anticompetitive non-compete agreements generally, the FTC put employers on notice that it presumed such agreements to be unfair. The final rule, which was promulgated in April 2024, is estimated to increase workers' earnings by nearly $300 billion per year and will expand career opportunities for nearly thirty million Americans.[216] In the healthcare sector specifically, banning noncompete agreements could result in reducing consumer prices by nearly $150 billion per year.[217] Unmoved by such "win-win" opportunities, policymakers committed to Establishment Antitrust had long ignored this low-hanging fruit, missing the potential for rulemaking and instead recommending resource-intensive adjudications.

Expect more pro-worker and pro-consumer action from competition law authorities guided by the New Antitrust. In the face of increased corporate concentration, Hiba Hafiz has called for a comprehensive, whole-of-government approach to combat harm in the labor market.[218] Hafiz has

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[213] *See generally* Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law*, 1 J. L. & POL. ECON. 28 (2020); Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113 (2022).

[214] Press Release, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices [https://perma.cc/6NT5-L6KC].

[215] *See* FTC Complaint, *In the Matter of Prudential Security, et al.*, available at: https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecuritycomplaint.pdf [https://perma.cc/P2ML-4GED] (2022).

[216] FTC, *supra* note 182; *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/S4GE-Q7LD].

[217] Statement Lina M. Khan, Chair, FTC, Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf [https://perma.cc/C246-TAW9]. The FTC's proposed rule is an important first step to protecting workers. As Claire Kelloway has pointed out, the proposed rule would not apply to no-poach agreements, which may affect as many as 80% of fast food workers. *See* Claire Kelloway, *How the FTC's Noncompete Ban Would Affect Food Workers*, FOOD & POWER (Jan. 26, 2023), https://www.foodandpower.net/latest/ftc-noncompetes-rule-jan-26-23 [https://perma.cc/F6W4-JHZP].

[218] Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37 (2020).

argued that FTC and DOJ guidance can integrate labor market effects into the merger review process. By utilizing metrics such as labor market friction to more precisely analyze an employer's power in the labor market, the agencies can develop evidence necessary to block mergers that tend to create local monopsonies.[219] The agencies could also define the threshold for monopsony as lower than that of a monopoly in a product market, because labor markets are "less elastic than product markets and allow significant monopsony even without entry barriers or collusion."[220]

Hafiz also calls for legislation to create a new dynamic of interagency review for mergers. Like the Federal Communications Commission ("FCC") and the Federal Energy Regulatory Commission ("FERC") in areas concerning their expertise, the National Labor Relations Board ("NLRB") could impose conditions on mergers that are likely to result in highly concentrated labor markets.[221] Given the complexity of labor markets across different industries, it would be wise to rely on the NLRB's extensive expertise to evaluate how potential large transactions impact worker bargaining power. The NLRB could employ a "public interest" standard, which is currently used by the FCC and FERC, considering "broader public welfare effects within and beyond" each market examined.[222] A cross-agency approach such as the one outlined by Hafiz would address the inherent limitations of the FTC, which has historically struggled to adequately protect workers' rights.[223]

C. FURTHER APPLICATIONS OF THE NEW ANTITRUST

Even beyond the pursuit of racial equity, fair compensation, and equitable labor terms, the New Antitrust's sophisticated understanding of markets and power is also benefiting the public. For example, Khan's FTC is actively targeting anticompetitive mergers in key markets that threaten competition and consumers.[224] The academic work of Vaheesan, Lande, and Kwoka laid the foundation for this tough new approach. President Biden has called specific attention to the widespread consolidation of hospitals across the country,[225] following the lead of experts who agree that hospital mergers

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[219] Hafiz, *supra* note 189.

[220] *Id.*

[221] Hafiz, *supra* note 218, at 39–40. As the author explains:

> The Board would be authorized to condition merger approval on ensuring robust labor protections for employees of the merged firm, including but not limited to establishing a default opt-out union, mandatory arbitration leading to a first collective bargaining agreement, or other conditions. Interagency merger review and 'public interest'-based merger conditions are not unusual outside of labor markets. In a number of industries, regulatory agencies supplement the antitrust agencies' limited product market, consumer welfare-focused review to evaluate broader public welfare effects within and beyond that market. Joint merger review between the DOJ and the Federal Communications Commission (FCC) (telecommunications mergers) and Federal Energy Regulatory Commission (FERC) (electric power mergers) are prominent examples.

