FINDING COMMON GROUND AMONG ANTITRUST REFORMERS

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Until recently, the antitrust bar paid little attention to antimonopoly movement critiques of the way antitrust rules are framed and enforced. They did not need to consider those views until the antitrust enforcement agencies did. Antitrust lawyers are undoubtedly taking the antimonopoly movement seriously now.

During President Biden's first year in office, he placed three antimonopoly movement favorites in charge of competition policy: Jonathan Kanter at the Justice Department's Antitrust Division, Lina Khan at the Federal Trade Commission, and Tim Wu at the White House's National Economic Council. This recognition and influence marked a remarkable achievement for a movement that was barely on the policy-making radar five years ago.[1]

In broad outline, the newly prominent antimonopoly movement (which I will also term "neo-Brandeisian")[2] seeks to transform antitrust law into a thor-

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[1] Senator Elizabeth Warren has been a leading champion of antimonopoly movement thinking since at least 2016. Sen. Elizabeth Warren, Keynote Remarks at New America's Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), www.warren.senate.gov/newsroom/press-releases/senator-elizabeth-warren-delivers-remarks-on-reigniting-competition-in-the-american-economy. Within the antitrust world, antimonopoly movement activists first shared the stage with well-known academics and practitioners in the antitrust field who had not previously engaged with their ideas at a 2017 conference at the University of Chicago. David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (Apr. 4, 2017), www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies.

[2] DAVID DAYEN, MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER 2–3 (2020); BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION xvi (2010). Journalist David Dayen first referred to the "New Brandeis Movement," from which "neo-Brandeisian" derives. Dayen, *supra* note 1. This article uses "antimonopoly" (or "antimonopolist") and "neo-Brandeisian" interchangeably.

oughgoing attack on concentrated economic power.[3] Neo-Brandeisians target concentration for reasons that go beyond preventing the exercise of market power, which they treat as a byproduct of concentration not requiring separate analysis. They aim to stop exploitation in the economic realm—going beyond harms to consumers and other buyers to include exploitation of small and powerless suppliers such as small businesses, farmers, and workers—and to interdict oligarchy in the political realm.[4]

Some neo-Brandeisian policy proposals overlap with those of other antitrust reformers. These include, for example, strengthening the structural presumption in horizontal merger analysis and overturning various Supreme Court precedents.[5] Other antimonopoly movement policy positions are distinctive, notably:[6]

- opposition to economic concentration per se—regardless of whether market power is exercised or firm scale or scope generates substantial efficiencies;
- aversion to vertical integration generally, and especially by large digital platforms, particularly when the same firm runs a platform and competes on one of the platform's sides; and
- endorsement of collective action by small suppliers (which could include small businesses, farmers, or workers) to redress a disparity in bargaining power when they deal with large firms.

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[3] The antimonopoly movement does not use the term "monopoly" literally (to refer to an industry with just one firm). Instead, it applies the term "monopoly" to all firms with strong positions in concentrated industries, including both oligopolists and dominant firms.

[4] This emphasis of antimonopoly movement thinking has brought renewed attention to social and political justifications for competition policy that the courts discarded a half century ago. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (indicating that during the 1970s, the courts were persuaded to adopt an exclusively economic approach to antitrust questions); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986) (Posner, J.) (concluding that antitrust decisions since the late 1970s articulated an economic goal).

[5] For lists of antitrust precedents proposed for repeal by neo-Brandeisians, see Letter from Sally Hubbard, Dir. of Enf't Strategy, Open Mkts. Inst., to David Cicciline & F. James Sensenbrenner, Jr., Chair & Ranking Member, House Subcomm. on Antitrust, Com., and Admin. Law 20–21 (Apr. 17, 2020) (letter joined by multiple antimonopoly groups and allies); Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO (Nov. 18, 2019), onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7. For a list of decisions establishing legal rules that impede meritorious antitrust cases identified by antitrust reformers not associated with the antimonopoly movement, see Jonathan B. Baker et al., Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets 7–11 (Apr. 30, 2020) [hereinafter Baker et al., Protecting Competition in Digital Markets], ssrn.com/abstract=3632532.

[6] These and other antimonopoly movement positions are discussed *infra* Part II.A.

From a non-neo-Brandeisian perspective, antitrust reform is necessary to bring under control market power, which has been growing throughout the U.S. economy for decades.[7] As an economic problem, market power harms directly victimized buyers and suppliers. Market power also harms society as a whole by lessening economic growth and productivity and by contributing to our Gilded Age levels of inequality.[8]

Growing market power means that antitrust is not working the way it should be. The antitrust rules in place today—which collectively describe how we implement antitrust policy—are not those employed when modern antitrust was developed in the 1940s and elaborated on during the next three decades. Rather, today's rules were largely created by the courts beginning in the late 1970s. The courts transformed antitrust law with the expectation that doing so would boost the economy without substantially increasing the risk of market power. But it is now evident that this expectation was misplaced, as those rules failed to control what turns out to have been a progressively growing exercise of market power.

Three quarters of a century ago, the United States adopted an antitrust policy—a policy of fostering and protecting competitive markets.[9] After decades of debate, antitrust was preferred over two broad alternatives for addressing the development of large firms: laissez-faire (or, to similar effect, business self-regulation) or close government supervision (through extensive regulation or deconcentration).[10] Relative to those alternatives, the promise of antitrust policy is to make society wealthier, as competition gives firms incentives to lower costs and develop new and improved products and services and new ways of doing business, while inhibiting the potential for firms with market power to exploit their buyers and suppliers. In this way, antitrust policy helps

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[7] JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 13–25 (2019) [hereinafter BAKER, ANTITRUST PARADIGM].

[8] *Id.* at 26–31.

[9] Liability under the Sherman Act and Clayton Act, the primary antitrust statutes, is predicated on identifying acts that harm competition. This conduct requirement limits the means by which the antitrust laws can be used to pursue any goal, economic or otherwise. In part for this reason, regulation may usefully supplement antitrust in fostering competition. *See, e.g.*, Jonathan B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust Law*, 17 J. COMPETITION L. & ECON. 493 (2021).

[10] During the first half of the 20th century, advocates of taming concentrated economic power proposed two broad ways to do so, both involving close governmental supervision. One, associated with Louis Brandeis, sought to restore competition through systematic deconcentration, and by preventing large firms from engaging in unfair competition. The other, associated with Theodore Roosevelt, rejected deconcentration in favor of domesticating large firms through industrial policy (extensive governmental supervision and planning).

support inclusive economic growth,[11] which makes society as a whole better off and, by doing so, buttresses our democratic political institutions.

The promise of antitrust policy may appear hollow, however, against the backdrop of a secular slowdown in the rate of economic growth and an economy that increasingly directs the gains from a growing economic pie to large firms and their well-heeled owners rather than sharing them widely.[12] These economy-wide developments have persisted for several decades, making it progressively harder to defend U.S. economic regulatory policy generally, antitrust included, as helping to sustain the inclusive economic growth it seeks to nurture.[13]

Three primary camps take part in antitrust policy debates today:[14] neo-Brandeisians (or antimonopolists), centrist reformers (or post-Chicagoans), and conservatives (or Chicagoans).[15] Generally speaking, the centrist reform

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[11] Other economic policies put into place before or around the mid-20th century also contributed to the pursuit of inclusive economic growth. *Infra* notes 59–64 and accompanying text. Antitrust law makes growth more inclusive because returns from market power go disproportionately to the wealthy. By inhibiting the ability of firms to take rents from the buyers (including consumers) and suppliers (including workers) through the exercise of market power, the antitrust laws reduce inequality on average. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 11–13 (2015), www.law.georgetown.edu/georgetown-law-journal/glj-online/104-online/antitrust-competition-policy-and-inequality/.

[12] BAKER, ANTITRUST PARADIGM, *supra* note 7, at 22 (describing declining economic dynamism); Baker & Salop, *supra* note 11, at 1–3 (describing growing inequality).

[13] Public concern with market power has also been fueled by the rise of large digital platforms during the 21st century. Those firms once were seen as benign or even benevolent, but as they increasingly shape how we live and work, some of their marketplace behavior has drawn governmental condemnation and many now see them as too powerful.

[14] As should be obvious, the descriptions below are broad-brush generalizations. No summary can accurately represent the views of all commentators associated with a school of thought. Nor does this depiction of the intellectual landscape attempt to capture the views of commentators outside those camps.

[15] The term "Chicago" (in "Chicagoans" and "post-Chicagoans") refers to the Chicago School of antitrust, associated historically with Robert Bork, Frank Easterbrook, Richard Posner, and others. Other authors similarly identify three contemporary schools of antitrust thought but vary in how they label them. *E.g.*, Daniel A. Crane, *On Antitrust and Big Tech, Biden Must Return to His Centrist Roots*, THE HILL (Apr. 13, 2021), thehill.com/opinion/technology/547921-on-antitrust-and-big-tech-biden-must-return-to-his-centrist-roots/ (referring to "neo-Brandeisians," "reform centrists," and "pro-business conservatives"); Herbert Hovenkamp, *Selling Antitrust*, 73 HASTINGS L.J. 1539, 1541, 1542 (2022) (referring to "new [p]rogressives," "centrist[s]," and "neoliberal[s]"); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE GILDED AGE) (identifying "neo-Brandeisian," "post-Chicago," and "Chicago" Schools of thought); William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, ANTITRUST, Summer 2021, at 46 (recognizing "transformationalists," "expansionists," and "traditionalists"); A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 270 (2020) (discussing "populist critics," "mainstream progressives," and "conservatives"); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, ANTITRUST, Summer 2021, at 33 (referring to "populists," "modernists," and the "Chicago" camp). This article largely avoids using the term "progressive" because it has different connotations depending on whether it is

camp seeks to strengthen the antitrust laws to attack growing market power, and looks particularly to modern economic learning, both theoretical and empirical, as a guide. Both neo-Brandeisians and post-Chicagoans support antitrust reform. While the antimonopolists target economic concentration, and treat market power as a byproduct not requiring separate analysis, the centrist reformers target market power and look to economic learning to determine how much to credit concentration as an indicator of market power or as its source.

On the whole, antitrust conservatives defend the antitrust rules implemented by the courts today. This camp largely takes the view that those rules appropriately avoid chilling beneficial conduct while preventing competitive harms. By contrast, the centrist reformers view the error-cost balance reflected in current antitrust rules as skewed toward systematically under-deterring anticompetitive conduct and thus advocate stronger rules (i.e., rules that would do more to deter harmful conduct).

To date, none of the three major camps has staked out a position against antitrust (in the broad way that antitrust policy is described above). Conservatives say they support antitrust and defend current antitrust rules on policy grounds. Centrist reformers seek to strengthen antitrust, relying on economic analysis to improve the rules. Many antimonopolists say they want to restore antitrust rules similar to those in place during the mid-20th century. While the neo-Brandeisian intellectual framework pushes toward close government supervision (deconcentration and regulation) and the conservative approach leads toward de facto laissez-faire, we are not reprising the three-sided argument over economic regulatory policy from the early 20th century.[16] Hyperbolic rhetoric aside,[17] today's debate is primarily about policy details—fashioning specific rules—not about the legitimacy of antitrust.

The antimonopoly movement's voice, energy, and growing significance in policy debates can help advance the cause of antitrust reform. This article

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applied to a historical movement, used to describe contemporary divisions within the Democratic Party, or used in reference to contemporary antitrust commentators (who variously apply it to antimonopolists, centrist reformers, and both camps collectively). This article does, however, distinguish liberal political economy from progressive (anti-oligarchy) political economy.

[16] BAKER, ANTITRUST PARADIGM, *supra* note 7, at 36–38. The positions of the three camps debating today are not as extreme as the positions advanced then. *Supra* notes 14–17 and accompanying text. By contrast, the Critical Legal Studies movement, a school of legal thought that grew out 1960s and 1970s social activism to challenge ways that the law favors the interests of the wealthy and powerful, was likely more skeptical than today's antimonopolists that antitrust rules can prevent exploitation by monopolists. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming from—Where Are We Going*, 62 N.Y.U. L. REV. 936, 961–64 (1987).

[17] *E.g.*, Sandeep Vaheesan, *How Robert Bork Fathered the New Gilded Age*, PROMARKET (Sept. 5, 2019), promarket.org/2019/09/05/how-robert-bork-fathered-the-new-gilded-age/ (calling for "root and branch reconstruction" of antitrust).

explains why antimonopolists and post-Chicagoans should work together to advance both groups' goals. Doing so is likely a prerequisite for assembling a successful political coalition and mobilizing a broad range of support for reform. The article takes a centrist reform perspective that shares the neo-Brandeisian interest in strengthening the antitrust laws and antitrust enforcement but does not adopt the antimonopoly movement's intellectual framework or support all antimonopoly movement policy positions.

Part I places antimonopoly movement views in an historical context. It explains how modern antitrust was adopted in the 1940s, in the wake of the Great Depression, as part of a broader effort to support inclusive economic growth and why that approach to economic regulatory policy is under pressure today. This Part also clarifies how this historical narrative differs from that of neo-Brandeisians, on the one hand, and antitrust conservatives on the other.

Part II describes the neo-Brandeisian intellectual framework and the policy positions that flow from it, and points out where they diverge from the post-Chicagoan perspective. Part III explains why antimonopolists and centrist reformers should work together. It also identifies fault lines they must navigate to do so and areas of potential common interest.

I. THE DEVELOPMENT OF MODERN ANTITRUST

A. THE 20TH CENTURY[18]

For decades after 1890—the year Congress enacted the Sherman Antitrust Act—the antitrust laws were enforced inconsistently and government policy toward large firms was the subject of bitter political debate. That changed after Thurman Arnold took the helm of the Justice Department's Antitrust Division toward the end of the New Deal, and his litigation program pushed Congress to refashion the antitrust laws and courts to change their interpretation. The "structural era" antitrust rules put into place beginning in the 1940s were relaxed beginning in the late 1970s and 1980s. That is when antitrust entered its "Chicago School" era, named after proponents of the less interventionist approach associated with the University of Chicago.[19] Today's debate over antitrust's future reflects, to a considerable extent, competing accounts of

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[18] Some of the discussion in this Part was adapted from Jonathan B. Baker, *Revitalizing U.S. Antitrust Enforcement Is Not Simply a Contest Between Brandeis and Bork—Look First to Thurman Arnold*, COMPETITIVE EDGE (Jan. 31, 2019), equitablegrowth.org/revitalizing-u-s-antitrust-enforcement-is-not-simply-a-contest-between-brandeis-and-bork-look-first-to-thurman-arnold/.

[19] The administrability concerns of the Harvard School also played an important role in that transformation of antitrust. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

what happened in the 1940s and 1980s and alternative assessments of the consequences of those developments.

I have elsewhere explained in detail how the United States reached an informal political consensus (which I call a "political bargain") during the 1940s to prefer antitrust policy to the alternatives of laissez-faire and close government supervision, how implementation of that policy changed substantially beginning in the late 1970s without undermining the underlying consensus, and why growing market power threatens that consensus.[20] This account will place that narrative in a broader historical context about economic policy that goes beyond regulating large firms: it will frame antitrust as part of a larger constellation of policies aimed at achieving inclusive economic growth.

1. *The 1940s Transition to Structural Era Antitrust*

The strict antitrust rules developed and enforced between the 1940s and the mid-1970s reflected skepticism about firm conduct in concentrated markets and were hostile to all but the smallest mergers. The term "structural era" alludes to the judicial emphasis during that period on relying on market structure and per se rules to simplify economic proof and its consistency with the then-dominant "structure, conduct, performance" paradigm in the industrial organization economics.[21] That economic paradigm related market power to market shares and market concentration (i.e., to market structure). While the antitrust statutes condition liability on a showing of anticompetitive conduct, courts in that era relied heavily on market structure to inform how the competitive consequences of firm conduct were assessed.[22]

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[20] On the development and evolution of the informal political consensus, see Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006) [hereinafter Baker, *Political Bargain*]; Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010) [hereinafter Baker, *Preserving*]; Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175 (2013) [hereinafter Baker, *Economics and Politics*]. On growing market power, and the challenge it presents, see BAKER, ANTITRUST PARADIGM, *supra* note 7, 1–52. *See also* Jonathan B. Baker, *Accommodating Competition: Harmonizing National Economic Commitments,* 60 WM. & MARY L. REV. 1149 (2019) [hereinafter Baker, *Accommodating Competition*] (describing the assurance of competitive markets as a social commitment, entered into during the 1940s, and placed on a comparable footing to social commitments to the protection of private rights to contract and property and to the prevention of economic hardship to vulnerable market participants through social insurance and regulation).

