
DO WE NEED A NEW SHERMAN ACT?

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Mounting evidence suggests that the American economy is suffering from a lack of competition. This Article details the empirical evidence that illustrates the nature of America’s competition problem. It then discusses the causes, both legal and economic, of ineffective antitrust enforcement. Finally, this Article closes by identifying potential congressional, executive, and judicial reforms that can serve to reinvigorate competition.

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I. INTRODUCTION

Since 1980, evidence has accumulated that the United States economy is becoming less dynamic and less competitive.¹ The significant decline in firm entry rates

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¹ See, e.g., Barry C. Lynn & Lina Khan, *The Slow-Motion Collapse of American Entrepreneurship*, *WAS. MONTHLY*, July–Aug. 2012, at 27, 27–28; Ufuk Akcigit & Sina T. Ates, *What Happened to U.S. Business Dynamism?* (Nat’l Bureau of Econ. Rsch., Working Paper No. 25756, 2019), <http://www.nber.org/papers/w25756> [<https://perma.cc/GR9U-V85P>];

between 1977 and 2013 indicates that fewer new companies have been forming.² Over the last thirty years in the United States, there has not only been widening income inequality across households, but also widening income inequality across companies.³ For example, publicly-traded nonfinancial firms in the ninetieth percentile of market capitalization enjoy returns on invested capital more than five times larger than those of the median firm.⁴ Compared to twenty years ago, that is a more than two-fold increase in the gap between such firms.⁵ Indeed, the profit gap between the largest firms (e.g., Google, Facebook, Apple) and the rest now hovers around its highest point in fifty years.⁶

Antitrust, when leveraged properly, serves as a remarkable tool to reinvigorate competition in the economy. An underdiscussed yet particularly captivating merit of antitrust is its distinctive redistributive ability: Antitrust enforcement redistributes “for free” in the sense that it does not create the deadweight loss that characterizes many other redistributive policies.⁷ When enforcement turns a monopoly market into a competitive market it reduces deadweight loss, expands output, and raises allocative efficiency and productivity.⁸ This stands in stark contrast to other

COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4–6 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf [<http://perma.cc/T5PX-ZEEY>].

² COUNCIL OF ECON. ADVISERS, *supra* note 1, at 5.

³ *Id.* at 4–5.

⁴ *Id.* at 5 fig.1.

⁵ *Id.*

⁶ *Id.*

⁷ David C. Hjelmfelt & Channing D. Strother, Jr. *Antitrust Damages for Consumer Welfare Loss*, 39 CLEV. STATE L. REV. 505, 507 (1991) (“[E]conomists view deadweight loss to be the major harm of monopolistic acts to society because such harm reflects a misallocation of resources [and] the transfer of wealth generally used to measure antitrust damages is not considered a harm to society overall by most economists.”).

⁸ Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235 (2017); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021); Sandeep Vaheesan, *Two-and-a-*

redistributive mechanisms, such as taxes, which generate deadweight loss.⁹

Furthermore, it is important to note which citizens tend to benefit from such enforcement. Because the top ten percent of households hold almost eighty-nine percent of shares in publicly-traded American companies,¹⁰ these households disproportionately benefit from the higher corporate profits that are the result of anticompetitive conduct and market power.¹¹ Thus, competition inherently redistributes from rich to poor. Competition converts corporate profit into lower prices for a broader population. When you have an increase in competition, you are taking money from the wealthy owners

Half Cheers for 1960s Merger Policy, HLS ANTITRUST ASSOC.: BLOG (Dec. 12, 2019), <https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/> [<https://perma.cc/9V4M-CLKJ>].

⁹ Paul Boyce, *Deadweight Loss Definition*, BOYCEWIRE (Jan. 10, 2021), <https://boycewire.com/deadweight-loss-definition-and-examples/> [<https://perma.cc/BA6N-MLTA>].

¹⁰ Fifty-six percent of Americans own at least some stock. Lydia Saad & Jeffrey M. Jones, *What Percent of Americans Own Stock?*, GALLUP (Aug. 13, 2021), <https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx> [<https://perma.cc/97BG-PSE2>]. However, per Federal Reserve data, the wealthiest one percent of Americans hold fifty-three percent of stock and the wealthiest ten percent own eighty-nine percent of stock. Jack Caporal, *How Many Americans Own Stock? About 145 Million—But the Wealthiest 10% Own More Than 80%*, MOTLEY FOOL (Nov. 2, 2021, 11:09 AM), <https://www.fool.com/research/how-many-americans-own-stock/> [<https://perma.cc/CR4K-ARRP>]. In fact, over the past two decades, the wealthiest one percent is the only segment of Americans that has expanded their share of stocks owned. *Id.*

¹¹ See James A. Schmitz, Jr., *Because of Monopolies, Income Inequality Significantly Understates Economic Inequality* 8 (Fed. Rsrv. Bank of Minneapolis, Working Paper No. 777, 2021), <https://www.minneapolisfed.org/research/working-papers/because-of-monopolies-income-inequality-significantly-understates-economic-inequality> (on file with the Columbia Business Law Review) (finding that monopolies create wealth for those in the monopoly at the expense of higher prices for those outside of the monopoly); see also Isabel Cairo & Jae Sim, *Market Power, Inequality, and Financial Instability* 17 (Fin. & Econ. Discussion Series, Working Paper 2020-057, 2020) (discussing that an increase in capital gains substantially contributes to wealth inequality).

of capital and giving it to the range of people who buy that product.¹²

Part II documents the accumulating evidence, both industry-wide and within specific markets, of the lack of competition within the economy. Part III examines the causes of the lack of effective antitrust enforcement we see today, particularly the influence of the Chicago School. Part IV details a variety of proposed solutions to reinvigorate antitrust enforcement.

II. EVIDENCE OF A COMPETITION PROBLEM

A hallmark signal of decreasing dynamism and competition is a high ratio of profits to wages. Recently, Jan Eeckhout has shown this ratio is substantially higher today than it was in the 1980s and 1990s.¹³ This likely reflects a number of factors, including the exercise of monopsony power by employers.¹⁴ At the same time, real wages have not increased since the 1970s,¹⁵ even while total productivity has risen sharply.¹⁶ This suggests that workers are not sharing in the fruits of their own economic production. Rather, firms are capturing the surplus. While the post-pandemic economy may exhibit an increase in the labor share relative to its pandemic peak, such short-term shifts need not imply a reversal of the broader trend.

Market-specific studies provide additional insights into the harms of declining competition. From consumer industries as

¹² See Schmitz, *supra* note 11 (discussing how monopolies significantly decrease the purchasing power of low-income households more than high-income households).

¹³ JAN EECKHOUT, *THE PROFIT PARADOX: HOW THRIVING FIRMS THREATEN THE FUTURE OF WORK* 34 fig.6 (2021).

¹⁴ Other potential factors include rising fixed and sunk costs, network effects, increased rent seeking, and globalization. See Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, J. ECON. PERSPS., Summer 2019, at 44, 53–59.

¹⁵ EECKHOUT, *supra* note 13, at 29 fig.3.