[222] *Id.* at 40.

[223] *Id*. at 39–40.

[224] *Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights "Oversight of the Enforcement of the Antitrust Laws"*, 117th Cong. 3 (Sept. 20, 2022) (statement of Lina Khan, Chair of the FTC), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf [https://perma.cc/4TAT-KVCJ].

[225] Exec. Order No. 14036, 86 C.F.R. §132 (2021).

tend to drive up medical costs.[226] Citing increased prices and lower quality care, Khan's FTC has successfully challenged four different large mergers between dominant hospitals.[227] The agency has frequently failed to stop such mergers in the past.[228] The New Antitrust is adding to the agency's argumentative armamentarium, helping it to make a more compelling case for competition.

Khan's FTC is also producing key judicial precedents to validate legal theories that will empower the agency to continue to challenge anticompetitive activities. Take, for instance, the FTC's challenge to Meta's acquisition of Within, a software company that develops virtual reality ("VR") fitness applications like *Supernatural*.[229] After bringing an adjudicative challenge to the companies' proposed merger, the FTC was unable to enjoin the companies from merging until the conclusion of the agency's adjudication.[230] However, it made a significant advance in product market definition. The FTC successfully demonstrated that the relevant market was VR fitness apps, countering Meta's assertion that "non-VR connected fitness products and services" were also part of the relevant market.[231] The narrower market is appropriate for many qualitative reasons made more salient by the New Antitrust, including the ongoing shift of commerce online, and the power of platforms like Facebook, Instagram, and WhatsApp over so much of online life.[232]

Market definition is a critical area for antitrust to move beyond Establishment Antitrust's overreliance on quantitative measures. As Thomas B. Nachbar has argued:

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[226] Harris Meyer, *Biden's FTC Has Blocked 4 Hospital Mergers and Is Poised To Thwart More Consolidation Attempts*, LUND REP. (July 20, 2022), https://www.thelundreport.org/content/bidens-ftc-has-blocked-4-hospital-mergers-and-poised-thwart-more-consolidation-attempts [https://perma.cc/L8PE-ULSQ].

[227] *Id.* The FTC challenged mergers between RWJ-Barnabas Health and St. Peter's Healthcare System in New Jersey, HCA Healthcare and Steward Health Care System in Utah, Hackensack Meridian Health and Englewood Healthcare Foundation in New Jersey, and Lifespan and Care New England Health System in Rhode Island. *Id.* The agency's challenge to the $439 million Hackensack Meridian Health-Englewood Healthcare Foundation merger was upheld on appeal by the 3rd Circuit, which found the merger would have given the combined entity a 47% market share and allowed it to raise prices substantially. *See* Barbara Grzincic, *FTC's Lawsuit Can Put the Brakes on N.J. Hospital Merger – 3rd Circ*, REUTERS (Mar. 23, 2022), https://www.reuters.com/legal/litigation/ftcs-lawsuit-can-put-brakes-nj-hospital-merger-3rd-circ-2022-03-23 [https://perma.cc/LXJ4-K4MP].

[228] Spencer Weber Waller, *How Much of Health Care Antitrust Is Really Antitrust*, 48 LOY. U. CHI. L.J. 643, 658–59 (2017). As the author explains:

> The poster child for [pre-Biden] antitrust exceptionalism in the health care industry consisted of the disastrous defeats suffered by both the DOJ's Antitrust Division and the FTC in the 1990s in challenging a series of hospital mergers in different areas of the country. . . . Courts would bend market definitions to ensure no violations. Other courts accepted variations of the good citizen defense that normally gets laughed out of court.

[229] F.T.C. v. Meta, 654 F.Supp.3d 892, 903 (N.D. Cal. 2023) (denying plaintiff's motion for preliminary injunction).

[230] *Id.*

[231] *Id.* at 913 ("Unsurprisingly, Defendants disagree. They claim that the FTC's proposed market is impermissibly narrow because it excludes 'scores of products, services, and apps' that are 'reasonably interchangeable' with VR dedicated fitness apps, including . . . non-VR connected fitness products and services.").

[232] On platforms' power, see generally Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263 (2008); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018); Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487 (2016); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008).

