ANTITRUST FOR THE COMMON GOOD

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ABSTRACT

Recently, scholars and activists—pointing to increasing concentration of corporate power, particularly in the technology sector—have called for significant revisions to the dominant "Chicago School" approach to antitrust law that has characterized U.S. competition policy for the past several decades. At the same time, debates are ongoing among legal conservatives regarding the plausibility and desirability of grounding constitutional and legal philosophy on a non-positivist footing. This Article presents a theory of antitrust enforcement grounded in the classical legal tradition, one that affirms that moral and metaphysical considerations are never truly absent from the lawmaking process. Among other claims, it defends the value of economic competition—understood in the traditional sense of the term—as a legitimate subject of state action on the grounds that such competition is more likely to promote the flourishing of individual citizens than its absence.

INTRODUCTION

Antitrust is hot again. In recent years, a traditionally arcane area of law—once almost exclusively the domain of specialist practitioners and economically-minded law professors—has increasingly taken center stage in American political life.[1] While decades of steadily increasing market consolidation largely went unnoticed by many citizens, the rapidly expanding role of large technology companies in American life—Amazon, Google, Facebook, and a handful of others—is no longer being overlooked.[2] Widespread public scrutiny surrounds the substantial financial and political power now wielded by a handful of gatekeeper firms—power that the COVID-19 pandemic, with its forced shift to screen-mediated shopping and socialization, cemented in dramatic fashion.[3] The founders of such firms, many of whom still enjoy substantial authority over the companies they helped create, are now routinely compared to the "oligarchs" of Standard Oil

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[1] *See, e.g.*, David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/technology/tech-giants-antitrust-law.html [https://perma.cc/9FX6-RSAV] ("When Americans fear the future, they turn to antitrust action. . . . [I]t is happening now, as big technology companies work on artificial intelligence that threatens to create a world where human beings are eternal losers.").

[2] *See, e.g.*, Sara Morrison & Shirin Ghaffary, *The Case Against Big Tech*, VOX (Dec. 8, 2021, 5:30 AM), https://www.vox.com/recode/22822916/big-tech-antitrust-monopoly-regulation [https://perma.cc/E2TW-CRGA].

[3] *See* Shira Ovide, *How Big Tech Won the Pandemic*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/04/30/technology/big-tech-pandemic.html [https://perma.cc/U6BB-HBW6] ("In the last year, the five tech superpowers—Amazon, Apple, Google, Microsoft and Facebook—had combined revenue of more than $1.2 trillion . . . . It was a strange and amazing year for Big Tech.").

and the great railways of the late nineteenth century.[4] It was in opposition to those oligarchs that modern American antitrust law first emerged.[5]

This renewed interest in antitrust has produced a number of surprising bipartisan bedfellows. In the 117th Congress, Senators Amy Klobuchar (a senior Democrat) and Chuck Grassley (a leading Republican) worked to spearhead the American Innovation and Choice Online Act, a technology-focused measure that would constitute the most significant expansion of antitrust law in decades.[6] Progressive antitrust scholar Lina Khan attracted significant Republican support for her nomination to serve as chair of the Federal Trade Commission ("FTC"), despite massive opposition from traditionally Republican business interests.[7] Leading plaintiffs'-side attorney Jonathan Kanter's nomination to be Assistant Attorney General for the Antitrust Division in the Biden-Harris Administration's Department of Justice drew similar bipartisan backing.[8] In an otherwise polarized time, partisans of the left and right increasingly find themselves supporting a reinvigorated approach to antitrust enforcement over the laissez-faire status quo.

Conflicting motivations, however, underpin this apparent unity. Antitrust enforcement has traditionally been associated with the political left, given that at its heart, antitrust law involves challenging entrenched corporate power in the name of the disempowered.[9] Skepticism of such power, and its innate potential to skew political participation, usually entails a defense of democracy and egalitarianism as countervailing ideals.[10] Given this trajectory, it is unsurprising to find contemporary politicians on the left arguing for vigorous enforcement.

The political right's recent interest in antitrust is less straightforward. While some have offered a political-theoretic defense of antitrust law in

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[4] *See, e.g.*, Josh Hawley, *The Big Tech Oligarchy Cries Out for Trustbusters*, WALL STREET J. (Apr. 30, 2021, 4:53 PM), https://www.wsj.com/articles/the-big-tech-oligarchy-calls-out-for-trustbusters-11619816008 [https://perma.cc/V4U2-TE3Y] ("The Big Tech companies are the railroad monopolies, Standard Oil and the newspaper trust rolled into one, and tech CEOs are our robber barons.").

[5] *See, e.g.*, MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 445–53 (1962) (recounting the excesses of Gilded Age elites).

[6] American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); *see also* Open App Markets Act, S. 2710, 117th Cong. (2022). *See generally* Tom Romanoff, *The American Innovation and Choice Online Act: What It Does and What It Means*, BIPARTISAN POL'Y INST. (Jan. 20, 2022), https://bipartisanpolicy.org/explainer/s2992 [https://perma.cc/9CQF-UTE6] (providing a nonpartisan assessment of the legislation).

[7] *See* Leah Nylen, *Tech Critic Lina Khan Gets Bipartisan Committee Nod for FTC Post*, POLITICO (May 12, 2021, 1:14 PM), https://www.politico.com/news/2021/05/12/lina-khan-bipartisan-ftc-487554 [https://perma.cc/54EB-X6SS] ("Lina Khan, the progressive tech critic President Joe Biden nominated to the Federal Trade Commission, won bipartisan approval from the Senate Commerce Committee on Wednesday, earning support from all but four GOP members.").

[8] Cristiano Lima-Strong, *First Khan, Now Kanter? Democrats and Republicans Are Uniting Around Biden's Tech Picks*, WASH. POST (Oct. 7, 2021, 9:13 AM), https://www.washingtonpost.com/politics/2021/10/07/first-khan-now-kanter-democrats-republicans-are-uniting-around-bidens-tech-picks [https://perma.cc/6MC8-9APV] ("Jonathan Kanter, who has represented Big Tech rivals like Yelp and News Corp, skated through his nomination hearing without incident, as both Democrats and Republicans lauded his tougher stance on regulating digital behemoths.").

[9] *See, e.g.*, MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY xviii, the authors elaborate,

> Our reality is formed not just of monopolized supply chains and brands, but an entire language that precludes us from even noticing, from discussing the concentrated power all around us. . . . We can learn from our forebears, going back hundreds of years, who knew something about concentrated corporate power and tensions with liberty.

[10] *See, e.g.*, *id.* at 456 ("This is the choice that has always confronted the American people, liberty for all or a small aristocracy governing our commerce and ourselves.").

general, centered on the principle of distributed property ownership as the cornerstone of "small-r" republicanism,[11] that level of depth is rare. Rather, much of the political right's recent interest in antitrust appears driven by concern over the power of certain *kinds* of firms, rather than the power of private firms in general.[12] The corporations of particular concern, in this case, are those tech firms willing to enforce speech and discourse norms more restrictive than those contained in the American First Amendment.[13] The logic is straightforward enough, even if theoretically unsophisticated: *if tech companies are going to behave censoriously, it is time to break them up.*

The recent embrace of antitrust enforcement in some quarters of the political right, even understood in this narrower sense, has been met with consternation by some right-of-center constituencies.[14] Reinvigorating antitrust law, at least on the scale contemplated by some recent proposals, would represent a major shift away from established orthodoxy—the light-touch approach to antitrust that has become the norm among judges and lawyers.[15] That orthodoxy itself is now under fire.

Antitrust, however, is not the only question of law and first principles being debated in some corners of the right. Recent years have witnessed an ongoing debate about the interpretation of legal texts and the role of judges, primarily centered on the extent to which traditional methodological distinctives of the conservative legal movement—"originalism" and "textualism"—have been defined down into meaninglessness.[16] The chief catalyst for these debates was the Supreme Court's 2020 decision in *Bostock v. Clayton County*, in which Justice Neil Gorsuch deployed textualist rhetoric to reach an unexpected conclusion. Writing for the majority, Justice Gorsuch

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[11] *See generally* JOSH HAWLEY, THE TYRANNY OF BIG TECH (2021) (arguing for a link between antitrust enforcement and classical "small-r" republicanism); *see also* MARK T. MITCHELL, PLUTOCRATIC SOCIALISM: THE FUTURE OF PRIVATE PROPERTY AND THE FATE OF THE MIDDLE CLASS 14 (2022) (arguing that "democracy without private property is fundamentally unstable and will not survive. . . . [B]roadly disseminated private property is an indispensable ingredient for a society of free citizens.").

[12] *See* Phil Gramm & Jerry Ellig, *The Misguided Antitrust Attack on Big Tech*, WALL STREET J. (Sept. 14, 2020, 7:13 PM), https://www.wsj.com/articles/the-misguided-antitrust-attack-on-big-tech-11600125182 [https://perma.cc/3Q7D-Z53J] ("Conservatives want to use antitrust as a club to get social-media companies to curb their alleged political bias.").

[13] *See* Neil Chilson & Casey Mattox, *[The] Breakup Speech: Can Antitrust Fix the Relationship Between Platforms and Free Speech Values?*, KNIGHT FIRST AMEND. INST. (Mar. 5, 2020), https://knightcolumbia.org/content/the-breakup-speech-can-antitrust-fix-the-relationship-between-platforms-and-free-speech-values [https://perma.cc/FW7E-SZX7] ("Based on largely instinctual assessments that platforms face little competitive pressure on how they govern speech, some have sought to expand antitrust enforcers' mandate beyond competition values.").

[14] *See*, Phil Gramm & Christine Wilson, *The New Progressives Fight Against Consumer Welfare*, AM. ENTER. INST. (Apr. 3, 2022), https://www.aei.org/op-eds/the-new-progressives-fight-against-consumer-welfare [https://perma.cc/T6N8-ZG9V] ("With the consumer-welfare standard uprooted, antitrust would become a license to control the American economy, capriciously rewarding favored businesses and punishing disfavored ones. The president has appointed regulators who are openly hostile to those they regulate and to the economic system of the country."); Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND., Oct. 2018, at 1, 1, https://www2.itif.org/2018-consumer-welfare-standard.pdf [https://perma.cc/WM4H-KJ7S] ("[T]here is no legitimate case for abandoning the consumer welfare standard in favor of a vague and hard-to-enforce alternative that represents an amalgam of conflicting goals, some of which would work against progress and the national interest.").

[15] *See* STOLLER, *supra* note 9, at 322 ("[The Chicago School] persuaded much of the political world that there was no longer a consensus, or need, for strong antitrust enforcement.").

