BOOK REVIEW

THE END OF ANTITRUST HISTORY REVISITED

THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE. By Tim Wu. New York, N.Y.: Columbia Global Reports. 2018. Pp. 154. $14.99.

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INTRODUCTION

In April 2007 the Antitrust Modernization Commission reported to Congress that "the state of the U.S. antitrust laws" was "sound."[1] Created by lawmakers to examine whether antitrust laws should be revised, the bipartisan Commission concluded that existing statutes were sufficiently flexible to address emerging issues, and that courts, antitrust agencies, and practitioners were now in proper agreement that "consumer welfare" was the "unifying goal of antitrust law."[2] A decade later, the American Bar Association's Antitrust Section delivered a similar assessment, remarking that "the Nation's system of competition enforcement has been in good hands."[3] These reports represented a high-water mark of agreement within the antitrust community that, despite ongoing debates about specific doctrinal tests or particular standards of proof, antitrust law was, altogether, on the right course. The fact that antitrust had shed its public appeal in favor of an expert-driven enterprise — becoming "less democratic and more technocratic"[4] — was generally seen as further evidence of its success.[5]

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[1] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS i (2007).

[2] *Id.* at 35; *see id.* at 32.

[3] AM. BAR ASS'N, SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT 2 (2017).

[4] Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008).

[5] *See, e.g.*, Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 585 (2018) ("Over the last fifty years antitrust has become much more technical, particularly in areas such as merger enforcement and exclusionary behavior, but also in more collateral areas such as assessing causation and measuring damages. As its technical competence has increased, its 'movement' quality has faded into the background or become political noise. Simultaneously, technical antitrust has become less interesting to politicians, who cannot win elections by talking about the Herfindahl-Hirschman Index or average variable cost."). *But cf.* Harry First &

Today, however, it is clear that what may have appeared as the end of antitrust history proved instead to be a prolonged pause in an enduring clash over the purpose and values of the U.S. antitrust laws.[6] Over the last few years, the relative stability of the antitrust consensus has yielded to a sharp rupture.[7] Two aspects of this break are most notable: first, the fact that the debate cuts to foundational questions about the goals of antitrust, and second, its highly public-facing nature. No longer relegated to law journals and practitioner conferences, antitrust has once again been thrust to the forefront of public conversation, prompting

Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544–46, 2572–74 (2013) (criticizing the shift of antitrust away from its democratic roots).

[6] *Cf.* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (declaring that the spread of economic and political liberalism marked a lasting and stable ideological end point). Not all antitrust scholars adopted this "end of history" view of the field. *See, e.g.*, 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, 1110 (1989) (predicting "that deconcentration will reemerge as a significant policy concern in antitrust's second century").

[7] Many, including myself, have participated in this contestation. *See, e.g.*, BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010) (identifying the various dangers of monopoly and arguing for restoring antitrust law); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016) (arguing that laws structuring the economy, including antitrust, should be focused on preventing economic domination); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017) (arguing that the enfeebling of antitrust as a check on concentrated private power has likely contributed to economic inequality); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1010 (2013) (identifying antitrust law at its best as a tool for checking the power of dominant firms); Sanjukta Paul, *Antitrust as Allocation of Coordination Rights*, 67 UCLA L. REV. (forthcoming 2020) (on file with the Harvard Law School Library) (reframing antitrust as an enterprise that allocates economic coordination rights and arguing that this allocating constitutes the core function of antitrust); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012) (arguing that enhancing efficiency should not be the sole aim of antitrust and identifying economic freedom, a level playing field, and fairness as additional desirable goals); Maurice E. Stucke & Marshall Steinbaum, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. (forthcoming 2020) (on file with the Harvard Law School Library) (arguing that replacing the consumer welfare standard with an "effective competition" standard will help reorient antitrust towards dispersing concentrated private power); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37 (2014) (identifying ways in which exercises of power by large corporations function as forms of private governance and arguing that antitrust law and policy should be treated as a critical tool of democracy reformers); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019) (arguing that enforcement should be reoriented towards controlling the power of large corporations rather than targeting workers who organize for higher wages and improved working conditions); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 744 (2017) (arguing that a welfare-based approach to antitrust neglects critical structural considerations, as evidenced by Amazon); Matt Stoller, *How Democrats Killed Their Populist Soul*, THE ATLANTIC (Oct. 24, 2016), https://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-their-populist-soul/ 504710 [https://perma.cc/9FAC-R673] (tracing Democrats' abandonment of antimonopoly politics).

front-page headlines,[8] congressional hearings and investigations,[9] magazine covers,[10] and discussion at a presidential debate.[11] Antitrust law has been transformed quickly from a relatively settled and sequestered domain of expertise to an area of active debate, with its future now something to be constructed rather than inherited.

Professor Tim Wu's *The Curse of Bigness* is a book for this moment. In just under 150 pages, Wu offers a sweeping history of antitrust law and traces how it is that, in his view, antitrust became unmoored from its central tenets and animating principles. The book presents a diagnosis and a bold call to arms, seeking to recover a republican theory of antimonopoly and to rehabilitate robust antitrust enforcement. Writing about a specialized area of law for a generalist audience inevitably exposes an author to criticism, which Wu has drawn.[12] But assessing the book solely as an academic contribution misunderstands the theory of change reflected in Wu's choice of format. *The Curse of Bigness* is written

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[8] *See, e.g.*, Brent Kendall & John D. McKinnon, *Justice Department Is Preparing Antitrust Investigation of Google*, WALL ST. J. (June 1, 2019), https://www.wsj.com/articles/justice-department-is-preparing-antitrust-investigation-of-google-11559348795 [https://perma.cc/ZR3J-ZBJE]; Steve Lohr, *House Antitrust Panel Seeks Documents from 4 Big Tech Firms*, N.Y. TIMES (Sept. 13, 2019), https://nyti.ms/31f9LyN [https://perma.cc/M9AQ-G9SF]; Tony Romm, Elizabeth Dwoskin & Craig Timberg, *Justice Department Announces Broad Antitrust Review of Big Tech*, WASH. POST (July 23, 2019), https://www.washingtonpost.com/technology/2019/07/23/justice-department-announces-antitrust-review-big-tech-threatening-facebook-google-with-more-scrutiny [https://perma.cc/72YS-S2TP]; David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law*, N.Y. TIMES (June 20, 2019), https://nyti.ms/2J8QAiv [https://perma.cc/Z9XB-UND2].