> [M]odern market definition has been treated in antitrust as a matter of quantitative economics, with markets defined by economic formulas lacking a connection to widely held social understandings of competition. Antitrust law needs to augment these quantitative approaches by explicitly acknowledging qualitative aspects of markets, including the normative visions of competition they represent.[233]

The New Antitrust makes this shift to the qualitative easier, by welcoming the insights of non-quantitative approaches to policy evaluation. Another significant victory in the Meta/Within litigation was the acceptance of the FTC's "potential competition" theory of harm: that one harm to competition comes from "the potential loss of a *future* competitor (the acquiring company)."[234] In other words, if Meta were unable to acquire Within, it might build its own VR dedicated fitness application—a welcome dose of competition in that market. As noted by Lee Hepner of the American Economic Liberties Project, this represents a significant legal victory, as "the Judge accepted key arguments at the heart of the Commission's enforcement agenda."[235] For dominant tech companies like Meta and Amazon, which rely on serial acquisition of nascent competitors, the judicial validation of the potential competition theory presages important challenges to their anti-competitive practices.[236]

Also of note is the broader economic impact of New Antitrust-inspired enforcement efforts against anticompetitive mergers among firms in already concentrated industries. Even when it loses in what are often conservative courts, the FTC's enforcement actions serve as a deterrent, signaling to firms that their coordination is under scrutiny. As a result, dominant companies may be turning away from some merger plans, aware that they cannot expect a quick and easy disposition of mergers that escaped scrutiny in the past.[237] The FTC and DOJ are targeting key industries plagued by concentration (e.g. hospitals, defense contracting, and technology).[238] The FTC is also creatively using enforcement and consent orders to ensure it receives early warnings

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[233] Thomas B. Nachbar, *Qualitative Market Definition*, 109 VA. L. REV. 373, 373 (2023).

[234] F.T.C. v. Meta, 2023 WL 2346238, at *22.

[235] Winston Cho, *Meta Won Approval to Buy a Virtual Reality App, but FTC Laid Groundwork to Halt Big Tech's Next Deal*, HOLLYWOOD REP. (Feb. 6, 2023, 5:40 PM), https://www.hollywoodreporter.com/business/business-news/meta-within-ftc-challenge-legal-ruling-1235319297 [https://perma.cc/XL6V-JGCX].

[236] *See, e.g.*, Chris Alcantara, Kevin Schaul, Gerrit De Vynck & Reed Albergotti, *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions [https://perma.cc/6LJ3-SGCJ].

[237] Leah Nylen & Michelle F. Davis, *US Antitrust Enforcers Are Chilling Big Mergers*, BLOOMBERG (May 10, 2023, 6:00 AM PDT), https://www.bloomberg.com/news/articles/2023-05-10/m-a-deal-pace-slows-as-biden-administration-cracks-down-on-antitrust#xj4y7vzkg [https://perma.cc/KF3R-KGZQ] ("Alphabet Inc.'s Google put aside internal discussions about potentially acquiring another large technology company because of concerns it would attract too much antitrust scrutiny.").

[238] Major mergers like Nvidia's planned $40 billion acquisition of Arm and Lockheed Martin's planned $4.4 billion acquisition of Aerojet Rocketdyne were scrapped after the FTC sued to block the deals. *See* Dara Kerr, *Lina Khan Is Taking Swings at Big Tech as FTC Chair, and Changing How it Does Business*, NPR (Mar. 9, 2023, 8:30 AM ET), https://www.npr.org/2023/03/07/1161312602/lina-khan-ftc-tech [https://perma.cc/PZH2-6CK4]. Notwithstanding the failed merger, Nvidia recently became one of the most valuable companies in the United States on the back of its dominant technology fueling the AI boom. *See* Aditya Soni & Patturaja Murugaboopathy, *Nvidia Briefly Hits $2 Trillion Valuation as AI Frenzy Grips Wall Street,* REUTERS (Feb. 23, 2024), https://www.reuters.com/technology/global-markets-marketcap-pix-2024-02-23/ [https://perma.cc/9BVT-CJJB].

about potentially anti-competitive moves that may fall below the thresholds for Hart-Scott-Rodino merger review.[239]

