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The Ideological Roots of America's Market Power Problem

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Mounting research shows that America has a market power problem.[1] In sectors ranging from airlines and poultry to eyeglasses and semiconductors, just a handful of companies dominate.[2] The decline in competition is so con-

1. *See Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing [http://perma.cc/7JTE-TCME] (arguing that high profits indicate a need for competition); *Benefits of Competition and Indicators of Market Power*, COUNCIL ECON. ADVISERS 4-6 (May 2016), http://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf [http://perma.cc/T5PX-ZEEY] (detailing the evidence of declining competition); Senator Elizabeth Warren, Keynote Address at New America's Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [http://perma.cc/KC8J-YZVG] (arguing that the lack of competition in the markets "threatens our economy, and threatens our democracy").
2. Four companies—American Airlines, United, Delta, and Southwest—have captured eighty percent of the national airline market. David Dayen, *Unfriendly Skies*, AM. PROSPECT (Nov. 3, 2017), http://prospect.org/article/unfriendly-skies [http://perma.cc/3SKP-8K5Z]. Four poultry firms—Pilgrim's Pride, Tyson, Purdue, and Sanderson Farms—have gained control of nearly sixty percent of the market. *A Look at the Poultry Industry—How Does Chicken Get on Your Plate?*, FARMAID (May 18, 2015), http://www.farmaid.org/issues/industrial-agriculture/a-look-at-the-poultry-industry-how-does-chicken-get-on-your-plate [http://perma.cc/HZH7-79BQ]. One company, Luxottica, controls sixty percent of the sunglasses market in the United States. Dennis Green & Anaele Pelisson, *2 Companies Control Most of the Sunglasses Bought in the US*, BUS. INSIDER (Aug. 25, 2017, 3:40 PM), http://uk.businessinsider.com/companies-dominate-sunglass-market-luxottica-safilo-2017-8?r=US&IR=T [http://perma.cc/F362-K4TT]. Five health insurers—Anthem, Blue Cross Blue Shield, United Healthcare, Aetna, and Cigna—control over eighty-three percent of the coun-

sistent across markets that excessive concentration and undue market power now look to be not an isolated issue but rather a systemic feature of America's political economy.[3] This is troubling because monopolies and oligopolies produce a host of harms. They depress wages and salaries, raise consumer costs, block entrepreneurship, stunt investment, retard innovation, and render supply chains and complex systems highly fragile.[4] Dominant firms' economic power allows them, in turn, to concentrate political power, which they then use to win favorable policies and further entrench their dominance.[5]

As a few technology platform companies mediate a rapidly growing share of our commerce and communications, the problem will only worsen.[6] Since these gatekeeper firms have captured control over key distribution networks, they can squeeze the businesses reliant on their channels. Furthermore, these firms leverage their platform power into new lines of business, extending their dominance across sectors. Their muscle, in turn, spurs additional consolidation, as both competitors and producers bulk up in order to avoid getting squashed.[7] Concentration begets concentration.

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try's health insurance market. David McLaughlin, *Health Insurer Deals Face Market Review That Felled Past Tie-Ups*, BLOOMBERG (May 23, 2016), http://www.bloomberg.com/news/articles/2016-05-23/health-insurer-deals-face-market-review-that-felled-past-tie-ups [http://perma.cc/CEB6-EP3G]. Three drug stores—CVS, Walgreens, and Rite Aid—control ninety-nine percent of the drug stores in the country. Nathan Bomey, *Walgreens in $17.2B Deal To Acquire Rite Aid*, USA TODAY (Oct. 27, 2015), http://www.usatoday.com/story/money/2015/10/27/walgreens-rite-aid/74684642 [http://perma.cc/R4RQ-FR59].

3. Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASHINGTON CTR. EQUITABLE GROWTH (Mar. 20, 2017), http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today [http://perma.cc/8LWU-5BZL] ("Market power is a substantial and widening problem for the U.S. economy today.").

4. BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010).

5. SIMON JOHNSON & JAMES KWAK, THIRTEEN BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2011); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE. J. CONST. L. & POL'Y 37 (2014).

6. *See, e.g.*, FRANKLIN FOER, WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH (2017); JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017); MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY (2016); Julie E. Cohen, *Law for the Platform* Economy, 51 U.C. DAVIS L. REV. 133 (2017); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Shannon Bond, *Google and Facebook Build Digital Ad Duopoly*, FIN. TIMES (Mar. 14, 2017), http://www.ft.com/content/30c81d12-08c8-11e7-97d1-5e720a26771b [http://perma.cc/LH2D-P8FD]; Luther Lowe, Opinion, *It's Time To Bust the Online Trusts*, WALL ST. J. (Oct. 31, 2017, 6:05 PM), http://www.wsj.com/articles/its-time-to-bust-the-online-trusts-1509487518 [http://perma.cc/2JJP-474E].

7. Max Niesen, *Amazon Is Already Reshaping Health Care*, BLOOMBERG (Mar. 26, 2018), http://www.bloomberg.com/gadfly/articles/2018-03-26/amazon-s-health-care-threat-is-already-reshaping-the-industry [http://perma.cc/4TLJ-C25G].