[9] *See, e.g.*, Press Release, House Judiciary Committee, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets (June 3, 2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2051 [https://perma.cc/6GZG-T45K] (announcing that the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law was initiating a broad investigation into the state of competition in digital markets and the adequacy of existing laws); *Hearings: Online Platforms and Market Power, Part 1: The Free and Diverse Press*, HOUSE JUDICIARY COMMITTEE (June 11, 2019), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2260 [https://perma.cc/G36J-R3CF]; *Hearings: Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship*, HOUSE JUDICIARY COMMITTEE (July 16, 2019), https://judiciary.house.gov/calendar/eventsingle.aspx? EventID=2258 [https://perma.cc/E63T-M667]; *Hearings: Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition*, HOUSE JUDICIARY COMMITTEE (Sept. 12, 2019), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2294 [https://perma.cc/ T2P4-E8ND].

[10] *See, e.g.*, Charles Duhigg, *The Case Against Google*, N.Y. TIMES MAG. (Feb. 20, 2018), https://nyti.ms/2C7Sb6Y [https://perma.cc/WKB8-4EQQ]; *Too Much of a Good Thing*, THE ECONOMIST (Mar. 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing [https://perma.cc/FU6B-MDTQ].

[11] *See* Naomi Nix, Ben Brody & David McLaughlin, *Democrats Slam Corporate Power with Vow of Antitrust Crackdown*, BLOOMBERG (June 26, 2019), https://www.bloomberg.com/news/articles/2019-06-27/democrats-slam-corporate-power-with-vow-of-antitrust-crackdown [https://perma.cc/7PZ2-8D7M].

[12] *See, e.g.*, Douglas Ginsburg, *Judging a Book: Ginsburg Reviews 'The Curse of Bigness,'* LAW360 (Dec. 3, 2018, 5:12 PM), https://www.law360.com/articles/1099074 [https://perma.cc/T9QC-WWU3].

for a mainstream audience because Wu believes that reinvigorating antitrust will require more than winning over academics or practitioners. Instead, informing and engaging the public — including advocates, organizers, policymakers, journalists, and other general readers — is a prerequisite for creating the political pressure needed to reorient antitrust around the antimonopoly values it has abandoned in recent decades.[13]

This Review builds on Wu's book to explain the significance of the current rupture in antitrust and to situate it within a broader intellectual trajectory. Debates over the foundational purpose of antitrust are not new, and examining how this latest clash fits alongside previous contestations is essential for understanding what has yielded the current contestability and assessing the competing visions.

Part I of this Review summarizes Wu's chief contributions in *The Curse of Bigness*, focusing on three tenets that form the basis of the book. Part II offers an analytic breakdown of the overhaul in antitrust doctrine that is the subject of Wu's critique, tracing the transformation of antitrust to changes in descriptive claims and normative assumptions that the Chicago School introduced. I argue that framing Chicago's interventions this way lets us map the current antitrust debate with greater coherence. Doing so, moreover, reveals the limits of proffered correctives to the Chicago School and underscores the need for what has been called a "Neo-Brandeisian" program in law and political economy. Part III argues that a central component of the Neo-Brandeisian project should include reforming the institutional structure of antitrust law and policy. Although most critiques of present-day antitrust focus on doctrinal rules and the substantive legal framework that governs antitrust analysis, the exclusive reliance on a common law approach to antitrust is a key source and enabler of current dysfunctions. Complementing (or even largely supplanting) this common law structure with an administrative approach would both equip antitrust to keep pace with evolving business practices and new market realities and help democratize antitrust in the ways that Wu and other reformers champion.

I. *THE CURSE OF BIGNESS*

Wu's *The Curse of Bigness* is structured around three key tenets: (1) that antitrust and antimonopoly are central to America's political tradition and critical safeguards of a democratic republic (pp. 16–19); (2) that the structure of our economy inextricably shapes our experience as citizens (pp. 39–44); and (3) that the decades-long project to defang antitrust is the product of an intellectual revolution that redefined how we

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[13] As used by contemporary antitrust reformers, "antimonopoly" refers to a framework that seeks to control and check private concentrations of economic power. Promoting antimonopoly does not categorically require promoting competition or decentralization, and it relies on a toolkit broader than just antitrust. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

assess competition through adopting "consumer welfare" as the law's only goal (pp. 88–91, 135).

First, Wu makes clear that his aim is to help recenter antitrust as a key "check on private power as necessary in a functioning democracy" (p. 19). Revisiting the legislative history of antitrust, he notes that lawmakers passed antitrust laws with the expressly political goal of preventing economic autocracy and prohibiting coercive conduct (pp. 30–31).[14] He analogizes antitrust to constitutional law, both in function and in import, following a tradition of scholars who have explored what it means for antitrust to serve a constitutional role (p. 54).[15] Wu draws out two distinct aspects of this constitutional dimension. He argues that the passage of the antitrust laws reflected a "[c]onstitutional choice in industrial and national policy," suggesting that lawmakers passed antitrust laws in order to codify a set of foundational principles that were to set the backdrop of American life (p. 17). Analogizing antitrust to the checks and balances of the U.S. constitutional system, Wu also underscores how constitutional design and antitrust law both reflect a distrust of concentrated power (p. 31). The steady erosion of antitrust, then, is a threat not just to open markets and fair competition, but to the basis of democratic governance.

Second, Wu makes the case that economic concentration inextricably shapes our experience as citizens and that how we structure our markets is foremost a political question that demands critical public engagement (p. 33).[16] This tenet is most directly an echo of Justice Brandeis, whose

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[14] Somewhat perplexingly, while Wu relies heavily on the legislative history of the Sherman Act to establish its republican roots, he also suggests that parsing this history for an original purpose is a lost cause: "Let us not spend any more time on the impossible task of trying to find the true original meaning of the Sherman Act" (p. 32).