¹⁶ *Id.*

wide-ranging as beer,¹⁷ domestic airlines,¹⁸ education,¹⁹ household appliances,²⁰ healthcare,²¹ and tech,²² economists have painted a general picture of an economy where competition problems abound and where antitrust laws are under-enforced. While economic harms of declining competition have been estimated,²³ lack of competition can also result in serious noneconomic harms that cannot be so easily quantified.²⁴ For example, Thomas Wollmann identified a relationship between antitrust under-enforcement and quality-of-care in the dialysis market.²⁵ But despite the harm that dialysis mergers have been proven to

¹⁷ See Jayendra Gokhale & Victor J. Tremblay, *Competition and Price Wars in the U.S. Brewing Industry*, 7 J. WINE ECON. 226 (2012).

¹⁸ See José Aza, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018).

¹⁹ Austan Goolsbee & Chad Syverson, *Monopsony Power in Higher Education: A Tale of Two Tracks 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26070, 2019), https://www.nber.org/system/files/working_papers/w26070/w26070.pdf [<https://perma.cc/A9K7-4N44>].

²⁰ See Orley C. Ashenfelter, Daniel S. Hosken & Matthew C. Weinberg, *The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool*, 5 AM. ECON. J.: ECON. POL'Y 239 (2013).

²¹ See David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 J. AM. MED. ASSOC. 1964, 1966 (2013); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. Rev. 397 (2021).

²² Massimo Motta & Martin Peitz, *Big Tech Mergers*, 54 Econ. Pol'y 1 (2020).

²³ See Jan De Loecker, Jan Eeckhout & Gabriel Unger *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020).

²⁴ See Schmitz, *supra* note 11, at 8 (detailing how monopolies have lowered low-income individuals' access to professional dental care).

²⁵ Thomas G. Wollman, *How To Get Away with a Merger: Stealth Consolidation and Its Effects on US Healthcare* 20 (Nat'l Bureau of Econ. Resch., Working Paper No. 27274, 2021) https://www.nber.org/system/files/working_papers/w27274/w27274.pdf [<https://perma.cc/43AB-W6F5>] (noting the negative relationship between mergers of dialysis providers and spending on dialysis machines or care staff).

cause, many continue to escape the notice of the Federal Trade Commission (FTC).²⁶

The media has also played an important role in bringing attention to the harms of insufficiently competitive markets that have materialized throughout the pandemic. Mergers in the medical device industry led to a shortage of ventilators, forcing frontline workers to decide which patients would get to breathe.²⁷ Consolidation in agribusinesses led to farmers dumping milk and destroying eggs when millions of Americans were experiencing a shortage of food.²⁸ The largest banks prioritized wealthy clients for pandemic aid while small business were failing.²⁹

While a lot of attention has been paid to end consumer harms from lack of competition, recent years have also seen a flourishing of labor literature on monopsony power and

²⁶ The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), Pub. L. 94-435, 90 Stat. 1383 requires parties to mergers of a particular size to file premerger notification. This premerger notification program is administered by the FTC. Mergers that do not meet the FTC's filing thresholds, which are updated annually, are exempt from filing a premerger notification. Wollman shows that, in the dialysis market, the FTC takes action against mergers that have filed a premerger notification and result in high market concentration as measured by the Herfindahl-Hirschman Index (HHI). Wollmann, *supra* note 25, at 31 fig.1. However, the agency does not take action against any mergers that are exempt from filing—even when post-merger market concentration, as measured by HHI, is high. *Id.* This discrepancy in the FTC's merger enforcement reveals that, due to the agency's reliance on notification exemptions, it sometimes fails to enforce against mergers that would result in reduced quality-of-care for dialysis patients.

²⁷ Nicholas Kulish, Sarah Kliff & Jessica Silver-Greenberg, *The U.S. Tried To Build a New Fleet of Ventilators. The Mission Failed.*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html> [<https://perma.cc/QT39-YKMZ>].

²⁸ Claire Kelloway, *Why Are Farmers Destroying Food While Grocery Stores Are Empty?*, WASH. MONTHLY (Apr. 28, 2020), <https://washingtonmonthly.com/2020/04/28/why-are-farmers-destroying-food-while-grocery-stores-are-empty/> [<https://perma.cc/X3T8-L4BF>].

²⁹ See Emily Flitter & Stacy Cowley, *Banks Gave Richest Clients 'Concierge Treatment' for Pandemic Aid*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/04/22/business/sba-loans-ppp-coronavirus.html> [<https://perma.cc/9DBL-3PUX>].

worker harms.³⁰ Industry-specific studies have identified firms' monopsony power in the labor market and lack of firm competition on quality as powerful explanations for the aggregate decline in labor's share of Gross Domestic Product (GDP).³¹ One study has shown that hospital mergers can slow the wage growth of nurses.³² Another study has found that public school districts exert significant monopsony power over teachers.³³ Further, numerous studies have shown the harmful and anticompetitive impacts of non-compete agreements on wages and job mobility.³⁴

Facebook provides a nice example of the way in which lack of quality competition can interact with labor markets. Facebook currently employs about 15,000 content moderators.³⁵ In the abstract, this number might seem

³⁰ See, e.g., Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR REV. 3 (2020); Anna Sokolova & Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, 74 ILR REV. 27 (2020); Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203 (2010).

³¹ See, e.g., Autor et. al, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020) (providing evidence that the fall in the labor share is the result of the rising dominance of the most productive firms in each industry); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020) (showing that there was no corresponding decline in capital share for the decline in labor share).

³² See Prager & Schmitt, *supra* note 21, at 401.

³³ Michael R. Ransom & David P. Sims, *Estimating the Firm's Labor Supply Curve in a "New Monopsony" Framework: Schoolteachers in Missouri*, 28 J. LABOR ECON. 331 (2010).

³⁴ See, e.g., Alexander J.S. Colvin & Heidi Shierholz, ECON. POL'Y INST., NONCOMPETE AGREEMENTS (2019), <https://files.epi.org/pdf/179414.pdf> [<https://perma.cc/E9XU-VRXF>]; see also U.S. DEPT. OF TREAS., NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf [<https://perma.cc/76YE-Z7FZ>]; John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (Dec. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639 (on file with the Columbia Business Law Review).

³⁵ See PAUL M. BARRETT, N.Y.U. STERN CTR. BUS. HUM. RTS, WHO MODERATES THE SOCIAL MEDIA GIANTS? A CALL TO END OUTSOURCING 4

sufficient, but scaled by its 2.9 billion monthly users, Facebook has a very low rate of content moderation per user.³⁶ Further, AI systems and users report more than three million items every day to Facebook as potentially warranting removal.³⁷ This might well be the result of Facebook's market power allowing it to provide low quality services. By contrast, if Facebook had to compete vigorously to retain users, it might have to improve quality through better content moderation.³⁸ In order for Facebook to achieve competitive quality levels, it would likely need to hire thousands more content moderators. Hiring workers and paying them wages commensurate with their work would likely redistribute some of Facebook's profit share into labor share. This type of setting demonstrates how it is possible that the low labor share of national income reflects insufficient quality competition in new economy businesses such as social media.

III. SHORTCOMINGS OF ANTITRUST ENFORCEMENT

Over the last thirty years, antitrust enforcement has been hindered by courts' excessive concern with the wrong issues, in addition to courts' concern with the risk of false positives (incorrectly labeling harmless conduct as anticompetitive).³⁹ The Supreme Court has focused on preventing false

(2020), <https://bhr.stern.nyu.edu/tech-content-moderation-june-2020> [https://perma.cc/N6RE-CG7P].