[21] *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSPS., Winter 2000, at 43, 49–52.

[22] When the courts of that era adopted per se rules not conditioned on market structure, they generally did so based on a practical judgment that it was not worth incurring the costs of distinguishing harmful and beneficial conduct through an examination of the relevant circumstances, not because they questioned the link between market structure and competitive effects. *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 142–44 (1959).

Landmark structural era decisions include *Socony* (1940), which established horizontal price-fixing as illegal per se without regard to the reasonableness of prices or business justification for the conduct;[23] *Alcoa* (1945), which interpreted the prohibition against monopolization to place stringent limits on the conduct of dominant firms;[24] *Brown Shoe* (1962), which recognized that horizontal and vertical mergers should be reviewed strictly to head off incipient competitive harm;[25] *Philadelphia National Bank* (1963), which established a strong presumption against horizontal mergers that exceed concentration thresholds;[26] and decisions from the 1950s and 1960s treating tying,[27] group boycotts,[28] and vertical intrabrand non-price agreements[29] as illegal per se.

Neo-Brandeisians interpret the structural era antitrust rules as a triumph for antimonopolist antitrust advocate and Supreme Court Justice Louis Brandeis—a triumph snatched away three decades later by Robert Bork, a law professor and appellate judge associated with the Chicago School.[30] In this story, economic policy in the 1940s represents what Progressive era reformers

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[23] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The conduct was prohibited regardless of the defendants' market power. *Id.* at 224 n.59.

[24] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). Congress authorized the appellate panel to hear the case as the court of last resort, so the decision is generally treated as carrying the authority of a Supreme Court precedent. United States v. Grinnell Corp., 384 U.S. 563 (1966), later clarified that the offense of monopolization has two elements: monopoly power and its willful acquisition or maintenance.

[25] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[26] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[27] N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[28] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[29] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[30] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 78–79, 83, 102–03, 109 (2018); BARRY C. LYNN, LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE 193, 204 (2020); Khan, *supra* note 15, at 1666. *But cf.* Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1095 n.46, 1096 (2019) (noting that unlike Brandeis, Thurman Arnold was concerned with inefficiency and consumer harm rather than power imbalances). Ironically, some prominent mid-20th Century liberals did not view structural era antitrust enforcement as successful. During the 1960s and 1970s, consumer advocate Ralph Nader criticized the Federal Trade Commission as sleepy, and Sen. Phillip Hart pushed no-fault demonopolization to interdict oligopoly conduct. *See* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*," 74 IOWA L. REV. 1105 (1989) (describing the influence of these critiques on the federal enforcement agencies, and the resulting Congressional backlash). Well-known liberal economists John Kenneth Galbraith and Lester Thurow preferred industrial policy to antitrust. JOHN KENNETH GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 120–21, 215–17, 256–57 (1973); LESTER C. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 127, 146–50 (1980); Fox & Sullivan, *supra* note 16, at 960–61.

would call a victory of "the people" over "the interests."[31] What Brandeis termed the "curse of bigness"[32] was checked by antitrust and regulation. The antimonopoly movement's narrative assimilates the mid-20th century development of modern antitrust doctrine into a broader chronicle of 20th century progressive political achievements that also include an expansion of political rights, greater inclusion of historically disadvantaged groups into mainstream political and economic life, and increased economic security for the less fortunate.[33]

There is some basis for this interpretation. Mid-20th century courts saw the antitrust laws as advancing social and political goals[34]—particularly Brandeisian concerns to protect democracy from the outsized influence of concentrated economic power and to ensure that small businesses have an opportunity to compete[35]—along with pursuing economic goals such as stopping firms with market power from exploiting consumers and other victims. Occasionally, monopolies were broken up.[36] In much of the communications, energy, financial services, and transportation industries, direct economic regulation of big business, another of Brandeis's enthusiasms,[37] supplanted or supplemented antitrust law.

There is also some basis for a competing conservative account, which interprets the mid-20th century antitrust rules as a reflection of populist antipathy to big business that was taken too far and thankfully corrected beginning in the late 1970s.[38] Both the antimonopolist and conservative accounts view anti-

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[31] Theodore Roosevelt, The Progressive Covenant with the People (campaign speech recorded in 1912), www.loc.gov/collections/theodore-roosevelt-films/articles-and-essays/sound-recordings-of-theodore-roosevelts-voice/.

[32] LOUIS DEMBITZ BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., as projected by Clarence M. Lewis, 1934).

[33] The antimonopoly movement arguably views antitrust within the frame of an intellectual project concerned with increasing democratic participation rather than as part of an intellectual project of creating social wealth. *See* Baker, *Economics and Politics, supra* note 20, at 2180–81 (describing two sweeping intellectual projects animating much contemporary legal scholarship).

[34] *E.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 427–29 (2d Cir. 1945); Brown Shoe Co. v. United States, 370 U.S. 294, 315–16 (1962).

[35] *See, e.g.*, Pitofsky, *supra* note 4.

[36] Courts more often employed a quasi-structural remedy, compulsory licensing of intellectual property.

[37] Jonathan Sallet, *Louis Brandeis: A Man for This Season,* 16 COLO. TECH. L.J. 365 (2018).

[38] *See* William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1423–28 (1990) (describing how Robert Bork's case for antitrust reform was rooted in his critique of 1960s antitrust decisions). In this view, Chicagoans such as Bork preserved economic vitality by freeing markets from excessive antitrust enforcement and economic regulation. As with the antimonopoly interpretation, there is a basis for the conservative narrative. In response to the Chicago critique, even proponents of robust antitrust enforcement acknowledged that the mid-20th century antitrust rules had chilled the pursuit of efficiencies, and that some change of course would be beneficial. Robert Pitofsky, *Does Antitrust Have a Future,* 67 GEO. L. REV. 321, 323–25 (1987); LAWRENCE A.

trust policy as a contest between Brandeis and Bork over whether competition policy should tilt toward consumers, workers, small business, and farmers, or toward big business.[39]

A better interpretation of 1940s antitrust understands it not as a distributional contest but as something new: the outcome of an informal political consensus that rejected extensive economywide deconcentration and regulation, on the one hand, and laissez-faire deregulation on the other, in favor of relying on competitive markets to help foster inclusive economic growth.[40] By

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SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 1.3, at 7 (2d ed., 2006); *see also* Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 40, 42–44 (Robert Pitofsky ed., 2008) (indicating that the antitrust doctrines of the 1950s and 1960s were also criticized by several influential non-Chicagoans, such as Phillip Areeda, Donald Turner, and Robert Pitofsky, as well as by Chicagoans).

[39] *See* WU, *supra* note 30 (neo-Brandeisian view); Richard A. Epstein, *'The Curse of Bigness' Review: Revisiting the Gilded Age*, WALL ST. J. (Dec. 2, 2018) (conservative view). Senator Amy Klobuchar's informed history implicitly views antitrust policy as a choice between Brandeis and Bork by treating the Progressive era administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson as the high point for antitrust enforcement. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 120–21 (2021). Klobuchar treats Thurman Arnold's aggressive enforcement as a welcome exception in a broader narrative of antitrust's long 20th century decline. *Id.* at 354, 416–17 n.131.

[40] *See generally* Baker, *Political Bargain*, *supra* note 20. This interpretation of the antitrust policy established in the 1940s is consistent with a model of political competition between two diffuse interest groups: large firms on the one hand, and the potential victims of large firm market power (consumers, workers, farmers, and small business) on the other. *Id.* The model assumes that it is easier for a diffuse interest group to solve its collective action problems to mobilize politically under conditions of adversity (the absence of political power) than with political success, and that political success for one interest group does not create procedural hurdles for a competing interest group to organize. When the two groups recognize that they interact politically in repeated play, they may reach a self-enforcing political bargain (an informal consensus, not a literal bargain) to prefer competition policy over two alternatives: laissez-faire (which benefits large firms by permitting them to exercise market power) and deconcentration or economy-wide regulation (which shifts rents away from large firms). Each group does better in long-run expectation with competition policy because that outcome allows them to split the efficiency gains from competitive markets (the benefits of economic growth), and avoids regulatory instability from cycles in policy between a regime that redistributes in favor of large firms (laissez-faire) and a regime that redistributes in favor of consumers, workers, farmers, and small business (deconcentration or regulation). While the model treats large firm interests as in an informal negotiation with others, that should not be interpreted as a normative claim that firms, as distinct from individuals, have or should have entitlements to political rights. Rather, it recognizes that producer interests have been important historically and continue to be important in shaping regulatory policy, and that in practice, many people associate themselves with producer interests to an important extent. *See id.* at 496–97 (discussing the "division of the polity into two broad interest groups"). A complementary explanation for the stability of moderate political positions in a two-party competition turns on the incentive of a political party to moderate its positions in order to attract swing voters from the other party when the first party's political base is strongly motivated to turn out and the election is close. *See* Felix Bierbrauer, Aleh Tsyvinski & Nicolas Werquin, *Taxes and Turnout: When the Decisive Voter Stays at Home*, 112 AM. ECON. REV. 689 (2022). If one party tends to favor the interests of big business while the

making markets more competitive, antitrust law and enforcement would boost innovation, productivity, and efficiency,[41] and the gains would be captured and shared across the economy.[42] That approach was politically acceptable so long as the gains from making markets more competitive were shared.[43] Antitrust became a positive sum game rather than a way to make a zero-sum distributional choice.[44] It fosters competitive markets to help generate social wealth and to help prevent large firm interests from appropriating an unfair share of those social gains.

Thurman Arnold facilitated the birth of the new approach. As the leader of the Department of Justice's Antitrust Division from 1938 through 1943, Arnold ramped up enforcement. But his program was not a Brandeisian mix of deconcentration and regulation. "Unlike the Brandeisians," the historian Ellis Hawley wrote, "Arnold never seemed greatly concerned about the mere possession of economic power or the social evils of bigness per se." Arnold accepted that large firms were desirable "as long as they were efficient and passed along the savings to consumers."[45]

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other tends to favor the interests of consumers, workers, farmers, and small business, and if the base of the party out of power tends to be more motivated, then the party out of power would compete for voters nationally and in swing districts by tacking toward its base but not catering solely to its strongest partisans.

[41] *See* Kaysen & Turner, *supra* note 22, at 13–14 ("To sum up, efficiency and progressiveness [productivity growth and innovation] are the most important economic results whose achievement can be substantially influenced by antitrust policy."). Kaysen & Turner also recognized other goals: promoting competitive processes, prescribing a standard of fair conduct, and limiting the political power and social leadership of big business in society as a whole. *Id.* at 11, 17.

[42] *Cf.* JOEL P. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 17 (1954) ("[T]he essential premise of a free enterprise economy [is] that in the long run such a system, operating through competitive markets, provides the most effective means of promoting economic progress, economic justice, and the general welfare.").

[43] Side payments like social insurance may be required as part of the political bargain to ensure that the social gains from competition are shared with consumers, workers, farmers, and small business, thereby making the informal consensus politically acceptable. Baker, *Economics and Politics*, *supra* note 20, at 2187–88. They may be a necessary complement to antitrust to ensure inclusivity because competitive markets favor the wealthy: competitive markets maximize a social welfare function that gives more weight to those with higher lifetime incomes (i.e., those who value additional income the least). Takashi Negishi, *Welfare Economics and Existence of an Equilibrium for a Competitive Economy*, 12 METROECONOMICA 92 (1960); *see also* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018).

[44] This interpretation does not suppose that regulation is the product of disinterested public officials acting to advance the public good. Rather, it views competition policy as arising through the political interaction of self-interested economic actors, who reach a self-enforcing outcome that makes all better off (in long-run expectation). That outcome is not "the inevitable product of Coasian bargaining among conflicting interest groups or evolutionary selection" but a "possible outcome . . . when coordination is made possible by repeated interaction." Baker, *Political Bargain*, *supra* note 20, at 493.

[45] ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 428 (1966); *see also* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 113 (1995) (describing Arnold's approach to the problem of monopoly as embracing "little of the rhetoric and virtually none of the substance" of the antimonopoly tradition associated with Louis

Arnold's enforcement program relied primarily on enforcement under the antitrust laws: he urged the courts to enforce tough checks on the anticompetitive conduct of large firms in concentrated markets.[46] But it also incorporated elements of industrial planning and industry self-regulation: Arnold targeted industry-wide problems with multiple lawsuits aimed at competitive bottlenecks, and cases were often resolved through consent settlements that allowed industry to participate in developing relief.[47]

"By linking antitrust to consumer interests, and in defining consumer interests as he did," biographer and antitrust expert Spencer Weber Waller explains, "Arnold set the stage for modern antitrust . . . ."[48] Arnold's approach was ratified in key judicial decisions governing price-fixing and monopolization and by Congress when it enacted new merger legislation.[49]

Achieving the consensus that Arnold brokered was far from inevitable. For decades, political conflict over the role of large firms in the economy had seemed impossible to resolve. The informal political bargain (or social contract) explains why political conflict over large firms died down after the 1940s, to the point where historian Richard Hofstadter, writing in 1964, described antitrust as "one of the faded passions of American reform."[50] Instead of operating as an arena for political conflict, antitrust policy increasingly looked like technocratic economic regulation.[51]

Brandeis). *Cf.* Thierry Kirat & Frédéric Marty, *The Late Emerging Consensus Among American Economists on Antitrust Laws in the 2nd New Deal (1935–1941)*, 29 HIST. OF ECON. IDEAS, 11, 23 (2021) (explaining that Arnold, like Franklin Roosevelt, sought to reinvigorate antitrust enforcement without challenging private economic power).

[46] *See* SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 83 (2005) (describing Arnold's view that the Antitrust Division should see itself as a prosecutor using the courts to make law, not a regulatory agency, and that it should be hostile to abuses of power not business per se); *id.* at 91–99 (describing major litigation pursued during Arnold's tenure).

[47] *Id.* at 92; *see* Hawley, *supra* note 45, at 429–30 (describing Arnold's plans to use consent decrees and industry-wide enforcement programs).

[48] Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 608 (2004).

[49] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (monopolization); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 311–23 (1962) (reviewing 1950 Celler-Kefauver Act amendments to Clayton Act § 7).

[50] Richard Hofstadter, *What Happened to the Antitrust Movement?, in* THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS 188 (1979 reprint). From the mid-20th century through the mid-2010s, public debate was muted. Even when antitrust disputes gained the attention of politicians and the public, as with the Justice Department's case against Microsoft or challenges to large mergers, popular attention usually focused narrowly on the economic harms and benefits of specific firm conduct. That has changed over the past decade, as market power and antitrust policy have once again become conspicuous topics in political and policy discourse. Antitrust largely disappeared from political party platforms after 1988, but returned to the Democratic platform in 2016.

[51] Herbert Hovenkamp describes the judicial development of antitrust rules after WWII—and particularly their focus on market structure—as a response to changes in economic theory and to

The benefits of antitrust enforcement as an alternative both to widespread economic regulation and to the threat of market power posed by laissez-faire economic policies have long been understood, but the full import of Arnold's accomplishment has not been widely recognized. Modern antitrust law is an underappreciated and highly consequential achievement of the World War II generation. The achievement stands alongside more heralded developments in economic policy—particularly the creation of international economic institutions and social safety net policies—in helping to construct a society that captured and shared broadly the benefits of economic growth.[52] These developments collectively supported the American Dream of greater economic opportunity and better living standards. In short, the antitrust policy put into place during the 1940s helped implement a liberal political consensus for achieving inclusive growth.[53]

After the modern social safety net was instituted (beginning in the 1930s) and antitrust enforcement was ramped up (beginning in the 1940s), American liberals reached what historian Alan Brinkley has described as "an accommodation with modern capitalism . . . ."[54] They took the view that "the achievements of the New Deal had already eliminated the most dangerous features of the corporate capitalist system . . . ."[55] The government would not seek to "reshape capitalist institutions" but would instead "reshape the economic and social environment in which those institutions worked" through macroeconomic policy and a social safety net.[56]

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internal problems with the case law. Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 346–59 (2009). This can be interpreted as an argument about why the rules that implemented the political bargain during the postwar decades took the form they did.

[52] These include two international economic institutions established during the 1940s: the General Agreement on Tariffs and Trade (GATT), later replaced by the World Trade Organization, and the International Monetary Fund (IMF). Major social insurance programs, social security and unemployment insurance, were established during the New Deal.