[15] *See, e.g.*, Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 381 (1965) (describing antitrust as "an integral part of the economic constitution of the United States"); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1217, 1231 (2001) (stating that "[t]he Sherman Act of 1890 . . . is a classic super-statute," *id.* at 1231, or a law that can be considered "quasi-constitutional," *id.* at 1217); Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 88–93 (2013) (describing antitrust as "a rule against private regulation," *id.* at 88, that is akin to private nondelegation, a constitutional doctrine). *But cf.* Daniel A. Crane, *"The Magna Carta of Free Enterprise" Really?*, 99 IOWA L. REV. BULL. 17, 23 (2013) ("[T]he U.S. antitrust laws are not understood as constitutional in any meaningful sense.").

[16] Wu writes:

> This book aspires to resurrect and try to renovate the lost tenets of the Brandeisian economic vision. It envisions a vigorous, healthy economy, a skepticism of the self-serving rhetoric projecting the romance of big business or the inevitability of monopoly, and, above all, a sensitivity to human ends. Brandeis took matters like bigness and concentration as inseparable from the very nature of democracy, and the conditions under which its citizens would live. They determined what kind of country we would live in and what kind of environment that country would provide for its citizens. (p. 33)

This basic idea was also captured by Justice Harlan in his partial dissent in *Standard Oil Co. of New Jersey v. United States*, 222 U.S. 1 (1911), the government's major antitrust lawsuit against Standard Oil that resulted in the break-up of the corporation. *Id.* at 83 (Harlan, J., concurring in

1934 book is a namesake for Wu's.[17] Justice Brandeis analyzed the phenomenology of concentrated private power, examining how living in a nation of monopolies and oligopolies — being subject to their whims and arbitrary dictates — shaped the experience of civic life.[18] Wu, channeling Justice Brandeis, answers that it leads to "a certain inhumanity," likely to both "rob the American people of their character" and "suppress[] industrial liberty" (p. 41).[19] The analysis focuses on how having one's life largely governed by unaccountable private power tends to undermine liberty and self-determination. "We like to speak of freedoms in the abstract, but for most people, a sense of autonomy is more influenced by private forces and economic structure than by government" (p. 40), Wu writes, explaining that Justice Brandeis viewed "real freedom as freedom from both public *and* private coercion" (p. 41). The threat to liberty posed by monopoly — which can be understood as a form of private sovereign — remains a "major blind spot for contemporary libertarianism, which is rightly concerned with government overreach but bizarrely tolerant of mistreatment or abuse committed by so-called private actors" (p. 41 n.*).[20]

A striking corollary to the idea that extreme economic concentration undermines personal and political liberty is that it can also facilitate the rise of fascism. A major current underlying Wu's book is that *failing* to police the growth and incursion of extreme concentrations of private power will not just come at the expense of certain republican ideals but, instead, threatens democracy altogether (p. 139). Wu argues that the German Republic's acceptance of monopolies and concentrated industry in key markets helped give rise to Hitler, and that the mid-century push for reviving antitrust in the United States was driven, in part, by fears that — absent intervention — America, too, could fall subject to the same fate (pp. 79–82).[21] In the lead-up to the passage of the Anti-Merger

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part, and dissenting in part) ("The Nation had been rid of human slavery — fortunately, as all now feel — but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life.").

17 *See* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1934).

18 *See generally id.*

19 In the last quotation, Wu quotes LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 48 (1914).

20 *See generally* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37–74 (2017).

21 Wu adds that "the real political support for the laws in the postwar period came from the fact that they were understood as a bulwark against the terrifying examples of Japan, Italy, and most of all the Third Reich" (p. 79). *See generally* Daniel A. Crane, *Antitrust and Democracy: A Case Study from German Fascism* (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 18-

Act of 1950, both of the bill's chief sponsors discussed how halting the rising tide of economic concentration was critical for avoiding totalitarianism.[22]

Third, Wu pegs the enfeebling of antitrust to an intellectual shift ushered in by the Chicago School (pp. 83–92). The Chicago School began with a group of economists and lawyers primarily associated with the University of Chicago (pp. 84–85). Its key founders included Professors Aaron Director, Milton Friedman, and George Stigler and the group grew to include figures such as Professor Ward Bowman and then-Professors Frank Easterbrook, Richard Posner, and Robert Bork (pp. 84–85). Backed by money from the Volker Fund, the group established a project to "promote private enterprise."[23] Their scholarship applied neoclassical price theory to the study of legal rules and, in particular, to the analysis of antitrust.[24] Under the guidance of Director, students and researchers studied various antitrust doctrines through the lens of price theory, criticizing prevailing case law and theories of

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009, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164467 [https://perma.cc/47UF-PRA4].

[22] *See, e.g.*, 96 CONG. REC. 16,452 (1950) (statement of Sen. Estes Kefauver) ("I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state."); 95 CONG. REC. 11,486 (1949) (statement of Rep. Emanuel Celler) ("I want to point out the danger of this trend toward more and better combines. I read from a report filed with former Secretary of War Royall as to the history of the cartelization and concentration of industry in Germany: 'Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war.'"). A decade earlier, President Roosevelt had also warned that increasing concentration of private power could eventually yield fascism. *See* President Franklin D. Roosevelt, Message to Congress on the Concentration of Economic Power (Apr. 29, 1938), https://publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/roosevelt-speeches/fro42938.htm [https://perma.cc/D73S-Q4LD] ("Unhappy events abroad have retaught us two simple truths about the liberty of a democratic people. The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is fascism — ownership of government by an individual, by a group, or by any other controlling private power.").

[23] Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 180–81 (1983) (quoting Director in a discussion held March 21–23, 1981, in Los Angeles).