³⁶ See *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2021*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [https://perma.cc/LS74-DUVM] (last visited Apr. 7, 2022).

³⁷ See BARRETT, *supra* note 35.

³⁸ Charlotte Slaiman, *Facebook and Twitter Made the Right Decision. Big Tech Is Still Too Powerful*, PUB. KNOWLEDGE (Jan. 12, 2021), <https://publicknowledge.org/facebook-and-twitter-made-the-right-decision-big-tech-is-still-too-powerful/> [https://perma.cc/8BMP-TSQH].

³⁹ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984) ("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.").

positives,⁴⁰ despite the error-cost literature explaining that the balance of enforcement has swung too far towards a non-interventionist approach.⁴¹ Additionally, the assumption that markets will self-correct without the intervention of the law, a frequent crutch used by those who favor under-enforcement, directly contradicts microeconomic theory showing that monopolists use their resources to keep their monopoly.⁴² Analysis demonstrates that markets will not tend to self-correct after monopolization, and there is no theoretical reason to imagine that self-correction would work as a policy to protect consumers.⁴³ The anticompetitive intent of defendants is often clear and transparent in internal documents, but courts have underutilized this information to interpret the nature and impact of conduct as anticompetitive.⁴⁴ Moreover, courts often incorrectly assume that vertical contracts and vertical mergers are almost always beneficial.⁴⁵

It is also counterproductive that courts have determined that antitrust law protects market “competition” rather than “competitors.”⁴⁶ This distinction becomes merely semantic

⁴⁰ See, e.g., *Verizon Comm’ns Inc. v. Law Offs. of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) (“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) (“Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”).

⁴¹ See Jonathan Baker, *Taking the Error out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1, 2 (2015).

⁴² See *id.* at 8–12.

⁴³ See Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L.J. F. 960, 975 (2018) (“[A]ntitrust case law provides numerous examples of dominant companies that possessed durable market power, and of dominant firms that successfully erected entry barriers to exclude new rivals.”).

⁴⁴ See Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151, 152–54 (2004).

⁴⁵ Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1962 (2018).

⁴⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (Warren, C.J.) (“It is competition, not competitors, which the [Clayton] Act protects.”); Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 248

when one considers the reality that competition cannot exist without competitors, whether they are large, small, nascent, potential, differentiated, or of any other form. More recently, the Ninth Circuit has determined that antitrust does not necessarily value the welfare of consumers, either.⁴⁷ One might reasonably ask whom, if not competitors or consumers, antitrust laws are designed to protect. If the laws are designed to protect dominant firms and defendants, then enforcement is not necessary and antitrust laws serve no purpose.⁴⁸

These aforementioned problems can be traced back to the rise of the Chicago School in the 1970s. Chicago School adherents claimed to use economic analysis in antitrust but more often relied on simple assumptions such as ‘markets will self-correct’ that did not require enforcement.⁴⁹ Despite its betrayal of legislative intent,⁵⁰ this approach saw great

(1967) (arguing that antitrust policy should protect “competition, not competitors”); *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990) (Kozinski, J.) (“It can’t be said often enough that the antitrust laws protect competition, *not* competitors.”).

⁴⁷ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020) (Callahan, J.) (“[A]ctual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of antitrust law.”).

⁴⁸ Chicago School advocates argue that the antitrust laws are meant to promote total welfare rather than consumer surplus. See Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 137 (2010); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 720 n.38. Under such an interpretation, antitrust laws should encourage the most efficient market outcome, whether that means a market dominated by one firm or composed of many small firms. This focus on total welfare without regard to competitive processes or market structures, however, is deeply flawed. See Khan, *supra*, at 744–46 (“[S]eeking to assess competition without acknowledging the role of structure is misguided. This is because the best guardian of competition is a competitive process, and whether a market is competitive is inextricably linked to—even if not solely determined by—how that market is structured.”).

⁴⁹ Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 PENN. L. REV. 1843, 1848–49 (2020).

⁵⁰ Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021); Khan, *supra* note 43, at 968 (“[P]lacing competition in the service of efficiency . . . represents a grotesque distortion of the antitrust laws that Congress passed.”).

adoption by the courts.⁵¹ While the Chicago School approach was tremendously popular in the late twentieth century, it has recently been shown to have failed spectacularly at maintaining competitive markets.⁵²

Many economists and attorneys would like to continue applying economic notions, such as considering the welfare of all sides of platforms, both consumers and input suppliers, and using economics to enforce antitrust laws.⁵³ Both of these activities are worth continuing if they are done correctly. It is crucial to note, however, that the way in which courts have been carrying out antitrust enforcement is not supported by current economics research. Those who want to use “economics” in antitrust must accept and use the reality of modern economics literature and all the market flaws it allows us to analyze. The Chicago School’s conception of price theory is not merely outdated; even in 1975, their economic analysis was flawed.⁵⁴ It concluded, for example, that

⁵¹ 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.”); *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986) (McKay, J.) (“As we approach this case, we must bear in mind that the purpose of the antitrust laws is the promotion of consumer welfare.”).

⁵² Khan, *supra* note 48, at 739 (describing the myriad of negative consequences stemming from reliance on the Chicago School approach).

⁵³ See Khan, *supra* note 43, at 963–64 (pointing out that a subset of authors in the *Yale Law Journal*’s “Unlocking Antitrust Enforcement” series advocated for continuing the consumer welfare standard); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUST. ORG. 74 (2019); Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19 (2014) (arguing in support of the consumer welfare standard); Tougher Enforcement Against Monopolists (TEAM) Act, S. 2039, 117th Cong. (2021) (proposing the codification of the consumer welfare standard).

⁵⁴ Carl Shapiro, *Antitrust: What Went Wrong and How To Fix It*, ANTITRUST, Summer 2021, at 33, 37 (“The advances in IO Economics during the 1970s and 1980s did not support the laissez faire approach to antitrust that we now associate with the Chicago School.”).

companies cannot gain market power from vertical mergers,⁵⁵ that monopolists are limited to single monopoly profit,⁵⁶ and that predation is irrational.⁵⁷ Additionally, their error cost analysis placed an outsized importance on false positives in antitrust intervention.⁵⁸

There is a great deal of modern economic analysis that should supplant Chicago School price theory. The game theory literature and the strategy literature lay out numerous tactics that firms use to gain market power.⁵⁹ Understanding these tactics is important to the way in which courts should weigh harm or liability in antitrust cases. For example, the fact that experienced top management planned a strategy and attempted to carry it out—whether it ended up being successful or not—should tell the courts a great deal about the state of competition in that market, and how the firm was trying to disrupt or lessen it. Currently, competitive harm cannot be inferred in cases where there is substantial evidence of predatory intent but not strong economic evidence of recoupment. This standard, imposed by the Supreme Court’s decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,⁶⁰ has led to the demise of predatory pricing

⁵⁵ ROBERT H. BORK, THE ANTITRUST PARADOX 226 (1978) (“Antitrust’s concern with vertical merger is mistaken. Vertical mergers are a means of creating efficiency, not of injuring competition.”). *But see* Salop, *supra* note 45 (advocating for increased vertical merger enforcement in order to subdue the influence of Chicago School economics).