As public recognition of this problem grows, increased attention is focusing on antitrust law. Politicians, advocacy groups, academics, and journalists have all questioned whether the failure of antitrust is to blame for declining competition, and whether the law must be reformed in order to tackle the monopoly problems of the twenty-first-century.[8] For example, members of the House of Representative recently created an Antitrust Caucus, a forum for Congress to study and address monopoly issues. Democrats, meanwhile, last year identified renewed antitrust as a key pillar of their economic agenda, promising to "revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come before big corporations that are getting even bigger."[9] The interest is bipartisan: a Republican Attorney General, for example, is leading an antitrust investigation into Google, explaining, "We need to have a conversation in Missouri, and as a country, about the

8. *See, e.g.*, BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); Zephyr Teachout and Lina Khan, *Market Structure and Political Law*, 9 DUKE J. CONST. L. & PUB. POL'Y 37 (2014); Cory Booker, *The Government Should Fight "Corporate Villainy" in Tech*, *Senator Cory Booker Says*, RECODE (July 24, 2017), http://www.recode.net/2017/7/24/16017764/cory-booker-new-jersey-senator-silicon-valley-antitrust-inequality-corporate-villainy-recode-podcast [http://perma.cc/2R5S-PYW4]; David Dayen, *Bring Back Antitrust*, AM. PROSPECT (Nov. 9, 2015), http://prospect.org/article/bring-back-antitrust-0 [http://perma.cc/VT2H-5L9W]; Paul Krugman, *Challenging the Oligarchy*, N.Y. REV. BOOKS (Dec. 17, 2015) http://www.nybooks.com/articles/2015/12/17robert-reich-challenging-oligarchy [http://perma.cc/5T77-TX3X] (describing an argument attributing increased economic inequality to monopolies); Philip Longman, *Bloom and Bust*, WASH. MONTHLY (November/December 2015), http://washingtonmonthly.com/magazine/novdec-2015/bloom-and-bust [http://perma.cc/3BPT-X5Y8]; Matt Stoller, *How Democrats Killed Their Populist Soul*, ATLANTIC (Oct. 24, 2016), http://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-their-populist-soul/504710 [http://perma.cc/WE22-V3D9] ("At the same time that the nation has achieved perhaps the most tolerant culture in U.S. history, the destruction of the anti- monopoly and anti-bank tradition in the Democratic Party has also cleared the way for the greatest concentration of economic power in a century."); Warren, *supra* note 1 (arguing that the lack of competition in the markets "threatens our economy, and threatens our democracy"); Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC (July 13, 2017), http://newrepublic.com/article/143595/return-monopoly-amazon-rise-business-tycoon-white-house-democrats-return-party-trust-busting-roots [http://perma.cc/H4CB-YD24].

9. Tess Townsend, *Keith Ellison and the New 'Antitrust Caucus' Want to Know Exactly How Bad Mergers Have Been for the American Public*, N.Y. MAG. (Dec. 4, 2017, 8:00 AM), http://nymag.com/selectall/2017/12/antitrust-bill-from-keith-ellison-seek-info-on-mergers.html [http://perma.cc/X5JY-KSG9]; Matthew Yglesias, *Democrats' Push For A New Era of Antitrust Enforcement, Explained*, VOX (July 31, 2017, 8:00 AM), http://www.vox.com/policy-and-politics/2017/7/31/16021844/antitrust-better-deal [http://perma.cc/HM9Z-ULTJ]; *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, HOUSE DEMOCRATS: A BETTER DEAL, http://abetterdeal.democraticleader.gov/crack-down-on-abuse-of-power [http://perma.cc/A5DW-FWAE].

concentration of economic power."[10] In recent months, *The American Prospect*, *The Nation*, and *The New York Times Magazine* have all devoted stories to America's monopoly problem.[11] No longer the exclusive purview of a small group of lawyers and economists, antitrust is going mainstream.

The *Yale Law Journal*'s recent series on the future of antitrust, "Unlocking Antitrust Enforcement," offers potential solutions to our market power problem. Generally, the authors seek to map out paths for stronger enforcement under current law. They do so by identifying (1) areas where cases could fix past judicial errors;[12] (2) areas where enforcers have not brought cases that they could;[13] and (3) areas requiring enforcers to recognize traditional harms in new settings.[14] The commentary offered by many of these Features is timely and valuable.

What is missing from these pieces, however, is any discussion of what philosophy should guide antitrust law and its enforcement. Some of the authors explicitly ratify the current "consumer welfare" approach, which holds that output maximization is the proper goal of antitrust.[15] Others do not address the topic directly, but nonetheless offer recommendations embedded in the cur-

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10. Joshua Brustein, *This Peter Thiel-Backed Senate Candidate Has It In for Google*, BLOOMBERG (Mar. 8, 2018), http://www.bloomberg.com/news/articles/2018-03-08/josh-hawley-s-missouri-senate-bid-could-be-a-problem-for-google [http://perma.cc/DN2C-J6HL].

11. *See* David Dayen, *The Rehabilitation of Antitrust*, AM. PROSPECT (Dec. 22, 2017), http://prospect.org/article/rehabilitation-antitrust [http://perma.cc/9S4R-HYQC]; Charles Duhigg, *The Case Against Google*, N.Y. TIMES MAG. (Feb. 20, 2018), http://www.nytimes.com/2018/02/20/magazine/the-case-against-google.html [http://perma.cc/6SN2-JS6N]; Scott Galloway, *Silicon Valley's Tax-Avoiding, Job-Killing, Soul-Sucking Machine*, Esquire (Feb. 8, 2018), http://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley [http://perma.cc/SPX6-X9UY]; Stacy Mitchell, *6 Ways To Rein In Today's Toxic Monopolies*, NATION (Feb. 16, 2018), http://www.thenation.com/article/six-ways-to-rein-in-todays-toxic-monopolies [http://perma.cc/KH7H-RDA8]; *Too Much of a Good Thing*, *supra* note 1.