[53] *Cf.* J. BRADFORD DELONG, SLOUCHING TOWARDS UTOPIA: AN ECONOMIC HISTORY OF THE TWENTIETH CENTURY 399 (2022) (describing post-WWII policy as simultaneously enabling the market economy to generate growth and prosperity, and checking the market to "keep the 'market economy' from turning into a 'market society' that people might reject, a society where employment was not stable, incomes were not commensurate with what people deserved, and communities were being continually upended and transformed by market fluctuations."). My usage of the term "liberal"—a contested concept with multiple meanings—reflects how the term has been employed in 20th century U.S. politics, including its acceptance of a government role to protect the interests of disadvantaged groups, a pragmatic commitment to policy experimentation, and "the use of democratic means to attain a great national end of active government devoted to serving the common good." James T. Kloppenberg, *Liberalism*, *in* 1 THE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 475, 480 (Michael Kazin ed., 2010).

[54] BRINKLEY, *supra* note 45, at 269.

[55] *Id.*

[56] *Id.* at 268; Michael K. Brown, *The Ambiguity of Reform in the New Deal*, 10 STUD. AM. POL. DEV. 405, 406 (1996) (describing the "change of New Deal liberalism from a concern with structural reform of the economy to economic growth").

The pursuit of economic growth was a central theme of U.S. economic policy after the Second World War.[57] This policy was established during the 1940s, enthusiastically embraced in the 1960s, debated during the 1970s, reasserted in a conservative anti-statist form during the 1980s, and diluted but still pursued during the 1990s.[58] The postwar focus on growth did not reflect a waning of concerns about competition but a recognition that the terms of the informal policy consensus had been set.

When viewed as a political project, 1940s antitrust is part of a broad reorientation of American political economy toward achieving inclusive economic growth.[59] That reorientation began during the New Deal and was completed after the Second World War. That is when the political system (including the courts) adopted two national economic commitments (deeply entrenched norms) and harmonized them with each other and with a prior national economic commitment.[60] The prior commitment, to protect private economic rights (contract and property), came with the Constitution. The first new commitment, to implement robust social insurance and regulation to protect those vulnerable to market forces (a social safety net), was the product of

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[57] ROBERT M. COLLINS, MORE: THE POLITICS OF ECONOMIC GROWTH IN POSTWAR AMERICA 234 (2000).

[58] *Id.*

[59] The informal political bargain does not easily fit within a common conceptualization of the clash of political ideas in 20th century America "as a battle between the philosophies of laissez faire and welfare statism." Ellis W. Hawley, *The Discovery and Study of a "Corporate Liberalism,"* 52 BUS. HIST. REV. 309, 313 (1978); *see also* Alonzo L. Hamby, *The New Deal: Avenues for Reconsideration*, 31 POLITY 665, 665 (1999) (contrasting Brinkley's view of New Deal era history with a "progressive interpretation" that depicts politics "as a series of dualistic struggles between the forces of progress and those of reaction, generally defined as 'the people v. the interests,' or 'the producing classes v. the barons of big capitalism.'"). The political bargain is also not a recasting of the "corporate liberalism" idea that understands early 20th century political economy as a form of corporate-led economic planning and coordination through private associations, think tanks, and similar institutions. *E.g.*, MARTIN SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS (1988). In the informal consensus neither big business interests nor the consumer, farmer, small business, and worker interests that sought to regulate large firms controlled economic policy. Large firms accepted the political bargain, not because they preferred it to laissez-faire but because they preferred it to the policy instability resulting from a distributional contest between big business and the rest of society. *See also, e.g.*, Baker, *Political Bargain, supra* note 20; *cf.* W. Elliott Brownlee, *The Public Sector*, *in* 3 THE CAMBRIDGE HISTORY OF THE UNITED STATES 1013, 1017–20 (Stanley L. Engerman & Robert E. Gallman eds., 2000) (describing models of the development of the U.S. public sector in the 20th century, including the adoption of income and corporate taxation, that describe it variously as a victory for social democracy, as captured by corporations and the wealthy to blunt redistribution, as captured by special interests supporting the military and social welfare programs, as captured by changing economic groups with middle class groups as the main victors, or shaped importantly by political conflict among economic interest groups with the state as an autonomous actor).

[60] *See* Baker, *Accommodating Competition*, *supra* note 20.

the New Deal.[61] The second new commitment, to competitive markets, was adopted during the 1940s, as discussed above. As part of the same reorientation toward inclusive economic growth, these commitments were complemented by the embrace of a broad industrial policy of providing public goods, including rural electrification (such as the Tennessee Valley Authority power projects) and extensive government support for research and development.[62] These four broad initiatives—three commitments and a policy—were largely developed and harmonized during the 1930s and 1940s.[63] Collectively they reflect and support the liberal consensus for inclusive economic growth, which has shaped economic policymaking since the mid-20th century.[64]

The ideal of America as a land of economic and political opportunity—however imperfect that picture has been in practice—played a central role in the great ideological contests of the 20th century. Those contests pitted the political and economic freedoms of Western democracies against fascist and socialist alternatives. The adoption of competition as economic policy supported the democracies in that contest by promoting economic opportunity and growth. More broadly, the liberal consensus for promoting economic

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[61] This commitment was established during the New Deal, with the enactment of social security and unemployment insurance (though it had predecessors and was augmented since with, for example, health insurance). As with the competition commitment, many sets of policies would satisfy the social safety net commitment, and different political coalitions could implement it in different ways. Since the 1930s, for example, health insurance programs (particularly Medicare and the Affordable Care Act), have become part of the social safety net. If Congress were to enact robust policies to assure decent housing and useful and remunerative employment, as proposed by Franklin Roosevelt as part of his Second Bill of Rights (along with medical care), those too could be understood as implementing this commitment. (Congress declared full employment as national policy in 1946, but this declaration was largely aspirational.)

[62] The federal government's role in providing a broad range of public goods has grown since the 1940s and is well entrenched today. Prominent examples from the 1950s include congressional establishment of the interstate highway system and what is now the Defense Advanced Research Projects Agency (DARPA). This role has 19th century roots in federal, state, and local efforts to promote internal improvements such as canals and railroads, and in the government's inherent "police power" to regulate in the general interest of public health, safety, morals, and welfare.

[63] The commitment to private economic rights was harmonized with an emerging, but not fully established, commitment to competition earlier, in the late 19th century. Baker, *Accommodating Competition*, *supra* note 20, at 1157–63.

[64] A progressive political economy approach to constitutional law frames these institutional developments differently. That approach seeks to structure our institutions to oppose oligarchy, provide broad economic opportunities to achieve a middle-class standard of living, and ensure that all groups (particularly including those historically disadvantaged) can share in those opportunities. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 8–12 (2022). From this point of view, what I have termed commitments to competitive markets and to a social safety net advance progressive political economy goals but fall short of achieving those goals. The progressive political economy approach treats private rights to property and contract—the economic commitment with direct textual support in the Constitution—more as an impediment to implementing an anti-oligarchy vision than as a commitment that must be harmonized with it. *See id.* at 416–17, 477.

growth and innovation and sharing their benefits widely helped sustain democracy by cultivating the economic preconditions for meaningful participation in self-governance and by contributing to the legitimacy of our democratic political institutions.[65]

The mid-20th century political project came under pressure during the 1970s, leading to substantial modifications in the way inclusive economic growth was pursued. Notwithstanding those modifications, growth has slowed and become less inclusive over the ensuing decades. These developments have strained the liberal consensus to the point of risking its breakdown absent substantial policy adaptations, including in antitrust.

2. *The 1980s Transition to Chicago School Era Antitrust*

The courts substantially modified antitrust rules between the late 1970s and early 1990s. Landmark decisions included *Brunswick* (1977), which instituted the antitrust injury requirement, thereby making it necessary for courts to evaluate the economic basis for linking the alleged violations to resulting injuries to affected parties;[66] *GTE Sylvania* (1977), which abandoned a per se prohibition against vertical intrabrand non-price restraints in favor of the rule of reason, requiring courts to consider claimed efficiencies when evaluating competitive effects;[67] *BMI* (1979), which limited the per se rule against horizontal agreements to restraints lacking any plausible efficiency justification;[68] *Matsushita* (1986), which indicated that courts should not infer an agreement among rivals from circumstantial evidence unless their conduct would otherwise make no economic sense, and encouraged courts to decide that question on motions for summary judgment;[69] *Baker Hughes* (1990), which interpreted structural era precedent to authorize a wide-ranging economic analysis of the competitive effects of mergers;[70] *Brooke Group* (1993), which created high hurdles to proving predatory pricing, whether brought as a monopolization claim or as a violation of the statute preventing price discrimination in the sale

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[65] The liberal consensus contributed to the sense that our democratic political institutions served the people, not favored groups or interests. It evolved out of the New Deal, which sought to improve the economy by improving democracy. ERIC RAUCHWAY, WHY THE NEW DEAL MATTERS 178 (2021).

[66] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[67] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[68] Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).

[69] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[70] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

of goods;[71] and *Trinko* (2004), which narrowed the way monopolization law applies to refusals to deal.[72]

While the antimonopoly movement interprets these developments as a laissez-faire counterrevolution instigated by large firm interests,[73] and conservatives interpret them as a welcome correction to populist anti-business rules that went too far,[74] I see them differently: as a sweeping but not fundamental reworking of the rules operating within the informal political bargain—sweeping enough to describe antitrust as shifting from the structural era to the Chicago School era but not so great as to reject the political bargain in favor of laissez-faire.[75] Some aspects of the 1980s change in antitrust—particularly the downsizing of the antitrust enforcement agencies during the Reagan administration and the aggressively non-interventionist rhetoric of some federal enforcers—could be viewed as attempting to hollow out the antitrust laws.[76] On the whole, however, the shift in policy is better understood as a thoroughgoing modification of antitrust doctrines aimed at permitting firms to capture more efficiencies—without discarding antitrust's fundamental commitment to protect and foster competition to promote innovation, productivity, and efficiency and allow the resulting gains to be shared economy-wide.[77]

Historians and political economists divide in how they interpret the way economic regulatory policy changed around 1980. That change is often de-

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[71] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[72] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). While *Trinko* was decided well after the other referenced decisions, it addressed monopolization from a similar perspective.

[73] Tim Wu describes Bork's project as "*laissez-faire* reincarnated, without the Social Darwinist baggage, and with a slightly less overt worship of monopoly . . . ." WU, *supra* note 30, at 91.

[74] *Supra* note 38 and accompanying text.

[75] The political bargain does not determine closely the specifics of the doctrinal rules, which the courts specify. This allows the terms of the political bargain to change over time. Baker, *Preserving*, *supra* note 20, at 631–32.

[76] Some leading Chicago School figures, including Aaron Director and Ronald Coase, likely came to their antitrust views out of a deeply held conviction that all political interference with market activities is hostile to freedom and societal welfare. George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 2 (2010). Their influence on antitrust policy, however, came primarily through their theoretical and empirical economic analyses of antitrust rules and cases.

[77] Baker, *Political Bargain*, *supra* note 20, at 505–15; Baker, *Preserving*, *supra* note 20, at 632–33. Even liberal commentators recognized that structural-era antitrust rules frequently sacrificed beneficial production efficiencies and would benefit from reform. *Supra* note 38. While the 1980s rule modifications were justified by a concern that the earlier rules were chilling production efficiencies, they had a substantial distributional effect: they tended to redistribute surplus from consumers and suppliers to large firms by increasing the risk that firms would exercise market power.

scribed as a break from the past,[78] replacing liberalism with neoliberalism,[79] in much the way that neo-Brandeisians and antitrust conservatives both describe the rise of the Chicago School as a regime shift. Many historians point, for example, to the substantially decreased progressivity of taxes, the changes in labor law that led to a rapid decline in private sector unionization, the hardship caused by welfare reform, and the weakening of financial regulation (which contributed to the 2007 financial crisis that sparked the Great Recession).[80] Other historians, however, see the liberal consensus as withstanding a conservative assault, bending to account for new economic conditions and new political coalitions, but not breaking.[81] That interpretation is consistent with my interpretation of the rise of the Chicago School as an extensive but

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[78] *E.g.*, MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 264 (2005); KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 263-64, 269 (2009); DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 6 (paperback ed. 2017) (distinguishing a period of "regulated capitalism" lasting from the late 1940s through the late 1970s from "neoliberal capitalism" running from the early 1980s to the present). Looking more broadly at the "combination of ideas, policies, institutions, and electoral dynamics" that created a "hegemonic governing regime," some historians have identified a "New Deal order" that lasted from the 1940s through the 1970s, after which it was "displaced or even overthrown by a different, more market-centered reform logic that became the basis of shifting electoral and policy coalitions in the 1970s and beyond." Gary Gerstle, Nelson Lichtenstein & Alice O'Connor, *Introduction*, *in* BEYOND THE NEW DEAL ORDER: U.S. POLITICS FROM THE GREAT DEPRESSION TO THE GREAT RECESSION 1, 8-9 (Gary Gerstle, Nelson Lichtenstein & Alice O'Connor, eds. 2019); *see also* Gary Gerstle & Steve Fraser, *Introduction*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, at ix (Steve Fraser & Gary Gerstle eds., 1989) (arguing that the "New Deal order" lasted from the 1940s through the 1970s).

[79] *See, e.g.*, Romain Huret, Nelson Lichtenstein & Jean-Christian Vinel, *The New Deal: A Lost Golden Age?*, *in* CAPITALISM CONTESTED: THE NEW DEAL AND ITS LEGACIES 3 (Romain Huret, Nelson Lichtenstein & Jean-Christian Vinel eds., 2020) (describing neoliberalism as "the attempt to insert the principles of classical liberalism into modern governance"). According to one progressive political economy account, economic policy successfully reconciled the inherent tension between capitalism and democracy for three decades after WWII through sustained and relatively equitably shared growth, but after the early 1970s, when that earlier approach stopped working, neoliberalism emerged as a new attempt to resolve the tension. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 20–22 (2014). This progressive political economy account could be read as consistent with my argument that a liberal consensus was established in the mid-20th century, reworked substantially in the 1980s, and has come under pressure today. *See also id.* at 23 (recognizing the "decline of the postwar economic compromise and the return of a conflict between capitalism and democracy in which old questions will once again become new").

[80] *See id.* at 8–10 (describing some aspects of neoliberalism in the United States); Kotz, *supra* note 78, at 14 (describing institutional changes in the role of government in the economy during the neoliberal era).

[81] Julian E. Zelizer, *The Unexpected Endurance of the New Deal Order: Liberalism in the Age of Reagan*, *in* BEYOND THE NEW DEAL ORDER, *supra* note 78, at 71. *See* Huret et al., *supra* note 79, at 11–12 (discussing the "long-term influence of liberal reform," indicating that "the neoliberal assault on the New Deal order has fallen short of its grandest expectations[,]" and concluding "that the New Deal order remains a very effective framework to make sense of U.S. political history and the transformation of U.S. political economy in the years since 1929").

not fundamental change in antitrust rules—as reworking but not overthrowing the informal political bargain.

The post-1980 change of course resulted from a shift in the political coalition governing regulatory policy from center-left to center-right.[82] In presidential politics, that political shift is most evident in the 1980 election of Ronald Reagan, but it had begun to occur earlier. For example, the Carter administration, taking its cue from the Kennedy-Breyer hearings, deregulated airlines. The new coalition formed in response to the difficult economic conditions during the 1970s and in reaction to the extension of the federal government's role in economic life required to address civil rights and environmental problems that had recently become salient.[83]

In modifying regulatory policy, the new coalition did not reject the liberal consensus for economic growth or the economic commitments that underlie its policy implementation, including the competition commitment—though it trimmed their application, often substantially and often after bitter policy debate.[84] While antitrust rules were relaxed—too far, it turns out, to deter the

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[82] *See* THOMAS BYRNE EDSALL, THE NEW POLITICS OF INEQUALITY 21 (1984) (describing a rightward shift in national politics that converted "what had been in 1974 an anti-business Democratic Congress into, by 1978, a probusiness Democratic Congress" and paved the way for a sharp shift to the right in 1981); *id.* at 241 (predicting that the "fundamental policy realignment" will "remain in place regardless of which party" controls the White House and Senate); THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (describing the role of race and taxes in the disintegration of the liberal coalition during the 1970s and 1980s); *id.* at 165–66 (describing policy consequences resulting from an alliance of working and middle-class whites and corporate America over a shared belief that both were victims of an overly ambitious federal government); *cf.* Kovacic, *supra* note 38, at 1420–23 (describing a rightward shift in Congress on antitrust beginning in 1976).