[16] *See* Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, AM. MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism [https://perma.cc/7E2X-BPA8], for a representative examples of the critical literature, denouncing "the folly of a morally neutered, overtly positivist approach to interpreting legal texts" and "a denuded jurisprudence that solely relies on proceduralist bromides."

found that Title VII of the Civil Rights Act had, since its enactment in 1974, *always* prohibited private employers from discriminating on the basis of sexual orientation and gender identity, irrespective of the historical contingency of those identity categories themselves.[17] For many members of the conservative legal movement, the *Bostock* decision was a watershed moment.[18] After all, textualism and originalism derived their appeal from their promise to anchor textual meaning in the evidence of history—whether in a concept of "original intent," "original public meaning," or something similar—and hence stabilize it.[19] The possibility that these methods could be invoked in the service of apparently ahistorical conclusions, while strongly suggested by decades of scholarship claiming an "originalist" justification for interpreting constitutional provisions at high levels of generality, was alarming.[20] Were the methods of originalism and textualism themselves perhaps incomplete, or even fundamentally wrong?

It is unnecessary to address that question here. For present purposes, it is notable that the contemporary right's embrace of antitrust and emerging critique of originalism and textualism, while seemingly independent phenomena, tend to share a common philosophical concern: Judges and policymakers of the political right, under the influence of assumptions peculiar to libertarian economic thought, have largely lost the ability to conceive of "law" in its properly classical sense.[21] This classical sense inevitably implicates that bugbear of modern legal scholars: "natural law."

It is commonplace today to hear the argument that law has no other warrant for its moral force and applicability than that a duly constituted sovereign happened to enact it—the view known as legal positivism.[22] Traditionally, though, law was envisioned as more fulsome than that. In the older view, law tracks the shape of fundamental reality in such a way that its authority derives from its *truth*.[23] While certain issues might be more or less obscure, essential points—such as the taboo against incest—are perennially valid.[24] A law authorizing incest, in this view, is simply no "law" at all; rather,

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[17] *See* Bostock v. Clayton County, 140 S. Ct. 1731. 1750, 1754 (2020).

[18] *See, e.g.*, J. Joel Alicea, Dobbs *and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement [https://perma.cc/N45K-E3F2].

[19] *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998), explaining,

> It is hard to tackle a problem if your law winks out of existence in two years or less (much less, since most laws are enacted in a legislature's final weeks or months) . . . . We the living enforce laws (and the Constitution that provides the framework for their enactment and enforcement) that were adopted yesterday because it is wise for us to do so today.

[20] *See, e.g.*, Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 649–54 (2016) (arguing that the Fourteenth Amendment's proscription on caste-based discrimination requires states to authorize marriages between persons of the same sex).

[21] *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 2–4 (2022), for a lengthy argument to this effect, stating,

> The classical law was deeply inscribed in our legal traditions well before the founding era, and was explicit in legal practice through the nineteenth century and into the twentieth century. Indeed, the classical vision was central to the American legal world until it began to break down, initially in the period before World War I and finally after World War II.

[22] *See* Wayne D. Moore, *Legal Positivism*, *in* THE WILEY-BLACKWELL ENCYCLOPEDIA OF SOCIAL THEORY (Bryan S. Turner ed., 2017).

[23] *Cf.* VERMEULE, *supra* note 21, at 8.

[24] *See, e.g.*, Dwight W. Read, *Incest Taboos and Kinship: A Biological or a Cultural Story?*, 43 REVS. IN ANTHROPOLOGY 150, 150 (2014) (restrictions on incest are "perhaps the most universal of cultural taboos").

it is an illicitly issued diktat lacking a necessary warrant.[25] Where this logic is neglected, judges find themselves interpreting legal text apart from a sense of the metaphysical context that makes any law at all intelligible—a kind of blindness that allows the (historically contingent) assumptions of modern thought to color one's analysis. As generations of critics on the left have demonstrated, it is the defining characteristic of modern thought—*especially* modern economic thought—that its own situatedness and historical limitations are ignored in the name of a purported objectivity.[26]

If such a classical tradition does in fact exist, and does contain genuine truths, what would that mean for the law as a whole? That question is only beginning to be reexamined. To date, however, effectively no sustained scholarly attention has been directed to the question of antitrust law's relationship to this classical tradition. As a *historical* matter, this is unsurprising: modern antitrust law and policy emerged in a post-Enlightenment philosophical milieu hostile to that prior understanding of law.[27] But if the possibility of alternative "ontologies of law" is entertained, such silence is not *theoretically* defensible. If the claims of the classical tradition are in fact true—that all law, consciously or not, embeds a certain set of assumptions about the nature of reality, and that some such assumptions may enjoy ongoing validity beyond the civilizational circumstances of their development—then antitrust, like any other field of law, is subject to examination on the classical tradition's terms.

This Article—the first of its kind—will take up that challenge, and it will seek to give an affirmative account of antitrust law through the lens of the classical natural law tradition. First, it will consider the state of existing antitrust orthodoxy and its principal critics, and the need for a fuller-orbed understanding of this area of law that accounts for fundamental philosophical issues. Second, it will examine the concepts of antitrust law at their root, providing an account of why the preservation of a certain kind of competition—as opposed to monopoly or other actions taken in restraint of trade—constitutes a proper use of political authority. In so doing, the argument will *not* rely on the traditional consumer welfare rationales usually invoked in antitrust debates, but it will argue from the first principles of the classical philosophical tradition. Third, this Article will assess the implications—for reliance interests, enforcement decisions, and questions of market definition—of grounding antitrust law and policy in a non-positivist legal ontology. Fourth and last, it will explore how the principles considered here can and will continue to manifest in diverse forms across the American tradition of antitrust law.

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[25] *Cf.* AUGUSTINE, ON THE FREE CHOICE OF THE WILL, ON GRACE AND FREE CHOICE, AND OTHER WRITINGS 10 (Peter King ed., 2010) ("[A] law that is not just does not seem to me to be a law.").

[26] *Cf.* MARK FISHER, CAPITALIST REALISM: IS THERE NO ALTERNATIVE? 8, 81 (2009), arguing,

> For most people under twenty in Europe and North America, the lack of alternatives to capitalism is no longer even an issue. Capitalism seamlessly occupies the horizons of the thinkable. . . . The tiniest event can tear a hole in the grey curtain of reaction which has marked the horizons of possibility under capitalist realism. From a situation in which nothing can happen, suddenly anything is possible again.

[27] *Cf.* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2280–93 (2013) ("[E]conomic conditions . . . gave rise to a pervasive number of these so-called trusts, the various legal structures in which these combinations were housed, and the laws in effect prior to the enactment of state and federal antitrust legislation that attempted to regulate them.").

Debates over the trajectory of American antitrust law are likely here to stay, at least for the foreseeable future. The question is whether interlocutors are willing to ground their terms in an intelligible, philosophical paradigm.

I. ANTITRUST: A DISCIPLINE DEBATING ITSELF

Modern American antitrust law is just over a century old, yet over that time it has already undergone a substantial process of evolution.[28] In considering current debates over the trajectory and future of antitrust doctrine, it is worth briefly tracing the course of American antitrust law from the days of the great trusts until the present. From there, it is possible to obtain a fuller picture of the current doctrinal consensus that has come to enjoy broad support and, more recently, the rise of an increasingly vocal reform movement.

While the general concerns underlying modern antitrust law were not foreign to premodern societies—no less a luminary than Martin Luther denounced, in 1524, merchants seeking to "buy up altogether the goods or wares of a certain kind in a city or country, so that they alone have such goods in their power, and then fix prices, raise and sell as dear as they will or can"[29]—the issue took on new urgency during the Industrial Revolution. John D. Rockefeller's Standard Oil Company had swelled to gigantic proportions, dominating the industry, and railway systems had begun to cartelize, causing widespread alarm.[30]

In response, Congress passed the Sherman Act in 1890, which directly banned monopolies and attempts to monopolize, and the Clayton Act in 1914, which more specifically identified certain actions—such as anticompetitive mergers and acquisitions—as tending to create monopolies.[31] The FTC Act, also passed in 1914, generally barred unfair and deceptive acts and practices and created a federal enforcement apparatus.[32] The effects of these laws on corporate consolidation and expansion were quickly felt. A steady stream of court decisions restricting various business practices and articulating a myriad of rationales for those restrictions emerged over the following decades.[33]

This period of experimentation did not last. The 1970s witnessed the emergence of a new approach to antitrust in the work of the "Chicago School" of antitrust scholars, many of whom would go on to serve as federal judges or as law professors at leading schools.[34] Chief among them was Robert Bork, whose 1978 book *The Antitrust Paradox: A Policy at War With*

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[28] *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 260 (1989), for an extensive overview of this process, particularly in its early years, stating, "After a decade of profound change in scholarly perspective, judicial analysis, and federal enforcement policy, antitrust scholars still disagree vigorously over core antitrust goals and methods, and continue to embrace diverse political and economic visions."

[29] Martin Luther, *On Trade and Usury*, *in* THE OPEN CT. 16, 27 (1897); *see also* John Ehrett, *Martin Luther's Theology of Antitrust*, MOD. REFORMATION (June 3, 2022), https://modernreformation.org/resource-library/web-exclusive-articles/martin-luthers-theology-of-antitrust [https://perma.cc/H3L8-JB5Q] (expounding Luther's analyses).

[30] *See, e.g.*, Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*, 64 ANTITRUST BULL. 295, 296–302 (2019) (recounting this history).

[31] *See* Sherman Act, 15 U.S.C. § 1; Clayton Act, 15 U.S.C. § 12.

[32] *See* FTC Act, 15 U.S.C. § 41.

[33] *See* Glick, *supra* note 30, at 304–09 (summarizing these developments).

[34] *See* STOLLER, *supra* note 9, at 230–31 (recounting the history of this process).

Itself, represented a bombshell intervention in then-contemporary debates.[35] While Bork was certainly not the only representative of the Chicago school, for present purposes this discussion will center on his formulation of the fundamental issues due to his prominence and lasting influence.

Bork was highly critical of the profusion of policy goals that he took to be underpinning antitrust enforcement in the decades preceding, and he was generally dismissive of the Supreme Court's efforts to articulate various theoretical justifications for the antitrust laws in the first place.[36] On his view, the Court's antitrust caselaw represented an unsystematic project shot through with anti-business bias and one that had systematically failed to provide any real warrant for its own existence.[37]

On Bork's view, to the extent the antitrust laws existed to preserve "competition," it was necessary to interpret that term in a very particular way. Specifically, Bork advanced a definition of "competition" as "a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."[38] He subsequently went on to define the terms "monopoly" and "restraint of trade" as "terms of art for situations in which consumer welfare could be so improved," such that "to 'monopolize' or engage in 'unfair competition' would be to use practices inimical to consumer welfare."[39]

It is, at the very least, highly dubious whether Bork's definitions of "competition" and "monopoly" really have much to do with what ordinary language speakers mean by those terms. After all, the English language has a vast profusion of words connoting "practices inimical to consumer welfare"—buffalo, swindle, grift, scam, and so forth. Does "monopolize" really connote *nothing* else? One might as well substitute the nonsense word "pfflyx" for the same result.