12. C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group*: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018); Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018).

13. C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

14. A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L. J. 2110 (2018); Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026 (2018).

15. *See* Hovenkamp & Shapiro, *supra* note 13, at 2020; *see also* Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 76 ("[T]he country is best served by a more-or-less neoclassical antitrust policy with consumer welfare, or output maximization, as its guiding principle.").

rent frame.[16] And for others, perhaps, this question falls beyond the scope of the project: because the goal is to identify opportunities for more enforcement under the current regime, debating the guiding framework of the law is to them merely academic.

But neglecting this question is misguided. The sweeping market power problem we confront today is a result of the current antitrust framework. The enfeebled state of antitrust enforcement traces directly to an intellectual movement that fundamentally rewrote antitrust law —redefining its purpose, its orientation, and the values that underlie it. Addressing the full scope of the market power problem requires grappling with the fact that the core of antitrust has been warped. To be sure, many of the ideas the *Features* authors introduce are worth pursuing. But they pick at the symptoms of an ideology rather than the ideology itself.

Engaging the issue, by contrast, will go to the heart of why the current regime is crippled, enabling us to tackle the underlying theories and assumptions that have defanged antitrust. It will help ensure that calls for reinvigorated enforcement are not misdirected or exploited, and help ensure that doctrine develops to promote—and not undercut—the proper values of antitrust. Doing so is also likely to reveal or illuminate additional areas of unused authority, underused doctrine, or contestable areas of both.

Moreover, politicians and public figures are debating the framework head-on: a Senate hearing last December asked whether "consumer welfare" is the right standard,[17] while a cable TV host in January said our current approach to antitrust undermines key freedoms.[18] Strikingly, critiques of the current phi-

16. Hemphill & Weiser, *supra* note 12.

17. Indeed, a Senate Judiciary Subcommittee even held a hearing asking whether the consumer welfare standard is "Outdated or a Harbor in a Sea of Doubt?" *Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 115th Cong. (2017). Senator Orrin Hatch has also given two speeches on the Senate floor on the topic. *See Hatch Speaks on Growing Controversy over Antitrust Law in the Tech Sector*, SEN. ORRIN HATCH (Aug. 3, 2017), http://www.hatch.senate.gov/public/index.cfm/2017/8/hatch-speaks-on-growing-controversy-over-antitrust-law-in-the-tech-sector [http://perma.cc/XXJ9-SPCS]; *Hatch Speaks Again on 'Hipster Antitrust,' Delrahim Confirmation*, ORRIN HATCH (Sept. 25, 2017), http://www.hatch.senate.gov/public/index.cfm/2017/9/hatch-speaks-again-on-hipster-antitrust-delrahim-confirmation [http://perma.cc/6DAA-25JF].

18. See, for example, a recent exchange between Tucker Carlson and Senator Mike Lee (R-UT) *Sen. Lee Big Tech Companies Ruining Our Freedom, Privacy*, FOX NEWS (Jan. 10, 2018) http://video.foxnews.com/v/5707398112001 [http://perma.cc/2PRP-KLZN]; Maya Kosoff, *Republican Eviscerates Facebook Executives: "Do You Have a Profile On Me?"*, VANITY FAIR (Oct. 31, 2017, 6:53 PM), http://www.vanityfair.com/news/2017/10/senator-kennedy-grills-facebook-lawyer-senate-intelligence-committee-hearing [http://perma.cc/5P2M-W5FF] ("I think you do enormous good, but your power sometimes scares me.").

losophy have come from *The American Conservative* and *The Nation* alike.[19] Ignoring the broader conversation risks reinforcing the latent sense that antitrust experts are blind to the society-wide impacts of their profession and dismissive—or even unwelcoming—of the public's interest.[20]

This Response explains why addressing America's market power problem requires recognizing its ideological roots. Part I describes the Chicago School's interventions in antitrust. Part II explains how this ideological intervention bears on enforcement. Part III considers how the recommendations offered in the Collection are useful but will likely prove inadequate to address the scope of the problem, and Part IV offers some concluding thoughts.

I. FROM ANTI-MONOPOLY TO PRO-MONOPOLY: THE CHICAGO SCHOOL'S THEORY OF POWER

The antitrust laws were passed against the backdrop of growing economic concentration and the rise of industrial trusts. Railroad barons had captured control over critical transportation networks, while monopolistic corporations dominated sectors ranging from oil and sugar to tobacco and steel. A small group of investment bankers, meanwhile, used their control of the credit system to further roll up industries, directing the fate of the economy.[21]

Through enacting the antitrust laws—the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914—Congress sought to check this extreme concentration of private power and federalize the antimonopoly laws that had existed at the state level. Lawmakers recognized that unchecked monopoly power threatened core liberties and precluded true democracy. Taken as a whole, the antitrust laws were intended to preserve open markets and enhance opportunity, prevent large firms from extracting wealth from producers and consumers, and safeguard against extreme concentrations

19. Daniel Kishi, *Robert Bork's America*, AM. CONSERVATIVE (Mar. 1, 2018), http://www.theamericanconservative.com/articles/robert-borks-america [http://perma.cc/A3CR-XFUP]; Mitchell, *supra* note 11.