[24] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979) (noting that Director's conclusions involved "viewing antitrust policy through the lens of price theory"). Although the Chicago School is often described as ushering in the "law and economics" movement, the first law and economics movement traces back to the Progressive Era. *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT, at viii (1998). This "first law and economics movement" was comprised of institutional economists, the most prominent of whom include Professors J.M. Clark, John Commons, Richard Ely, Walton Hamilton, and Robert Hale. *See id.* at 5.

harm.[25] Perhaps the "most influential" of these efforts, Wu notes, was Bork's paper revisiting the legislative history of the Sherman Act and concluding that the sole purpose of the antitrust laws was to maximize consumer welfare (p. 88). Although a long list of scholars would subsequently debunk Bork's claim,[26] the Supreme Court adopted Bork's fictitious account.[27]

The embrace of consumer welfare by courts and enforcers alike "threw out the broader concerns that had long animated the [Sherman] Act and its enforcement" (p. 89). Under the new paradigm, harm to competition would manifest solely as harm to allocative efficiency in the form of higher prices or lower output. Wu observes that Chicago's framework pledged economic rigor yet neglected to consider a host of economic costs, including stagnation and stunted innovation (p. 90). "In truth," Wu writes, "Robert Bork's attack on antitrust was really *laissez-faire* reincarnated" (p. 91). With the codification of Chicago's ideas, antitrust "lost its traditional goals" (p. 103).

Several factors enabled ideas once considered "lunatic fringe"[28] to redefine antitrust. Channeling the work of Professor William Kovacic, Wu notes that Chicago's triumph relied on key concessions from and alliances with the Harvard School, comprised of centrist scholars and enforcers such as Professors Donald Turner and Phil Areeda and then-Judge Stephen Breyer (p. 103).[29] Kovacic's analysis focuses on how the institutional concerns that occupied Harvard School thinkers (such as their misgivings about expansive private rights of action under the U.S.

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[25] *See, e.g.*, Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); John L. Peterman, *The* Brown Shoe *Case*, 18 J.L. & ECON. 81 (1975); John L. Peterman, *The Clorox Case and the Television Rate Structures*, 11 J.L. & ECON. 321 (1968). Bowman later noted that much of his article reflected Director's thinking. *See* Kitch, *supra* note 23, at 200 ("It happens that my name appears on an article on tie-ins. Eighty percent of that article is Aaron Director . . . ." (footnote omitted)).

[26] *See, e.g.*, John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 263–64 (1988); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1146–49 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68–71 (1982).

[27] *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978))).

[28] Posner, *supra* note 24, at 931 ("In some quarters the Chicago school was regarded as little better than a lunatic fringe.").

[29] *See also* Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1919 (2009) (book review) ("Whereas the Chicago School tends to argue for the robustness of markets and hence for minimal need for regulatory interventions, the Harvard School tends to focus on the institutional limitations of governmental actors — regulators, judges, and juries — to correct even real market failures. Conjunctively, the two schools often tend toward similar noninterventionist results."); 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, 47–50.

antitrust system) led them to embrace some of the same prescriptions as Chicago.[30] Wu adds that these scholars were also haunted by critiques that antitrust enforcement had become arbitrary and unjustifiably aggressive, nothing short of "the blind firing of muskets at companies that just seemed bad" (p. 103). Meanwhile price theory, along with the consumer welfare standard, appeared to promise a disciplined and rigorous approach to enforcement. A decades-long attack by Chicago on the existing paradigm had left Harvard School academics more susceptible to — and perhaps less critical of — Chicago's interventions (p. 105). As the ideological makeup of the federal judiciary shifted, courts adopted Chicago's theories much more readily.

Within a decade the Chicago movement began encountering some resistance from what is referred to as the "Post-Chicago School," a group of economists and lawyers that "emerged to challenge many of [Chicago's] basic premises" (p. 107). Whereas Chicago scholars had introduced general theories, Post-Chicago academics sought to qualify them, circumscribing the set of conditions under which Chicago's predictions would hold. Yet despite their interventions, "the antimonopoly provisions of the Sherman Act went into a deep freeze from which they have never really recovered" (p. 108). Our economy today reflects this neglect, with highly concentrated product and labor markets along with a tech industry that, while once open and dynamic, is increasingly closed and controlled (pp. 114–26).

Wu closes by sketching the outlines of a Neo-Brandeisian agenda that would resuscitate antitrust. He recommends a merger enforcement program that would fulfill Congress's mandate to arrest mergers even when concentration is in its incipiency, and he proposes that antitrust agencies open up merger review to greater public scrutiny and accountability (pp. 127–30). He urges a return to the "big case" tradition that targeted AT&T and Microsoft (pp. 93–101), and implores enforcers to recover corporate breakups as a mainstay antitrust remedy, observing that the administrative difficulty of structural remedies is often overstated and the benefits (including the "self-executing" nature of breakups) underappreciated (pp. 132–33). Finally, Wu calls for antitrust to abandon consumer welfare as its stated goal and return to a "protection of competition" test, which is more faithful to legislative history and earlier precedent (pp. 135–37). Building on scholarship by Professors Barak Orbach and Eleanor Fox,[31] among others, Wu observes that the

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[30] Kovacic, *supra* note 29, at 40–42, 50–62.

[31] *See, e.g.*, Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013) ("The big choice is between outcome orientation, on the one hand, and concern for process as well as outcome, on the other. Do we value the process of rivalry, relatively open access, and contestability of markets by entrepreneurs and firms without market power? Or should we limit antitrust condemnation to acts that provably lessen output?"); Khan, *supra* note 7, at 744 ("[T]he Chicago School shifted the

goal of preserving competition is "focused on protection of a *process*," whereas promoting consumer welfare prioritizes "the maximization of a *value*" (p. 136). Refocusing antitrust on protecting the competitive process, Wu argues, would bring enforcement more in line with actual business realities while also reflecting congressional intent.

Wu's lucid book offers a compelling account of why antitrust has gone awry. His critique and reform agenda have helped inform a broader public discussion about what antitrust stands for, what failed enforcement has delivered, and what's at stake with recovering an approach to antitrust that is anchored in its antimonopoly roots. Returning antitrust to its founding values, as Wu reminds us, is fundamentally about recovering a framework that recognizes the economic and political threats posed by concentrated private power.