But for Bork, defining "competition" in any other sense would produce profoundly undesirable results.[40] A broader concept of "competition" as something worth preserving would undermine the reliability and consistency of the law by (1) leaving unclear what business practices were proscribed by the antitrust laws, (2) illicitly punishing successful businesses for delivering value to consumers, and (3) harming consumers by forcing them to accept less-than-optimal economic conditions as a result of depriving successful market entrants of the benefits of scale.[41] On net, the philosophical costs of adopting an unintuitive reading of key antitrust terms were outweighed by the advantages of collapsing judges' analytical responsibilities into the sole task of determining allocative efficiency, a move that courts would later come to understand as an evaluation of the effects of a challenged business practice on consumer prices.[42]

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[35] *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX (reprint ed. 2021).
[36] *Id.* at 47–48.
[37] *Id.* at 1–7, 12.
[38] *Id.* at 58.
[39] *Id.*
[40] *Id.* at 58–59.
[41] *Id.* at 3–6.
[42] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720 (2017) ("Although Bork used 'consumer welfare' to mean 'allocative efficiency,' courts and antitrust authorities have largely measured it through effects on consumer prices.").

This narrow understanding of "competition" did, indeed, offer a more predictable approach than the preceding antitrust tradition. And the effects of this new paradigm for antitrust would go on to be broadly felt across the corpus of antitrust law.[43]

Over time, the Chicago School's understanding of "competition" in the context of antitrust has been concretized into the "consumer welfare standard"—a principle of judge-made law that treats "consumer welfare" as the lodestar for determining whether a particular business practice should or should not be proscribed.[44] For example, when considering whether a proposed merger violates the antitrust laws, a court will look primarily to its effects on the prices consumers will pay.[45] This follows from the intuition that monopolies or oligopolies facing little competition have an incentive to charge extortionate prices once they control the market.[46]

On its face, this version of "consumer welfare" sounds like an unimpeachable ideal. And indeed, in response to a recent proliferation of intellectual genealogies—which tend to call both the standard's intellectual provenance and market outcomes into question[47]—defenders of the standard have pointed to its apparently expansive scope.[48] Who could possibly disagree with such a goal?

But a paradox embedded in this argument becomes clear upon reflection. If "consumer welfare" is interpreted expansively, it loses the very grounding in objectivity and enforceability that led Bork to pen his critique in the first place. Yet if "consumer welfare" means only price effects, then it is a highly reductive approach that seems to miss the point of antitrust as a domain of law altogether. It would be a very strange "antitrust" law that, in the name of lower prices alone, would theoretically allow a single corporation to dominate an entire sector of the economy as long as it did not charge outrageous prices.

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[43] *See* AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 137–38 (2021) (detailing the dramatic effects of the Chicago School's approach on the subsequent development of antitrust law).

[44] *See, e.g.*, 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, 396–97 (2020) ("The 'Chicago' approach—consistent with a broader body of scholarship that extended well beyond the University of Chicago—gained broad acceptance in the courts and antitrust enforcement agencies. The Supreme Court adopted Bork's language in 1979, declaring that 'Congress designed the Sherman Act as a "consumer welfare prescription."' ").

[45] *See* Khan, *supra* note 42, at 720.

[46] *See, e.g.*, *id.* at 723 ("Standard Oil charged monopoly prices in markets where it faced no competitors; in markets where rivals checked the company's dominance, it drastically lowered prices in an effort to push them out.").

[47] *See, e.g.*, Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2354 (2013); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69–70 (1982); *see also* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 597 (2019) ("As recent empirical research reveals, the consumer welfare standard, paradoxically, has neither helped consumers nor their welfare. Instead, the US economy has a market power problem, with a small number of firms reaping significant supracompetitive profits in many industries.").

[48] *See* Greenfield et al., *supra* note 44, at 400, 421, explaining,

> The application of the consumer welfare standard has evolved with economic learning since the 1960s, and can continue to evolve as needed to meet many of the antitrust populist critiques, insofar as they identify failures to address anticompetitive conduct that results in higher prices or reduced output, quality, or innovation. . . . [T]he consumer welfare standard and agency practice do account for non-price harm to consumers.

Fortunately, few, if any, discussants have been willing to follow the price-effects line of logic to its conclusion.[49] The majority of those involved in debates over the consumer welfare standard seem to agree that antitrust has at least *something* to do with competition in markets as a good in itself; beyond that, the picture grows cloudy: What, exactly, is antitrust *for*—and is it *good*?[50] That first-order question seems to be no more settled today than it was in Bork's time.

Enter the recent cadre of scholars and critics loosely categorized as "Neo-Brandeisians"—after Louis Brandeis, the Supreme Court Justice perhaps most willing to interpret the antitrust laws broadly.[51] Where Brandeis once served as the particular target of Bork's critique, his latter-day admirers have adopted him as an icon, a figure who presciently contended that the purpose of the antitrust laws extends beyond mere price effects to the larger question of power distribution.[52] On a Brandeisian model, the antitrust laws exist to help prevent dominant economic players from attaining such market power that the possibility of meaningful democratic participation by citizens is eroded.[53] In the words of Lina Khan, perhaps today's foremost Neo-Brandeisian, modern antitrust law's "undue focus on consumer welfare is misguided" in that it "mistakenly supplants a concern about process and structure (i.e., whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e., whether consumers are materially better off)."[54] Significantly, this Neo-Brandeisian critique is no more—and no less—normative in character than Bork's own.[55] Where Bork took predictability as his highest value, as a quintessential function of law qua law, the Neo-Brandeisians invoke democracy and the preservation of its necessary conditions as theirs. How should a judge or policymaker weigh these disparate claims?

As the debate currently stands, this foundational question confronting scholars and policymakers today is not one that can be settled by recourse to historical data. Textualists[56] generally rule appeals to legislative history out

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[49] For one such example of this extreme position, see Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth Maximization?*, 1994 BYU L. REV. 499, 499–500.

[50] For an overview of this problem, see Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 259–66 (1995).

[51] *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018) (recounting Justice Brandeis's contributions).

[52] *See id.* ("Brandeis and many of his contemporaries feared that concentration of economic power aids the concentration of political power, and that such private power can itself undermine and overwhelm public government.").

[53] *See id.*

[54] *See* Khan, *supra* note 42, at 737.

[55] *See* John Ehrett, *The Bork Paradox and the Conservative Legal Movement*, 5 AM. AFFS. 54, 60 (2021), https://americanaffairsjournal.org/2021/08/the-bork-paradox-and-the-conservative-legal-movement [https://perma.cc/LN9H-KK7N], the authors explain,

> Bork's own argument in *The Antitrust Paradox* is a case for the value of economic rationality as an 'objective' interpretive principle for the federal antitrust laws. . . . If the eponymous tempting of America is the judicial 'habit of legislating policy from the bench,' does not *The Antitrust Paradox* offer such an object of judicial desire?

[56] Textualists are referenced to the extent that "antitrust textualism" is even intelligible in the case of a statute worded as expansively as the Sherman Act. For an extended argument that the antitrust statutes have consistently been read against the import of the text, see Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1205–08 (2021), stating, "It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital."

of hand,[57] and "purposivists" struggle to make their case where the meanings of foundational concepts are unstable and contingent. The threat of a permanently irresolvable conflict of visions beckons between those who want to break up trusts in the name of one moral value and those who reject such interventions in the name of an alternate value.

Might the older, classical tradition of natural law perhaps offer a way through this impasse? To that end, the next Part will begin to develop a positive account of market competition, rooted in a substantive metaphysical foundation that can more effectively support a reinvigorated enforcement of antitrust law.

II. THE CLASSICAL TRADITION AND THE FOUNDATIONS OF ANTITRUST

In contemporary political debates, "antitrust" is usually invoked as if the term represents something familiar, something about which all discussants generally agree. This apparent agreement, however, is superficial. In such conversations, most participants likely understand "antitrust" to refer to the general corpus of positive laws governing antitrust enforcement—the Sherman and Clayton Act, the FTC Act, and the large body of jurisprudence that has grown up around them. All too often, though, what is left unexamined is the possibility of profound disagreement about the meaning of the terms that constitute those statutes. In Fregean terms, the *sense*, or textbook meaning, of "antitrust" is understood easily enough, while the *reference*—the set of actual realities that the laws encode—remains opaque.

Given the vast amounts of time and money expended on antitrust enforcement and defense, along with the significant reliance interests riding on court decisions interpreting the antitrust laws, it is remarkable how philosophically unstable the field's core terms still seem to remain. It is a state of affairs that philosopher of law Oliver Black—in what is (to date) the only sustained philosophical examination of antitrust law's core concepts—describes as the "scandal of antitrust."[58] As the previous Part explained, the question of the value judgments underpinning antitrust enforcement is seriously contested today. It is universally agreed that antitrust has *something* to do with "competition," but exactly what is unclear. As the rise of Neo-Brandeisian critiques has shown, Bork's counterintuitive definition of "competition" never fully caught on—but it is not enough to simply find that definition unsatisfactory. If an alternative theory is to emerge, one must be prepared to provide an alternative account of the concept: what, after all, *is* "competition" anyway? And why should the law seek to preserve it given other potential countervailing interests? An account of antitrust law rooted in the classical tradition—the tradition of natural law commonly associated with Aristotle, Thomas Aquinas, and others—must engage these questions head-on.

In developing such an account, this Part will argue for the following two claims:

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[57] *See, e.g.*, Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 627–29 (2005) (critiquing efforts to reconcile textualist interpretive methodology with the antitrust statutes).

[58] OLIVER BLACK, CONCEPTUAL FOUNDATIONS OF ANTITRUST 6 (2005).

(1) Antitrust law should seek to preserve economic competition, in the intuitive sense of the term (the first-order goal of antitrust law); and

(2) This first-order goal is justified because, on a classical metaphysical paradigm, economic competition ultimately maximizes the welfare of both individuals and authorities, in which "welfare" is understood in the traditional sense as "participation in various forms of good"[59] (the second-order goal of antitrust law, and—classically speaking—the implicit goal of all law as such[60]). This conception of antitrust is, accordingly, more consistent with the "common good" than alternative accounts.

A. COMPETITION: A DEFINITION AND DEFENSE

What is "competition" in the first place? As seemingly facile as the question may appear, it is precisely this issue that rests at the heart of many debates over the nature and goals of antitrust. And historically, the tendency to take the term for granted has masked substantial differences in opinion about its substantive content.