20. This impression may be reinforced by comments from antitrust experts. *See, e.g.*, Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 93 NOTRE DAME L. REV. (forthcoming 2018) (manuscript at 6, 11, 14) http://ssrn.com/abstract=3097452 [http://perma.cc/NF75-PBK2] (identifying those engaged in antitrust issues as belonging to two separate groups: the "cognoscenti" and the "illiterati"; noting that "[t]he antitrust cognoscenti may not take movement antitrust arguments seriously, regarding them as economically ill informed, untested, excessively rhetorical, incoherent, or paranoid"; and expressing disdain for popular interest in antitrust, stating, "Antitrust is an excellent example of why the American Constitutional system is a republic and not a direct democracy").

21. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY (1913).

of private power.[22] The Celler-Kefauver Act, a supplementary antitrust law, was passed in 1950 due to fears that excessive consolidation could deliver fascism.[23] Recognizing this purpose, the Supreme Court has described the antitrust laws as both a "charter of economic liberty"[24] and the "Magna Carter of free enterprise."[25]

The antitrust statutes do not outlaw monopoly in all instances. But they carry a strong prophylactic orientation against the concentration of private economic power. This is clear from legislative history, stretching from the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, to the Celler-Kefauver Amendment and the Hart Scott Rodino Act.[26] Judicial interpretation followed course: the Court, for example, stated that Section 7 of the Clayton Act forbids mergers where "the trend to a lessening of competition" was "still in its incipiency."[27] Enacting this prophylactic orientation into enforcement standards, the antitrust agencies through the 1970s relied on bright-line rules and structural presumptions.

Starting in the 1940s and 1950s, a group of scholars began questioning this approach. In an influential essay from the 1960s, Robert Bork and Walt Bowman criticized a "protectionist trend" in antitrust doctrine, claiming the law

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22. The legislative history is carefully mapped out in John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 265 (2017).

23. As Senator Carey Kefauver, one of the bill's sponsors, warned: "Through monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future. . . .A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. . . .It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state." 96 CONG. REC. 16,452 (1950) (statement of Sen. Kefauver).

24. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

25. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (antitrust laws are "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms").

26. *See* H.R. REP. NO. 63-1142, at 19 (1914) (stressing the importance of stopping monopolies at the outset); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2016); Thomas Horton, *Recovering Antitrust's Lost Values*, 16 U. N.H. L. REV 179, 240 (2018).

27. Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962).

had gone awry.[28] Specifically, they argued that antitrust was overly harsh towards exclusionary practices and mergers, and was penalizing pro-competitive conduct. The incipiency approach had "proved calamitous," they argued, and was fundamentally misguided, since the very existence of concentration at its early stages "is prima facie evidence that greater concentration is socially desirable."[29] Rising concentration "indicates that there are emerging efficiencies or economies of scale," and increased efficiency is socially valuable, "for it means that fewer of our available resources are being used to accomplish the same amount of production and distribution."[30] Lastly, Bork and Bowman criticized judicial efforts to apply the law such that it fulfilled the goals Congress expressed, dismissing these concerns as "social policy" that rendered application of the law vague and unpredictable.[31]

Many other writings would help build the edifice of today's antitrust. But this piece distilled some of the key intellectual moves that form the basis of the present regime. Especially notable was their criticism of recent action by the Federal Trade Commission (FTC). In a case seeking to block a merger attempt by Proctor & Gamble, the FTC stated that "economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition."[32] Bork and Bowman claimed that this "turns the normal order of policy around."[33] They write, "Instead of desiring competition as a means to efficiency, the Commission here makes 'the vigor of competition' an end in itself . . . ."[34] In their view, efficiency should be the goal and competition the means; in fact, the only purpose of competition is to "provide[] society with the maximum output that can be achieved at any given time with the resources at its command."[35] This approach—placing competition in the service of efficiency—has been followed by courts.[36]

28. Robert Bork & Walt Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 364 (1965).

29. *Id*. at 368.

30. *Id.*

31. *Id*. at 369.

32. *Id*.

33. *Id.* at 374.

34. *Id*.

35. *Id.* at 365.

36. *See, e.g.*, Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986) (Posner, J.) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency.").

As numerous scholars have documented, this represents a grotesque distortion of the antitrust laws that Congress passed.[37] Not only does it supplant the goal of antitrust, but it also stamps the law with a value that is, in many ways, deeply antithetical to the goal of competition. Competition refers to a process. Efficiency, by contrast, refers to an economic outcome, and is silent on the means by which it is achieved. On Bork and Bowman's account, the welfare-based goal should override the structural concern about competition.

This defining move has crippled antitrust enforcement in two important ways, as I describe in Part II. But it is also worth examining how this shift ushered in a profoundly different theory of power. Writing on behalf of four Justices in *United States v. Columbia Steel Co.*, Justice Douglas in 1948 stated:

> In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.[38]

The account Justice Douglas offers views economic power as inextricably political. Power in industry is the power to steer outcomes. It grants outsized control to a few, subjecting the public to unaccountable private power—and thereby threatening democratic order. The account also offers a positive vision of how economic power should be organized (decentralized and dispersed), a recognition that forms of economic power are not inevitable and instead can be restructured.

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37. The legislative history is carefully mapped out in John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Stucke, *supra* note 22; Khan & Vaheesan, *supra* note 22.