⁵⁶ Salop, *supra* note 45, at 1968.

⁵⁷ Bork, *supra* note 55, at 144–55. *But see* C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018)

⁵⁸ Hovenkamp & Scott Morton, *supra* note 49, at 1870–71.

⁵⁹ *See* Shapiro, *supra* note 54, at 35 (“IO Economics has made great strides over the intervening 40 years in addressing issues critical to the enforcement of antitrust law. Examples include the incentives of monopolists to build extra capacity or tie up critical inputs to deter entry, vertical contracting generally (Nobel prizes have been earned in contract theory), firms competing in the presence of network effects, firms engaging in patent licensing and cross-licensing and forming patent pools, the economics surrounding standard-essential patents, and firms merging with their rivals or their suppliers.”).

⁶⁰ 509 U.S. 209 (1993).

cases despite modern economic theory showing the very real threat they pose.⁶¹

Courts should also update their understanding of the economic literature on vertical mergers. Vertical mergers—mergers that occur between companies that provide different products in an ecosystem—can lead to foreclosure of rivals. An “upstream” supplier can refuse to supply something that is necessary for downstream firms to compete. Similarly, a “downstream” firm can refuse to buy from competitors of its upstream supplier. A recent survey of the vertical merger literature found that empirical evidence does not support a presumption that such mergers are procompetitive.⁶² Indeed, this directly contradicts the belief long-held by Chicago School scholars that vertical combinations are generally procompetitive.⁶³

In addition to work on vertical mergers, courts should also pay attention to recent work on the role of nascent competitors.⁶⁴ An especially noteworthy contribution to this literature argues that “an incumbent firm may acquire an innovative target and terminate the development of the target’s innovations to preempt future competition.”⁶⁵ The

⁶¹ C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2067 (2018).

⁶² Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 R. INDUS. ORG. 273, 273 (2021).

⁶³ See BORK, *supra* note 55, 225–45 (1978); Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. CHI. L. REV. 925, 936 (1978); *see also* Salop, *supra* note 45, at 1966–71 (detailing flaws in Chicago School analysis of vertical mergers); Hovenkamp & Scott Morton, *supra* note 49, at 1864 (“Models of vertical relationships that include bargaining and sophisticated econometrics can be used to evaluate vertical mergers, disposing of Bork’s strong conclusion that vertical mergers are virtually never anticompetitive.”); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 519–20 (1995) (describing how vertical mergers can lead to exclusionary effects, promote coordinate conduct, and allow evasion of pricing regulations).

⁶⁴ See C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1880 (2020).

⁶⁵ See Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649, 649 (2020).

authors call such acquisitions “killer acquisitions” and measure their empirical prevalence in the pharmaceutical industry.⁶⁶ The paper finds that killer acquisitions do occur in the pharmaceutical industry, that the FTC has not taken enforcement actions to prevent them, and that they may negatively impact the direction of innovation.⁶⁷ This suggests that nascent competitors are extremely important, especially in a world of innovation competition. An overly simplistic enforcement posture that focuses only on changes in Herfindahl-Hirschman Index (HHI), the predominant estimate of overall market concentration based on static firm market-shares, for example, would miss the harm of killer acquisitions because the acquisition of a nascent competitor with small or negligible market share would not noticeably change the HHI.⁶⁸

Courts would also do well not to ignore behavioral economics—a field that has generated lab experiments, field experiments,⁶⁹ theory, a number of Nobel Prize winners,⁷⁰ and a sizable literature. This literature does not simplistically conclude that consumers are “irrational.” Rather, it demonstrates that scholars are becoming more skilled at modeling the reality of consumer behavior. The literature explains the way in which consumers are limited in their

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. ECON. LITERATURE 315 (2009); Emel Filiz-Ozbay & Erkut Y. Ozbwat, *Auctions with Anticipated Regret: Theory and Experiment*, 97 AM. ECON. REV. 1407 (2007).

⁷⁰ See Robert Shiller, *Richard Thaler Is a Controversial Nobel Prize Winner—But a Deserving One*, GUARDIAN (Oct. 11, 2017, 6:56 AM), <https://www.theguardian.com/world/2017/oct/11/richard-thaler-nobel-prize-winner-behavioural-economics> (on file with the Columbia Business Law Review) (“The economics Nobel has already been awarded to a number of people who can be classified as behavioural economists, including George Akerlof, Robert Fogel, Daniel Kahneman, Elinor Ostrom, and [Robert Shiller]. With the addition of Thaler, we now account for approximately 6% of all Nobel economics prizes ever awarded.”).

ability to optimize in complex environments.⁷¹ It also shows that consumers have behavioral biases that can be characterized and measured. Consumers routinely over-respond to default settings, even when opting out of these settings can be beneficial.⁷² They are routinely impatient.⁷³ They can be manipulated by the context in which choices are presented to them.⁷⁴ Firms that are trying to maximize profit will take advantage of these persistent biases to increase their profit.⁷⁵ In other words, when firms design a web page to take advantage of consumers' known behavioral biases, competition is not actually a click away; instead, consumers must exert considerable effort to overcome switching costs, obtain information, and make good choices.⁷⁶

Although it would be beneficial for courts to consider these, and other, developments in economics, this does not address a key issue: Executive and judicial concern over false positives has prevented antitrust agencies from successfully deterring

⁷¹ Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451 (2003).

⁷² See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 673 (1999).

⁷³ See *id.* at 678.

⁷⁴ See *id.* at 678; see also Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43 (2021) (describing how dark patterns leverage cognitive biases to circumvent user preferences).

⁷⁵ See Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 ALA. L. REV. 2, 3–4 (2020).

⁷⁶ This phenomenon is exemplified by the process that consumers must undergo to cancel an Amazon Prime membership. Amazon makes the process for signing up for Amazon Prime. For instance, Amazon offers a free thirty-day trial to new customers that automatically converts into a paid subscription at the end of the trial period. This process illustrates that enrolling in Amazon Prime is essentially a zero-click experience. Ending Prime membership, on the other hand, requires many clicks during which users must repeatedly decline to enroll in and learn the benefits of Prime. See Complaint and Request for Investigation, Injunction, and Other Relief Submitted by The Electronic Privacy Information Center (EPIC) at 4–5, *In re Amazon.com, Inc.* (F.T.C. Feb. 23, 2021), <https://epic.org/wp-content/uploads/privacy/dceppa/amazon/EPIC-Complaint-In-Re-Amazon.pdf>. [<https://perma.cc/R8AC-F2WJ>].

anticompetitive conduct. This trend is exemplified well by antitrust agencies' attempts to block hospital mergers. From 1990-2003, there was a large wave of hospital mergers, which antitrust agencies generally failed to block.⁷⁷ However, after economists developed a new technique for measuring substitutability and head to head competition, agencies began to employ these techniques to successfully block anticompetitive transactions.⁷⁸ More recently, a second wave of hospital mergers has occurred.⁷⁹ And unfortunately, in a

⁷⁷ WILLIAM B. VOGT & ROBERT TOWN, HOW HAS HOSPITAL CONSOLIDATION AFFECTED THE PRICE AND QUALITY OF HOSPITAL CARE? 11 (2006), <https://folio.iupui.edu/bitstream/handle/10244/520/no9researchreport.pdf?sequence=2> [<https://perma.cc/UC32-QMCU>] (discussing that the U.S. Department of Justice and FTC had been unsuccessful in seven consecutive attempts to block hospital mergers and had not won a hospital case since from 1989 through 2005).