The FTC is also continuing to ramp up its enforcement efforts and is utilizing its full toolkit of legal theories to tackle anticompetitive behavior. For example, in its recent challenge to the highly questionable conglomerate merger between Amgen and Horizon Therapeutics (a long-ignored category of mergers), the FTC highlighted how Amgen could use the merger to reinforce Horizon's monopoly over drugs like Tepezza and Krystexxa by leveraging Amgen's existing portfolio of drugs to raise entry barriers for potential competitors.[240] According to the FTC, Amgen has a history of leveraging its products to gain preferred placements on insurers' and pharmacy benefit managers' lists of covered medications.[241] The FTC also enjoyed a spree of merger victories to close out 2023, including the determination by the 5th Circuit that Illumina's acquisition of Grail "threatened competition in the market for cancer detection tests."[242] It also won a preliminary injunction halting the acquisition of Propel Media by IQVIA, a leader in programmatic advertising to health care professionals.[243]

To be sure, the FTC has also suffered some setbacks. Consider its suit to prevent Microsoft's $69 billion acquisition of gaming giant Activision Blizzard,[244] which highlighted concerns that the tech giant would use its position as a gaming platform (i.e., Xbox) to withhold access to widely popular titles from its rivals.[245] The FTC identified a pattern by Microsoft of acquiring popular gaming production studios and subsequently foreclosing other platforms and competitors from accessing their products and

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[239] In a settlement agreement with private equity firm JAB Consumer Partners, the FTC required JAB "to tell the FTC about any other clinics it wants to buy near its existing assets in other states . . . [t]hat early-warning requirement was a first-of-its-kind condition in an FTC order and would 'allow the FTC to better address stealth roll-ups by private-equity firms…'" *See, e.g.*, Dave Michaels & Ryan Tracy, *Wall Street Deal Making Faces Greater Scrutiny, Delays Under FTC's Lina Khan*, WALL ST. J. (Aug. 15, 2022, 5:30 AM), https://www.wsj.com/articles/bidens-regulators-take-a-harder-look-at-wall-street-deals-11660555801 [https://perma.cc/6W7D-C9GC].

[240] *FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition that Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses*, FTC (May 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat [https://perma.cc/4JLR-LCKY].

[241] *Id.*

[242] Illumina reacquired Grail in 2021 despite antitrust challenges. Press Release, FTC, Statement Regarding Illumina's Decision to Divest Grail (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-illuminas-decision-divest-grail [https://perma.cc/J2N6-AGVQ]. Two other transactions— Sanofi's proposed takeover of Maze Therapeutics and John Muir's proposed takeover of San Ramon Regional Medical Center—were also abandoned in December 2023 after FTC challenges. *See* Press Release, FTC, Statement Regarding the Termination of Sanofi's Proposed Acquisition of Maze Therapeutics' Pompe Disease Drug (Dec. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-sanofis-proposed-acquisition-maze-therapeutics-pompe-disease-drug [https://perma.cc/4HNJ-86MW]; Press Release, FTC, Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Healthcare (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-john-muirs-takeover-san-ramon-regional-medical-center-tenet [https://perma.cc/M464-X44J].

[243] Press Release, FTC, Statement on FTC Win Securing Temporary Block of IQVIA's Acquisition of Propel Media (Jan. 3, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/StatementonFTCWinSecuringTemporaryBlockofIQVIA%E2%80%99sAcquisitionofPropelMedia [https://perma.cc/4DSF-7Y74].

[244] Steve Albertson, Thomas Ensign & Mark S. Ostrau, *With Microsoft Complaint, Lina Khan's FTC Takes on Another Big Tech Gaming Deal*, FENWICK (Dec. 22, 2022), https://www.fenwick.com/insights/publications/with-microsoft-complaint-lina-khans-ftc-takes-on-another-big-tech-gaming-deal [https://perma.cc/3CCX-RVFY].

[245] *Id.*

services.[246] However, the FTC's challenge to Microsoft's acquisition has run into several roadblocks. After a district court refused to grant the agency injunctive relief,[247] a decision which was upheld by the Ninth Circuit,[248] Microsoft closed its record-breaking acquisition in late 2023.[249] Despite this setback in federal court, the FTC has revived its in-house challenge to the deal based on its inherent threat to competition and consumers. And as the FTC's case against Illumina in the Fifth Circuit demonstrated, such an adjudicatory action can yield immense benefits for consumers and may yet mitigate the harm caused by Microsoft's acquisition.[250]

The roadblocks that antitrust authorities have faced in restoring robust competition policy are in part a product of agencies' past adherence to Establishment Antitrust nostrums. For years, the DOJ's and FTC's vertical merger guidelines emphasized positive aspects of vertical mergers.[251] However, the FTC and DOJ's new merger guidelines, released in 2023, better articulate the potential harms from such mergers.[252] These new merger

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[246] *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.*, FTC (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc [https://perma.cc/Y7LM-AVQU], the FTC explained:

> In a complaint issued [December 8, 2022], the FTC pointed to Microsoft's record of acquiring and using valuable gaming content to suppress competition from rival consoles, including its acquisition of ZeniMax, parent company of Bethesda Softworks (a well-known game developer). Microsoft decided to make several of Bethesda's titles including Starfield and Redfall Microsoft exclusives despite assurances it had given to European antitrust authorities that it had no incentive to withhold games from rival consoles.