38. United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

Compare this account with one offered by Justice Scalia in *Verizon v. Trinko*. The case involved a telecommunications carrier's refusal to deal with a competitor, and—like *Columbia Steel Co.*—was brought under Section 2 of the Sherman Act:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[39]

This account, by contrast, views monopoly power as not just unthreatening but also beneficial. Economic power is both a product of metaphysical "free-market" forces and a key stimulus for them.[40] Far from being viewed as a menace, monopoly power is revered as a vital guardian of innovation.[41] Five members of the Court—including Justices Breyer and Ginsburg—joined Justice Scalia's opinion. The decision was unanimous.

These two passages offer a glimpse into the drastically different descriptive and normative accounts of power that mark the overhaul in antitrust. The transformation is often described in terms of legal standards, but it is also worth recognizing how starkly the background set of assumptions—about the source and the effects of concentrated economic power—have changed. (Indeed, the shift in legal standards has been justified largely on the basis of this

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39. Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

40. This shrouding of market relations from politicization is a signature move of neoliberalism. For a comprehensive account of how neoliberal thinking has shaped the law generally and particular areas specifically, see David S. Grewal & Jedediah Purdy, *Neoliberalism and the Law*, 77 L. CONTEMP. PROBS. 1 (2014); Amy Kapczynski, *Intellectual Property's Leviathan*, 77 L. CONTEMP. PROBS. 131 (2014); Jedediah Purdy, *Neoliberal Constitutionalism*, 77 L. CONTEMP. PROBS. 195 (2014); Zephyr Teachout, *Neoliberal Political Law*, 77 L. CONTEMP. PROBS. 215 (2014).

41. Justice Scalia's statement speaks to a longstanding debate between Schumpeter and Kenneth Arrow about whether monopoly or competition best favors innovation. But a host of empirical evidence weighs against Justice Scalia's position. *See generally* Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361 (Josh Lerner & Scott Stern eds., 2012) (addressing how competition policy can best promote innovation); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007) (calling for a move beyond the *Schumpeter vs. Arrow* debate toward an embrace of antitrust's essential role in fostering innovation).

new view of power as benign.) This particular move is part of a broader trend away from understanding concentrated private power as a problem of domination, implicating our ability to self-govern.[42] In other words, we have shifted from a republican theory of antitrust to a neoliberal one.

Some antitrust scholars dismiss the focus on the Chicago School's role, claiming that its actual influence on the law is overstated and that "at the level of specific rule making" antitrust has "tended to take a moderate position between extremes."[43] Others argue that the set of ideas that shaped contemporary antitrust have more complex and diverse roots than a single source.[44] I acknowledge that the intellectual history is not simple. But, for the purpose of this Response, I focus on one aspect of the Chicago School's contribution: that they embedded at the core of antitrust law a radically different descriptive and normative account of power. The shift was not so much a matter of adopting more technical rules as it was of ushering in a new ideology.[45]

Given the broad and general terms in which Congress wrote the antitrust statutes, their application turns critically on notions of economic power. When suspicion of concentrated power is replaced with reverence for it—and when power is viewed as inevitable rather than as the product of legal choices[46]—the antitrust laws founder.

II. HOW THE CURRENT IDEOLOGY ENFEEBLES ANTITRUST ENFORCEMENT

As authors of the *Yale Law Journal* Collection observe, the current market power crisis demands more active and aggressive antitrust enforcement. The opportunities they identify are valuable. But developing an antitrust regime equipped to tackle the full scope of our competition problem will also require grappling with the descriptive and normative account of market power that underlies current interpretation. Even under existing statute and case law, a different theory of power would illuminate under-used legal authorities and

42. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017).

43. Hovenkamp, *supra* note 20, at 17.

44. William Kovacic, *Antitrust Double Helix*, 1 COLUM. BUS. L. REV. 1, 13-14 (2007) ("[T]he intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix that consists of two intertwined chains of ideas.").

45. For others who share this view, see Horton, *supra* note 26, at 240 ("It is time therefore to stop treating neoconservative economics and its attendant laissez-faire antitrust implications as hard unrefuted science. We should instead begin recognizing neoconservative economic ideologies for the values-laden political, social, moral and economic ideologies they are.").

46. ROBERT HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952).

could encourage antitrust authorities to bring cases that reach forms of harm neglected by the current regime. This Part explains how the Chicago School's account of market power cripples enforcement.

A. *Welfare Effects and Mythic Markets*

Adopting consumer welfare as the single goal of antitrust codified the central role of welfare analysis in antitrust enforcement. As ample scholarship has documented, this shift was wrong as a matter of legislative history.[47] But as is now clear, it also turned out to be deeply damaging for enforcement. In this Section, I argue that one reason the present antitrust framework fails to adequately address market power is that the law pegs liability to welfare *effects* rather than to the competitive *process*.[48]

Congress enacted the antitrust laws to rein in the power of industrial trusts.[49] Responding to a fear of concentrated power, antitrust sought to distribute it. In this sense, antitrust was "guided by principles," or a specific set of values that the law sought to promote.[50] The law was "for diversity and access to markets; it was against high concentration and abuses of power."[51] By being *against* excessive concentration, the law conceived of "competition" as a set of conditions, including the openness of markets and the dispersion of market power.