[83] BAKER, ANTITRUST PARADIGM, *supra* note 7, at 47; *cf.* Edsall, *supra* note 82 (emphasizing the political consequences of a changed economic environment); Kotz, *supra* note 78, at 76–81 (attributing a shift from regulated capitalism to neoliberalism to changing views of big business and attributing that change to the economic crisis of the 1970s, the expansion of social regulation, intensifying international competition, and receding memory of the Great Depression); DELONG, *supra* note 53, at 429–34 (attributing a neoliberal turn away from social democracy primarily to a sharp slowdown in economic growth, exacerbated by inflation). The modifications of antitrust rules occurred rapidly and coincident with a broader shift in economic regulatory policy. For that reason, it is hard to credit the attribution of pro-business antitrust outcomes since the mid-1970s to an antitrust-specific theory not closely tied to major political developments at the start of that period—such as the suggestion that around that time antitrust enforcement became technocratic, freeing judges and enforcers from direct political control and thereby allowing concentrated business interests to exercise more influence on antitrust outcome. Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline in Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. (forthcoming 2023).

[84] *See* Zelizer, *supra* note 81, at 74 ("As conservatives moved to dismantle the welfare state and reinvigorate the military state [after the 1960s], liberals stood their ground, they extended their reach, and they did so frequently and effectively."); *id.* at 78 ("Liberals achieved a series of important victories in defending social insurance and expanding existing programs, even as they came under serious attack."); Collins, *supra* note 57, at 234 (describing growth-centric economic policies from the 1940s through the end of the 20th century, with the details recast decade by

substantial growth of market power[85]—the judicial system has maintained core antitrust norms against anticompetitive collusion,[86] exclusion,[87] and mergers.[88] Although some social insurance programs, particularly welfare, were reformed under pressure from the right—and, as with antitrust, those reforms went too far[89]—the United States has generally maintained major programs like social security, Medicare, Medicaid, and unemployment insurance over the decades since 1980, and eventually, in the Obama administration, extended health insurance.[90] The scope and nature of government provision of public goods were routinely subject to partisan debate but Congress has continued to provide substantial research and development funding. The commitment to private economic rights—an economic commitment that predated the New Deal and was a central focus of *Lochner* era constitutional interpretation—was supported (not challenged) by the new coalition. While some on

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decade); *cf.* Baker, *Preserving*, *supra* note 20, at 634–41 (explaining why the political changes since the late 1970s should not be interpreted as overturning the political bargain in antitrust in favor of a laissez-faire economic regulatory policy); DELONG, *supra* note 53, at 448–49 (distinguishing between left neoliberals, who sought to achieve inclusive economic growth more efficiently through market mechanisms, and right neoliberals, who generally opposed government intervention in the economy and thereby rejected the goal of inclusive economic growth). While the shift to a center-right political coalition governing regulatory policy did not reject the liberal consensus for inclusive economic growth or the political bargain in antitrust, the new coalition's policies for promoting those ends, particularly tax and antitrust policies, benefitted the wealthy substantially and contributed importantly to the Gilded Age levels of inequality observed today.

[85] *See* Baker et al., Protecting Competition in Digital Markets, *supra* note 5 (identifying judicial decisions establishing legal rules that impede meritorious antitrust cases).

[86] *E.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); NCAA v. Alston, 141 S. Ct. 2141 (2021).

[87] *E.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[88] Many horizontal mergers were blocked. *See* Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 55–56 (2021) (providing a list of government horizontal merger challenges litigated to a decision between 2000 and 2020, and their judicial resolution).

[89] During the Clinton administration, for example, Congress circumscribed welfare eligibility by ending the legal right to cash assistance and imposing a five-year time limit on federal assistance to any particular family. These changes contributed to increased poverty. PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA 82, 86–87 (2013). For a more positive view of the 1994 legislation see Ron Haskins, Isabel Sawhill & Kent Weaver, *Welfare Reform: An Overview of Effects to Date* (Brookings Welfare Reform & Beyond Policy Brief. No. 1, 2001); Ron Haskins, Isabel Sawhill & Kent Weaver, *Welfare Reform Reauthorization: An Overview of Problems and Issues* (Brookings Welfare Reform & Beyond Policy Brief. No. 2, 2001).

[90] *See* Zelizer, *supra* note 81, at 78 (describing the "series of important victories" achieved by liberals in the decades after the 1970s "in defending social insurance and expanding existing programs" even though those programs "came under serious attack"). *But see* W. Elliot Brownlee, *The Public Sector*, *in* 3 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 1013, 1058 (Stanley L. Engerman & Robert E. Gallman, eds., 2000) (describing Reagan-era changes in federal taxation as "disrupt[ing] the policy equilibrium established after World War II" that had reflected a popular and bipartisan consensus in national policy toward taxation and redistribution through the public sector).

the right wanted to reject the liberal consensus,[91] the political system did not do that.[92]

Over time, though, the right took control of the courts, particularly the Supreme Court.[93] As a result, the commitment to social insurance is now threatened, for example by Justices who want to restrict agency rulemaking,[94] and the competition commitment is now threatened by the possibility that the Court will not recognize that market power has grown and the antitrust laws need strengthening. While the mid-20th century liberal consensus is threatened in the courts from the right, the Biden administration's as yet unsuccessful efforts to enact major legislation to expand the social safety net and

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[91] For example, the members of the Mont Pèlerin Society, founded in 1947, included many prominent conservative economists associated with the Austrian and Chicago Schools of thought such as Milton Friedman, F.A. Hayek, Ludwig von Mises, and George Stigler as well as notable philosophers and other intellectuals. The Society was founded to advocate a classical liberal political perspective that supported free markets, free expression, and private property in opposition to what they saw as a tendency toward totalitarian state control around the world. Statement of Aims, The Mont Pelerin Society (1947), www.montpelerin.org/statement-of-aims/; ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 105 (2012). In practice, this meant, among other things, that Society members generally viewed the mid-20th century acceptance in Europe and the United States that governments had an appropriate role in providing economic security as a way station toward socialism. *See* Robert Higgs, *Fifty Years of the Mont Pelerin Society*, 1 INDEP. REV. 623 (1997).

[92] *But see* Gary Gerstle, *America's Neoliberal Order*, *in* BEYOND THE NEW DEAL ORDER, *supra* note 78, at 257, 262 (arguing that the liberal order was replaced by a neoliberal one with a "commitment to laissez-faire capitalism that lies at the heart of this order's political economy"). The influential 1971 memo by future Supreme Court Justice Lewis Powell to the Chamber of Commerce explicitly recognized labor unions and collective bargaining as essential freedoms. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971) (calling for more vigorous participation in public debates by big business to defend free enterprise against regulation and inequitable taxation encroaching on private ownership, consumer choices, and a market economy). When in power, though, the center-right coalition instituted policies discouraging unionization, and its efforts contributed substantially to the secular decline in private sector unionization since the mid-20th century and to undermining political support for the liberal consensus today.

[93] The timing of vacancies (relative to which party controlled the White House and Senate) and the increasing conservativism of the Republican Party empowered the right wing of the center-right regulatory policy coalition on judicial nominations and shifted the composition of the Court. Although the views of Trumpian populists differ from those of pro-business conservatives on some issues, probably including policy toward large digital platforms, the Republican Party as a whole does not appear enamored of the mid-20th century liberal consensus for framing economic policy around inclusive economic growth.

[94] *E.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022). *See generally* Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 969 (2021) (discussing a potential revival of the nondelegation doctrine, and restricting judicial deference to agency decisions involving major questions).

invest in public goods[95] and its elevation of promoting competition to an administration priority[96] work toward supporting the liberal consensus.[97]

B. THE CONTEMPORARY CHALLENGE

The reworking of antitrust law that began in the late 1970s sought to improve antitrust enforcement without rejecting the hard-won political consensus achieved decades earlier. The courts, under the influence of Robert Bork, Frank Easterbrook, and other Chicagoans, bet that greater efficiencies from relaxing antitrust rules would more than compensate for the increased risk that firms would gain and exercise market power.[98]

We now know that the Chicagoans lost their bet. Since the implementation of Chicago-inspired antitrust deregulation, market power has increased and has not been accompanied by long-term economic welfare gains. Instead, economic dynamism and the rate of productivity growth have been declining, and growing market power has contributed to a skewed distribution of wealth.[99] Given this record, it is not surprising to see strains in the mid-20th century liberal consensus, which aimed to achieve inclusive growth.

With the benefit of hindsight, it is evident that the Chicago-oriented antitrust rules are not up to the task of controlling market power. The predicament goes beyond the direct economic harms. The greater the license to exercise market power accorded to big businesses, the greater the threat that the political consensus for modern antitrust enforcement, formed in the 1940s, will

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[95] The Build Back Better Framework: President Biden's Plan to Rebuild the Middle Class, www.whitehouse.gov/build-back-better/.

[96] President Biden promulgated a far-reaching Executive Order setting out concrete steps for enhancing competition throughout the government. Exec. Order N0 14036 (issued July 9, 2021). This strong public commitment to competition policy recalls Franklin Roosevelt's 1938 call to Congress to curb monopolies and concentrated economic power. FRANKLIN D. ROOSEVELT, *Recommendations to the Congress to Curb Monopolies and the Concentration of Economic Power, April 29, 1938*, *in* 7 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 305 (Samuel I. Rosenman ed., 1941). That speech led Congress to create the Temporary National Economic Committee, which undertook a high-profile investigation of industrial concentration in a wide range of industries and foreshadowed ramped up antitrust enforcement by the Justice Department.

[97] These steps could also be seen as small steps in support of efforts to prioritize anti-oligarchy policies.

[98] *See* BAKER, ANTITRUST PARADIGM, *supra* note 7, at 43–46 (describing the influence of the Chicago School on the courts); *id.* at 82–86 (describing and criticizing arguments that the risks of harm from monopoly and oligopoly conduct are limited); *cf.* DELONG, *supra* note 53, at 446 (concluding that the three main factual claims justifying the small-government libertarianism advocated by Milton Friedman that the Reagan administration sought to implement were wrong, including the claim that the market economy, left alone by government, would produce a more egalitarian outcome than achieved in the post-WWII decades).

[99] *Supra* notes 11 & 12. On productivity trends, see LIDA R. WEINSTOCK, CONG. RSCH. SERV., IF 10557 INTRODUCTION TO U.S ECONOMY: PRODUCTIVITY (2021).

collapse—setting up a divisive political choice between laissez-faire economic policies and an extensive regulatory response. Regardless of whether one side prevails or policy instability results, such a political conflict would be a deeply troubling setback. It would mark the end of Thurman Arnold's competition-promoting and economic growth-enhancing approach to supervising large firms.

On the whole, the main threat to the liberal political economy project over the past half century generally and to the political bargain for competition policy in particular has come from conservative advocates of laissez-faire.[100] Among the fundamental commitments and policy underlying national economic policy since the 1940s, these conservatives support the primacy of private economic rights. Success for their perspective would jeopardize the commitment to social insurance and the policy of providing public goods because the redistribution required to fund safety net programs and public goods could be framed as narrowing property rights. It could also jeopardize the commitment to competition because antitrust prohibitions and remedies could be framed as interfering with private contractual rights.[101]

In antitrust, where the rules are largely judge-created, the conservative threat comes mostly from the courts. Recent decisions of the Supreme Court do not suggest any questioning of the Chicagoan antitrust project. The danger today is that conservative courts, especially a conservative Supreme Court, will not recognize our growing market power problem, not understand the need to strengthen our antitrust rules, and not alter antitrust's perilous course. Through inaction—that is, by simply adhering to the current antitrust rules—the courts are undermining by stealth the informal political consensus for competition policy.[102] Even worse, the courts may push the rules further in a non-interventionist direction.[103]

From a post-Chicago perspective, antitrust rules should be updated in several ways. Congress or the courts should incorporate presumptions that better reflect the likelihood that certain practices harm competition, correct current judicial rules that reflect unsound economic theories or unsupported empirical

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[100] Baker, *Preserving*, *supra* note 20, at 636–39; *see also supra* note 91 (describing the views of the founding members of the Mont Pelerin Society). In recent years, the conservative intellectual case for laissez-faire has been framed by Randy Barnett and Richard Epstein, among others.

[101] *See* Baker, *Accommodating Competition*, *supra* note 20, at 1156–57.

[102] As of 2010, the political bargain appeared to have withstood non-interventionist pressure, such that overturning it in favor of laissez-faire would require a broad political mobilization by non-interventionists. Baker, *Preserving*, *supra* note 20, at 652. By the end of that decade, however, after the magnitude of the market power problem had become clear in economic research, it had become apparent that failing to strengthen antitrust rules would operate as a stealth rejection of the political bargain. BAKER, ANTITRUST PARADIGM, *supra* note 7, at 4, 35.

[103] *E.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

claims, and reduce substantive or procedural barriers to prevailing on meritorious claims. Various legislators and commentators have offered specific proposals for reforms along these lines.[104]

II. THE ANTIMONOPOLY MOVEMENT'S INTELLECTUAL FRAMEWORK

This Part describes the antimonopoly movement's intellectual framework and the policy positions that flow from it. It then explains why that framework leads neo-Brandeisians to misdiagnose the primary threat to democracy today.

A. THE POLITICAL THREAT FROM ECONOMIC CONCENTRATION[105]

The antimonopoly movement describes antitrust as centrally and most importantly a political project: defending democracy and liberty by attacking "the enhanced political power of concentrated industries."[106] On this account, antitrust "strike[s] at the root cause of private political power—the economic

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[104] *See, e.g.*, Baker et al., Protecting Competition in Digital Markets, *supra* note 5; BAKER, ANTITRUST PARADIGM, *supra* note 7; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, J. ECON. PERSPS., Summer 2019, at 69; Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), S.225, 117th Cong. (2021); *see also* Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916 (2018); Symposium, *The Post-Chicago Antitrust Revolution*, 168 U. PA. L. REV. 1843 (2020).

[105] This sketch of antimonopoly movement ideas relies substantially on the academic writing of Lina Khan and Tim Wu because those authors have been appointed to prominent policy-making positions. Similar themes also appear in the writing of other antimonopoly movement advocates, many of whom are also referenced. In addition, it treats the majority staff report of the House subcommittee investigation of competition in digital markets as an antimonopoly movement document given the involvement of Lina Khan in its drafting. SUBCOMM. ON ANTITRUST, COM. & ADMIN. LAW, HOUSE COMM. ON THE JUDICIARY, MAJORITY STAFF REPORT, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020) [hereinafter SUBCOMMITTEE STAFF REPORT]. Similarly, it views the Prohibiting Anticompetitive Mergers Act of 2022 as an antimonopoly movement document. Prohibiting Anticompetitive Mergers Act of 2022, S.3847 & H.R. 7101, 117th Cong. (2022) [hereinafter Mergers Act]. This proposed legislation was sponsored by congressional allies of the antimonopolists and endorsed by organizations prominent in advocating neo-Brandeisian antitrust positions. Press Release, Sen. Elizabeth Warren, Warren, Jones Introduce Bicameral Legislation to Ban Anticompetitive Mergers, Restore Competition, and Bring Down Prices for Consumers (Mar. 16, 2022), www.commondreams.org/newswire/2022/03/16/warren-jones-introduce-bicameral-legislation-ban-anticompetitive-mergers-restore; *see also* Sara Morrison, *Elizabeth Warren's Plan to Break up Big Everything*, RECODE (Apr. 5, 2022), www.vox.com/recode/23003056/elizabeth-warren-big-tech-mergers.

[106] WU, *supra* note 30, at 23. The neo-Brandeisians' thick conception of democracy goes beyond the responsiveness of the political system to popular views to incorporate moral and civic dimensions. Attacking economic concentration, in the antimonopoly view, helps to create a substantial space in the marketplace for developing virtues such as moral agency, self-improvement and the cultivation of character, and human flourishing. Deconcentration is said to promote these democratic virtues by freeing commercial activity and the world of work from domination by large firms exercising arbitrary power and distributing moral space throughout the economic community. *See* Teachout, *supra* note 30; LYNN, *supra* note 30.

concentration that facilitates political action."[107] Even worse, an unholy alliance between a strongman leader and monopolized industry "has an indelible association with fascism and authoritarianism."[108]

Beyond the threat to democracy, neo-Brandeisians explain, concentration leads to economic harm through the exercise of market power, particularly by "transferring wealth from the many among the working and middle classes to the few . . . at the top of the income and wealth distribution."[109] According to the neo-Brandeisians, these political and economic evils have a common ideological underpinning in "the philosophy of competition policy and antitrust" that has prevailed since the Reagan administration.[110]

In the antimonopoly movement's account, many of our current social ills flow to a substantial extent from growing market concentration. These maladies include the economic exploitation by large firms of disadvantaged groups: their customers (particularly end consumers and small business customers) and suppliers (particularly workers, farmers, and small business suppliers).[111] The concentration-related afflictions are also said to include income and wealth disparities unprecedented in the modern era and contemporary threats to democracy. The consolidation of industry, in turn, is described as the foreseeable byproduct of the Supreme Court's rejection of non-economic values beginning around 1980, midwifed by a Chicago School intellectual movement "that fundamentally rewrote antitrust law . . . ."[112] With its "fixation on efficiency,"[113] the economic-oriented Chicago approach "discarded far too much of the role that law was intended to play in a democracy, namely,

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[107] WU, *supra* note 30, at 22–23; *see also* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 966 (2018); Mergers Act, *supra* note 5, at 3. The neo-Brandeisians look to firm size and market structures when analyzing firm conduct because those concentration-related features are thought to be correlated with political power. Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 40 (2014) ("A company's political power is at its apex when it is both large in terms of the economy and plays a dominant role in its own markets."); *id.* at 70 (indicating that many factors that will lead to corporate exercise of market power "are a function of, or correlated with," firm size or market concentration).