⁷⁸ Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, ANTITRUST, Spring 2005, at 21, 25 (1997) (“[S]mall increases in concentration can generate higher prices in the localized competition model of mergers among sellers of differentiated products . . . [because] two brands may be close substitutes even if both have low market shares.”); Gregory J. Werden, *Simulating the Effects of Differentiated Product Mergers: A Practical Alternative to Structural Merger Policy*, 5 GEO. MASON. L. REV. 363, 369 (1997) (“Courts . . . have never recognized that market shares are meaningless if markets are delineated broadly. Shares of a very broad market do not indicate what really matters—how often consumers of the product(s) of either merging firm view a product of the other merging firm as their next best substitute, and how close other substitutes are in such cases.”); Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23, 23 (discussing substitutability); Paul Klempner, *Equilibrium Product Lines: Competing Head-to-Head May be Less Competitive*, 82 AM. ECON. REV. 740 (1992) Barry C. Harris & David A. Argue, *FTC v. Evanston Northwestern: A Change from Traditional Hospital Merger Analysis?*, ANTITRUST, Spring 2006, at 34, 35 (discussing substitutability analysis in the Evanston trial); *In re Evanston Nw. Healthcare Corp.*, Docket No. 9315 (F.T.C. Aug. 6, 2007).

⁷⁹ ROBERT A. BERENSON ET AL., ADDRESSING HEALTH CARE MARKET CONSOLIDATION AND HIGH PRICES: THE ROLE OF THE STATES (2020), https://www.urban.org/sites/default/files/publication/101508/addressing_h [<https://perma.cc/RBC9-F7TE>]; AM. HOSP. ASSOC., TRENDWATCH CHARTBOOK 2018: TRENDS AFFECTING HOSPITALS AND HEALTH SYSTEMS 25 (2018),

few of these new cases, courts have gone backwards, ruled for defendants, and required antitrust agencies to expend resources on appeals in order to win.⁸⁰ Defendants have also asked their respective states for Certificates of Public Advantage (COPA) that would allow their merger to escape federal antitrust scrutiny.⁸¹ COPAs are regulatory regimes that “allow states to approve mergers that reduce or eliminate competition in return for commitments from the hospital to make public benefit investments and control health care cost growth.”⁸² In theory, COPAs require states to supervise defendants so that they cannot use their market power to raise prices or lower quality. In practice, however, COPAs frequently allow defendants to raise prices in a way that is difficult to regulate.⁸³

The failure to deter pay-for-delay schemes stands out as another example of judicial indifference to anticompetitive

<https://www.aha.org/system/files/2018-07/2018-aha-chartbook.pdf>
[<https://perma.cc/QM3Q-TGBY>].

⁸⁰ *FTC v. Thomas Jefferson Univ.*, 505 F.Supp. 3d 522 (E.D.P.A 2020), *dismissed on appeal per stipulation*, No. 20-3499, 2021 WL 2349954 (3d Cir. 2021) (denying the FTC’s request for a preliminary injunction); *FTC v. Penn State Hershey Med. Ctr.*, No. 17-2270 (3d Cir. 2019) (denying FTC’s request for a preliminary injunction); *FTC v. Advoc. Health Care Network*, No. 16-2492 (7th Cir. 2016) (denying FTC’s request for a preliminary injunction).

⁸¹ Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers: Evidence from Maine, Montana and South Carolina* (June 24, 2020), <https://ssrn.com/abstract=3634577> (on file with the Columbia Business Law Review); Erin C. Fuse Brown, *Hospital Mergers and Public Accountability: Tennessee and Virginia Employ a Certificate of Public Advantage* (Ga. State Univ. College of L., Legal Stud. Rsch. Paper, 2018-30, 2018), <https://ssrn.com/abstract=3255765> (on file with the Columbia Business Law Review); Jennifer Henderson, *This Tactic Helps Hospitals Ease Merger Scrutiny*, MEDPAGE TODAY, (Apr. 2, 2021), <https://www.medpagetoday.com/special-reports/exclusives/91907> [<https://perma.cc/J6Q3-UH96>].

⁸² See, Fuse Brown, *supra* note 81, at 1.

⁸³ RANDALL R. BOVBJERG & ROBERT A. BERENSON, URB. INST., *CERTIFICATES OF PUBLIC ADVANTAGE: CAN THEY ADDRESS PROVIDER MARKET POWER?* (2015), <https://www.urban.org/sites/default/files/publication/42226/2000111-Certificates-of-Public-Advantage.pdf> [<https://perma.cc/G9ZZ-3GSL>].

conduct.⁸⁴ A pay-for-delay strategy is relatively simple—an incumbent pharmaceutical manufacturer pays a generic entrant to stay out of the market.⁸⁵ Despite the straightforwardness of this strategy, it took the FTC ten years of litigation to convince courts to enjoin it.⁸⁶ In the FTC’s 2000 case against Schering-Plough, the Eleventh Circuit adopted an overly permissive patent test, which effectively immunized pay-for-delay settlements from antitrust scrutiny.⁸⁷ It was not until the FTC’s 2013 case against Actavis that the Supreme Court overturned the Eleventh Circuit’s patent test and found that pay-for-delay agreements are subject to antitrust scrutiny.⁸⁸ Further, even though the FTC won the case, three members of the Court expressed that it was acceptable for incumbents to pay entrants to stay out.⁸⁹

Another case that demonstrates the lack of deterrence today is the very basic horizontal merger of Sprint and T-Mobile.⁹⁰ It was evident that the merger satisfied the structural presumption for illegality established by *United States v. Philadelphia National Bank* using a well-established market definition.⁹¹ The *Philadelphia National Bank* standard establishes that, “a merger will be presumptively anticompetitive if the merged firm would have more than a

⁸⁴ Fed. Trade. Comm’n, Pay-for-Delay: How Drug Companies Pay-Offs Cost Consumers Billions (2010), <https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf> [<https://perma.cc/K4DL-RP9V>].

⁸⁵ *Id.*

⁸⁶ *Compare* Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005) (adopting permissive patent test that effectively immunized pay-for-delay settlements from antitrust scrutiny) *with* FTC v. Actavis, Inc., 570 U.S. 136 (2013) (overturning the Eleventh Circuit’s patent test, finding pay-for delay agreements subject to antitrust scrutiny).

⁸⁷ *Schering-Plough Corp.*, 402 F.3d at 1056

⁸⁸ *Actavis, Inc.*, 570 U.S. at 136.