In other words, antitrust law was structured to preserve a set of structural conditions (competition) as a way of promoting a set of outcomes and principles.[52] Essential to this set-up was the idea that "the competitive process is the

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47. As Leonard Weiss wrote, "It seems certain that Congress never thought in terms of the welfare triangle when it passed the antitrust laws." Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PENN. L. REV. 1104, 1104-05 (1979). *See also* Horton, *supra* note 27; Barach Orbach, *Foreward: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151 (2013); Stucke, *supra* note 22.

48. Even when courts claim to be analyzing the competitive process, they tend to use consumer welfare as a proxy to assess it. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[I]t must harm the competitive *process* and thereby harm consumers.").

49. Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013); Robet Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L REV. 1051 (1979).

50. *See* Fox, *supra* note 49.

51. *Id.*

52. As described above, these included preventing unfair wealth transfers from consumers, producers, and workers to monopolistic firms; preserving open markets in order to ensure opportunity for entrepreneurs; and halting excessive concentrations of private power. Khan & Vaheesan, *supra* note at 277; Robert Lande, *Wealth Transfers as the Original and Primary Goal of Antitrust*, 34 HASTINGS L.J. 1 (1987).

preferred governor of markets."[53] Promoting this set of conditions would mean "power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair."[54]

Reorienting antitrust analysis around welfare has largely severed the definition of "competition" from an analysis of structure and process (especially in cases involving conduct rather than mergers). The primacy of effects-based economic analysis has crippled enforcement in two major ways. First, it has imported into antitrust a set of assumptions about how markets work that are overly simplistic and systematically bias antitrust against intervention.[55] Second, it has prompted a shift away from per se rules and towards rule of reason analysis—rendering litigation highly protracted and costly.[56]

Embedded in current analysis are a series of neoclassical economic theories about how markets work.[57] These include the idea that market power is fleeting and monopolies often benign. Dominant firms can both deliver efficiencies and abuse their power, the argument goes, but the risk of abuse is checked by constant threat of entry by firms that will compete away any monopoly profits, rendering abuse of power unlikely. Two aspects of this theory are worth teasing out: first, the assumption that any abuse of market power will necessarily generate higher margins and spur new entrants and, second, the implication that abuse or maintenance of market power will not be durable. Growing empirical research casts doubt on both points: in fact, players that have captured control over a market often impede entry by small upstarts, thereby maintaining their dominance.[58] Yet this myth persists in the doctrine.

Perhaps the clearest example of how neglecting structural concerns in competition analysis handicaps enforcement is the refrain that the antitrust laws are meant to "protect competition, not competitors." It is true that some actions that enhance competition may also undermine competitors, and that the anti-

53. Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1154 (1981) ("One overarching idea has unified these three concerns [animating antitrust law] (distrust of power, concern for consumers, and commitment to opportunity of entrepreneurs): competition as process. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair.").

54. *Id*.

55. Jonathan Baker, *Taking the Error Out of 'Error Cost' Analysis*, 80 ANTITRUST L.J. 1 (2015) (describing the erroneous assumptions that underlie the current regime).

56. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007).

57. Baker, *supra* note 55.

58. *Id*. at 10.

trust laws should not be used to protect competitors at the expense of competition. But, in practice, the "competition, not competitors" refrain is often used to tarnish enforcement action and justify inaction. After all, as the Ninth Circuit has noted, "[i]njury to competition necessarily entails injury to at least some competitors" and competition "consists of a rivalry among competitors."[59]

Enforcement has lagged not just because welfare-based analysis blinds us to important metrics and measures of competition, but also because of how the consumer welfare standard has been administered. The shift from rules to standards has meant that most forms of conduct are analyzed under the "rule of reason." In today's formulation, the rule of reason serves as a supposed balancing test of harms and benefits. In practice, gauging the effects of particular conduct ends up turning on the "conflicting testimony of the parties' retained expert economists."[60] Indeed, as Rebecca Allensworth notes, the evolution and increasing centrality of the rule of reason approach has meant a "delegation of authority from judges and juries to economists," who now determine "the application, and sometimes even content, of antitrust rules."[61]

Although the heightened role of economic expertise is justified as bringing greater certainty and objectivity to the law, the rule-of-reason regime has rendered the law unpredictable and indeterminate.[62] It also seems to undermine enforcement. For one, it results in heavy discovery costs and inconsistent outcomes, which tend to dissuade private parties from filing suit.[63] Studies also show that when plaintiffs *do* litigate claims governed by the rule of reason, they "almost never win."[64] Lastly, the Court has cited the steep costs and indeterminacy of the rule of reason as a basis for restricting plaintiffs' access to courts, further narrowing avenues for enforcement.[65]

Centering antitrust on welfare concerns means that legal analysis largely turns on economic models that seek to assess on a case-by-case basis when given activity is anticompetitive.[66] This move away from structure, in turn, has

59. Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1988).

60. Maurice Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1427 (2009).

61. Rebecca Allensworth, *Adversarial Economics in Antitrust Litigation*, 106 N.W. U. L. REV. 1261, 1273 (2012).

62. Stucke, *supra* note 60.

63. *Id*. at 1467.

64. Allensworth, *supra* note 61; Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 4 (2009).

65. Stucke, *supra* note 60, at 1383.

66. The exception is horizontal price fixing, which is treated as per se illegal.

tied the law to a set of neoclassical assumptions about markets that disinvite antitrust action against dominant firms. In other words, the current regime assesses competition by analyzing how conduct affects welfare, and then defines market dynamics such that conduct is rarely anti-competitive.