[108] WU, *supra* note 30, at 18; *see id.* at 79 (attributing post-World War II political support for antitrust to its role as a bulwark against fascism).

[109] Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235–36 (2017).

[110] Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018) [hereinafter Khan, *New Brandeis*]; *cf.* Lina M. Khan, *Amazon's Antitrust Paradox*, 1216 YALE L.J. 710, 741 (2017) (identifying the prevention of unjust wealth transfers as a goal of the Sherman Act, while describing that goal as political as well as economic) [hereinafter Khan, *Amazon*]; Khan & Vaheesan, *supra* note 109, at 278–79 (same).

[111] Mergers Act, *supra* note 5, at 3, 21.

[112] Khan, *supra* note 107, at 964; *see also* Khan & Vaheesan, *supra* note 109, at 236.

[113] Khan, *New Brandeis*, *supra* note 110, at 132.

constraining the accumulation of unchecked private power and preserving economic liberty."[114]

Several distinctive features of antimonopoly movement rhetoric flow from the spotlight the movement places on the adverse political consequences of economic concentration. These include a depiction of antitrust as an arena for political conflict rather than as a technocratic economic exercise,[115] a concern with exploitative conduct of large firms beyond their exercise of conventionally defined market power,[116] an emphasis on enhancing democratic participation in antitrust policymaking,[117] and an insistence that markets are not natural

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[114] WU, *supra* note 30, at 17. While the neo-Brandeisians see a wide range of social and political problems flowing from the concentration of economic power, they largely avoid suggesting the use of antitrust law to achieve social goals like more jobs or less inequality directly. *But see infra* note 119. Rather, they seek to use antitrust to prevent concentrated power by refocusing it on market structure and a broader assessment of market power. Khan, *New Brandeis*, *supra* note 110, at 132.

[115] *E.g.*, Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J. F. 980 (2018),www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust.

[116] *E.g.*, SUBCOMMITTEE STAFF REPORT, *supra* note 5, at 247–329 (describing Amazon as taking advantage of counterparties, including third-party sellers in its marketplace, workers, rivals that are also customers, and consumers). The report emphasizes the way a dominant firm can harm trading partners through its bargaining power without regard to whether competition was reduced, and thus without regard to whether the antitrust laws were violated. For example, the harms to Amazon's third-party sellers are termed "bullying," not the exercise of market power. *Id.* at 267. To the extent Amazon's alleged conduct evidences exploitation of pre-existing market power, not exclusion to obtain or maintain that power or other conduct from which harm to competition might flow, its conduct would not support finding antitrust liability as the antitrust laws are currently interpreted, *supra* note 9, though it could provide a basis for demonstrating Amazon's market power and the injury to its victims. *See generally* Dayen, *supra* note 2; ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020).

[117] *E.g.*, WU, *supra* note 30, at 129–30; Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 362–63 (2020); *cf.* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021) (describing the common law-like evolution of antitrust law as antidemocratic). This neo-Brandeisian theme was anticipated by Harry First and Spencer Waller, who have called for antitrust to become more politically responsive by relying less on technical experts and more on democratic institutions. Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013); Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. U. L. REV. 807 (2019). To similar effect, and in the interest of disclosure, antimonopolist law professor Zephyr Teachout's otherwise complimentary review of my 2019 antitrust book pressed the criticism that the book advocates an "anti-politics." Zephyr Teachout, *Antitrust Deficit*, DEMOCRACY J. (Summer 2019), democracyjournal.org/magazine/53/antitrust-deficit/ (reviewing JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019)). Neo-Brandeisians likely share my view about the importance of insulating antitrust enforcement—particularly judicial decisions—from direct political influence, as a curb to partisan misuse of antitrust enforcement, special interest protectionism, and crony capitalism. BAKER, ANTITRUST PARADIGM, *supra* note 7, at 53–70. While we agree that antitrust law and enforcement "necessarily operate in a political context," *id.* at 54, we describe that context differently—and that difference appears to be at the heart of Teachout's critique. Antimonopolists see antitrust as the product of an unremitting political struggle between the people and the interests, while I identify an informal political consensus to adopt antitrust as

and inevitable but necessarily structured by law and policy.[118] They also include hostility to the economic focus of the "consumer welfare standard,"[119] sensitivity to the political influence of big business,[120] dismissal of economic analysis as politically motivated,[121] and concerns that the "revolving door"

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economic regulatory policy in the 1940s, and explain how the implementation of that policy changed when the political coalition in charge shifted from center-left to center-right beginning in the late 1970s. Along with neo-Brandeisians, I would welcome a political mobilization for government action against substantial and widening market power, potentially including new legislation. *Id.* at 206–07, 207 n.45. While I describe day-to-day antitrust enforcement as technocratic, relying heavily on economic analysis, I also explain that antitrust rules, enforcement, and policy are responsive to ideological shifts and new economic learning. BAKER, ANTITRUST PARADIGM, *supra* note 7, at 65. An aroused public and Congress could push the courts to revise antitrust rules to shore up the political bargain, *id.* at 206–07, and my book relies on economic analysis to defend the changes it proposes. Neo-Brandeisians seek an engaged public and Congress for a different reason: to attack concentrated economic power and the political power it spawns. They see technocratic enforcement based on economic analysis as inadequate for that task.

[118] Khan, *New Brandeis*, *supra* note 110, at 132. *See* Vaheesan, *supra* note 115, at 980–81 (describing antitrust as unavoidably political); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L & PUB. POL'Y 37, 38 (2014) (describing market structure as "innately political"); *cf.* Khan, *supra* note 107, at 969 n.40 (stating that the "shrouding of market relations from politicization is a signature move of neoliberalism"). This is a larger issue than antitrust. Lawyers tend to argue that law nests economics by creating institutions (like property and contract rights and enforcement mechanisms) that make markets possible. By contrast, economists tend to argue that economics nests law, as preferences and interests shape politics and institutions (including law). Both perspectives have merit, making it reasonable to view the characteristics of legal institutions and market institutions as simultaneously determined.

[119] *E.g.*, WU, *supra* note 30, at 135; Khan, *Amazon, supra* note 110, at 737; Khan, *supra* note 112, at 976. While neo-Brandeisians have disclaimed using antitrust to achieve social goals "like more jobs or less inequality," Khan, *New Brandeis*, *supra* note 110, at 132, layoffs and harms to local communities, among other social concerns, could count as harms to competition under a neo-Brandeisian merger legislation proposal. Mergers Act, *supra* note 5, at 3 & 21; *cf.* David Dayen, *Bring Back Antitrust*, THE AM. PROSPECT, Nov. 9, 2015, at 50 (suggesting that the adverse spillover effects of the exercise of monopsony power on "labor and environmental standards" provide a reason for antitrust policy to incorporate "all of the consumer effects of market concentration"). Some European reformers favor changing the welfare standard to recognize other social goals. *E.g.*, Rutger Claassen & Anna Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, 12 UTRECHT L. REV. 1 (2016); *cf.* Harry First & Eleanor M. Fox, Philadelphia National Bank, *Globalization, and the Public Interest*, 80 ANTITRUST L.J. 307 (2015) (discussing the role of non-economic public interest factors in merger review abroad). European antitrust reformers debate whether the antitrust laws should be interpreted to permit rivals to collaborate in order to promote environmental stability or secure fair labor standards among suppliers but those issues are not the primary focus of antimonopolist antitrust reformers today in the United States. *E.g.*, Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 8 J. ANTITRUST ENF'T 354 (2020). Goals like these are better understood as proposing constraints on how economic growth is pursued than as rejecting the value of inclusive economic growth.

[120] Mergers Act, *supra* note 5, at 3.

[121] *See* Matt Stoller, *How Economists Corrupted the Internet*, BIG (Mar. 22, 2021), mattstoller.substack.com/p/how-biden-can-clean-up-obamas-big (explaining that "money from dominant firms offered to the antitrust economics world is endemic[,]" and "that antitrust economics is designed purely as a language for excluding ordinary people from debates over political economy"). *But see* WU, *supra* note 30, at 55 (stating that "[n]o one denies that economic considera-

(government enforcer ties to the private sector, before or after their public sector employment) facilitates the ideological capture of public antitrust agencies and skews the policy advice that the defense bar and consulting economists provide.[122]

Many antimonopoly movement policy perspectives and recommendations can be traced to the neo-Brandeisian emphasis on the political and economic threats from economic concentration and its concern with the threat of economic exploitation in concentrated markets. These include calls for systematic deconcentration;[123] hostility to vertical integration by multi-sided platforms;[124] hostility to mergers;[125] and skepticism that mergers generate efficiencies.[126] They also include calls for antitrust enforcement to pay more attention to

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tions are what should govern any individual case"); *id.* at 128 (stating that "[t]o abandon economic analysis entirely would be implausible").

[122] Teachout & Khan, *supra* note 118, at 44–46; SUBCOMMITTEE STAFF REPORT, *supra* note 5, at 402; Jeff Hauser, Max Moran & Andrea Beaty, *Better Policy Ideas Alone Won't Stop Monopolies*, WASH. MTHLY. (July 18, 2020).

[123] *E.g.*, Mergers Act, *supra* note 5, at 6; *id.* at 43–46 (establishing a process by which federal enforcers can unwind consummated mergers in concentrated markets); *see also* TEACHOUT, *supra* note 116, at 15–16 (indicating that breaking up the five largest companies will not be sufficient, and listing twenty-two large firms as examples of "companies that should no longer exist in their current form"); Khan & Vaheesan, *supra* note 109, at 285 (endorsing "no-fault" antitrust liability for "firms found to possess monopoly or oligopoly power that inflicts substantial injury and cannot be justified on operational grounds, such as economies of scale"); *id.* at 287, 291 (favoring structural remedies, such as horizontal or vertical divestitures, to remedy monopolization); AM. ECON. LIBERTIES PROJECT, THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH 141–42, 146 (Jan. 12, 2021), www.economicliberties.us/our-work/courage-to-learn/# (endorsing no-fault monopolization and no-fault oligopolization, and structural separations); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM L. REV. 973 (2019) (calling for the implementation of a regulatory regime or antitrust remedy separating digital platforms from commerce).

[124] Khan, *Amazon*, *supra* note 110, at 792–97; AM. ECON. LIBERTIES PROJECT, *supra* note 123, at 141–42, 146; SUBCOMMITTEE STAFF REPORT, *supra* note 5, at 377–81.

[125] Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust,* 86 U. CHI. L. REV. 595, 602 (2019). *See* Mergers Act, *supra* note 5 (proposing stringent standards for evaluating horizontal mergers and acquisitions by dominant firms); AM. ECON. LIBERTIES PROJECT, *supra* note 123, at 146–47 (proposing per se prohibitions for some mergers); OPEN MKTS. INST., RESPONSE BY THE OPEN MARKETS INSTITUTE TO THE REQUEST BY THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE FOR INFORMATION ON MERGER ENFORCEMENT 4, 11–12 (Apr. 21, 2022) [hereinafter OMI RESPONSE] (proposing standards similar to those in the 1968 merger guidelines and augmenting them by prohibiting all acquisitions by firms with at least a 25% market share or dominance shown by direct evidence).

[126] *See* Steinbaum & Stucke, *supra* note 125, at 602 (criticizing the current antitrust regime as credulous about ostensible merger benefits); Sandeep Vaheesan, *Merger Policy for a Fair Economy*, LPE PROJECT BLOG (Apr. 5, 2022), lpeproject.org/blog/merger-policy-for-a-fair-economy/ (questioning the assumptions that mergers result in efficiency and that firms share the resulting benefits with the public); *cf.* Khan & Vaheesan, *supra* note 109, at 280 (discussing problems and failures of efficiency-based approach to prospective merger review).

harms to workers and farmers,[127] calls for greater scrutiny of large information technology platforms[128] and private equity ownership,[129] and recommendations for antitrust exemptions to allow disadvantaged groups to obtain countervailing economic power through coordination.[130]

Concern with the excessive political influence produced by concentrated economic power also underlies the antimonopoly movement's desire to implement these recommendations through bright line prohibitions,[131] which limit judicial discretion, and their concomitant call for antitrust enforcement to rely less on economic analysis.[132] The antimonopoly movement's preference for relying on the political branches to correct these problems—looking to new legislation or rulemaking by the FTC or the executive branch rather than

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[127] Mergers Act, *supra* note 5, at 3, 4.

[128] *E.g.*, Lina Khan, Chair, Fed. Trade Comm'n, Remarks at the Charles River Associates Conference: Competition and Regulation in Disrupted Times (Mar. 31, 2022); *see also* Khan, *Amazon, supra* note 110; SUBCOMMITTEE STAFF REPORT, *supra* note 5; AM. ECON. LIBERTIES PROJECT, *supra* note 123, at 138.

[129] AM. ECON. LIBERTIES PROJECT, *supra* note 123, at 140, 150, 155, 158, 160–61; *cf.* Mergers Act, *supra* note 5, at 10, 17 (defining large private equity firms as dominant firms subject to acquisition limits and to pre-merger notification).

[130] Submission of Sanjukta Paul to the House Committee on the Judiciary, Digital Markets Investigation 1, 8 (Apr. 21, 2020), judiciary.house.gov/issues/issue/?IssueID=14921 (recommending antitrust exemptions to permit joint bargaining and cooperation by workers, small sellers, service providers and other entities when doing so would provide a countervailing check on the power of dominant players); *accord*, Khan, *supra* note 15, at 1664. *See* Marshall Steinbaum, *The Antitrust Case Against Gig Economy Labor Platforms*, LPE PROJECT (Apr. 7, 2022), lpeproject.org/blog/the-antitrust-case-against-gig-economy-labor-platforms/ (proposing a legal strategy for protecting workers by attacking vertical restraints that inhibit platform competition as part of a broader effort to support disempowered workers); *cf.* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 4 (2020) (describing the central function of antitrust law as the allocation of coordination rights among economic actors, not as the promotion of competition). The antimonopolists' goal would be to allow, for example, ride-hailing drivers to act collectively to negotiate higher pay or better working conditions from Uber and Lyft or small sellers or app developers to act collectively to negotiate lower commissions with large platforms like Amazon, Apple, or Google's Android.

[131] Khan & Vaheesan, *supra* note 109, at 237, 280 (calling for clear rules and simple presumptions of illegality to govern mergers, dominant firm conduct, and vertical restraints); Steinbaum & Stucke, *supra* note 125, at 620–21. Neo-Brandeisians have not encouraged courts to evaluate whether threats to democracy flow from the challenged conduct in individual cases. Instead, they endorse the structural era approach of pursuing non-economic goals indirectly, through the adoption of presumptions of anticompetitive effect based on concentration. Khan & Vaheesan, *supra* note 109, at 279–80. *See* Teachout, *supra* note 30, at 1088 (explaining that a policy can have multiple goals without giving judges the power to determine whether specific conduct promotes or impedes those goals). *But see* Francisco Beneke, *Towards a More Complete Understanding of Market Power and Consumer Harm in Antitrust Law*, PROMARKET (Dec. 16, 2021), www.promarket.org/2021/12/16/antitrust-consumer-welfare-economics-market-power/ (recommending that courts evaluate defendants' political influence in individual cases based on lobbying expenses, campaign contributions, and employment of former government officials).

[132] Khan, *supra* note 107, at 972–74; *cf.* Elizabeth Popp Berman, *Economics: Looking Back to Move Forward*, DEMOCRACY J. (Spring 2022), democracyjournal.org/magazine/64/economics-looking-back-to-move-forward/ (questioning left-neoliberalism's historical reliance on economic-oriented policy analysis focused on efficiency).

working solely through the courts—is likely tied to its political goal of enhancing democratic participation,[133] though it could also reflect a tactical calculation about the difficulty of persuading conservative judges and Justices to change course.