Antitrust scholars have long recognized this ambiguity. In the opening pages of *The Antitrust Paradox*, Bork laid out five potential definitions of "competition," all of which had circulated more or less unsystematically through antitrust jurisprudence at various points.[61] It is no exaggeration to observe that Bork's larger argument stands or falls according to whether one finds his account of "competition" plausible.

First, "competition" might be defined as "the process of rivalry."[62] Bork even admitted that this definition reflected "a natural mode of speech"—though for him, it was still "a loose usage" that tended to "invite the further, wholly erroneous conclusion that the elimination of rivalry must always be illegal."[63] Identifying competition and rivalry, Bork argued, was wholly unsatisfactory because it would "make[] rivalry an end in and of itself, no matter how many or how large the benefits flowing from the elimination of rivalry."[64] One would risk jeopardizing a society "founded upon the elimination of rivalry," a project "necessary to every integration or coordination of productive economic efforts and to the specialization of effort."[65] The prospect of "the complete atomization of society" beckons.[66]

Second, "competition" might be defined as "the absence of restraint over one person's or firm's economic activities by any other person or firm."[67]

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[59] *Id.* at 34.
[60] *See* VERMEULE, *supra* note 21, at 35, arguing,

> There is no escape, for interpreters, from the duty to answer, one way or another, the questions whether government is acting in the public interest and whether government action is adequately reasoned. . . . For lawyers, it simply will not do to become excessively skeptical about the common good, or to take the possibility of disagreements about the common good as fatal objections to drawing upon the concept or its cognates in legal interpretation.

[61] BORK, *supra* note 35, at 55–59.
[62] *Id.* at 55.
[63] *Id.*
[64] *Id.* at 56.
[65] *Id.*
[66] *Id.*
[67] *Id*.

The problem with this definition is that it would seem to treat *all* contracts as intrinsically anticompetitive.[68]

Third, "competition" might be defined as a market state where an individual participant's decisions do not change the price of a particular good or service.[69] Bork reasoned that this form of "perfect competition" simply did not obtain under real-world conditions and so was an illicit goal of antitrust law.[70]

Fourth, "competition" might be understood as a state of affairs characterized by market fragmentation and the existence of small competitors—a definition once put forward by Chief Justice Earl Warren.[71] Bork notes, correctly, that this definition is unusually imprecise.[72] So, too, if the definition is more charitably read as merely stating that "competition" is defined by the existence of competitors, it is simply tautological.

Fifth and last, "competition" might simply be taken as a term of art referring to "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."[73] As previously noted, this is the definition that Bork himself ultimately elects to embrace.[74]

Definitions two, three, and four are niche understandings of "competition," and have few, if any, advocates today.[75] For all intents and purposes, contemporary debate over the meaning of "competition" involves a choice between Bork's first and fifth definitions.[76]

It is worth pointing out that Bork's argument against the "natural" understanding of competition is plainly a straw man: all competition is not agonistic in an absolute sense. Two runners competing in the Olympics are "coordinated" in the sense that they follow an agreed-upon set of rules, but it strains language to the breaking point to suggest that in so doing they are not "competing." And as previously noted, Bork's choice of the fifth definition simply does not accord with the ordinary sense of the word. To the extent it is possible to conceive of "competition" in a way that does not pathologize all productive associations as such, these considerations are powerful prima facie reasons to prefer some version of the first definition.

All of these factors, taken together, weigh in favor of adopting something like Black's formulation of "competition" in the sense contemplated by Bork's first definition: "X and Y compete where X achieves X's goal only if Y does not achieve Y's."[77] This model can be formalized as follows:

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[68] *Id.*
[69] *Id.* at 57.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 57–58.
[73] *Id.* at 58.
[74] *Id.*
[75] *Id.* at 55–59.
[76] Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 851–52 (2014) (explaining Bork's challenge to "the broader question of whether antitrust law should serve primarily or exclusively to police practices involving the exercise of market power to diminish market competitiveness or should also take into account amorphous concerns with fairness, small business independence, and deconcentration for its own sake"—that is, his challenge to the "category 1 definition" in Bork's typology)
[77] BLACK, *supra* note 58, at 7.

X competes with Y where there are actions Ax and Ay and goals Gx and Gy such that:

(1) X does Ax with the intention of achieving Gx;

(2) Y does Ay with the intention of achieving Gy; and

(3) X achieves Gx only if Y does not achieve Gy.[78]

This definition aligns with the ordinary sense of the term and goes far further to explain the logic of the antitrust laws in the first place than Bork's far more restricted definition. However, articulating an intelligible—and recognizable—definition of "competition" is merely a first step. *Justifying* said competition is a different question entirely, and far more fraught.

B. THE CLASSICAL NATURAL-LAW TRADITION: AN EXCURSUS

Before proceeding to consider how this concept of competition can be justified according to the terms of the classical natural law tradition, it is necessary to provide a brief overview of certain core philosophical concepts that have largely dropped out of the modern Anglo-American intellectual grammar.

The classical philosophical tradition of natural law is traceable at least as far back as Aristotle[79] and would go on to be interpolated at some level into the mainstream of Western Christian thought more broadly via engagement with the Islamic East and the work of theologian Thomas Aquinas.[80] While it is not possible here to provide a detailed examination of the tradition as a whole—many excellent studies exist that provide such an account[81]—several core themes are of central importance for any account of antitrust that seeks to ground itself in the classical paradigm. These themes include *essence*, *potentiality*, *virtue*, and *goodness* as such.

At the bottom, the classical tradition is committed to an ontology in which the world is composed of discrete substances that may be sorted into different classes according to their "essences," or sets of features without which they would not be members of the class.[82] For Aristotle, a human being may be described, in terms of its essence, as a "rational animal."[83] While human beings share with other animals the characteristics of motility, sensibility, agency, the need to consume nutrients, and so forth, their intellectual faculties appear to be—if not *qualitatively* different, at least *quantitatively* superior.[84] The precise nature of this "rationality" is more

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[78] *Id.* at 10.

[79] *See* ARISTOTLE, RHETORIC I.12, 73 ("[B]y 'universal' law I mean the law of nature. For there is a natural and universal notion of right and wrong, one that all men instinctively apprehend, even when they have no mutual intercourse nor any compact.").

[80] For an overview of this process and a critique of the results, see Clark A. Merrill, *Leo Strauss's Indictment of Christian Philosophy*, 62 REV. POL. 77, 80–85 (2000), stating, "Aquinas transformed classical natural right; or it might be more accurate to say that he accepted the exoteric teaching of the classical political philosophers as the true natural right teaching."

[81] *See, e.g.*, HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY (Thomas R. Hanley trans., Liberty Fund 1998) (1936); VERMEULE, *supra* note 21, at 188 n.10 (collecting authorities).

[82] *See* ARISTOTLE, *Physics*, *in* THE COMPLETE WORKS OF ARISTOTLE, VOLUME 1: THE REVISED OXFORD TRANSLATION 315, 339 (Johnathan Barnes ed., R. P. Hardie & R. K. Gaye trans., 1991) (expounding, "[T]hat which is completely unchangeable, the primary reality, and the essence of a thing, i.e. the form").

[83] *See* ALASDAIR C. MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 5–6 (1999).

[84] See ARISTOTLE, *De anima* III.11.

debatable than "animality"; one scholar of the tradition describes this supposedly distinctive faculty as the "ability to discern among finite goods."[85] One might prefer to offer an alternative formulation of the "essence" of a human being—that is, an account of precisely that which distinguishes human beings from stones, trees, and chimpanzees—but the general point stands.

While the term "classical tradition" may imply that such a worldview of "essences" has been superseded—and indeed, "essentialism" is a favored target of postmodern critique[86]—the core of the above argument is little more than a baseline assumption of Western culture. To be sure, many metaphysicians and other philosophers have offered alternative ontologies over the years, but vanishingly few have laid out the implications of such new paradigms for the possibility of legal and social order more broadly.[87] It is entirely reasonable to assert that the Western legal tradition broadly takes a "substance metaphysics" for granted: the cluster of phenomenological sense impressions customarily labeled as "person" is both the subject and object of the laws; this "person" is generally assumed to have certain properties (such as mental states and the capacity to intend actions) that, as categories, exist across all tokens of the type of "person."[88]

For the classical tradition, taking the reality of essence seriously requires that one can ask of any substance not only "what it is," but also "what it is *for*."[89] On a traditionally Aristotelian account, woven throughout both the natural and human worlds is a pervasive purposiveness: an orientation towards particular "ends" or "destinations."[90] The word "trajectory" may prove more illuminating here than the traditional phrase *telos*, or "goal"; it is the trajectory, metaphysically speaking, of an acorn to grow into an oak tree if it is planted in rich soil and carefully tended.[91]

An acorn, of course, is not an oak tree—or, more precisely, it is not *yet* an oak tree. Latent within the acorn is the capacity, or potential, to become an oak tree if certain conditions are met. The satisfying of those conditions will allow the acorn to develop in a manner consistent with its nature *as* an acorn. Hence, a thinker working within the Aristotelian tradition would

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[85] MARY L. HIRSCHFELD, AQUINAS AND THE MARKET: TOWARD A HUMANE ECONOMY 109 (2018).

[86] For a fulsome overview of these debates and a proposed resolution, see JASON ĀNANDA JOSEPHSON STORM, METAMODERNISM: THE FUTURE OF THEORY 91–94 (2021).

[87] This is precisely the point that has made the study of Martin Heidegger's philosophy an intellectual lightning rod: in what sense, if any, is his revisionist metaphysics related to (or, conversely, inextricably related to) his Nazi political allegiances? *See generally* Pierre Bourdieu, THE POLTICAL ONTOLOGY OF MARTIN HEIDEGGER (1991) (outlining this controversy).

[88] *See, e.g.*, EDWARD FESER, ARISTOTLE'S REVENGE: THE METAPHYSICAL FOUNDATIONS OF PHYSICAL AND BIOLOGICAL SCIENCE 13, 95 (2019), expounding,

> The man of common sense supposes that it is one and the same self that undergoes the bodily and psychological changes he experiences. . . . Like the man on the street, [the ordinary scientist] supposes that he is dealing with physical entities that exist in- dependently of his conscious awareness of them, and he also supposes that his own eyes, ears, hands, etc., of which he makes use in carrying out his investigations, are further physical objects that exist alongside of and causally interact with the physical things he is studying.

[89] *See, e.g.*, ARISTOTLE, *supra* note 82, at 340 ("Now surely as in action, so in nature; and as in nature, so it is in each action, if nothing interferes. Now action is for the sake of an end; therefore the nature of things also is so.").

[90] *See, e.g.*, FESER, *supra* note 88, at 375–77 (expounding and defending an account of natural teleology).