B. An Embedded Preference for Under-enforcement

A second major reason the current framework in antitrust fails to address our market power problem is its embedded preference for under-enforcement. This orientation is justified by a set of theories about market dynamics and particular notions of legal institutions, which I describe below. As with the neoclassical assumptions that shape how courts and enforcers analyze consumer welfare, there is reason to doubt the empirical basis for preferring under-enforcement to over-enforcement.

The justification for under-enforcement has been articulated succinctly by Judge Frank Easterbrook. Explaining that courts face "a fundamental difficulty" in assessing the effects of conduct, he weighed the tradeoff: "If the court errs by condemning a beneficial practice, the benefits may be lost for good . . . If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time."[67] The basis for this is that "[m]onopoly is self-destructive," given that monopoly prices attract entry that will compete away market power.[68] In other words, punishing efficiency-enhancing conduct is costlier than failing to punish efficiency-reducing conduct, as the latter will eventually self-correct while bad legal precedents persist. This view has significantly shaped judicial thinking and analysis.[69] It is such a mainstay of contemporary analysis that at a recent oral argument, Justice Neil Gorsuch stated, "[W]hy shouldn't we take Judge Easterbrook's admonition seriously, that judicial errors are a lot harder to correct than an occasional monopoly where you can hope and assume that the market will eventually correct it? Judicial errors are very difficult to correct."[70]

Decision theory provides another way to describe this approach. Courts and doctrine have adopted the principle that Type II errors (false negatives, or

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67. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

68. *Id.*

69. *See, e.g.*, Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004) ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. . . .The cost of false positives counsels against an undue expansion of § 2 liability."); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (explaining that mistaken inferences and false condemnations are "especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

70. Transcript of Oral Argument at 18, Ohio v. Am. Express Co. (Feb. 26, 2018) (No. 16-1454).

not finding violations when the conduct harmed competition) are to be preferred over Type I errors (false positives, or finding violations when the conduct did not harm competition). While the cost-benefit framing of this principle lends it a veneer of scientific truth, it is worth identifying how this principle represents select assumptions about market dynamics and a particular conception of government institutions.

First, favoring Type II errors assumes away entry barriers and holds markets as "self-correcting," suggesting that any abuse of market power will eventually be checked through competition. But antitrust case law provides numerous examples of dominant companies that possessed durable market power,[71] and of dominant firms that successfully erected entry barriers to exclude new rivals.[72] Second, this approach assumes a backdrop of chronic epistemological doubt and uncertainty, with courts and enforcers unable to distinguish between conduct that promotes competition and that which undermines it. This, too, stands on shaky ground, as it fundamentally inverts the relationship between legal standards and the institutions that apply them. Whether particular conduct in a given context is anticompetitive should be determined through legal standards, not the independent assessment of individual judges. Concerns that enforcers and courts will decide improperly should be addressed through clarifying legal standards and minimizing the role of judicial discretion, not through requiring that enforcers and courts simply err on the side of not acting.

Notably, the need for this error cost judgment arises precisely because antitrust currently measures competition through welfare effects. The focus on this outcome leads to the recognition that "the economic impact of many contestable business behaviors is uncertain and therefore very difficult to assess correctly ex ante."[73] Because the effects of conduct are deemed unknowable, enforcers and courts will frequently confront instances where they must effectively guess. The preference for false negatives is offered as a way to guide enforcers through uncertainty. In other words, the focus on consumer welfare first privileges a narrow set of economic metrics—which then enables the admission that "[e]conomics is incapable of providing enforcers many of the definitive answers they seek."[74] Consumer welfare weds analysis to an inquiry that ultimate-

71. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

72. Jonathan B. Baker, *Exclusion as a Core Competition Concern,* 78 ANTITRUST L.J. 527, 535-36 (2013).

73. Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010).

74. *Id*. at 83.

ly proves indeterminable, and that indeterminacy is then used as justification for under-enforcement.

But this indeterminacy is not inevitable. It reflects the pegging of liability largely to welfare effects while neglecting the competitive process.[75] This is not to argue that expectations of future effects should be abandoned completely, but that present indicia can be used to structure analysis so as to encompass gradations of error analysis, rather than a binary choice between false positives and false negatives.[76] By anchoring enforcement in a default preference for false negatives, the current antitrust framework structurally favors under-enforcement.

III. TACKLING OUR MARKET POWER PROBLEM REQUIRES TACKLING THE FRAMEWORK OF ANTITRUST

Against the backdrop of growing calls to rehabilitate antitrust, the Features in the Collection identify ways to strengthen enforcement. Many of the contributions offer useful roadmaps for harnessing current doctrine to address anti-competitive conduct. But most either ratify or simply neglect to address the current philosophy that orients antitrust. By doing so, they pick at the symptoms of an ideology rather than grappling with the ideology itself. Identifying paths for greater enforcement within a framework that systematically disfavors enforcement will fall short of addressing the scope of the market power problem we face today.

In some cases, the authors acknowledge that the case law in a particular doctrinal area obstructs enforcement, but offer avenues through which meritorious plaintiffs could succeed. For example, in their review of predatory pricing doctrine, C. Scott Hemphill and Philip J. Weiser note that the Court's dicta in *Brooke Group* reflects "a deeply skeptical attitude" toward predatory pricing, but they read the doctrinal test as more accommodating than dicta suggests.[77] Citing two circuit court decisions, they observe that courts may be willing to accept modern theories of recoupment, which would make it possible for plaintiffs to meet one of the two prongs of the doctrinal test. Hemphill and Weiser briefly suggest in passing that courts should presume recoupment in certain contexts, but they largely focus on offering alternate ways to measure both recoupment and below-cost pricing. Yet it is not clear that any predatory pricing

75. In antitrust parlance, this prediction of future competitive outcomes is achieved through "dynamic competition models."