⁸⁹ *Id.*

⁹⁰ *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

⁹¹ *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 364–66 (1963).

thirty-percent market share.”⁹² The *Deutsche Telekom AG* court itself stated that the plaintiffs satisfied this requirement.⁹³ It also stated that the plaintiffs satisfied a different standard for the presumption that a merger would be anticompetitive.⁹⁴ This standard, utilized by the Department of Justice (DOJ) and FTC, measures market concentration with HHI.⁹⁵ Despite the fact that plaintiffs satisfied these two different standards, the court relied on evidence of the merger’s efficiencies in order to find that the merger was acceptable.⁹⁶ It did so while explicitly acknowledging that the Supreme Court has previously found that efficiencies cannot be used as a defense to illegality.⁹⁷ Further, the court’s “evidence” of the Sprint/T-Mobile merger’s efficiencies was derived wholly from the defendants’ own conclusions about the merger’s efficiencies, including testimony from T-Mobile’s own President of Technology.⁹⁸ It accepted defendants’ self-serving statements that they would continue to compete vigorously, and rejected the robust findings concerning head to head competition that have characterized merger review of decades. The court placed its faith in an entrant constructed out of pieces of the merging firms, and ultimately ruled in favor of the defendant.⁹⁹

During the Obama administration, the government’s success rate in merger cases was high.¹⁰⁰ While this sounds

⁹² *Deutsche Telekom AG*, 439 F. Supp. 3d at 205.

⁹³ *Id.* at 205–06.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 208.

⁹⁷ *Id.* at 207.

⁹⁸ *Id.* at 208–210.

⁹⁹ *Deutsche Telekom AG*, 439 F. Supp. 3d at 243; see Press Release, U.S. Dep’t of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish, (July 26, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package> [<https://perma.cc/2YXP-LS4B>].

¹⁰⁰ Joshua H. Soven & Justin Epner, *After the Obama Administration: What Comes Next in Antitrust Merger Enforcement Policy?*, ANTITRUST, Fall 2017, at 88, 91–92.

impressive, the rate partly reflects antitrust agencies' lack of incentive to bring difficult cases to trial. Enforcement agencies are also deterred by a lack of resources from bringing more marginal cases to trial. This is further exacerbated by the agencies' unwillingness to bring difficult cases because their chances of winning potentially meritorious cases are lowered by courts' under-enforcement posture.¹⁰¹

The losses we have seen recently are due to excessively high standards of liability and judicial misunderstanding of the economics of competition. These are both well exemplified by the Department of Justice's lawsuit against American Express.¹⁰² In 2010, following two years of investigation, the DOJ sued American Express for the non-discrimination restrictions that it imposed on merchants. American Express's non-discrimination restrictions prevented merchants from "steering" their customers towards credit cards, such as Visa and Discover, whose merchant fees are lower than those of American Express.¹⁰³ The anti-steering restrictions forbade merchants from offering incentives, such as free coffee, for using credit cards other than American Express, it forbade them from verbally requesting that customers use other cards, and it even forbade them from truthfully telling their customers the fees that American Express was charging the retailer.¹⁰⁴ In antitrust, this sort of anti-steering restriction is called a most favored nation clause (MFN) or a price parity clause.¹⁰⁵

¹⁰¹ While the DOJ under Obama garnered headlines for successfully challenging the AT&T/T-Mobile merger (a conventional horizontal merger challenge), they did not move to block the TicketMaster/LiveNation and Comcast/NBC vertical mergers (both of which displayed more novel theories of harm). See Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 17 (2012).

¹⁰² *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018).

¹⁰³ *Id.* at 2283.

¹⁰⁴ *Id.* at 2284.

¹⁰⁵ Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nations Provisions*, 27 ANTITRUST 20, 20 (2013).

In 2018, the Supreme Court decided that American Express's most favored nation clause did not violate § 1 of the Sherman Act.¹⁰⁶ The majority opinion contained insufficient analysis of competition between credit cards.¹⁰⁷ Instead, it created an entirely new, "economically incoherent" analysis of relevant markets in two-sided transaction markets.¹⁰⁸ The Court essentially stated that, in two-sided markets, plaintiffs must prove that anticompetitive effects on one side of the platform outweigh procompetitive effects on the other.¹⁰⁹ It ignored the district court's finding that American Express's anti-steering restriction created higher product prices for all merchants who accepted American Express—a finding that alone would have been sufficient to establish American Express's power and the anticompetitive effects of their anti-steering restriction.¹¹⁰ Because so many businesses with market power in the new economy operate as two-sided platforms, the American Express decision further weakens antitrust laws and discourages antitrust enforcement.¹¹¹ Particularly troubling is the majority's suggestion that, by sharing its monopoly profits with the cardholders, American Express can offset its anticompetitive behavior on the merchant side.¹¹² If one extended this idea to other industries, the outcomes would be clearly undesirable. If there were an airline cartel, for example, airlines could claim that the airline industry is a two-sided platform with pilots on one side and passengers on the other. Then, as long as airlines raised the wages of the pilots, they could offset anticompetitive conduct

¹⁰⁶ *Am. Express Co.*, 138 S. Ct. at 2281.

¹⁰⁷ *Id.* at 2292–96.

¹⁰⁸ Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 49.

¹⁰⁹ See *Am. Express Co.*, 138 S. Ct. at 2281–82, 2286–88; John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805, 1809–1810 (2020).

¹¹⁰ *Id.*; see also *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 208 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹¹¹ See Kirkwood, *supra* note 109, at 1823.

¹¹² See *Am. Express Co.*, 138 S. Ct. at 2281.

that raised fares to passengers. Further, according to this line of reasoning, Microsoft might not face liability from excluding Netscape if it had given some of its monopoly profits to Windows developers (one side of the market).¹¹³

In cases other than American Express, courts have also erred in their reasoning. The ostensible reason that the Deutsche Telekom court gave for allowing the Sprint/T-Mobile merger, for example, was that it believed the executives when they said that they would keep competing.¹¹⁴ By blindly believing these executives, the court ignored substantial evidence that competition actually encourages firms, especially those directly competing for the same customers, to innovate, offer lower prices and higher quality.¹¹⁵ Indeed, the court's opinion openly eschews the use of economic analysis, explaining that, because the telecommunications industry is so complex, it should "not be examined solely according to traditional economic models or based narrowly on the simpler business calculus that may be more fitting in evaluating competitive effects in relatively simpler and stable product market."¹¹⁶ So, without the aid of economic analysis, the court concluded that the company would continue to compete after the merger, just as "a boxer who has strived and sweated for years to reach the title prize fight is not likely to pull punches and take a dive the moment he steps into the ring against the reigning champ."¹¹⁷ This is a conclusion that relies wholly on speculative assumptions about executives' intentions instead of considering the profit incentives of the firms.

¹¹³ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

¹¹⁴ *Deutsche Telekom AG*, 439 F. Supp. 3d at 243 ("To borrow a sports metaphor, a boxer who has strived and sweated for years to reach the title prize fight is not likely to pull punches and take a dive the moment he steps into the ring against the reigning champ.").

¹¹⁵ Wendy Carlin, Mark Schaffer & Paul Seabright, *A Minimum of Rivalry: Evidence from Transition Economies on the Importance of Competition for Innovation and Growth*, 3 B.E. J. ECON. ANALYSIS & POLY No. 1, art. 17, 2004, at 1, 1; Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701.

¹¹⁶ *Deutsche Telekom AG*, 439 F. Supp. 3d at 243.