[247] FTC v. Microsoft Corp., No. 3:23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001 at *1 (N.D. Cal. July 10, 2023).

[248] FTC v. Microsoft Corp., No. 23-15992, 2023 U.S. App. LEXIS 17985 (9th Cir. July 14, 2023).

[249] Stephen Totilo, *Microsoft Finally Closes Deal to Buy Activision Blizzard*, AXIOS (Oct. 13, 2023), https://www.axios.com/2023/10/13/microsoft-activision-deal-closes [https://perma.cc/V7V9-NVWY].

[250] Brief of Respondent at *1, *21, Illumina, Inc. v. F.T.C., No. 23-60167 (5th Cir. 2023). The Agency argues:

> This case involves a textbook example of a vertical merger that threatens to clog competition in a developing industry. What makes Illumina and Grail's merger an especially clear statutory violation is that Grail's downstream competitors are completely dependent on Illumina's NGS platforms and have no available substitute today or in the near future.

In the case of Microsoft/Activision, Microsoft's acquisition of the popular game developer would significantly disadvantage Microsoft's competitors in the gaming console and subscription markets, as gaming platforms substantially rely on the type of AAA games that Activision/Blizzard produce. Post-merger, Microsoft could withhold future Activision games from competing platforms, raise prices, or degrade game quality. *See* Complaint 2–4, ¶¶ 7–14, Microsoft Corp. & Activision Blizzard, Inc., F.T.C. Docket No. 9412 (Dec. 8, 2022).

[251] U.S. DOJ & FTC, VERTICAL MERGER GUIDELINES (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf [https://perma.cc/DH9A-JD9Z]. The guidelines state:

> Vertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers . . . Due to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger.

The agencies' prior stance on the economic benefits of vertical mergers was central to Microsoft's defense in the Activision/Blizzard merger. Citing caselaw and Establishment scholarship on the procompetitive effects that vertical mergers "often generate," Microsoft posited that the proposed vertical merger would "make Activision's games *more accessible* to consumers." *See* Defendants' Memorandum of Law in Opposition to Motion for Preliminary Injunction 14–20, F.T.C. v. Microsoft Corp., Case No. 3:23-cv-02880 (N.D. Cal. June 17, 2023).

[252] *See* U.S. DOJ & FTC, MERGER GUIDELINES 22 (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/Z8WZ-XPVG]. The guidelines state:

guidelines incorporate many of the principles espoused by the New Antitrust.[253] They set the stage for more meaningful merger review by outlining key principles that directly challenge (based on empirical data and case law) the very behavior previously embraced under Establishment Antitrust analyses.[254]

These actions do not reflect a simple political shift within antitrust enforcement agencies. Rather, they represent the application of rigorous scholarship, deeply informed by current market realities, and the long-term interplay of power and market structure. Before the Chicago School revolution, "Congress, enforcement agencies, and the courts recognized potential threats posed by vertical arrangements," challenging such arrangements via the same theories of leverage and foreclosure that Khan is reviving today.[255] The New Antitrust revives those normative commitments, protecting consumers, workers, and competition—as originally intended by U.S. antitrust laws.[256] And it does so on the basis of rigorous legal scholarship employing more diverse and illuminating methods than the narrow economism characteristic of Establishment Antitrust.

CONCLUSION: THE TIMELINESS OF THE NEW ANTITRUST

The New Antitrust has more robust intellectual foundations than Establishment Antitrust, the methodological infirmities of which have long been manifest. Even in the 1970s, antitrust expert Lawrence Anthony Sullivan worried about the direction of the field. As he observed, reliance upon neoclassical economic "analysis in antitrust may lead to an unduly limited conception of statutory purpose."[257] Sullivan went on to demonstrate that "more humanistic disciplines" of greater scope, depth, accuracy, or normative richness could complement economics' penchant for

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> The Agencies therefore examine whether a trend toward consolidation in an industry would heighten the competition concerns identified in Guidelines 1-6. . . . If an industry has gone from having many competitors to becoming concentrated, it may suggest greater risk of harm, for example, because new entry may be less likely to replace or offset the lessening of competition the merger may cause. . . . The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets and whether there is a trend toward further vertical integration. . . . For example, a trend toward vertical integration could magnify the concerns discussed in Guideline 5 by making entry at a single level more difficult and thereby preventing the emergence of new competitive threats over time.