[91] *See* John M. Rist, *Some Aspects of Aristotelian Teleology*, 96 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N 337, 346 (expounding Aristotle's account of how "[t]he acorn is a living thing which will grow into an oak-tree").

reason that the acorn is an acorn *actually* and an oak tree *potentially*.[92] The acorn's capacity to become an oak tree is described in this approach as a "potency" of the acorn; it is something unrealized but realizable in principle—which could be actualized under certain conditions.[93]

The net effect of this metaphysical approach is that all beings exist as composites of actuality and possibility, meaning that it is possible to speak of them not merely in terms of what they are, but also in terms of what they *could be*. A man might live a sedentary lifestyle and hence be physically weak, but that weakness is not necessarily intrinsic to his "man-ness"; he can choose to adopt an exercise regimen and so develop his potentialities for fitness. The development of certain potentialities, Aristotle and the tradition following him have argued, is bound up with what is meant by "virtue."[94]

To grasp what is meant by this, consider that the term "good" is regularly predicated on nonhuman entities such as clocks and sandwiches, a habit that would be difficult to explain if "good" must be understood in a strictly deontological (or preference-maximizing) sense.[95] "Good," as used in this colloquial sense, seems to refer to a substance (usually an object, but not necessarily—who has not praised a faithful canine as a "good dog" upon a particularly successful fetch?) acting *in a manner consistent with its nature*.[96] A "good clock" is one that reliably tells time; a "bad clock" runs fast or slow. Likewise, a "good sandwich" satisfies one's expectations for what a *sandwich* should be—tasty, satisfying, and so on.

In this model, there is no a priori reason why one cannot extend a similar line of reasoning to human beings. In the simplest terms, a "good person" is someone who behaves in the manner that the speaker assumes that all persons, *as* persons, ought to behave—someone who, it might be said, properly "exercise[s] . . . those powers and capacities that are distinctively human, that is, intelligence and rational understanding."[97]

Those powers and capacities which the classical tradition identified as fortitude, justice, prudence, and temperance[98]—a list that the Christian tradition would go on to expand to include faith, hope, and love[99]—are "virtues." These qualities condition all human actions and may be developed over time through discipline and attentiveness. In lieu of stressing categorical

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[92] *Cf.* FESER, *supra* note 88, at 16 ("Water, steel, stone, flesh, etc. each have different potentials, and these differences reflect the differing actual features of these substances (such as their different chemical compositions).").

[93] *See* ARISTOTLE, *supra* note 82, at 426 ("[W]hen fire or earth is moved by something the motion is . . . natural when it brings to actuality the proper activities that they potentially possess.").

[94] *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 191 (3d ed., Univ. of Notre Dame Press 2007) (explaining that virtues are "acquired human qualit[ies] the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.").

[95] *See id.* at 57–58 (explaining that classically, " 'man' stands to 'good man' as 'watch' stands to 'good watch' or 'farmer' to 'good farmer' ").

[96] *See id.* at 58 (identifying the "functional concepts . . . of *man* understood as having an essential nature and an essential purpose or function").

[97] HENRY B. VEATCH, RATIONAL MAN: A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS 31 (1962).

[98] *See* Brad J. Kallenberg, *The Master Argument of MacIntyre's* After Virtue, *in* VIRTUES AND PRACTICES IN THE CHRISTIAN TRADITION: CHRISTIAN ETHICS AFTER MACINTYRE 7 (Nancy Murphy, Brad J. Kallenberg & Mark Thiessen Nation eds., 1997) (analyzing the provenance of the four cardinal virtues).

[99] *See* Joseph P. Wawrykow, *The Theological Virtues*, *in* THE OXFORD HANDBOOK OF AQUINAS 287 (Brian Davies ed., 2012) (providing a detailed account of these virtues).

and prescriptive rules, this tradition of moral reasoning (virtue ethics) focuses on the development of that faculty by which an individual assesses the circumstances surrounding a moral choice and makes a well-chosen decision.[100]

The impact of all this is that, for the classical tradition, moral reasoning—and so moral justification—takes its cues from the essential character of human beings as actors within empirical reality. As scholar Henry Veatch argues:

> [I]t is the everyday world . . . that we find ourselves in and that we must continue to live in as human beings, that is of significance for ethics. It is here that ethics must find the evidence for all its principles and the confirmation of all its conclusions.[101]

Transposed into the political context, Veatch's point cashes out as follows: when considering theories of justification for some action or other, a prudent authority will look to that action's anticipated effect on human beings and human beings' ability to cultivate virtue—that is, their possibility of developing as human beings by rightly actualizing the potencies intrinsic to their nature as human beings. The implication of this vision for law, qua law, is that laws themselves constitute "ordinance[s] of reason for the common good, made by him who has care of the community, and promulgated."[102] Through the distinctively human exercise of reason, the political authority ascertains whether a contemplated action will redound to the good of his or her subjects—a good that is understood in terms of their development of virtue—and acts accordingly.[103]

As before, a full defense of this approach to ethics and politics lies far beyond the scope of this study. What is relevant for the present purpose—the development of a coherent conception of antitrust law that roots its justification in the classical philosophical tradition—is the intelligibility of this understanding of moral reasoning, not necessarily its plausibility. Let the principal takeaway be a recognition that the classical tradition is, broadly speaking, committed to a view of the world in which natural science, ethics, and politics all exist within a unified intellectual structure, with disciplines inevitably shading into one another on the margins. And that tradition is profoundly *humanistic* in that, where politics are concerned, it places the nature of human beings and their moral development at its center.

C. JUSTIFYING COMPETITION

With the philosophical landscape of the classical tradition at least partially in view, it is now possible to consider in detail the relationship between competition and "welfare"—or more familiarly for students of that

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[100] *See, e.g.*, ALASDAIR MACINTYRE, ETHICS IN THE CONFLICTS OF MODERNITY: AN ESSAY ON DESIRE, PRACTICAL REASONING, AND NARRATIVE 243 (2016) (explaining the logic of virtue ethics as claiming that "agents do well only if and when they act to satisfy only those desires whose objects they have good reason to desire, that only agents who are sound and effective practical reasoners so act, that such agents must be disposed to act as the virtues require, and that such agents will be directed in their actions toward the achievement of their final end.").

[101] VEATCH, *supra* note 97, at 49.

[102] THOMAS AQUINAS, SUMMA THEOLOGICA II.90.4.

[103] *Cf.* VERMEULE, *supra* note 21, at 30–37 (explaining the role of the political authority in working toward their subjects' good). Curiously, individual virtue *qua* virtue is largely absent from Vermeule's analysis of the classical legal tradition. *Id.*

tradition, "flourishing"—and whether it is possible to derive a satisfactory justification for antitrust enforcement from the tradition's premises.

While Bork and his followers are best known for defending "consumer welfare" as the lodestar of antitrust law, similar approaches are commonplace. As Black points out, "[t]he argument [for the value of economic competition] usually invoked nowadays by theorists and practitioners of antitrust is a consequentialist one, that competition maximises welfare."[104]

However, Black himself does not follow that consensus, instead arguing that "orthodox" welfare-based justifications for antitrust should be rejected, on the basis that a "thick" account of welfare entails the claim that competition does not maximize welfare. Black explains:

> In more detail, the welfare-based argument raises three questions: (1) What is it to maximise welfare? (2) Does competition maximise welfare? (3) Is it a good thing to maximise welfare? The argument requires the answer yes to (2) and (3). Economics uses a thin sense of 'maximise welfare' which answers (1) in a way that supports the answers yes to (2) but no to (3): it therefore fails to justify competition and antitrust. That problem is perhaps solved by moving to a fuller, philosophical, concept of welfare, but this gives satisfactory answers to (1) and (3) at the cost of supporting the answer no to (2). So again there is a failure of justification. Impaled on this dilemma, we should contemplate alternative justifications for competition and antitrust.[105]

Black does not go on to offer such an alternative justification, but that is immaterial. His challenge must be confronted head on because, for a proponent of the classical tradition, defending a legal regime on any basis *other* than "welfare"—conceived in natural law terms—is an intrinsically misconceived effort, like searching for a square circle. Some argument is required that can support an affirmative answer to Black's second question—"does competition [maximize] welfare"—where "welfare" is understood in its "fuller" sense.

To that end, this study will advance three such arguments, all of which ultimately rely on premises distinctive to the classical tradition:

> (1) Economic competition involves the development of the uniquely human potentialities of the individuals engaged in such competition, in a manner that conduces to their development and cultivation of virtues;
>
> (2) Economic competition, on balance, is less likely to result in exploitation of individuals, where exploitation is understood as a failure to treat human beings in a manner consistent with their natures; and
>
> (3) Economic competition helps secure the political authority's ability to maintain peace and order by preventing overreliance on any single entity.

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[104] BLACK, *supra* note 58, at 33.
[105] *Id.* at 34.

Each of these three arguments will be considered individually.

1. Competition and Actualization

The first of the three classically oriented justifications for economic competition, considered in the context of antitrust law, begins from a radically different standpoint than traditional rationales for antitrust. This justification contends: the economic competition fostered by antitrust law, rightly conceived, creates a milieu within which individual human beings, as constituent members of firms engaged in economic competition, actualize their distinctive potentialities, effectively developing their own distinctly human capabilities through the exercise of intellectual and moral virtues.[106] Crucially, this justification for competition as the core of antitrust is not focused on price or abstract ideals, but on the *benefits to the market participants themselves*, understood in a classical philosophical register.

To grasp the logic here, begin with the simplest imaginable example of market competition: two youths operating competing lemonade stands on opposite sides of a busy thoroughfare. For the sake of the example, assume that the number of passersby is finite and there is insufficient business, such that both youths' stands could be economically profitable. Assuming that both youths share a goal of "generating profit," the definition of competition—"X achieves X's goal only if Y does not achieve Y's"[107]—is satisfied.

To pursue their common goal, the lemonade stand operators must take steps to compete effectively. The range of options open to them is, in principle, effectively infinite.

They might creatively imagine new ways to expand the range of products offered. They might develop the artistic competencies necessary to advertise their lemonade more effectively along the street. They might form relationships with individuals interested in serving as bulk buyers or third-party sellers of their wares. They might learn—and do—the math to determine that offering free samples will better allow them to attract business. In short, the reality of competition conduces the development of uniquely human virtues as competitors may do the following: (1) discipline themselves to work hard in their roles, thereby cultivating the virtues of fortitude and temperance; (2) apply mathematical knowledge in a manner consistent with the virtue of prudence; or (3) exemplify justice by not watering down their products and engaging in fair dealing with their rival.