¹¹⁷ *Id.*

In *FTC v. Qualcomm Inc.*, the court similarly failed to make use of proper economic analysis.¹¹⁸ Its opinion suggested technological markets should be insulated from antitrust scrutiny due to high rates of innovation.¹¹⁹ In addition, although it was the FTC's case, the DOJ intervened twice in the Qualcomm litigation, which is very unusual.¹²⁰ The DOJ's interventions were particularly disturbing because Makan Delrahim, who was then the Assistant Attorney General for the Antitrust Division, was a former lobbyist for Qualcomm.¹²¹ Although Delrahim formally recused himself from the DOJ's interventions, it is worth noting that the issues he pursued most fervently as Assistant Attorney General, namely intellectual property and competition, were the same issues for which he had previously lobbied on Qualcomm's behalf.¹²²

Even more disturbing than Delrahim's former affiliation with Qualcomm, however, was the court's finding that certain forms of consumer welfare need not be considered in antitrust cases.¹²³ This finding contradicts one of the most foundational

¹¹⁸ 969 F.3d 974 (9th Cir. 2020).

¹¹⁹ *Id.* at 990–91.

¹²⁰ See Jorge L. Contreras, *Rationalizing U.S. Standardization Policy: A Proposal for Institutional Reform*, 35 ANTITRUST, Spring 2021, at 41, 46; Kadhim Shubber, *US Regulators Face Off in Court over Qualcomm*, FIN. TIMES (Feb. 9, 2020), <https://www.ft.com/content/adbca366-49d3-11ea-aeb3-955839e06441> (on file with the Columbia Business Law Review).

¹²¹ Kadhim Shubber & Kiran Stacey, *Makan Delrahim, a Tech Lobbyist Turned Enforcer*, FIN. TIMES (July 26, 2019), <https://www.ft.com/content/225cd076-af81-11e9-8030-530adfa879c2> (on file with the Columbia Business Law Review).

¹²² See Contreras, *supra* note 120.

¹²³ *FTC v. Qualcomm Inc.*, 969 F.3d. 974, 992 (9th Cir. 2020) (“[A] substantial portion of the district court’s ruling considered economic harms to OEMs—who are Qualcomm’s *customers*, not its competitors—resulting in higher prices to consumers. These [consumer] harms, even if real, are not ‘anticompetitive’ in the antitrust sense—at least not *directly*—because they do not involve restraints on trade or exclusionary conduct in ‘the area of effective competition.’” (quoting *Ohio v. Am. Express* 138 S.Ct. 2274, 2285 (2018)); 1 PHILLIP AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW 7-148.2 (Supp. 2021) (“This restatement of antitrust harm is completely at odds with a decades-long rule, acknowledged by the

principles of antitrust enforcement: that antitrust laws should protect consumers.¹²⁴ If it is not intended to protect consumer welfare, the Sherman Act does not seem to have much purpose at all. After all, courts have already stated that antitrust laws are not designed to protect competitors.¹²⁵ It is nonsensical and self-contradictory for the country's most important anti-monopoly law to take into account only the welfare of the dominant firm.

IV. SOLUTIONS

Taken together, the economic and legal evidence strongly suggests that current antitrust laws are not successfully protecting competition. And, in the new economy, improved antitrust laws, regulation, and enforcement will be especially important.¹²⁶ This new economy, characterized by network effects and data collection, tends to produce concentrated markets.¹²⁷ Antitrust enforcers would therefore be wise to start their analysis at that baseline—the new market reality—when they assess potentially anticompetitive conduct. In order to protect competition in this new environment, the country must adjust its antitrust enforcement to reflect the natural evolution of its economy. It is important that standards for liability reflect both the high level of existing market power and the ease with which companies can now obtain and maintain market power.¹²⁸

Supreme Court, that antitrust's principal concern is with consumer harm. Further, conduct that raises customer prices lies at the core of such harm.”).

¹²⁴ Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof* 127 YALE L.J. 1996, 2020 (2018).

¹²⁵ See *supra* note 46.

¹²⁶ See generally Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (discussing the difficulties of promoting competition in the new economy).

¹²⁷ Khan, *supra* note 48, at 772 n.316.

¹²⁸ See Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. EQUITABLE GROWTH (Mar. 20, 2017), <http://equitablegrowth.org/research-analysis/marketpower-in-the-u-s-economy-today> [<https://perma.cc/GB5R-LSBE>] (detailing various causes of the lack of competition we see in markets today).

A. Congressional Reforms

It is crucial for competition law to prevent future monopolies. A recent bill introduced by Senator Klobuchar aims to accomplish exactly this.¹²⁹ Crucially, the bill provides that, “[e]xcept as provided . . . , exclusionary conduct shall be presumed to present an appreciable risk of harming competition.”¹³⁰ The bill’s creation of rebuttable presumptions would be especially useful, as it would save litigation resources and allow lawyers to take advantage of economic knowledge, but it would leave an escape valve for cases that do not fit the usual pattern. These rebuttable presumptions would disallow courts’ reliance

on inaccurate economic assumptions that are inconsistent with contemporary economic learning, such as presuming that market power is not durable and can be expected to self-correct, that monopolies can drive as much or more innovation than [companies in a competitive market], that above-cost pricing cannot harm competition, and other flawed assumptions.¹³¹

In this way, the bill would allow attorneys to present a much larger breadth of economic analysis to support their claims about anticompetitive conduct.

Another useful facet of the bill is that, for proposed mergers challenged by state or federal enforcers, it would shift the burden of proof onto merging parties to show that a merger will be beneficial for consumers or to show that innovation will not be harmed by a merger.¹³² When defendants bear the burden of proof and the burden is high, we can be confident that any conduct passing that standard will benefit consumers. This level of scrutiny would be appropriate, given the peculiar problems arising from the new economy and given the mistakes that have been made in past

¹²⁹ Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

¹³⁰ *Id.* § 9.

¹³¹ *Id.* § 2(a)(21).

¹³² *Id.* § 4.

antitrust enforcement. Placing the onus on merging parties to prove efficiencies also makes sense because managers of merging firms understand their own efficiencies and how they plan to use their new combination of assets.

A third virtue of this bill is that it does not create an entirely new paradigm. Instead, it looks to build upon the existing system. The bill would leave in place the judges that we have, it leaves in place judicial discretion, and it does not create bright line rules. It does explicitly tell courts that past decisions—*American Express*, *Trinko*, *Qualcomm*, *Brooke Group*—were wrong and it shifts more burdens to defendants.

While the Klobuchar bill looks to prevent future monopolies, it is also important for antitrust laws to regulate existing monopolies—the monopolies that antitrust law failed to prevent from forming in past decades. A recent bill introduced by House Antitrust Subcommittee Chairman David Cicilino House and its Senate companion look to do this.¹³³ The House bill forbids platforms from engaging in conduct that

- (1) advantages the covered platform operator’s own products, services, or lines of business over those of another business user; (2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator’s own products, services, or lines of business; or (3) discriminates among similarly situated business users.¹³⁴

The bill also forbids various other forms of discriminatory conduct.¹³⁵ These bills recognize that especially entrenched, powerful platforms cannot be disciplined quickly and thoroughly enough with current antitrust laws alone. A complementary solution is to regulate access to app stores, operating systems, interoperability of the social network, or

¹³³ American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

¹³⁴ H.R. 3816, 117th Cong. § 2(a)(1)–(3) (2021).