B. LOCATING THE CONTEMPORARY THREAT TO DEMOCRACY

The antimonopoly movement's central focus on the political threat from economic concentration leads it to depict economic regulatory policy as requiring a bifurcated choice between deconcentration (or regulation) and laissez faire.[134] Neo-Brandeisians are led to posit these two broad policy alternatives because they emphasize a distributional conflict in which the laissez-faire approach serves the parochial interests of large firms rather than the interests of the community as a whole. The Reagan-era reworking of antitrust doctrine, which "permitted large corporations to dominate our markets and politics[,]"[135] is described as part of a larger political and ideological project "of freeing capital from the social democratic fetters of the mid-twentieth century and strengthening its position, vis-à-vis other segments of society."[136] The regressive transfer of wealth to oligopolists and monopolists "in a host of key industries"—traceable to the Chicago School's intellectual revolution—is called "a politically, socially, and economically troubling outcome."[137] Changing course, the neo-Brandeisians say, would "advance the economic, political, and social interests of the vast majority of Americans."[138]

This perspective is shared by the constitutional scholars who seek to recover an anti-oligarchy vision of the Constitution.[139] They use the term "oli-

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[133] Vaheesan, *supra* note 115, at 989–90 (democratic accountability); Steinbaum & Stucke, *supra* note 125, at 618 (legislation and FTC rulemaking); Chopra & Khan, *supra* note 117 (FTC rulemaking); AM. ECON. LIBERTIES PROJECT, *supra* note 123, at 150–67 (executive branch rulemaking); *cf.* Ganesh Sitaraman, *Taking Antitrust Away from the Courts*, THE GREAT DEMOCRACY INITIATIVE (Sept. 2018), rooseveltinstitute.org/2021/08/30/the-great-democracy-initiative/ (proposing ways to shift antitrust enforcement from judges to government agencies). *But cf.* Khan & Vaheesan, *supra* note 109, at 237 (looking primarily to newly appointed antitrust officials and federal judges to accomplish antitrust reform).

[134] *See* Khan, *supra* note 107, at 964, 976, 979 (explaining that centrist reformers fail to challenge the current ideology that orients antitrust, and thereby ratify an approach that ultimately undermines their reform project). This bifurcated choice is consistent with the neo-Brandeisian view of 20th century regulatory policy as choosing between Brandeis and Bork. *Supra* notes 30–31and accompanying text.

[135] Khan & Vaheesan, *supra* note 109, at 238.

[136] *Id.* at 236 n.6.

[137] *Id.* at 294.

[138] *Id.*

[139] *See generally* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 689 (2014). Neo-Brandeisians similarly treat anti-oligarchy as a fundamental constitutional principle. Mergers Act, *supra* note 5, at 2. *See* Wu, *supra* note 5 (point (1)). As with neo-Brandeisian antitrust scholarship, constitutional law scholarship taking an anti-oligarchy (or progressive political economy) approach connects economic power with political threats

garchy" for any political system in which concentrations of economic and political power are mutually reinforcing, and I follow that usage here.[140]

The neo-Brandeisians are right in recognizing a political threat from concentrated economic power.[141] The wealthiest may have a disproportionate in-

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to democracy (Fishkin & Forbath, *supra*, at 670, 671, 693) and depicts a bifurcated choice between anti-oligarchy and laissez-faire. *See id. at* 687–90, 691; *cf.* Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1491–94 (2016) (analyzing why the power of economic elites is downplayed in contemporary constitutional theory); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 3 (2016) (recommending that economic governance focus on counteracting the effects of domination rather than on growth and efficiency). That scholarship describes the New Deal era developments in constitutional law as bringing out anti-oligarchy themes that were a recurrent part of constitutional law and interpretation from the nation's inception and were reinforced by Progressive era constitutional amendments, one of which allowed the federal government to institute an income tax. That interpretation differs from my view that New Deal developments in constitutional law underlie the creation of the liberal political consensus for inclusive economic growth. *See* Baker, *Accommodating Competition*, *supra* note 20. In contrast with neo-Brandeisian antitrust scholarship, which sees post-WWII antitrust policy as implementing an anti-oligarchy vision, *supra* text accompanying notes 30–33, progressive political economy constitutional law scholarship argues that that a conservative constitutional counterrevolution between 1937 and 1948 prevented the progressives of that era from completing the New Deal by expanding social and economic rights, making New Deal programs more inclusive, and removed the language of social-democratic constitutional political economy from mainstream public discourse. FISHKIN & FORBATH, *supra* note 64, at 317–20; *cf. supra* notes 54–58 and accompanying text (discussing changing views of liberals after the Second World War).

[140] FISHKIN & FORBATH, *supra* note 64, at 8. That usage appears to conflate two political systems that are conceptually distinct: "crony capitalism" and oligarchy. Crony capitalism is a systemic and entrenched corruption of democratic politics. In it, firms use their collective size and lobbying influence to obtain and protect market power, enriching themselves or their political allies (cronies). They invest some of the resulting rents to secure the political power that protects and extends their market power. Such a system would become an oligarchy if the resulting political power is wielded by the wealthy to support the interests of their social class, not just to protect and extend the market power of large firms—which is what contemporary anti-oligarchy and antimonopoly commentators appear implicitly to suppose. An oligarchy is a political system in which a small number of political actors control vast resources, which they deploy to enhance or defend their personal wealth and social position. To the extent that large firms are owned by wealthy families, the political system could tend toward crony capitalism and oligarchy simultaneously. That is, political institutions could both protect large firms from competition and systematically enrich the wealthy.

[141] Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1319–20 (2020); Pitofsky, *supra* note 4, at 1055. *See* Luigi Zingales, *Towards a Political Theory of the Firm*, J. ECON. PERSPS. Summer 2017, at 113, 115 (describing the "Medici vicious circle" in which economic and political power reinforce each other). Some countervailing dynamics may limit that threat, however. Powerful firms and industries have an incentive to use their power to foster competition among firms and industries selling complementary products. In addition, governmental actors have an incentive to preserve some competition to protect their power. *See* Steven Callander, Dana Foarta & Takuo Sugaya, *Market Competition and Political Influence: An Integrated Approach* (CEPR, Discussion Paper No. DP16210, 2022). Moreover, to the extent that private economic power facilitates the development of special interest lobbies that impede economic growth, exacerbate inequality, make political life more divisive, and contribute to political sclerosis, it can simultaneously undermine inclusive economic growth and public support for democracy. *See generally* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES (1982).

fluence on public policy today,[142] and sectoral regulation can operate to benefit the ostensibly regulated firms and industries.[143] But the neo-Brandeisians locate the proximate danger to democracy in the wrong place.

In the antimonopoly movement's vision of politics, large firm interests play a fundamental if not determinative role in menacing democracy.[144] Yet the imminent threat to democracy comes from authoritarians, not from the politi-

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[142] JEFFREY A. WINTERS, OLIGARCHY 249–51 (2011); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 252–82 (2008); THOMAS BYRNE EDSALL, THE NEW POLITICS OF INEQUALITY 241–42 (1984). Some empirical researchers have found that the wealthiest have a disproportionate influence on political outcomes. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. POL. 564 (2014); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 85 (2012). Those findings have been contested. J. Alexander Branham, Stuart N. Soroka & Christopher Wlezien, *When Do the Rich Win?*, 132 POL. SCI. Q. 43 (2017); Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSPS. POL. 1053 (2015); Omar S. Bashir, *Testing Inferences About American Politics: A Review of the "Oligarchy" Result*, RSCH. & POL., Oct.–Dec. 2015, at 1; *see also* Dylan Matthew, *Studies: Democratic Politicians Represent Middle-Class Voters. GOP Politicians Don't*, VOX (Apr. 2, 2018), www.vox.com/policy-and-politics/2018/4/2/16226202/oligarchy-political-science-politician-congress-respond-citizens-public-opinion.

[143] Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006).

[144] LYNN, *supra* note 30, at 1. *See* WU, *supra* note 30, at 139 ("[T]he struggle for democracy . . . must be one centered on private power—in both its influence over, and union with, government."). Empirical evidence supporting this claim is limited, however. *See* Nolan McCarty & Sepehr Shahshahani, Economic Concentration and Political Advocacy, 1999–2017 (Nov. 1, 2021) (unpublished manuscript), www.law.nyu.edu/sites/default/files/Sepehr%20Shahshahani%20Paper%20Final.pdf (finding little connection between economic concentration and either lobbying or concentration of political markets). *But see* Bo Cowgill, Andrea Prat & Tomasso Valetti, *Political Power and Market Power* (CEPR Discussion Paper No. 17178, 2022) (finding that, on average, lobbying expenditures increase after merger); *but cf.* Ufuk Akcigit, Salomé Baslandze & Francesca Lotti, Connecting to Power: Political Connections, Innovation, and Firm Dynamics (Nat'l Bureau of Econ. Rsch., Working Paper No. 25136, 2018) (finding that politically connected firms are more likely to survive and grow but less likely to innovate). The neo-Brandeisian emphasis on the threat to democracy from large firm interests also downplays the independent role of ideology in shaping political outcomes. For example, political theorist Wendy Brown shares the neo-Brandeisian view that neoliberalism undermines democracy but unlike the antimonopolists, she locates the problem in ideology rather than economic concentration. Brown's concern is that neoliberalism tends to view every aspect of political and social life in terms of market rationality or cost-benefit analysis, and that doing so undermines liberal democratic values and institutions like individual political autonomy, liberty, equality, and citizenship; free elections and representative democracy; and the rule of law. *See generally* Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690 (2006); WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015). Consistent with Brown's view, some prominent mid-20th century advocates of laissez-faire economic policies associated with the Mont Pelerin Society, *supra* note 91, viewed the philosophical underpinnings of their views as inconsistent with popular sovereignty. BURGIN, *supra* note 91, at 117–20; *see also* DELONG, *supra* note 53, at 92 ("For [Friedrich von] Hayek, overly democratic, egalitarian, and permissive societies would probably need at some point someone to seize power and reorder the society in an authoritarian mode that would respect the market economy."). In practice, however, the conservative approach to social policy has been shaped more by social conservatives seeking to support family responsibility and kinship obligations than by neoliberal market ideology. *See generally* MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM (2017).

cal power of large firm interests[145]—at least so long as big business avoids making common cause with Trumpian populists.[146] There is no direct connection between economic concentration and that populism: Trump has organized his political movement around cultural and identity issues, not economic issues.[147] The antimonopoly movement's diagnosis does not capture the contemporary authoritarian threat to democracy.[148]

The economic interests of Trumpian populists are on the whole distinct from, and at times opposed to, those of large corporations or the wealthy. Neither the white working class nor the evangelical movement—both important Trumpian demographics—benefits when large firms exercise monopsony power in labor markets or monopoly power in goods markets. Immigration is a core cultural nemesis for the Trumpian populists, but it generally benefits large firm interests. Trump voters and large firms tend to have divergent views on international trade.[149] Trump's authoritarian impulse to use political

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[145] The most noteworthy and direct political threats to antitrust institutions in recent years appear more related to partisan politics than to oligopoly capture of enforcement institutions and courts. BAKER, ANTITRUST PARADIGM, *supra* note 7, at 56.

[146] *See infra* notes 155–156 and accompanying text; *cf.* DANIEL ZIBLATT, CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY (2017) (explaining that European political democracies emerged and endured into the 20th century when conservative economic and political elites organized political parties and accepted democratic institutions).

[147] *See* WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY 68, 98, 109, 165–68 (2020) (describing Trump as a populist demagogue and his presidency as consistently attacking democratic norms and institutions); BARBARA F. WALTER, HOW CIVIL WARS START 129–60 (2022) (explaining the threat to democracy from Trump's encouragement of ethnic factionalism). Consistent with this interpretation, cultural and identity issues were more salient than economic issues for Trump voters in 2016. Lillian Mason, Julie Wronski & John V. Kane, *Activating Animus: The Uniquely Social Roots of Trump Support*, 115 AM. POL. SCI. REV. 1508 (2021); Diana C. Mutz, *Status threat, not economic hardship, explains the 2016 presidential vote*, 115: 24 PNAS E4330 (2018). Trump's coalition recalls the mid-20th century "radical right," which, sociologists of that era explained, was organized around status concerns rather than an economic cleavage and was hostile to liberal political values and democracy. *See generally* THE RADICAL RIGHT (Daniel Bell ed., 1963).

[148] The "key threats to democracy"—all of which fueled the candidacy of Donald Trump—are "political polarization; conflict—incited by racism and nativism—over the boundaries of American citizenship and the civic status of those in different social groups; soaring economic inequality; and executive aggrandizement." Suzanne Mettler et al., *Democratic Vulnerabilities and Pathways for Reform*, 699 ANNALS AMER. ACAD. POL. SCI. 8, 8 (2022); *see also* SUZANNE METTLER & ROBERT C. LIEBERMAN, FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY (2020). Of these, inequality is likely exacerbated by market power, but the others are not closely related to it. (The last threat refers to the Presidency, not corporate executives.) *Cf.* Larry M. Bartels, *Ethnic Antagonism Erodes Republicans' Commitment to Democracy*, 117 PROC. NAT'L ACAD. SCIS. (PNAS) 22752 (2020).

[149] *See* Marcus Noland, *Protectionism under Trump: The China Shock, Intolerance, and the "First White President"* (Peterson Inst. Int'l Econ., Working Paper No. 19-10, 2019) (discussing evidence that exposure to international trade competition encouraged voters to shift to Trump, mediated by race, diversity, education, and age).

power for partisan, political, or pecuniary gain[150] is in tension with large firm interests in protecting their property and investment incentives by safeguarding due process of law, though that impulse can work in favor of firms with political ties. While sufficiently concentrated economic power could threaten democracy,[151] and large social media platforms have been implicated in the spread of political disinformation, the social media amplification of disinformation is a sector-specific phenomenon exacerbated by the way the Internet has decentralized rapid communication, not the product of economy-wide oligarchy.

More generally, the political landscape today is more complex, and the political influence of large firm interests more limited, than the economic determinism hinted at by antimonopolists would suggest.[152] A view of today's politics as turning primarily on the economic interests of large firms does not credit the significance of social and cultural concerns as independent motivators of political positions. This is not an argument for ignoring the political role of concentrated wealth nor an argument against antimonopoly movement efforts to mobilize political opposition to market power.[153] Rather,

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[150] With respect to antitrust enforcement specifically, see Spencer W. Waller & Jacob E. Morse, *The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason*, COMPETITION POL'Y INT'L, July 2020, www.competitionpolicyinternational.com/wp-content/uploads/2020/07/North-America-Column-July-2-2020.pdf (recounting rumors and congressional testimony about political misuse of antitrust enforcement during the Trump administration).

[151] *Supra* note 141 and accompanying text.

[152] Moreover, the evidence is mixed or ambiguous on whether economic concentration has been increasing economy-wide, though it has surely grown substantially in a number of industries. *See, e.g.,* C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets* (Becker Friedman Inst. Econ. Working Paper No. 2021-55, 2021), ssrn.com/abstract=3839697; Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration, in* 35 NAT'L BUREAU ECON. RSCH. MACROECONOMICS ANNUAL 2020, at ch. 2 (2021).

[153] There is no inconsistency between seeking to persuade voters of the salience of our market power problems and recognizing that cultural and identity issues are central to Trumpian populism. Meaningful groups of voters, including voters who tend to vote Republican, appear to be motivated less by those non-economic concerns than by economic concerns. *See Beyond Red vs. Blue: The Political Typology*, PEW RSCH. CTR. (Nov. 9, 2021), www.pewresearch.org/politics/2021/11/09/beyond-red-vs-blue-the-political-typology-2/ (classifying 12% of the general public as in the Republican-leaning "Ambivalent Right"); Catalist Peoria Project 2.0 Clusters, thepeoriaproject.org/ (classifying 7.6% of the public in the Republican-leaning "Merit and Market" demographic); *cf.* JEFFERSON COWIE, THE GREAT EXCEPTION: THE NEW DEAL & THE LIMITS OF AMERICAN POLITICS 15–32 (2016) (arguing that the post-World War II liberal consensus could not have been achieved without the one-time changes in economic structure, labor relations, and income distribution that took place during the New Deal, and that in turn was made possible by a fortuitous solidarity among the white, male, industrial working class). It is also possible that in the wake of recent high-profile Supreme Court decisions taking conservative positions on abortion and guns, Democratic-leaning interest groups will find it easier to mobilize politically around cultural issues, with spillover benefits for their political advocacy on economic issues. *See supra* note 40.

it is an argument against discarding the benefits of inclusive economic growth to combat the political threat from concentrated economic power.[154]

Big business could align with Trumpian populists (or, as some argue, continue to do so[155]). That is because large firms prioritizing the economic interests of their owners could conclude they will be better off preserving the traditional Republican alignment and the economic benefits it brings them in areas like taxation and regulation, even as power in that alliance shifts toward cultural conservatives and that group's views grow more authoritarian.[156] But that is not a foregone conclusion given the independence and growing importance of Trumpists in the Party—who appear increasingly at odds with large technology firms in opposing the Party's pro-business conservatives—and given the cultural liberalism of many new economy firms.[157] The possible alignment of Trumpist Republicans with antimonopolists in taking on large technology platforms is another reason to think that the neo-Brandeisians, for

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[154] Beyond the economic benefits, reinforcing the liberal consensus also supports democracy. *Supra* note 65 and accompanying text. Slowing growth and rising inequality over the past forty years, coincident with weakening democratic institutions, should not call into question the benefits of achieving inclusive economic growth for supporting democracy. Those developments show instead that the specific policies adopted around the 1980s with an inclusive growth goal in mind, such as the Chicagoan change of course in antitrust, were unsuccessful. The appropriate response is to change policies, not to give up on the goal.