On this understanding, even a competitor who proves unsuccessful in the market has not experienced an unqualified loss. To the extent that a market participant was successful *at all*, even temporarily, they were required to

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[106] *Cf.* Kenneth G. Elzinga & Daniel A. Crane, *Christianity and Antitrust: A Nexus*, *in* CHRISTIANITY AND MARKET REGULATION: AN INTRODUCTION 74, 94 (Daniel A. Crane & Samuel Gregg eds., 2021), the authors explain,

> Even at a personal level, competition within ethical and legal boundaries can be considered salutary for all involved. . . . In the same way that an athlete running her hardest may hope to spur on her rivals to better performances, the Christian in business who competes hard for business need not wish her rival to perish, but may indeed hope that her competition spurs other firms to improvement.

The argument sketched here brings Elzinga and Crane's argument, which is couched in distinctively Protestant terms, into conversation with the classical tradition of virtue ethics and the common good.

[107] BLACK, *supra* note 58, at 7.

develop their distinctive human capacities and exemplify uniquely human virtues in the process.

It might be objected here that the existence of competition risks leading either or both participants into self-destructive behavior or socially deleterious behavior—for instance, operating a lemonade stand all day and all night, at the expense of necessary rest. However, if the claims of the classical tradition are true and if human beings, qua human beings, have certain common features and propensities, this situation will inevitably prove unsustainable: a market participant who behaves self-destructively will, eventually, be rendered unable to compete at all.

What of a scenario in which competition is, as it is in many cases, fundamentally asymmetric? Human beings are not universally fungible; rather, they enter markets with preexisting advantages and disadvantages. In a case where a market is heavily dominated by a single party, and small startups comprise the only potential challengers, would not any increase in virtue benefit only the hapless "little guy"?

While there is undeniable force to this objection, it is essential to note that competition, qua competition, takes place against a backdrop of epistemic uncertainty. Consider that competition, per the terms of the definition defended above, involves a situation in which "X achieves X's goal only if Y does not achieve Y's."[108] As Black argues, an element of uncertainty is already implicit in this model: "if X does Ax with the intention of achieving Gx, it follows . . . that X is not certain that he will not achieve Gx."[109] Put more directly, one cannot take an action *with the intention to achieve* a certain goal if one *knows* that that goal is unattainable; the intention in question would not actually constitute an "intention to achieve" the goal in question, but merely an "intention to pursue."

No market participant, no matter how seemingly dominant at a particular juncture, can predict the future. Blockbuster Video, once the undisputed colossus of the video-rental industry, famously missed an opportunity to acquire the then-startup company Netflix for a paltry fifty million dollars.[110] Hence, even a competitor enjoying significant structural advantages *ex ante* still has an incentive to act in such a way as to cultivate intellectual and other virtues: those who guide dominant firms must evaluate their potential rivals and select a course of action accordingly—even if that course involves continuing current patterns of behavior. Through the acts of engaging in such deliberation and action, the virtue of prudence is both exemplified and reinforced.

To strengthen this justification for economic competition, consider the contrary possibility: a situation in which competition does *not* obtain. Suppose the lemonade stand operators manage to slash expenses by jointly operating a single lemonade stand that enjoys a monopoly in the (small) local

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[108] *Id.*

[109] *Id.* at 20.

[110] *See, e.g.*, Minda Zetlin, *Blockbuster Could Have Bought Netflix for $50 Million, But the CEO Thought It Was a Joke*, INC. (Sept. 20, 2019), https://www.inc.com/minda-zetlin/netflix-blockbuster-meeting-marc-randolph-reed-hastings-john-antioco.html [https://perma.cc/JS54-GSDK] ("Everyone from Blockbuster who was at that meeting must cringe when they think back on it now. The company could have bought Netflix that day for $50 million, but its CEO didn't even bother to consider the possibility. He seemed to see it as a great big joke.").

lemonade market. What incentive would either participant have to develop any of the virtues and capacities previously considered? The market might be more "efficient" in a narrow sense, but the nonmonetary benefits generated by the competition would no longer obtain. And indeed, the recognition of such nonmonetary benefits is often alien to Chicago School antitrust analysis.[111]

One might also augment this argument by sketching an account of "innovation" not simply as a matter of consumer preference, but rather as an end in itself—an intrinsic, rather than instrumental good.[112] In centrally planned or otherwise hierarchically-directed entities, creativity—and the virtues associated with it—exists "on rails," within the parameters dictated unilaterally by a top-down authority. The incentive for individuals within the corporate entity to propose radical paradigm shifts is, accordingly, diminished. To the extent that room does exist for such intra-institutional developments, one must assume that a kind of "competition" is occurring within the firm itself, where optimal ideas are allowed to win out over established consensus. The dynamism of genuine creativity is, in short, bound up with the possibility or reality of opposition.

All this amounts to a fairly straightforward point: there is a substantial case for the view that human beings, qua human beings, are likely to benefit more from conditions of economic competition than from its absence. Antitrust law, when it seeks to preserve these conditions, functions consistently with the classical natural-law tradition's understanding of human beings and their flourishing.

2. Competition and Exploitation

A second classically rooted justification for the value of economic competition is likely more familiar: on net, economic competition is more likely to result in states of affairs in which individuals are not exploited, where "exploitation" is understood as the treatment of human beings inconsistently with their natures as human beings. Given widespread assumptions about the rapacious nature of contemporary capitalism,[113] this is a claim that certainly requires some elaboration.

Just as before, the relevant scale of analysis for present purposes involves the human being considered *as* a human being. To gain a fuller picture of how a state of economic competition may promote welfare more effectively than a state characterized by the lack thereof, it is necessary to explore the effects of competition on human beings conceived as both *consumers* (demand-side) and *producers* (supply-side).

On the demand side, a firm that drives its competitors out of a particular market—thereby monopolizing that market—and that subsequently

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[111] *See* Irwin M. Stelzer, *Some Practical Thoughts About Entry*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 24, 25 (Robert Pitofsky ed., 2008) ("Conservative economists take added joy from the fact that the Chicago School urges focus solely on the economic goals of antitrust policy, and that it liberates them from the necessity of considering possible social objectives.").

[112] *See, e.g.*, Elzinga & Crane, *supra* note 106, at 95 ("[T]he antitrust institution seeks to promote competitive processes that enable and incentivize innovation. This goal of promoting industrial innovation and progress finds ample support within a long-standing Christian tradition.").

[113] *See, e.g.*, KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 105 (Samuel Moore & Edward Aveling trans., Pacific Publishing Studio, 2010) (1867) (finding "exploitation of labour-power by capital, or of the labourer by the capitalist" at the heart of all generation of surplus-value).

increases its prices dramatically to capitalize on the lack of competition has, by rendering the price of goods and services *artificially* unstable, deliberately subverted individuals' abilities to reason prudentially about the ways in which to invest their limited resources. Put more sharply, this kind of extortionate conduct constitutes a form of deception by rendering individual human beings less able to develop their own capacities in a virtuous manner—the stability associated with a predictable pricing scheme.[114]

On the supply side, a firm that enjoys monopolistic or near-monopolistic advantages in a particular market possesses a unique ability to dictate the terms of the relevant labor market.[115] Absent external intervention, such a firm may compel workers to accept hazardous working conditions, below-par wages, or schedules incompatible with family life and community involvement—thereby affecting "exploitation" of human beings in an even more tangible sense. From this vantage point, one can more fully understand the real moral harm wrought by companies like Amazon—a favored target of Neo-Brandeisian antitrust reformers[116]—within the conceptual framework of the classical tradition.

To the extent that this justification includes the subordinate claim that *antitrust enforcement exists to prevent abusive pricing*, there are indeed echoes here of the old consumer welfare standard. This similarity is entirely intentional: to find the consumer welfare standard *too narrow to serve as a policy lodestar* is not, by any means, to suggest that the concerns underpinning it are *meritless.* It is entirely coherent to observe that human flourishing, as a concept, is far more fulsome than mere price effects, and that antitrust law can be oriented toward the former, while simultaneously holding that price effects are relevant to that ideal.

The overarching argument, however, requires a further showing, specifically, whether these goods can be obtained without retaining economic competition. For the purposes of addressing that issue, assume a situation characterized by the absence of competition—either a centrally planned economy or a market where a state-sanctioned monopoly exists. On the demand side, the political authority implements price controls as a mechanism for preventing the exploitative effects traditionally characteristic of a monopoly. On the supply side, the political authority imposes strict regulations intended to secure humane wages and working conditions for employees of the firm or other entity engaged in production. Is there any need for competition at all, or can welfare be secured through such an approach?

While it is possible to finesse such hypotheticals almost indefinitely, it is still reasonable to believe that, on balance, such a scenario *generally* does not obtain the same advantages as a competitive market (significantly, the

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[114] This should not be read as implying that all forms of variable pricing, such as the surge pricing associated with ridesharing services, are *per se* exploitative. Where such cases are concerned, the possibility of variability of pricing is generally known *ex ante* and can be factored into decision-making.

[115] *See* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 17 (2021), the author explains,

> When a single firm or a small number of firms hire from a labor market, those firms have labor market power. A single firm maximizes profits by choosing a wage below the competitive wage. Since workers cannot quit and find a competing employer to hire them, they must either accept the wage or undergo the costly process of dropping out of the labor market and either retiring or retraining.

[116] *See generally* Khan, *supra* note 42.

reason why *this* proposed justification employs a net-benefits criterion in lieu of a categorical claim).

On the demand side, as has been recognized for generations,[117] price controls tend to rob markets of the *organic*—that is, unintentional and hence non-exploitative—fluctuations in price that communicate to producers the need to increase the production of some good or service. This, in turn, renders producers less able to make prudent judgments about which production actions they should engage in and contributes to shortages or surpluses of good and services. Where goods are in short supply, consumers are indirectly rendered less able to make predictable decisions and so deprived of the opportunity to consistently pursue goals that allow them to develop their own capacities. Such shortages also tend to lead to the emergence of black markets characterized by high prices,[118] which—from the perspective of an individual consumer—are functionally equivalent to a situation in which a monopolist deliberately raises prices, and so carry with them the same downsides.

On the supply side, a manager executing the regulatory instructions of a higher political authority in a monopolistic setting may implement those regulations—particularly if they are vaguely worded—in a manner altogether inconsistent with the flourishing of the workers. Since that setting is monopolistic and devoid of labor market competition, the workers in question have no real recourse.

3. Competition and Authority

A final justification for economic competition as the basis of a classically grounded antitrust policy may be articulated relatively briefly. On a classical understanding of law, the proper function of the chosen political authority is the maintenance of peace and order[119]—a state of affairs that makes it possible for human beings to flourish, apart from avoidable threats of destruction. Implicit in this understanding of authority's function is the assumption that the political authority must secure the necessary conditions for both the internal enforcement of the political unit's laws and the defense of the political unit against external threats.[120]

Economic competition helps prevent a situation in which the political authority comes to depend wholly or mostly upon a single economic entity for the provision of goods and services essential to the maintenance of peace

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[117] *See* David R. Henderson, *Price Controls: Still a Bad Idea*, HOOVER INST. (Jan. 20, 2022), https://www.hoover.org/research/price-controls-still-bad-idea [https://perma.cc/8Q9K-8VHS], asserting,

> We see the results of price controls wherever governments impose ceilings on rents. Exhibit A in the United States is New York City, where rent control was imposed as a temporary measure in World War II and still exists today. For many apartment units, the controlled rent is well below the rent that would exist in a free market and the result is a long line of potential renters for a given rent-controlled apartment.