¹³⁵ *Id.* § 2(b).

other points of entry. This solution could successfully promote competition in these sectors more quickly than adopting new antitrust laws. Notice that, though regulation can be quicker than antitrust enforcement, the legislative solution is a long road. Competition will not suddenly increase after enactment, but instead over a period of time, marked by the entrance of new firms into previously monopolized markets. These new laws will need to protect these entrants from being excluded by existing dominant platforms, and the entrants would need to grow. Neither antitrust nor regulation will bring about speedy change, but both are necessary in the long run, and using both rather than one alone will bring change more quickly.

B. Executive Agency Reforms

Through more aggressive enforcement, the DOJ and FTC can play a key role in bringing antitrust laws into the modern world. Taking on more difficult challenges that propose novel theories of harm is vital for updating the antitrust laws because these laws are advanced almost exclusively through adjudication.¹³⁶ If the enforcement authorities were successful in more aggressive merger enforcement, this would also serve to have a deterrence effect on problematic mergers.¹³⁷

Another avenue for reform is “unfair methods of competition” rulemaking by the FTC.¹³⁸ Adjudication of cases should be supplemented by rulemaking in order to keep up with the dynamic economy of today. As has been noted by a former FTC Commissioner, adjudication has “thus far proved

¹³⁶ See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 359 (2018); see also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the [Sherman Act]’s broad mandate by drawing on common-law tradition.”).

¹³⁷ See Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 739 (2018).

¹³⁸ 15 USC § 45(a) (2018). See generally Chopra & Khan, *supra* note 136, at 357.

incapable of generating any meaningful guidance as to what constitutes an unfair method of competition.”¹³⁹ “Unfair methods of competition” rulemaking provides an opportunity to lower enforcement costs and promote clarity regarding the demarcation of anticompetitive conduct.¹⁴⁰

Under current laws, other executive agencies can also implement economic regulations that complement tougher antitrust laws. There are many competition problems in the United States that are due to sectoral-specific regulation that is unduly favorable to firms. For example, the Department of Transportation has not done enough to prevent airlines from hiding their extra fees from consumers.¹⁴¹ Because hidden fees prevent consumers from understanding which airlines are truly cheaper than others, Department of Transportation policy has hindered consumers from successfully selecting the airlines that are most affordable.¹⁴² President Biden’s Executive Order on Promoting Competition is a massive step in the right direction, advocating for a “whole-of-government

¹³⁹ Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1304 (2014).

¹⁴⁰ Chopra & Khan, *supra* note 136, at 357.

¹⁴¹ Press Release, Edward J. Markey, Senator, et al., With Holiday Season in Full Swing, Senators Markey and Blumenthal, Reps. Cohen and Garcia Reintroduce Legislation To Stop Sky-High Airline Fees (Dec. 9, 2021), <https://www.markey.senate.gov/news/press-releases/with-holiday-travel-season-in-full-swing-senators-markey-and-blumenthal-reps-cohen-and-garcia-reintroduce-legislation-to-stop-sky-high-airline-fees> [https://perma.cc/753U-387F]. A group of Senators and Representatives have proposed legislation to address this issue. See Forbidding Airlines from Imposing Ridiculous (FAIR) Fees Act of 2021, H.R. 6215, 117th Cong. (2021); Forbidding Airlines from Imposing Ridiculous (FAIR) Fees Act of 2021, S. 3352, 117th Cong (2021).

¹⁴² Transparency of Airline Ancillary Service Fees, 82 Fed. Reg. 13,572 (proposed Mar. 14, 2017) (suspending the public comment period on a rule proposed under the Obama administration that would have required more transparency into airline fees); see Holly L. Weaver, *One for the Price of Two: The Hidden Costs of Regulatory Reform Under Executive Order 13,771*, 70 ADMIN. L. REV. 491, 502 (2018); Justin Sablich, *Trump’s Moves on Airline Fees Prompt Transparency Questions*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/travel/donald-trump-impact-of-airline-fees-on-tourism.html> [https://perma.cc/38D7-PM4V].

approach” to address competition throughout the economy.¹⁴³ We are already seeing the results of this directive, with the Department of Defense recently releasing a report recognizing the national security risks and harm to taxpayers that have resulted from consolidation in the defense sector.¹⁴⁴

C. Judicial Reforms

While some antitrust scholars are opposed to judicial discretion,¹⁴⁵ we believe that course correction is possible even if antitrust law does not perfectly guide litigation outcomes. Many of the failures of antitrust we witness today are due to the influence of the previously-discussed Chicago School. Through the veneer of economics, Chicago School adherents were able to shape antitrust jurisprudence to advance their free-market goals. While it would take decades for the courts to independently correct this deviation from the Sherman Act’s prescription, legislation will hasten this change and give courts direction that is grounded in market realities and modern economic learning. The aforementioned Klobuchar bill would “overrule a number of faulty, pro-defendant Supreme Court cases involving conduct by large firms.”¹⁴⁶

Even absent legislative intervention, however, there is ample room for the judiciary to independently course correct. While courts should reject antiquated Chicago School economics discussed in Part II, they should also focus more

¹⁴³ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

¹⁴⁴ OFF. OF THE UNDER SEC’Y OF DEFENSE FOR ACQUISITION & SUSTAINMENT, DEP’T OF DEFENSE, STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE (2021), <https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/STATE-OF-COMPETITION-WITHIN-THE-DEFENSE-INDUSTRIAL-BASE.PDF> [<https://perma.cc/Z7W9-625Y>].

¹⁴⁵ See Paul *supra* note 8, at 248 (advocating for discretion to be delegated to administrative agencies such as the Federal Trade Commission); Rebecca Haw Allensworth, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1284–1285 (2011) (discussing how interpretation of the Sherman Act should be the responsibility of administrative agencies because the courts excessively rely on amicus briefs due to a lack expertise in this area).

¹⁴⁶ Shapiro, *supra* note 54.

carefully on the evidence about the specific market in question and its consumers. The use of assumptions, such as patents are great, rather than the facts about the anticompetitive conduct leads to decisions such as in *Qualcomm*¹⁴⁷ in which Qualcomm's own documents directly showed that its practices were designed to create market power.¹⁴⁸

V. CONCLUSION

The harmful effects of market power are apparent in nearly every sector of our economy. The shortcomings of antitrust that have led us to this state are the result of courts' deference to large corporation thanks to the influence of the Chicago School's laissez faire ideology. These facts lead many to believe that we need a complete reboot of the antitrust program. And given the history we have traced out in this Article, this sentiment is reasonable. We believe, however, that there is sufficient room to operate within the current framework. Through legislation, we can correct some of the mistakes the courts have made in interpreting the law and we can allow for regulation to fill in some of the holes left by a lack of enforcement over the past few decades. Such legislation would dovetail with executive agency initiatives stemming from President Biden's Executive Order on Promoting Competition and being pursued under existing statutory authority. Additionally, even absent legislative intervention, there is ample room for the judiciary to independently course correct. It is an exciting time in the development of antitrust law, but it is vital we reinvigorate competition enforcement to promote a vibrant and dynamic economy.

¹⁴⁷ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020) (Callahan, J.).

¹⁴⁸ *See FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 807–12 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).