[155] While Trump occasionally attacked business interests, those interests often supported his administration's economic regulatory policies without necessarily supporting his non-economic policies—as Trumpist concerns about the latter, suggest. *See* discussion *infra* note 157 and accompanying text. A recent study finds that between 2008 and 2020, top corporate executive teams grew more Republican on average (as well as more polarized, sorting by political affiliation). Vyacheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, *The Political Polarization of Corporate America* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30183, 2022).

[156] Since the mid-20th century, the Republican Party can be viewed as a political coalition of convenience between economic conservatives, who prioritize low taxes and business freedom, and cultural conservatives, who prioritize a social agenda, prominently including the right to life concerns of evangelicals and the immigration concerns of the white working class. Today, counter-majoritarian institutions like the rural biases of the Senate and Electoral College, along with gerrymandering and state voter suppression efforts, impede the assembly of competing political coalitions. Those features of the political system lessen the likelihood that any group within the Republican coalition would be able to achieve its major goals by defecting.

[157] Trumpists detect digital platform censorship of their voices and a willingness of "woke" technology firms to take the liberal side of cultural war issues such as LGBTQ rights, and look to antitrust enforcement as a possible solution. Giliad Edelman, *A Conservative Senator's Crusade Against Big Tech*, WASH. POST MAG. (Aug. 28, 2019). *See* Thomas B. Edsall, *The Marriage Between Republicans and Big Business Is on the Rocks*, N.Y. TIMES (Apr. 14, 2021). *Cf.* Cecilia Kang, David McCabe & Kenneth P. Vogel, *Tech Giants Are Aggressively Lobbying Washington to Back Off on Antitrust Rules*, N.Y. TIMES (June 23, 2021) (identifying a split among Trumpist Republicans). Their tech industry focus suggests that a Congress closely divided between the political parties will more likely enact new antitrust legislation targeting digital platforms or technology firms than enact comprehensive antitrust reform. *Cf.* Karl Bode, *Rep. Ken Buck Threatens to Use Antitrust to Attack 'Woke' Apple*, TECHDIRT (Apr. 5, 2022), www.techdirt.com/2022/04/05/senator-ken-buck-threatens-to-use-antitrust-to-attack-woke-apple.

all their concern to protect democracy, have not targeted the locus of the proximate contemporary threat to democratic institutions.

III. WORKING TOGETHER TO STRENGTHEN ANTITRUST

Antimonopoly movement proposals for revising antitrust rules are, on the whole, consistent with preserving antitrust as a central pillar of economic policy. Those proposals often recall the antitrust rules applied during the 1960s,[158] which were within the broad contours of the political bargain. So were the antitrust rules after they were reworked during the 1980s.[159]

Both sets of rules can reasonably be understood as ways to pursue inclusive economic growth, though experience has indicated that each left considerable room for improvement. The wide differences between the sets of rules makes clear that the political bargain left a substantial space for debate about implementation.[160] Notwithstanding the neo-Brandeisian depiction of economic regulatory policy as a bifurcated choice between deconcentration (or regulation) and laissez-faire—a frame that leaves out the concept of a political bargain to adopt antitrust—the policy proposals of today's antimonopolists would generally support the bargain.[161] That makes it likely that antimonopolists and centrist reformers can identify some ways to reform the rules to advance both groups' goals, i.e., rule changes that neo-Brandeisians would see as confronting economic concentration and post-Chicagoans would see as reining in market power.

It is in the interest of both groups to work together by promoting in concert policies that advance both groups' goals and by aiming their rhetorical fire at the too-weak antitrust rules adopted by the courts (and defended by conservatives) or at Congressional or antitrust agency inaction rather than at each other.[162] This does not mean hiding disagreements, changing views, or making the identical arguments for change; it means focusing advocacy efforts in

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[158] *See* Khan & Vaheesan, *supra* note 109, at 281–82 (calling for agency and judicial re-embrace of 1960s merger policy); LYNN, *supra* note 30, at 204–05 (discussing favorably the 1968 merger guidelines); OMI RESPONSE, *supra* note 125 (same).

[159] Those rules appeared consistent with the political bargain when introduced but increasingly appear inconsistent with it unless reformed.

[160] *See supra* note 75.

[161] While the structural era antitrust rules were consistent with the political bargain, post-Chicagoans think that developments in economic learning since then have identified ways to formulate the rules that would be even better for achieving inclusive economic growth. Chicagoans similarly tied their proposals for reforming structural era rules to their views about then-current economic learning. *See, e.g.*, Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1848 n.27 (2020). The choice of a set of rules from within the range consistent with the political bargain is a policy question.

[162] This statement does not assume that each group is a cohesive whole that reaches agreement on a common point of view. It instead supposes that people with the similar interests will undertake a similar calculus and come out about the same way.

ways calculated to be most productive. Working together is likely a prerequisite for assembling a successful political coalition and mobilizing a broad range of support for reform.[163] Otherwise, it is hard to see Congress enacting broad antitrust reform legislation, or to see new enforcement initiatives winning wide enough acceptance within the antitrust community to influence courts or agencies.

Success is not assured, but the consequences of going it alone are likely worse for each group. For the centrist reformers to do better on their own, that camp needs to suppose that growing market power will induce enough moderate Democrats and Republicans in Congress to join Democrats already concerned about the problem to create a legislative majority for post-Chicagoan reforms;[164] that this will happen after upcoming elections if voters are persuaded to augment congressional ranks with enough new legislators willing to pursue centrist reform; or that strong economic arguments made in the shadow of growing market power will be sufficient to persuade a Supreme Court majority to change course. The post-Chicagoans must also suppose that one of these routes will improve the economy soon enough, and by substantially more than what could be achieved from working in concert with the neo-Brandeisians today, to make it worth giving up the benefits for competition, innovation, and productivity that the two camps could potentially achieve together now.

For the neo-Brandeisians to do better on their own, they need to suppose that a marriage of convenience between pro-antitrust congressional Democrats and Trumpist congressional Republicans will create a legislative majority willing to enact sweeping reform legislation along antimonopoly movement lines. Or they need to believe that such a coalition will first enact antitrust legislation targeting large technology firms[165] and neither fall apart before enacting more comprehensive legislation nor, and more worrying, that having disciplined the digital platforms, the Trumpist Republicans (who may have non-antitrust related motivations to check the platforms) will join with probusiness Republicans to oppose further antitrust legislation and harm the prospects for antitrust reform when exercising the Senate's power to confirm

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[163] *Cf. supra* note 153 (explaining the feasibility of assembling such a coalition notwithstanding the cultural and identity concerns of Trumpian populists); Kotz, *supra* note 78, at 60, 187, 190, 205, 212 (highlighting the role of social movements demanding reform in inducing big business to accept regulation).

[164] Eric Cortellessa, *The Strange Coalition in Congress Poised to Score a Major Win Against Big Tech*, TIME (May 31, 2022). Antitrust legislation targeting large digital platforms has divided congressional Democrats, while splitting Republicans to a greater extent. Leah Nylan & Christiano Lima, *Progressives, Moderate Democrats Tussle over Tech Antitrust Package*, POLITICO (June 23, 2021); Adam Cancryn & Emily Birnbaum, *In Private, Vulnerable Senate Dems Back Off Tech Bill*, POLITICO (May 26, 2021).

[165] *See supra* note 157.

judges and executive branch officials. Or, the antimonopoly camp needs to suppose that neoBrandeisian views will capture both the Democratic Party and the electorate, allowing their allies to control the executive and legislative branches of government, and through that, the courts. That may not happen, though, if the courts do not change course on their own,[166] market power continues to grow, and the antimonopoly movement ends up taking the political blame for the resulting harms based on the prominent role of neo-Brandeisians in Biden administration antitrust policy-making and the high-level commitment of the administration to competition policy.[167] Even if it is reasonable for the neo-Brandeisians to expect electoral success, moreover, that could take a generation to happen. Over that time, on the antimonopoly movement's own account of the political threat, the increasing political power resulting from growing concentration could entrench an oligarchy—which could throw up barriers to governmental change and thereby turn achieving ideological ascendency among the Democrats into a Pyrrhic victory.

Both camps may thus come to recognize that not working together makes each worse off. An inability to bridge the divide between the two reform camps could hand victory to the antitrust conservatives, and, more broadly, put an end to the liberal consensus (from a centrist reform perspective)[168] or entrench an oligarchy (from an antimonopoly movement perspective). There is also a danger, at least from a post-Chicago viewpoint, that a deep rift between the antimonopoly and centrist reform camps would divert resources and energy from the more immediate and important fight to protect democracy from authoritarianism, and that ill feelings would impede working together on that essential task.

The remainder of this Part sketches two major fault lines that the two groups must navigate around, or agree to disagree on, in order to work together and identifies major areas where it may be possible for the two camps to find common ground on proposals for antitrust reform.

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[166] Antimonopoly movement enforcers might take the view that if the courts do not go along with their litigation efforts, that could be seen as a success of another kind: adverse judicial decisions could be condemned publicly and used to build political pressure for legislative change. That argument will be easier to make, however, if the enforcers first maximize their chances for success by presenting a compelling story of competitive harm rooted in the facts and based on economic analysis and nevertheless fail to persuade the courts.

[167] *Supra* note 96.

[168] If antitrust is delegitimized as a result of the way the neo-Brandeisian intellectual framework pushes toward rejecting the political bargain in favor of deconcentration and regulation, *supra* text accompanying note 158, or the way the conservative acceptance of current antitrust rules pushes toward stealth rejection of the political bargain, *supra* note 102 and accompanying text, that is likely to lead to political conflict between supporters of laissez-faire and regulatory alternatives. The resulting policy instability would further undermine inclusive economic growth and potentially raise doubts about the ability of democratic institutions to achieve social stability. *See* BAKER, ANTITRUST PARADIGM, *supra* note 7, at 48–52.

A. FAULT LINES

The two major fault lines between the antimonopoly movement and the centrist reformers are closely related. First, there is daylight between the neo-Brandeisian emphasis on the problems that economic concentration creates and the post-Chicagoan concern with the problem of market power.[169] Greater market concentration can generally be expected to increase the likelihood that market participants will exercise market power, so the two concerns will often point in the same direction. But not always.[170]

This fault line suggests possible differences in at least two areas.[171] One is how to define markets. The "hypothetical monopolist test" used in the merger guidelines relies on a conceptual experiment that involves the exercise of market power. Neo-Brandeisians would presumably prefer an approach more closely tied to identifying political threats from economic concentration.[172] Other possible differences related to this fault line involve the treatment of conduct such as mergers that would simultaneously increase concentration

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[169] I understand differences between the two camps over whether antitrust should rely on the consumer welfare standard (as that standard is understood by post-Chicagoans, to encompass a wide range of competitive dimensions) as primarily reflecting this fault line.

[170] For example, Landes and Posner influentially connected a single firm's economic market power with its market share, but they also observed that market power also depends on the ability and incentive of incumbent rivals to expand output inexpensively and the prospects for new competition (supply substitution or entry). William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). George Stigler influentially connected the likelihood of successful interfirm coordination with concentration, but he also identified factors such as the presence of large buyers, non-repeating transactions, and product heterogeneity that could frustrate coordination. George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

[171] In addition, I have the impression that neo-Brandeisians prefer to discuss antitrust doctrine in terms of legal categories (such as horizontal agreements, vertical agreements, and monopolization) while post-Chicagoans sometimes instead make economic distinctions (such as exclusion vs. coordination), and attribute that possible difference to these fault lines.

[172] *See* OMI RESPONSE, *supra* note 125, at 14 (rejecting the hypothetical monopolist test). In practice, antimonopolists appear to view product markets broadly: pharmaceuticals (rather than specific drugs); appliances (rather than separating out washing machines, dryers, dishwashers, and refrigerators); airlines nationwide (rather than looking at routes individually). *E.g.*, *Monopoly by the Numbers*, OPEN MKTS. INST. (2022), www.openmarketsinstitute.org/learn/monopoly-by-the-numbers. This perspective may lead them to advocate routinely collecting in "cluster markets" products that are complements in demand to end consumers (not just collecting demand substitutes, as is the usual approach today). Doing so would tend to evade the prohibition in current law on allowing defendants to justify harms to competition in one market with benefits in competition in another market unless coupled with a higher burden to prove efficiencies, to the extent it would combine what would previously have been viewed as separate markets into the same market. That was the effect of defining a two-sided market rather than two single markets in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). On the other hand, antimonopolists appear to view labor markets narrowly. OMI RESPONSE, *supra* note 125, at 14 (recommending that the enforcement agencies adopt the framework for market definition set forth in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), for defining product and non-labor input markets, while defining labor markets as consisting of 6-digit Standard Occupational Classification (SOC) code, commuting zone, and quarter).

and create efficiencies likely to benefit buyers (or other trading partners),[173] and neo-Brandeisian proposals for systematic deconcentration of major industries (potentially complemented with extensive regulation when deconcentration is impractical or delayed).[174]

The second major fault line involves the role of economic analysis and economic evidence. From a neo-Brandeisian perspective, economic analysis of the competitive effects of firm conduct is at best unnecessary and at worst counterproductive: economic analysis misses the political threat from increased concentration,[175] which should be antitrust law's primary focus,[176] and the testimony and policy advice of economists systematically favor big business interests.[177] By contrast, post-Chicagoans embrace economics. Centrist

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[173] For example, a horizontal merger that allows the merging parties to reduce costs or improve products may confer on the merged firm a competitive advantage over non-merging rivals and potential entrants. That advantage may simultaneously allow the merged firm to gain market share and benefit buyers through lower prices or better products. The neo-Brandeisian political justification for deconcentration suggests that antimonopolists would favor preventing increases in concentration under such circumstances. (Some critics have described doing so as identifying an "efficiency offense.") *Cf.* Lina M. Khan, Chair, Fed. Trade Comm., Remarks at the Charles River Associates Conference on Competition & Regulation in Disrupted Times (Mar. 31, 2022) (indicating that antitrust enforcers should evaluate whether a dominant firm would maintain a monopoly through the swift integration and rapid scaling of a product acquired through merger, when doing so allows the firm to quickly establish a strong foothold). This fault line may become apparent if the merging firms proffer convincing evidence that their transaction will confer substantial economic benefits on buyers. But it is hard to know how often this difference will arise in practice. Post-Chicagoans have expressed skepticism that horizontal mergers confer efficiencies, at least on average, so could potentially accept a rebuttable presumption against efficiencies from merger. Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PA. L. REV. 1941, 1966–67 (2020). Moreover, both groups would be expected to favor enforcement if, as a result of the efficiencies, buyers were harmed. That could happen if efficiencies resulting from a merger of non-maverick firms enhances coordination by increasing the threat to punish a maverick rival, thereby inducing the maverick to compete less aggressively. Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 186–87 (2002).

[174] For the neo-Brandeisian perspective, see the references cited *supra* note 123. From a post-Chicagoan perspective, the likely social costs of systematic deconcentration in terms of foregone growth and innovation counsel in favor of undertaking industry-specific evaluations of the economic consequences of structural remedies before deciding where to implement them.

[175] *See, e.g.*, Vaheesan, *supra* note 115, at 992–94 (criticizing the consumer welfare standard, which relies on economic analysis, on this ground); *see also supra* note 132 and accompanying text. Seen through the neo-Brandeisian lens of a bifurcated choice between deconcentration (or regulation) and laissez-faire, an antitrust policy that relies on economics ultimately supports laissez-faire. *Supra* note 134.