Fully realizing the antimonopoly values that Wu seeks to recover, however, will require more than antitrust. One cost of placing antitrust at the center of an antimonopoly agenda is that doing so can risk suggesting that competition or decentralization are ends in themselves, rather than means for checking private domination and securing freedom.[32] When faced with natural monopolies, for example, public utility regulations provide a way to preserve economies of scale while preventing the exploitative practices that monopolistic control enables.[33] In the context of workers or small enterprises, meanwhile, permitting coordination through labor laws or antitrust exemptions can enable forms of organizing that are critical for rebalancing power.[34] Given current challenges — including the dominance of a small number of technology platforms, certain aspects of which seem to exhibit natural monopoly features, and the revival of antitrust as an antiworker tool — recognizing competition as one among several mechanisms for checking concentrated private power is especially critical.[35] Doing so will also help renew antimonopoly principles for a twenty-first-century paradigm, one that builds on — rather than replicates — the Brandeisian era.

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analytical emphasis away from *process* — the conditions necessary for competition — and toward an *outcome* — namely, consumer welfare."); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2254 (2013) ("Federal antitrust statutes stress the significance of competition and appear to declare the preservation of competition as their goal. . . . [T]he preservation of competition in business has always served as the most intuitive and obvious goal of competition laws.").

[32] RAHMAN, *supra* note 7; Khan, *supra* note 13, at 131–32.

[33] K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018) (identifying public utility principles as key for confronting private control of essential goods and services).

[34] Paul, *supra* note 7.

[35] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019) (identifying how Amazon, Google, Facebook, and Apple serve as dominant intermediaries in digital markets); Vaheesan, *supra* note 7.

II. SITUATING NEO-BRANDEIS

Wu pulls no punches in his critique of the Chicago School, depicting its antitrust intervention as a project that supplanted democratically enacted laws with a pro-monopoly agenda. Yet as he notes, the Chicago School has not gone unchallenged: by the 1980s, Post-Chicago scholars — lawyers and economists "who were chagrined and dismayed by the misuse of economic tools to justify a *laissez-faire* ideology" — were publishing extensive rebuttals to Bork and his colleagues (p. 108). What Wu doesn't explain is why, despite Post-Chicago's efforts, Chicago has remained dominant and what, if anything, distinguishes the New Brandeis School from Post-Chicago. Would appointing more enforcers and federal judges who are receptive to Post-Chicago arguments be sufficient to rehabilitate antitrust in the ways that Wu urges? It is possible that parsing distinctions between schools of antitrust falls beyond the scope of Wu's book because it is aimed at a generalist audience. Yet the omission risks understating the case for the New Brandeis agenda. Clearly situating the New Brandeis movement in the wider context of current and historical antitrust debates is critical for championing its project.[36]

Situating Neo-Brandeisian ideas, in turn, requires further explicating the Chicago School transformation of antitrust as well as the Post-Chicago modifications. The Chicago School revolution in antitrust entailed a twofold shift. The first was presented as a descriptive change that offered a new set of assumptions about how firms behave under various conditions and what effects this behavior is likely to have. The second, meanwhile, was an expressly normative shift that replaced a republican theory of antitrust with a neoliberal one, holding that the goal of antitrust law should be to promote efficiency rather than to check and disperse concentrated private power.[37] This new set of descriptive and

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[36] Discussing "schools" of antitrust thought is rife with the hazards that attend any attempt to generalize the views of various groups. This is especially true of nascent intellectual movements, whose still-forming nature is in tension with a desire to articulate clear and general commitments. Therefore my use of "Chicago," "Post-Chicago," and "New Brandeis" in this Review will necessarily be imprecise, with the hope that these terms (however imperfect) can help illuminate the current terrain of antitrust debate. It is also worth noting that while the contemporary reform efforts are currently described as "Neo-Brandeisian," my use of the term does not intend to suggest that the movement does or should adopt Justice Brandeis's prescriptions across the board, but only that Justice Brandeis's insights provide a helpful guide in navigating antitrust and antimonopolism.

[37] On "neoliberalism" in law, see David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. CONTEMP. PROBS. 1 (2014). It is worth noting that the neoliberal shift in antitrust was part of a more general neoliberal reorientation of law and policy. *See, e.g.*, Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. CONTEMP. PROBS. 25 (2014) (describing how neoliberalism dominates U.S. family law); Amy Kapczynski, *Intellectual Property's Leviathan*, 77 L. CONTEMP. PROBS. 131 (2014) (describing how intellectual property law debates often assume a neoliberal conception of the state); Frank Pasquale, *The Hidden Costs of Health Care Cost-Cutting: Toward a Postneoliberal Health-*

normative assumptions, meanwhile, provided courts with the basis for changing the decision rules and legal standards that constitute antitrust analysis — delivering the body of antitrust law that governs today. Tracing the overhaul of antitrust doctrine to these descriptive and normative changes provides a framework for mapping the fault lines of the contemporary antitrust debate.

A. The Chicago School Intervention & Post-Chicago Corrective

The Chicago School's influence on antitrust had two key elements. The first consisted of new economic theories and modes of analysis that embedded in antitrust a set of descriptive claims about markets and market actors. This included both work in industrial organization economics (IO), which targeted the "structure-conduct-performance" (SCP) paradigm, and the application of price theory, which came to define the Chicago School's contribution to antitrust analysis.

The SCP framework guided antitrust enforcement through the 1960s. Informed by studies that showed a positive relationship between concentration and profits, the SCP paradigm represented a structuralist approach to antitrust, holding that concentrated market structures evince a lack of competition and facilitate anticompetitive conduct.[38] Structuralism began facing serious challenge from Chicago scholars in the 1970s, when work by Professors Harold Demsetz and Yale Brozen, among others, disputed the positive correlation between concentration and profits and argued that concentration may signal superior efficiency rather than a lack of competition.[39] Published at a time when proposals for deconcentration legislation were dominating antitrust policy discussions,[40] this scholarship helped erode the intellectual consensus that had

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Reform Agenda, 77 L. CONTEMP. PROBS. 171 (2014) (describing how neoliberal assumptions pervade health law and policy discussions); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. CONTEMP. PROBS. 195 (2014) (describing neoliberal thought in constitutional law); Zephyr Teachout, *Neoliberal Political Law*, 77 L. CONTEMP. PROBS. 215 (2014) (describing the neoliberal turn in election law).