76. For a sense of what a more nuanced and flexible regime would look like, see Devlin & Jacobs, *supra* note 73.

77. Hemphill & Weiser, *supra* note 12, at 2058.

regime that keeps the recoupment requirement, as currently structured, will meaningfully revive enforcement against anticompetitive forms of predation. After all, embedded in the recoupment test is the idea that predatory pricing should be treated as anticompetitive only if a firm can recoup its losses—even though predatory pricing can be anticompetitive even in the absence of recoupment.[78]

Jonathan Sallet and Michael Katz, meanwhile, astutely unpack how the Second Circuit's analysis in *American Express* is erroneous and confused.[79] They explicate the numerous missteps in the court's reasoning, connecting them to foundational definitional and legal questions in antitrust. But the deeper issue—which the authors do not engage—is that the Second Circuit's misguided approach follows the logic of the existing framework. On the one hand, this analysis is new: never before has a court effectively held that anticompetitive behavior is legal if the harms to one population are sufficiently offset by benefits to another set of users. But, on the other hand, the Second Circuit's move accords with and maps onto the approach the "consumer welfare" inquiry introduces: namely, to ignore structure and focus on net effects.

Perhaps another sign that the existing framework constrains vigorous action is that some of the suggestions touch the periphery of the problem rather than the problem head-on. Jonathan Baker and Fiona Scott Morton, for example, offer a useful piece exploring how to apply antitrust to most-favored nation clauses employed by dominant platforms.[80] While the piece targets one mechanism through which dominant platforms illegitimately maintain and expand their market power, the scope and sources of the platform power problem extends far beyond their use of MFNs. The more pressing antitrust issues regarding the big tech platforms concern how their control over and access to data, as well as their integration across multiple lines of business, enables them to entrench their dominance in ways that undermine competition. Against these dynamics of online platform markets, relying on welfare-based tools will leave much unaddressed.

To be sure, some of the authors' recommendations would address the market power problem more directly. For example, Herbert Hovenkamp and Carl Shapiro defend the structural presumption in merger enforcement and identify ways to strengthen it and broaden its application—a worthy and important part of reinvigorating the law. The structural presumption is based on the idea that the elimination of a significant competitor in a concentrated market will

78. Christopher Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013).

79. Katz & Sallet, *supra* note 12.

80. Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

likely lead to market power, and that concentrated markets often feature significant barriers to entry. Critically, competition analysis in this context is guided by these structural markers, rather than by an inquiry into future welfare effects. But the authors' commitment to the existing frame ends up distorting their interpretation of the structural tool. They write that "market structure has been a means of tackling merger law's more fundamental concerns, which are higher prices or reduced output or other consumer harms that result from less competitive market structures."[81] But this imports into structural analysis a focus on outcomes, misreading its purpose and orientation and potentially exposing it to weaker enforcement.

The piece that comes closest to grappling directly with the current antitrust framework is Steve Salop's on vertical mergers. Salop cogently picks apart the set of flawed economic assumptions that underlie the current approach and make enforcers overly sanguine about the competition effects of vertical tie-ups. Striking at the heart of some of the theories that sustain the current framework is powerful.

Strikingly, none of the pieces focus on monopolization law, or Section 2 of the Sherman Act. This is the doctrinal area that has been most enfeebled by the current antitrust framework—*and* whose revival could go furthest to addressing our market power problem head-on, given that it would target existing concentrations of market power that have been acquired or maintained illegally. Another key and potentially far-reaching tool that goes unmentioned is Section 5 of the FTC Act.[82] Yet reversing guidance that the FTC issued narrowing the reach of Section 5 and bringing actions under the provision would be one of the clearest steps the FTC could take to invigorate enforcement. Doing so, however, would likely require a clear reckoning with how the current framework debilitates antitrust tools, given that the existing guidance weds Section 5 to "consumer welfare." Until we reckon with the ideological frame that cripples our enforcement tools, our attempts to revitalize enforcement will fall short of the rehabilitation that is needed to address today's market power problem.

CONCLUSION

Given the systemic market power problem we face today, identifying ways to restore antitrust enforcement is vital. Doing so first requires recognizing that the source of the problem is not just a lack of enforcement, but also the current philosophy of antitrust. The existing approach is premised on a theory of market power that proves deeply hostile to enforcement. Restoring a theory of

81. Hovenkamp & Shapiro, *supra* note 13, at 2018.

82. *See* Vaheesan, *supra* note 26.

power that accords with the original values of antitrust—including a distrust of concentrated private power—is critical for reviving an enforcement regime that can fully address the concentrated market power across our political economy. This would require refocusing antitrust analysis on a structural inquiry about process and power, rather than on a set of metrics focused on a narrow set of outcomes.[83] While the "Unlocking Antitrust Enforcement" Collection offers some useful suggestions for how to strengthen enforcement, they neglect to grapple with the current framework, ratifying an orientation and set of assumptions that ultimately undermine their project.

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83. For further thoughts on what this approach could look like, see Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. PRAC. 131 (2018).