[118] *See* Edgar K. Browning & William Patton Culbertson, Jr., *A Theory of Black Markets Under Price Control: Competition and Monopoly*, 12 ECON. INQUIRY 175, 175 (1974) ("Circumvention of the controls . . . [may take] many familiar forms—quantity and quality adjustments, pairing or tying the purchase of one commodity to another, as well as more direct evasion through under-the-table payments.").

[119] VERMEULE, *supra* note 21, at 31 (stressing "peace" and "order" as aspects of the common good).

[120] *Id.* at 30–31 (the "temporal common good" entails protection of "the structural political, economic, and social conditions that allow communities to live in accordance with the precepts of legal justice"; moreover, "[t]he conditions that allow communities to live in accordance with justice define the legitimate ends of civil government").

and order. While a political authority's ability to promote peace and order is indeed always dependent upon certain conditions, dependence upon a *single economic entity* is avoidable through the prudent application of antitrust policy.

The consequences of overreliance on a solitary economic entity may prove dire. The failure of that entity—whether unintentionally, circumstantially, or on account of the misconduct of the entity's directors—may lead to the inability of the political authority to *exercise* authority—that is, to maintain peace and order within the authority's jurisdiction. But fortunately, this is a danger that is readily foreseeable and easily prevented. The political authority must simply be willing to intervene in existing markets to promote competitive conditions.

4. Competition and Welfare

This Part has demonstrated that it is possible for "competition," in its intuitive sense, to constitute the foundational concept underpinning an antitrust regime explicitly grounded in the classical natural-law tradition. Antitrust law need not adopt Bork's reductionist premises to reflect a coherent philosophy.

But do the premises of the classical tradition still lead to the same sort of laissez-faire economic results? At this point an opponent might claim, as a kind of "meta-objection," that what has been provided so far is no more than a list of bog-standard defenses of free-market economics. But the set of arguments laid out above are distinguishable because they are only intelligible in a context in which the *political authority* chooses to *consciously intervene* to prevent the emergence of *monopolistic conditions*. Underpinning this assumption is a total rejection of the premise that business decisions—whether couched in the language of property rights—are per se inviolable. The classical natural law tradition, while certainly acknowledging conceptions of property ownership, knows nothing of such a libertarian ethos.[121] On this account, intervention to preserve competition is entirely justified—and indeed, if the argument succeeds, it is the political authority's *duty* to engage in such interventions.

In conclusion, it is worth turning once again to consider Black's trilemma, discussed earlier in this Section, and his rejection of the claim that competition maximizes welfare. While Black acknowledges that it is possible to conceive of welfare as "participation in various forms of good"[122]—a move that many defenders of the classical tradition would radicalize in a Platonic direction, stressing that welfare amounts to participation in *the* Form of *the* Good[123]—he finds it difficult to establish a link between competition and welfare for two reasons.[124] The first calls into question the intelligibility of "welfare" as a unitary concept that could, in principle, be maximized by competition. The second raises a version of the

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[121] *See id.* at 42–43.
[122] BLACK, *supra* note 58, at 34.
[123] *See* ANDREW DAVISON, PARTICIPATION IN GOD: A STUDY IN CHRISTIAN DOCTRINE AND METAPHYSICS 95–100 (recounting the history of Christian appropriation of this Platonic motif).
[124] BLACK, *supra* note 58, at 49–51.

objection that competition undermines some values characteristic of a "thick" account of welfare.[125]

First, Black argues that competition maximizes welfare in a "thick" sense because "each item"—that is, each "basic good" or dimension of human flourishing—is a discrete thing or principle to be maximized, "so some process of balancing is needed where an increase in one brings a decrease in another."[126] This is not the knockdown objection that Black believes it to be, for the simple reason that on a classical Aristotelian account, "balancing" goods is *precisely* what is meant by virtuous living.[127] The valuable quality of "generosity," for instance, exists as a "golden mean" interposed between the dual vices of meanness (an absence of generosity) and profligacy (an excess of the same).[128] On this conception, virtue is not a matter of quantitative increase, but indeed of balancing; paradoxically, to "maximize" virtue is to strike the appropriate balance. Far from constituting a *critique* of the view that competition serves to maximize welfare, Black's argument simply underscores the need for rooting an account of competition in the classical tradition's metaphysical premises.

One might also point out that in the Christian appropriation of Aristotelian philosophy, all virtues—wisdom, love, and so forth—are ultimately convertible with the One God who is conceived as Being as such.[129] Truth, goodness, and beauty, while diverse terms, all ultimately have the same referent.[130] And so one might readily reject the premise of Black's argument, that "each item"—each human good—"is a separate maximand."[131] Rather, on the Christian account, they are all facets of God considered under different lights.

Second, Black presses a version of an objection previously considered: "[C]onsider . . . deep personal relations. How are these promoted, let alone maximised, by competition? A familiar complaint is that competition erodes social bonds: in that case, or anyway, it is likely to make deep personal relations harder to form and sustain."[132] However, the force of this objection falls away when "competition" is conceived in a fuller sense: firms in a competitive market compete for labor, and workers enjoy the power to strike bargains likely to secure favorable conditions that are conducive to the formation of social bonds outside the workplace. It is worth noting that in other contexts, Black has disaggregated "competition" in an economic sense

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[125] *Id.* at 49–50.

[126] *Id.* at 50.

[127] *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 111 (1988) (explaining that for Aristotle, "[t]o act virtuously is to act in accordance with a mean, a middle state between the two extremes of vice").

[128] *See* ARISTOTLE, NICOMACHEAN ETHICS IV.1 (1119b20–1122a17) ("[L]et us speak of Liberality. This virtue seems to be the observance of the mean in relation to wealth . . . . Prodigality and Meanness on the other hand are both of them modes of excess and of deficiency in relation to wealth.").

[129] *See, e.g.*, Stephen John Wright, DOGMATIC AESTHETICS: A THEOLOGY OF BEAUTY IN DIALOGUE WITH ROBERT W. JENSON 56 (2014) ("[I]f God is to be ontologically fundamental, having no ground in anything other than God's own divine nature, then "wisdom" must be identical with that nature if God is truly said to be wise. Following this logic, anything that is predicable of God is convertible with the divine essence.").

[130] *See, e.g.*, Leo J. Elders, *The Transcendental Properties of Being—Introduction: A Concise History Up to Thomas Aquinas*, 57 SAPIENTIA 459, 482 (2002) ("In the heart of being lie unity, truth, goodness and beauty which invite us to a community with being and fill our mind with knowledge and perfection.").

[131] BLACK, *supra* note 58, at 50.

[132] *Id.*

from brute "rivalry" resulting in "atomization"—but here Bork's strawman of "competition" appears to cast a lingering shadow.[133]

Hence, Black's arguments for uncoupling competition from welfare as an aspect of antitrust's fundamental justification fail, at least where the premises of the classical legal tradition are granted. The next Part will consider some implications of this classically grounded account of competition and antitrust for several key concepts in the antitrust tradition's doctrinal corpus.

III. THE IMPLICATIONS OF GROUNDING ANTITRUST "CLASSICALLY"

The relationship between economic competition and welfare, and whether this relation provides the fundamental warrant for antitrust, is undoubtedly a matter of high theory. A more urgent question remains unaddressed: What would be the implications of a classically grounded conception of antitrust for contested questions in contemporary antitrust debate?

While the range of such potential analyses is virtually infinite, this study will confine itself to four: (1) the weakness of the dominant conception of the consumer welfare standard; (2) discretionary decisions by an antitrust enforcement authority regarding markets in which to intervene; (3) market definition; and (4) reliance interests and their role in business decision-making. Through these analyses, this study will offer a counterpoint to the Chicago School's frequent claim that any approach to antitrust that ventures beyond a narrow conception of "consumer welfare" must be disastrously unprincipled.

A. RECONSIDERING THE CONSUMER WELFARE STANDARD

Whenever alternatives to the dominant antitrust paradigm are proposed, defenders of the consumer welfare standard are keen to invoke that standard's supposed workability.[134] After all, what could be more straightforward than simply looking to a challenged business decision's price effects?[135]

Assume for the sake of argument that a judge is committed to the "classical" theory of antitrust enforcement outlined here and is operating in a jurisprudential environment largely devoid of per se rules or other specific limits on market concentration or business practices. This is, in short, an

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[133] *Id.* ("How are [deep personal relations] promoted, let alone maximised, by competition?"). The answer lies in a simple distinction: the relevant point of analysis for antitrust purposes is *labor market competition* for workers, not *intra-household rivalry* as is implied. Indeed, it is difficult to envision a healthy household operating according to zero-sum logic. *See id.* at 14 ("The essence of rivalry is that X does not merely intend to achieve Gx, he also intends to prevent Y from achieving Gy.").

[134] *See* Richard Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 11, 13 (Robert Pitofsky ed., 2008) ("Having only a single objective at least *permits* the consistency and predictability needed to make a deterrence-based policy effective.").

[135] Set aside the problem, for traditional consumer-welfare analyses, that is posed by the emergence of digital markets structured around the existence of zero-priced goods. *See* John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 201 (2015) ("Given modern antitrust law's generally agreed-upon goal of maximizing consumer welfare, practices that tend to create net consumer surplus are today almost entirely insulated from antitrust scrutiny.").

antitrust environment structured solely according to the "rule of reason," the principle under which the Sherman Act's restraints of trade is understood to prohibit only *unreasonable* restraints.[136]

In place of embracing the consumer welfare standard, a classically minded judge might determine that antitrust law—*as* antitrust law—should be interpreted in a manner consistent with its nature and rationale: the protection of economic competition. That determination, of course, immediately raises a new question: what constitutes evidence of economic competition? In articulating an answer, the classically minded judge might look to the real-world indicia of competition, conceived in classical terms, that the prior Part outlined. Are market participants themselves appearing to benefit from the process and exemplifying creativity and innovation? Are consumers being forced to pay extortionate prices on account of a lack of choice? Do workers have the labor market flexibility to switch to competitor firms? Is the market sufficiently diverse that stakeholders exercising political authority are not unduly dependent upon a single entity? These are questions which courts can and do answer; they are not in any sense beyond the judicial ken.[137]

A defender of the consumer welfare standard may retort that the judicial consideration of so many variables leads to overwhelming indeterminacy, which the antitrust law cannot abide.[138] This critique, though, is readily reversed: What about the indeterminacy associated with deciding the parameters of the relevant market within which price effects are assessed or the inherent indeterminacy of determining which goods are meaningful substitutes for one another?[139] Upon examination, the analysis of price effects is not so objective as it may superficially appear.