38 JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968).

39 Yale Brozen, *The Antitrust Task Force Deconcentration Recommendation*, 13 J.L. & ECON. 279, 292 (1970); Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 174–77 (Harvey J. Goldschmid et al. eds., 1974). *But see* Leonard W. Weiss, *The Concentration-Profits Relationship and Antitrust*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra*, at 184, 185–233 (contesting studies that claimed to debunk the relationship between concentration and profits and defending antitrust enforcement that blocked horizontal mergers in concentrated industries).

40 *See, e.g.*, Industrial Reorganization Act, S. 1167, 93d Cong. (1973); CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959); PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11 (1968–69); *see also* Harlan M. Blake, *Legislative Proposals for Industrial Deconcentration*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 39, at 340 (summarizing the various deconcentration proposals).

supported programs to restructure industries, codify concentration thresholds, and strengthen antitrust laws to reflect structuralist principles.[41]

In addition to its IO-based critique, Chicago's intervention featured neoclassical price theory. Price theory assumes that market equilibrium is determined by the behavior of rational economic actors seeking to maximize profits or utility, often under the assumption of perfect or near-perfect competition.[42] It assumes, moreover, a system of perfect information and nonexistent entry barriers, combining to depict a frictionless world where any exercise of monopoly power resulting in windfall profits will be instantly disciplined by a flood of new entrants (or the threat thereof).[43] Chicago scholars argued that this price theory framework offered a "unified, coherent methodology for analyzing the causes and consequences of commercial activities," including the business practices of dominant firms.[44]

Viewing firm conduct through the lens of price theory enabled Chicago School thinkers to reinterpret business practices and market outcomes previously considered anticompetitive as procompetitive or benign. They argued that bright-line rules should be softened or even inverted; indeed, Bork held that swaths of conduct treated as per se illegal should instead be viewed as per se legal.[45] Chicago scholars argued that this price theory approach to antitrust introduced economically coherent analysis, a stark improvement over the "untheoretical, descriptive, 'institutional,' and even metaphorical" methods that pre-Chicago economists had used.[46]

While the Chicago School's intervention is often described in terms of a methodology, it is worth noting that the effect of both the "Chicago School of industrial organization economics" and the "Chicago School

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[41] Kovacic, *supra* note 6, at 1137–38 (stating that the Airlie House Conference summarized in *Industrial Concentration: The New Learning* "supplied a forum for opponents of structural antitrust analysis" to dispute the economic findings that supported deconcentration measures, ultimately weakening the intellectual and political support for these policies, *id.* at 1138).

[42] *See* GEORGE J. STIGLER, THE THEORY OF COMPETITIVE PRICE 12–13, 21–24 (1942).

[43] Posner, *supra* note 24, at 927 ("The predator loses money during the period of predation and, if he tries to recoup it later by raising his price, new entrants will be attracted, the price will be bid down to the competitive level, and the attempt at recoupment will fail.").

[44] Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 772–73 (2005).

[45] BORK, *supra* note 27, at 406.

[46] Posner, *supra* note 24, at 928; *see also id.* at 929 ("Casual observation of business behavior, colorful characterizations (such as the term 'barrier to entry'), eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of the careful definitions and parsimonious logical structure of economic theory. The result was that industrial organization regularly advanced propositions that contradicted economic theory."); Ronald Coase, *The New Institutional Economics*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 229, 230 (1984) ("The American institutionalists were not theoretical but anti-theoretical . . . . Without a theory they had nothing to pass on except a mass of descriptive material waiting for a theory, or a fire.").

of antitrust analysis" was to offer a universe of descriptive claims about self-correcting markets and rational market actors.[47] Price theory introduced not just a set of tools to analyze legal rules, but also a set of neoclassical assumptions about incentives, causality, and effects.[48] Although a stated commitment to scientific discourse suggested that Chicago scholars would constantly revise their theories and embedded assumptions in light of empirical evidence,[49] in practice many of these original models have remained largely unchanged.[50] Courts, meanwhile, have adopted Chicago's descriptive claims, codifying in case law a highly particularized, abstracted, and untested conception of how markets function.[51]

The normative dimension of Chicago's intervention also had two facets. The first, as Wu notes, involved Bork's revisionist account of the legislative history, in which Bork attempted to demonstrate that the primary goal Congress sought to advance through passing the Sherman Act was the promotion of allocative efficiency (pp. 88–91). Though Bork's attempt to derive this goal from the legislative history marked an effort to obscure his own ideological agenda, Bork's conclusion was expressly normative: that the antitrust laws *should* be enforced for the purpose of promoting efficiency.[52]

The other normative aspect followed from Chicago's methodological commitment. Because the economic analysis of law assesses legal rules on the basis of the welfare effects that they generate, a price theory approach to antitrust necessarily privileges efficiency criteria over, say,

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[47] Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, *in* HANDBOOK OF ANTITRUST ECONOMICS 1, 25 (Paolo Buccirossi ed., 2008) (distinguishing between the "Chicago school of industrial organization economics" and the "Chicago school of antitrust analysis").

[48] *See, e.g.*, Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 459 (1965) ("Running through all of the Bork-Bowman analysis is the assumption that business decisions must be motivated either by attempts to gain monopoly power or by efforts to improve efficiency, and that if the establishment of horizontal market power is not the immediate objective . . . the transaction must be designed to increase efficiency.").

[49] *See* MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 7–9 (1966).

[50] *See generally* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008). As has been widely noted, the Chicago School did not represent a monolithic set of views, and scholars associated with the Chicago School sometimes disagreed with one another. *See, e.g.*, Crane, *supra* note 29, at 1916–18; Kovacic, *supra* note 29, at 10 (identifying disagreements between Posner and Bork); Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 244 (2012) ("The Chicago School enjoys considerable heterogeneity in both economic approaches and policy prescriptions.").