[253] For example, one guideline states that, "When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers," and thus incorporates the labor considerations mentioned above. *See* MERGER GUIDELINES, *supra* note 252, at 3; *infra* Section III.B.

[254] For example, guidelines include: "Mergers Can Violate the Law When They Eliminate a Potential Entrant In a Concentrated Market," demonstrating a focus on future markets; "Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete," showing a recognition of the importance of market structures in lieu of simple economic outputs; "When Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, On a Platform, or to Displace a Platform," exhibiting close attention to the complex nature of platforms; and "When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers," incorporating the importance of labor considerations into the merger analysis. *See* MERGER GUIDELINES, *supra* note 252, at 2–3.

[255] Khan, *supra* note 35, at 731–33.

[256] Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 771 (2019) ("The Congresses that passed these statutes sought to limit the power of large-scale capital over consumers and producers, competitors, and citizens.").

[257] Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1218 (1977).

parsimony.[258] He believed that "antitrust scholarship could usefully explore the styles of analysis and some of the material from the humanistic disciplines of history and philosophy, and that it might be useful to draw upon social sciences other than economics, particularly on sociology and political science."[259] Unfortunately, too many in the field doubled down on the economism of the 1970s in subsequent decades. Some methodological advances were touted, but tended only to add the social scientific equivalent of epicycles to increasingly outdated premises, values, and methods.[260]

A new social science of optimal corporate size and power is needed. As it is built, we must bear in mind Maurice Stucke's prescient critique of the unexamined assumptions at the core of Establishment Antitrust:

> Prevailing competition advocacy glosses over four fundamental questions: First, what is competition? Second, what are the goals of a competition policy? Third, how does one achieve, if one can, the objectives of such desired competition? Fourth, how does one know if the economy is progressing toward these goals?[261]

After surveying considerable diversity of opinion on the definition of "competition," Stucke argues that it cannot be an "end in itself," but might better be thought of as "a policy tool to achieve broader government objectives for the economy."[262] These objectives include much more than the consumerism that has dominated Establishment Antitrust approaches.

Stucke's questions illuminate the dangers of over-specialization. Competition authorities that are only well-versed in economics cannot competently address concerns about labor, inequality, and long-term industrial policy that should be at the core of antitrust policy. Even if economists feel confident that their specialized knowledge can provide definitive answers, other disciplines offer much to contribute to the inquiry. The lawyer's role is to craft the best arguments, drawing from multiple disciplines and approaches within disciplines, and not to preempt such necessary inquiry by over-relying on one narrow approach.

Antitrust policy must embrace the full diversity of social science disciplines to effectively promote productivity and inclusive prosperity. The New Antitrust is well-poised to bring such expertise to the core of government regulation of commercial power. The moral and political economy principles at the heart of the New Antitrust articulate values that, when closely adhered to by antitrust policymakers, motivate enforcement priorities, rules, and analyses with better consequences for all than a narrow (and often short-sighted) pursuit of CW. Far from being an errant politicization of competition policy, the New Antitrust is instead an intellectually rigorous effort to correct the errors of economism. It should

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[258] *Id.* For more on the tension between parsimony, accuracy, and scope in philosophy of social science, see Paul Humphreys, *Causation in the Social Sciences: An Overview*, 68 SYNTHESE, (1986), at 1, 5.

[259] Sullivan, *supra* note 257, at 1214, 1235–38, 1240–41(1977) (demonstrating the various methodologies in which the humanities may contribute to antitrust theory and its modern application).

[260] Epicycles disguised the faults of geocentric models of the solar system by adjusting them to match astronomical observations. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 15 (2d ed. 1970).

[261] Stucke, *supra* note 163, at 953 (advancing fundamental queries that Establishment Antitrust tends to neglect or answer in unsatisfying ways).

[262] *Id.* at 987–88.

inform the work of all competition policymakers committed to reflecting the best of legal academic research in their enforcement agendas.