On balance, weighed against the theoretical advantages of the fuller-orbed account of antitrust's purposes, the existing consumer welfare standard is found wanting. Adopting an interpretation of the consumer welfare standard as focused solely on price effects means that the virtue-actualization and political stability justifications for economic competition drop out of the analysis. Conversely, where consumer welfare is interpreted as "whatever is good for consumers," the standard becomes even less determinate than the classically rooted theory developed here, which takes its cues from observing the natural flourishing of human beings rather than from intangible abstractions. Once again, considerations such as producer or worker welfare do not enter the discussion. Judges who take their cues from the classical legal tradition have viable alternatives to the consumer welfare orthodoxy available to them.

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[136] *See* BLACK, *supra* note 58, at 64–65.

[137] *Cf.* Steinbaum & Stucke, *supra* note 47, at 605–09 (elaborating a similar set of indicia, albeit without the orientation toward virtue ethics).

[138] *See, e.g.*, Greenfield et al., *supra* note 44, at 400 ("[A]dvocates of moving to a 'public interest' or other multifactor standard that departs from consumer welfare must show—accounting for modern judicial experience and economic learning—that the benefits of doing so would outweigh the costs, in terms of administrability, economic efficiency, and predictability of outcome.").

[139] *Cf.* Steinbaum & Stucke, *supra* note 47, at 600 ("Consequently, the consumer welfare standard provides little guidance as an antitrust goal. There remains no consensus on what the term actually means or who the consumers are.").

B. Reconsidering Intervention Decisions

Judges are not the only officials tasked with enforcing antitrust laws. An analysis of the implications of a classically grounded theory of antitrust must also account for those who bring antitrust prosecutions or, in the U.S. system, challenge proposed mergers and acquisitions.

Here, the central classical insight is that the resources available to a political authority for the enforcement of antitrust law are certainly not unlimited. This means that officials charged with executing the law must use their discretion—or, in classical terms, their prudential reason—to ascertain how and where the law is most wisely enforced.[140]

Political authority need not be neutral in determining in which markets to intervene to affirmatively secure competitive conditions. Where a particular product offered in a given market is deemed socially undesirable for some reason or other—for the sake of argument, say tobacco—that judgment may inform whether antitrust law is wisely applied to restore competitive conditions to that market.[141] Allowing the persistence of negative effects that follow from a *lack* of competition may constitute a deterrent—both for consumers considering whether to purchase the good or service and for workers determining whether or not to involve themselves in the industry.

C. Reconsidering Market Definition

Perhaps the thorniest question in modern antitrust litigation involves market definition, or the domain within which market participants engage in competitive behavior. This is a question that no account of antitrust law can leave unconsidered. And the classical natural-law tradition suggests some first steps toward an answer.

One might evaluate the question of market definition by way of an analogy to the classical approach to identifying and categorizing essences. In the classical philosophical tradition, members of a particular species are always enfolded within a larger genus; so, for Aristotle, a human being, as a "rational animal," is encompassed within the larger category of "animal."[142]

A specific example may make the significance of this hierarchical ordering clearer. Consider a perennial question: Is human rationality essentially akin to the kind of "rationality" demonstrated by a calculator or computer system? In a classical view, a human being and a calculator are fundamentally disanalogous in that the nature of human rationality is unavoidably structured and oriented by its relationship to the higher-order category of animal-ness, a category in which the calculator does not

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[140] *See* Vermeule, *supra* note 21, at 160–61 (stressing the need for political authorities to exercise "regnative prudence").

[141] *See* Black, *supra* note 58, at 51–54, contending,

> If competition and antitrust are justified by their effects on welfare, the objective theory motivates discrimination by antitrust authorities: since interventions are costly, they should be limited to protect competition in such markets ["for products that themselves promote welfare"] and not be made in markets for products that reduce or have no effect on welfare levels.

[142] *See* Feser, *supra* note 88, at 426–29 (presenting and defending an Aristotelian account of the category of "genus" construed broadly).

participate.[143] Or, put more concretely: like all animals, human beings initiate willful acts, and their rationality is apprehended through those acts. By contrast, a calculator processes data only when it is worked upon by an external agency. At bottom, the nature of the relevant terms of the comparison is informed by the higher-order context within which those terms are conceived.

This carries with it significant implications for contemporary antitrust policy. For instance, in the course of recent antitrust litigation, Google has argued that it is not in fact dominant in the online search business because many internet searches are conducted via the "search" functions on other websites, such as Amazon and Netflix.[144] Applying the principle of hierarchical classification that underpins the classical tradition, one can readily grasp that the "search" functions on Amazon and Netflix are not genuinely analogous to Google's search page: they are subordinated to the higher-order purpose of the websites within which they function but are not genuine substitutes for the distinctive internet-wide service that Google provides.

While the specific contours of a market-definition analysis grounded in the classical tradition would need to be worked out across individual cases, the orienting principle here is that judges should feel free to interrogate antitrust litigants' economic models according to their own practical reason. And in exercising that practical reason, they may employ a classically informed, philosophical approach.

D. RECONSIDERING RELIANCE INTERESTS

Finally, it is worth briefly revisiting the concern that motivated *The Antitrust Paradox* in the first place—the concern that loose, unsystematic approaches to antitrust policy inevitably cash out in an illicit "harassment of business" and the destruction of reasonable business expectations to the detriment of consumers and producers alike.[145]

From a classical perspective, market participants do not possess any right to a permanently homeostatic legal environment; the common good can certainly justify an unsettling of business expectations—a principle reflected in American law through the existence of statutes such as the Defense Production Act, which authorize the political authority to direct functioning private property for public purposes.[146] However, while a classically-rooted understanding of antitrust requires that businesses' reliance interests are not treated as absolute—else, antitrust enforcement would be barred in principle—this concern is not trivial.

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[143] *Cf.* MACINTYRE, *supra* note 83, at 5.

[144] *See* Alan Reynolds, *Big Tech's Monopoly of What?*, CATO INST. (July 28, 2021), https://www.cato.org/commentary/big-techs-monopoly-what [https://perma.cc/UH55-UG3B] (averring, in defense of Google, that "[g]eneral search is just a fraction of online search: Google's alleged 88 percent share of 'the search market,' according to the Department of Justice, refers only to unfocused general searches for anything and everything.").

[145] BORK, *supra* note 35, at 2, 6.

[146] *See* 50 U.S.C. § 4511(a) (in relevant part, authorizing the President "to require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order" and "to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense").

To help stabilize the range of potential outcomes that might follow from a judicial analysis, a political authority can—and typically should—promulgate clearly-worded per se rules to identify specific market behaviors that are proscribed. For purposes of the larger theory set out here, such per se rules pertaining to metrics like market concentration can serve as rough proxies for the presence of various positive effects associated with economic competition.

As markets evolve and take on new dimensions in light of technological change, per se rules can and should be revised. Following the promulgation of per se rules, a prudent political authority might institute a policy of "regulatory lookback" or retrospective review, in which the rules are periodically reconsidered to assess whether they are really serving as proper proxies for maintaining the positive effects of competition as discussed in the prior Section, or whether they need to be revised with respect to particular sectors or to capture particular forms of conduct.[147]

CONCLUSION

Herbert Hovenkamp, the unquestioned dean of American antitrust scholarship, once boldly pronounced that antitrust law was devoid of moral significance.[148] This Article has argued for precisely the opposite view. If the claims of the classical tradition are taken seriously, then all law—no matter how seemingly arcane or technical—encodes at bottom a particular form of morality.[149] That is as true for antitrust as it is for constitutional law.

With that principle in mind, this study has outlined the contours of a justification for antitrust law—more specifically, for the preservation of economic competition considered in the intuitive sense of the term—that finds its roots in the classical natural law tradition. After all, most Western jurisprudential concepts ultimately derive from that tradition, whether or not that provenance is acknowledged.[150] At bottom, a theory of "common good antitrust" favors an active role for the political authority in preserving market conditions likely to engender the benefits of competition. The bulk of this Article has sought to establish both how that conception follows from classical philosophical premises and how its distinctive value commitments might be worked out in practice.

Where does such a proposal fall on the spectrum of antitrust reform efforts currently being debated? As should be evident, a classically-rooted theory of antitrust possesses several similarities to contemporary Neo-Brandeisian calls for change—in particular the critique of the dominant consumer welfare standard and an insistence that too narrow conceptions of market definition must be revised. However, it departs from this critique in

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[147] For a fuller articulation of this proposal, see John S. Ehrett, *Antifragile Policymaking: A Strategy for Institutional Response to the Social Science Reproducibility Crisis*, 49 U. MEM. L. REV. 447, 472–75, n.82 (2019).

[148] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 7, 10, 47 (Harvard Univ. Press 2008) ("Market intervention must be justified and the justifications by and large are not moral ones. . . . Antitrust is an economic, not a moral, enterprise. . . . [It has no] moral content of its own, and is not well designed to provide rules of business ethics.").

[149] *See, e.g.*, VERMEULE, *supra* note 21, at 37 ("[A]ll legislation is necessarily founded on some substantive conception of morality.").

[150] *Id.* at 52–60 ("Right from the beginning, long before the Constitution of 1789 was written, the classical legal tradition structured and suffused our law.").

a significant way by proposing that the crisis of modern antitrust presuppositions is not necessarily grounded in an opposition of "concentrated corporate power" and "democracy." That opposition necessarily imports certain modern presuppositions, such as the universal normativity of democracy, into the analysis.

The antitrust theory this Article has proposed sounds in an altogether different register. It centers on the problem of "trusts"—that is, an absence of economic competition—for human beings qua human beings and for the possibility of political authority as such. Accordingly, the arguments outlined here hold irrespective of the nature of the political authority. This approach is consistent with the historical record of philosophical opposition to practices later proscribed by antitrust law, such as cartelization—opposition which existed even in pre-democratic societies.[151]

As Thomas Kuhn famously argued, paradigm shifts within disciplines are never accomplished overnight.[152] Much work remains to be done to consider the implications of the classical tradition for contemporary legal controversies, particularly those involving economic and political conditions never envisioned by the thinkers of yesteryear. Nevertheless, the project of constructing an account of antitrust law with deeper philosophical roots must begin somewhere.

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[151] *See* Luther, *supra* note 29, at 27.

[152] *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 151 (3d ed. 1996), claiming,

> The transfer of allegiance f[r]om paradigm to paradigm is a conversion experience that cannot be forced. Lifelong resistance, particularly from those whose productive careers have committed them to an older tradition . . . is not a violation of scientific standards but an index to the nature of scientific research itself.