[51] *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (noting "the general implausibility of predatory pricing").

[52] *See* BORK, *supra* note 27, at 89 ("Only [consumer welfare as a goal] permits courts to behave responsibly and to achieve the virtues appropriate to law.").

concerns about justice or fairness.[53] In this way, even those who rejected Bork's reading of legislative history could end up supporting the same efficiency-based conception of antitrust simply through sharing a commitment to price theory. And given that antimonopoly suspicion of dominant corporations stemmed from a fear that they would exercise their power in coercive ways (even if not strictly welfare-reducing in Chicago terms), collapsing anticompetitive conduct to welfare reduction swapped out a rich set of concerns about concentrated private power in favor of a benign (or even admiring) conception of the monopolist.[54]

The Chicago School operationalized its approach through an error-cost framework. The basic insight of error-cost analysis, introduced by Easterbrook, is that erroneous antitrust convictions are likely to be much costlier than erroneous antitrust acquittals because "judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."[55] A key assumption underlying the framework is that anticompetitive conduct will eventually be "undone by competitive forces," whereas "judicial errors that wrongly condemn a procompetitive practice" will lead firms to abandon beneficial practices, generating a significant social cost.[56] Because Chicago's application of price theory blurred the line between procompetitive and anticompetitive conduct, almost every enforcement opportunity now raised the risk not just of erroneously condemning conduct that did not rise to an antitrust violation, but also of erroneously condemning *beneficial* behavior.[57]

Post-Chicago academics contested the Chicago School primarily by refining and qualifying the conditions under which Chicago's theories held. Where Chicago claimed that conduct viewed as anticompetitive was, in fact, procompetitive, Post-Chicago's response was "it depends." This view favored replacing bright-line rules with a reasonableness standard, which courts now apply to most forms of conduct.[58] The most

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[53] *See generally* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 201–05, 212–15 (1980).

[54] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 968–70 (2018) (contrasting judicial opinions by Justice Douglas and Justice Scalia to demonstrate how the adoption of efficiency-oriented antitrust ushered in a profoundly different theory of power).

[55] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984).

[56] Wright, *supra* note 50, at 248.

[57] For a comprehensive critique of this error-cost framework, see Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

[58] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (applying rule of reason analysis to minimum resale price maintenance); NYNEX Corp. v. Disco, Inc., 525 U.S. 128 (1998) (applying rule of reason analysis to a purely vertical agreement to refuse to deal with third party); State Oil Co. v. Khan, 522 U.S. 3 (1997) (applying rule of reason analysis to maximum resale price maintenance); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (applying rule of reason analysis to vertical nonprice restraints); *see also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 136–37 (2018) (describing how courts have shifted away from the per se rule).

influential Post-Chicago work included Professors Steven Salop and Thomas Krattenmaker's "raising rivals' costs" model, which provided a framework for assessing when exclusionary conduct should be considered anticompetitive,[59] and Professor Michael Whinston's work, which identified the set of conditions under which a monopolist in one product market would have an incentive to monopolize an adjacent one.[60] Notably, while Post-Chicago criticized Chicago for being "too theoretical, simple, speculative, and unempirical,"[61] Post-Chicago's contributions similarly relied primarily on theory rather than empirics.[62]

Although a group of leading antitrust scholars was challenging the Chicago School's normative claims,[63] Post-Chicago thinkers engaged almost exclusively on the descriptive front. They issued correctives to Chicago's economic models but generally accepted the overarching paradigm that Chicago had introduced; they "start[ed] with the Chicago school's proposition that economics controls antitrust" and then "add[ed] complexity to the microeconomic analysis."[64] Where Bork's definition of consumer welfare included producer profits, Post-Chicago's definition "focuse[d] entirely on output and, correspondingly, low prices."[65] By offering primarily technical modifications to Chicago's framework, Post-Chicago thinkers implicitly ratified its normative and ideological

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[59] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 234–49 (1986).

[60] Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 841–56 (1990).

[61] Crane, *supra* note 29, at 1923.

[62] *Id.* at 1915 ("Post-Chicago tries to one-up Chicagoan theories with even more attenuated theories of its own, thus announcing the emperor's nudity while wearing clothes cut of the same purportedly invisible cloth.").

[63] *See, e.g.*, Blake & Jones, *supra* note 15, at 382–85 (critiquing Bork and Bowman's efficiency-based conception of antitrust and underscoring the antidomination roots of antitrust law); Blake & Jones, *supra* note 48, at 422–36 (identifying the political objectives of antitrust); John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy — Introduction*, 125 U. PA. L. REV. 1182, 1185 (1977) (critiquing the notion that "empirical evidence of the world objectively quantifiable and measured against a value-free economic model of 'efficiency' should be the sole test for defining antitrust policy"); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 918 (1987) ("The real battle is not about where correct economics leads. Rather, it is about fundamentally different views concerning law and society."); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1052 (1979) ("[A]n antitrust policy that failed to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century."); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076–78 (1979) (highlighting deconcentration measures and antitrust policies that were motivated by a desire to check concentrated private power and promote fair treatment).

[64] Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive* Daubert*?*, 34 AKRON L. REV. 795, 813 (2001).

[65] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* 4 (Univ. Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 18-15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197329 [https://perma.cc/A8ME-D7WS].

assumptions, which remain embedded in antitrust doctrine today. Despite broad acknowledgment that centering antitrust on neoclassical conceptions of welfare had no basis in legislative history, Post-Chicago commentators largely endorsed (if not embraced) its adoption.

Post-Chicago's choice to accept Chicago's normative paradigm stands in contrast with the New Brandeis intervention, which rejects the idea that antitrust law should be centered on promoting consumer welfare. As Wu's book stakes out, challenging this cramped normative vision is central to reinvigorating antitrust law as part of a broader antimonopoly project to structure private power to serve public ends.