[176] *Cf.* Khan, *New Brandeis*, *supra* note 110, at 132 (calling for antitrust to refocus antitrust on market structures and a broader set of measures to assess market power, instead of focusing on outcomes).

[177] Luigi Zingales, *Preventing Economists' Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 124 (Daniel Carpenter & David Moss eds., 2014) (describing incentives creating risks that economists inside and outside academia will cater to business interests). *See* AM. ECON. LIBERTIES PROJECT, *supra* note 123, at 15–18 (criticizing post-Chicago scholars, including economists, in part on this ground); *see also supra* note 122 and

reformers see economic analysis and economic evidence as essential for making the case for stronger antitrust rules and enforcement, evaluating the competitive effects of firm conduct and business practices, developing sensible legislative proposals for reform, and convincing economically oriented courts to change course.[178]

The political bargain perspective helps explain why. If antitrust law is to facilitate inclusive economic growth by allowing the economy to capture and share the efficiency, productivity, and innovation benefits of competition,[179] enforcers, courts, and Congress need to understand the likely effects of firm conduct and the incentives created by antitrust rules.[180] Economic analysis and economic evidence provide the best means to do so,[181] making economics cen-

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accompanying text. I find the claim that economists working on antitrust issues or related academic topics are systematically subject to oligopoly capture unconvincing. That claim cannot easily be rationalized with the recent shift in the economic literature toward recognizing substantial and growing market power or with the half-century of developments internal to the economics profession that underlie that shift: the game theory revolution in microeconomics, the creation of new empirical tools for measuring market power, and the greater availability of relevant data and greater computational ease arising from improvements information technology. *Cf.* Doris Geide-Stevenson & Alvaro La Parra Perez, *Consensus Among Economists 2020—A Sharpening of the Picture* tbl.1 (Dec. 2021), www.aeaweb.org/conference/2022/preliminary/paper/HBhGyFD7 (identifying increasing support for vigorous antitrust enforcement among members of the American Economic Association since 2000 (question 34), and declining support for the view that the competitive model is generally more useful for understanding the U.S. economy than are game theoretic models of imperfect competition or collusion since 1990 (question 30)). (In the interest of disclosure, I have professional credentials in economics.)

[178] *Cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 93 (6th ed. 2020) (explaining that "antitrust policy has always tracked prevailing economic theory to one degree or another"); *id.* at 97 (explaining why "the notion that a nonarbitrary antitrust policy can be crafted without a coherent economic model is absolutely untenable"); Idrees Kahloon, *The War on Economics*, NEW YORKER (May 16, 2022) (explaining that economics analysis does not necessarily support conservative outcomes and that economists were critical to the design and defense of the modern social-welfare state). Antitrust conservatives also say they rely on economics but from a centrist reform perspective they ignore or misinterpret recent developments in the economics literature.

[179] *Supra* notes 41–42 and accompanying text.

[180] Enforcers and courts need to discriminate between anticompetitive and procompetitive economic effects of business practices. Courts and Congress need to develop rules that channel firm conduct away from economically harmful coordination, exclusion, and mergers and toward obtaining competitive advantages by improving their products and services and reducing the quality-adjusted prices they charge their buyers (or by providing analogous advantages to their suppliers).

[181] In general, the prospects for litigation success in antitrust—a courtroom victory on liability, judicial adoption of the relief the agency sought, or a decision and rationale that moves the law toward stronger rules—are enhanced by framing cases in economic terms and making economic arguments supported by economic evidence (which may include market concentration but often go well beyond it). When strong facts support a sensible economic analysis, judges of all perspectives can support enforcement, even when the case is prominent and the stakes are high. BAKER, ANTITRUST PARADIGM, *supra* note 7, at 197–202 (discussing the Justice Department's *Microsoft* case).

tral to developing and enforcing antitrust rules that encourage innovation, growth, and efficiency, while discouraging the exercise of market power.[182]

The fault line over economics also makes it difficult for antimonopolists and centrist reformers to find common ground on price discrimination.[183] Neo-Brandeisians find the practice objectionable, primarily because firms can use price discrimination to exploit locked-in customers (identifiable customers or customer groups with high willingness to pay, accounting for their switching costs)[184] and perhaps also because perfect competitors (price-taking firms) cannot discriminate in price[185] and price discrimination can facilitate coordination. Post-Chicagoans find price discrimination anticompetitive in some cases but recognize that it can benefit buyers in other cases (e.g., by permitting sellers to serve buyers that value the product at more than its cost but would otherwise be priced out of the market), and that it can increase firm incentives to compete.[186]

Beyond the two major fault lines, it is unlikely that antimonopolists and centrist reformers would easily reach common ground regarding the neo-Brandeisian endorsement of collective action by small suppliers, particularly independent contractors and workers, to redress bargaining power disparities when dealing with large firms. From an antimonopolist perspective, antitrust exemptions for members of various exploited or disadvantaged groups and antitrust rules that accept a countervailing power justification for otherwise anticompetitive conduct by the systematically exploited or disadvantaged are

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[182] Courts and policymakers alike can and should assess arguments (including economic ones) on their logic and evidence, while recognizing and accounting for the interests, potential biases, and expertise of those who make them. This is not an argument for looking solely to the results of economic analysis to guide decisions in settings where non-economic factors also matter; it is an argument for employing economic analysis to evaluate the consequences of firm conduct and incentives created by rules in a setting where it is relevant to enforcement and policy-making.

[183] Sellers discriminate in price in an economic sense by charging different prices for the same product or service to different buyers or groups of buyers, or different markups over marginal cost when the costs of serving those buyers or buyer groups differs. Successful price discrimination requires that the seller have the ability to sort buyers by their willingness to pay or price sensitivity, and prevent arbitrage. Buyers may also engage in price discrimination when purchasing inputs, including labor. For ease of exposition, this discussion is framed in terms of price discrimination by sellers, but analogous issues arise with respect to price discrimination by buyers.

[184] LYNN, *supra* note 30, at 214; *see also id.* at 174–75, 207.

[185] Price discriminating sellers necessarily face downward sloping firm-specific demand, so in that sense have market power. Competitive price discrimination is possible, by which competition among firms discriminating in price prevents them from earning supracompetitive profits.

[186] *See* BAKER, ANTITRUST PARADIGM, *supra* note 7, at 132–34 (discussing price discrimination and its possible economic effects). The economic effects include potential exclusionary harms to competition from targeted discounting (price discrimination) by a dominant firm with superior access to customer data than its rivals. A recent merger challenge by the Justice Department alleges a similar theory. Complaint, United States v. UnitedHealth Grp. Inc., No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022).

unambiguously beneficial.[187] From a centrist reform perspective concerned with the role of antitrust in fostering inclusive growth, however, they present a tradeoff: they may increase inclusivity at the expense of economic growth and efficiency.[188] Under some circumstances this camp could resolve the tradeoff in a neo-Brandeisian direction: in favor of increasing inclusivity, such as by addressing inequality.[189] Liberals have historically supported antitrust exemptions for unions,[190] and post-Chicago antitrust commentators have generally not favored allowing antitrust defendants to justify conduct on the ground that the harms to trading partners in one market would be outweighed by benefits in other markets.[191] The two groups are unlikely always to agree: centrist reformers are often skeptical of antitrust exemptions and often question countervailing power defenses.[192]

B. COMMON GROUND

As a basis for discussion, this Part identifies areas where the two antitrust reform camps could potentially work together on policies that would advance their respective priority goals.[193] The spirit of the exercise is not to identify the intersection of current policy proposals in a Venn diagram sense; it is to suggest themes around which to frame specific reform proposals that both groups would see as making progress. The themes are intended as a starting point, not a compromise: they are ideas that both camps could readily accept and pursue together today. Doing so would help make progress on what both groups see

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[187] *E.g.*, Paul, Submission, *supra* note 130; Sanjukta Paul & Sandeep Vaheesan, *American Antitrust Exceptionalism*, *in* THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 113 (Sanjukta Paul et al. eds., 2022).

[188] Increased inclusivity is valuable for its own sake, particularly in an age of inequality. Baker & Salop, *supra* note 11. It also helps shore up the political support for antitrust. *Supra* note 43 and accompanying text.

[189] *See* Baker & Salop, *supra* note 11 (surveying options for adjusting competition policy to address growing inequality).

[190] The reduction in private sector unionization over the past few decades has likely contributed to growing inequality.

[191] *See, e.g.*, BAKER, ANTITRUST PARADIGM, *supra* note 7, at 192–93 (recommending that courts continue to avoid cross-market welfare tradeoffs except in unusual cases where the competitive harm in one market is small while the benefit to competition in another market is vastly greater and there is no practical way to obtain the benefit without accepting the harm).

[192] *E.g.*, Laura M. Alexander, *Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea* (Am. Antitrust Inst. white paper, Oct. 15, 2020). *But see, e.g.*, John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1 (2014) (advocating a limited defense for collusion to control buyer power).

[193] The text does not address opportunities to work together on procedural issues that impede public and private enforcement. Those may potentially include, for example, preventing compulsory arbitration of consumer complaints and limiting the scope of immunities from antitrust liability conferred by regulation. It also does not address the potential to work together on ways of promoting competition outside of antitrust law and enforcement. It focuses on framing broad rules of general applicability rather than industry-specific approaches to promote competition.

as sorely-needed substantive reforms. Advancing these goals in concert would also provide a way to build the working relationships and confidence needed for the camps to follow up by addressing more thorny areas of potential disagreement.

To the extent this list is interpreted as a legislative agenda, it was developed largely with reference to the aspirations of both camps but without regard to what might be feasible politically in the current environment. It could also be understood as an agenda for advocacy in the courts, for competition rulemaking by the Federal Trade Commission, or, in some cases, as an agenda for antitrust enforcers. The references to neo-Brandeisian and post-Chicagoan sources noted for each theme are intended to suggest why the theme is plausibly common ground, but those references should not be interpreted as claiming that the suggested policy has been endorsed either by those cited or by others in their camp.[194]

- Shift some burdens of production and persuasion to antitrust defendants, particularly firms with high market shares or other indicia of market power, in various legal or economic categories.[195]
- Strengthen the structural presumption of illegality in horizontal merger analysis by applying it at levels of concentration lower than those where the enforcement agencies have focused their attention in recent years and making it less easily rebuttable.[196]
- Allow courts to rely on direct evidence to demonstrate market power (that is, not require the inference of market power from market shares, which entails market definition).[197]

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[194] These references are also intended as representative examples, not comprehensive lists of commentators or sources suggesting each policy theme.

[195] *See, e.g.*, Mergers Act, *supra* note 5 (neo-Brandeisian perspective); CALERA, *supra* note 104 (centrist reform perspective).

[196] *See, e.g.*, Khan & Vaheesan, *supra* note 109, at 281 (neo-Brandeisian perspective); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018) (centrist-reform perspective). Louis Kaplow criticizes the structural presumption on the grounds that it is based on market definition, which Kaplow describes as incoherent, that common measures of market concentration are not good predictors of anticompetitive effects, and that it does not make sense procedurally for courts to deploy the structural presumption after a full record has been assembled. Louis Kaplow, *Replacing the Structural Presumption*, 84 ANTITRUST L.J. 565 (2022). For criticism of Kaplow's argument about the incoherence of market definition, see BAKER, ANTITRUST PARADIGM, *supra* note 7, at 290 n.37. Joseph Farrell and I defend the relationship between concentration and harms from merger in Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 U. PA. L. REV. 1985 (2021).

[197] This policy would overturn *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), with respect to vertical agreements under Sherman Act § 1 and prevent courts from extending that decision to other types of conduct. *See, e.g.*, Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, ANTITRUST BULL., Jan. 2022, at 130 (neo-

- Prevent courts from presuming that vertical conduct or vertical mergers benefit competition when undertaken by firms with high market shares or other indicia of market power, and identify circumstances in which courts should presume competitive harm from vertical conduct and mergers (perhaps tied to market shares or other indicia of market power).[198]
- Allow courts to evaluate competitive harms from conduct involving multi-sided platforms in markets limited to a single side of the platform.[199]
- Allow courts to review allegations of predatory pricing and predatory bidding under the same standards applied to non-price exclusionary conduct.[200]
- Prevent courts from predicating antitrust liability for conduct harming upstream suppliers, including workers, on a demonstration of harm to downstream buyers or end consumers.[201]
- Reduce legal impediments to finding antitrust violations when firms (including dominant firms) acquire or exclude nascent rivals or potential competitors.[202]
- Allow courts to find antitrust violations when firms engage in unilateral refusals to deal with a competitor when the conduct facilitates or protects the exercise of market power on balance, without regard to whether

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Brandeisian perspective); Steinbaum & Stucke, *supra* note 125, at 607–07 (same); Steven C. Salop, *The First Principles Approach to Antitrust,* Kodak*, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187, 200–01 (2000) (post-Chicagoan perspective).

[198] *See, e.g.*, Steinbaum & Stucke, *supra* note 125, at 610 (neo-Brandeisian perspective); Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, ANTITRUST, Summer 2019, at 12 (post-Chicagoan perspective).

[199] This policy would overrule *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) with respect to transaction platforms and prevent courts from extending that principle to other multi-sided platforms. *See, e.g.*, Letter from Sally Hubbard, *supra* note 5, at 20 (antimonopoly movement perspective); Steven C. Salop, Daniel Francis, Lauren Sillman, & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, *infra* this issue, 84 ANTITRUST L.J. 883 (2022) (centrist reform perspective).

[200] Doing so would overrule the judicially created safe harbor for prices above cost. *See, e.g.*, Utah Statement, *supra* note 5 (neo-Brandeisian perspective); Baker et al., Protecting Competition in Digital Markets, *supra* note 5, at 7 (post-Chicagoan perspective).

[201] This policy would confirm that the antitrust laws prohibit one type of cross-market balancing. *See, e.g.*, Utah Statement, *supra* note 5 (neo-Brandeisian perspective); Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers* 89 U. CHI. L. REV. (forthcoming 2023) (centrist reform perspective).

[202] *See, e.g.*, Steinbaum & Stucke, *supra* note 125, at 609–10 (neo-Brandeisian perspective); Baker et al., Protecting Competition in Digital Markets, *supra* note 5, at 11–12 (post-Chicagoan perspective).

the firms had a prior course of dealing or whether the refusal to deal involves a sacrifice of short-term profits, and without immunizing the conduct whenever the conduct benefits competition in some way regardless of the magnitude of the competitive benefit.[203]

- Increase enforcement attention to identifying harms to suppliers, including workers and small businesses,[204] and to identifying anticompetitive conduct of large technology platforms.[205]

IV. CONCLUSION

U.S. antitrust rules have twice been subject to major transitions: the development of structuralist antitrust in the 1940s and its replacement by Chicago School antitrust in the 1980s. Both transitions came about when antitrust law adapted to a changing economy, when it adapted to new ways of understanding business practices, and when the political system became receptive to change.[206]

Two of these factors now point strongly toward strengthening antitrust. First, antitrust needs to address the economy-wide growth of market power and novel antitrust issues raised by large digital platforms. Second, the Chicago School understanding of business practices has been challenged by a post-Chicago economic critique and a neo-Brandeisian political critique. The third factor, however, needs a boost. The Biden administration recognizes the need for change, but the political system as a whole and the courts are moving slowly. In this environment, the two antitrust reform camps can improve the prospects for reform by mobilizing a broad range of support for reinvigorating antitrust through finding common ground and working together to achieve changes.

Remedying growing market power will require an extensive antitrust reformation analogous in scope to what the Chicagoans accomplished in the 1980s while, obviously, changing the rules in very different ways. Although there are fault lines between neo-Brandeisians and centrist reformers, both camps

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[203] This policy would overturn the holdings or repudiate dicta or possible implications of several decisions. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Novell, Inc. v. Microsoft Corp., 731 F.3d. 1065 (10th Cir. 2013) (Gorsuch, J.); FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020). *See, e.g.*, Letter from Sally Hubbard, *supra* note 5, at 20 (antimonopoly movement perspective); Baker et al., Protecting Competition in Digital Markets, *supra* note 5, at 7, 9, 11 (post-Chicagoan perspective).

[204] *See, e.g.*, Paul, *supra* note 130 (antimonopoly movement perspective); BAKER, ANTITRUST PARADIGM, *supra* note 7, at 176–93 (centrist reform perspective).

[205] *See, e.g.*, SUBCOMMITTEE STAFF REPORT, *supra* note 5 (neo-Brandeisian perspective); Baker et al., Protecting Competition in Digital Markets, *supra* note 5, at 4 (post-Chicagoan perspective).

[206] BAKER, ANTITRUST PARADIGM, *supra* note 7, at 202–03.

seek to make antitrust more interventionist. They need to work together to change the direction of antitrust.