B. The Empirical Challenge & Neo-Brandeisian Normative Critique

This current challenge to the antitrust consensus is not altogether new. A small group of thinkers has been documenting the harmful effects of increased concentration and challenging the consumer welfare standard for the last decade.[66] However, only recently has this critique entered the mainstream antitrust discussion, spurring a scholarly debate and creating an opening for reform. This advancement has been driven by critiques on both descriptive and normative grounds.

On the descriptive front, at least two factors are straining the current consensus. The first is the proliferation in recent years of empirical studies that document increasing concentration and declining competition. Wu offers a high-level overview of concentration levels in major industries such as airlines, pharmaceuticals, and telecommunications (pp. 115–17) — but it is worth noting that studies reveal high concentration to now be a systemic, rather than isolated, feature of our economy. These reports have identified growing concentration across the

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[66] *See, e.g.*, LYNN, *supra* note 7; Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov./Dec. 2012), https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken [https://perma.cc/J6RA-5HGD]; Lina Khan & Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, WASH. POST (June 13, 2014), https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html [https://perma.cc/36HZ-6DAL]; Barry C. Lynn, *Killing the Competition*, HARPER'S MAG. (Feb. 2012), https://harpers.org/archive/2012/02/killing-the-competition [https://perma.cc/EML8-9XUU]; Barry C. Lynn & Phillip Longman, *Who Broke America's Jobs Machine?*, WASH. MONTHLY (Mar./Apr. 2010), https://washingtonmonthly.com/magazine/marchapril-2010/who-broke-americas-jobs-machine-3 [https://perma.cc/RS27-H9H3]; *see also* John M. Newman, *Reactionary Antitrust*, CONCURRENCES REV., Nov. 2019, at 66, 67–68 (tracing research and articles that offered internal and external critiques of the current antitrust paradigm).

economy,[67] an increase in markups,[68] and a falloff in corporate investment relative to profits.[69] Studies from labor economists, meanwhile, have shown that a majority of labor markets across the United States are highly concentrated,[70] that higher labor market concentration correlates with a decrease in wages,[71] and that the drop in labor's share of national income is partly due to an increase in markups.[72] Macroeconomic trends — such as significant reductions in business dynamism and new business formation, along with historic levels of wealth and income inequality — have also been connected to increasing monopolization and declining competition.[73] Detailed studies of merger policy have revealed that a significant share of mergers have resulted in price increases: out of fifty-three transactions that took place over the last few decades, over seventy-five percent resulted in price increases without any offsetting benefits in quality, cost, or nonprice measures.[74]

This body of research is drawing wide attention and spurring broader policy discussions about growing market power and its manifold effects. Notably these empirical works depart from the theory-heavy approaches of Chicago and Post-Chicago, which have been relatively slow to "join the empiricist bandwagon."[75] Chicago and Post-

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[67] COUNCIL OF ECON. ADVISERS, ISSUE BRIEF: BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf [https://perma.cc/XV5S-H7P6].

[68] Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, Q.J. ECON. (forthcoming 2020) (manuscript at 1), http://www.janeeckhout.com/wp-content/uploads/26.pdf [https://perma.cc/GK5C-NGVT].

[69] Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2017, at 89, 95–97; Germán Gutiérrez & Thomas Philippon, *Ownership, Concentration, and Investment*, AEA PAPERS & PROCEEDINGS, 2018, at 432, 432, https://doi.org/10.1257/pandp.20181010 [https://perma.cc/7HFR-D65F]; Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23583, 2017).

[70] José A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018).

[71] José A. Azar et al., *Labor Market Concentration* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017).

[72] Simcha Barkai, *Declining Labor and Capital Shares*, J. FIN. (forthcoming) (manuscript at 2, 23–26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489965 [https://perma.cc/YYK3-7QXE].

[73] IAN HATHAWAY & ROBERT E. LITAN, BROOKINGS INST., WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION (2014), https://www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf [https://perma.cc/D4RS-8CC5]; Joshua Gans et al., *Inequality and Market Concentration, When Shareholding Is More Skewed than Consumption* (Nat'l Bureau of Econ. Research, Working Paper No. 25395, 2018), https://ssrn.com/abstract=3306105 [https://perma.cc/EEL9-YYAJ].

[74] John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 631–32 (2013); *see also* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014).

[75] Crane, *supra* note 29, at 1931 ("There is an opportunity for entrepreneurial scholars from either camp to begin serious programs of empirical work on antitrust.").

Chicago scholars, meanwhile, have responded with skepticism and criticism to several of these studies, casting doubt on their methodologies and alleging that some are replicating the mistakes of the SCP framework.[76] While detailing the specific critiques (and responses) is beyond the scope of this Review, the friction underscores how the longstanding dominance of Chicago and Post-Chicago has led antitrust analysis to be governed by a fairly closed set of methodological approaches that — as new research is now highlighting — suffer from critical blindspots. The growing interest from non-IO subfields — including from researchers in labor economics, macroeconomics, and public finance, to name a few — has the potential to yield greater methodological pluralism in the field.[77]

A second factor is the failure, in several high-profile instances, of the current antitrust approach to deliver the procompetitive outcome. For example, last year the Justice Department lost its challenge to the AT&T/Time Warner transaction, first failing to convince a federal district court that the merger may substantially lessen competition and then again failing on appeal.[78] In the course of that review, District Court for the District of Columbia Judge Leon flatly rejected the government's predictions about how AT&T would exercise its newfound bargaining power, accepting instead AT&T's argument that the firm couldn't use the merger to gain leverage over customers and hike costs.[79] Within months of completing the deal, AT&T withheld HBO from Dish during

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[76] *See, e.g.*, Steven Berry, Fiona Scott Morton & Martin Gaynor, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, J. ECON. PERSP., Summer 2019, at 44, 45 ("[A] number of recent studies of markups . . . employ an analytical approach that was broadly rejected by the field of industrial organization more than 30 years ago: the 'structure-conduct-performance' paradigm."); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 722 (2018) ("So far as I can tell, recent assertions regarding economy-wide trends [in] market concentration in the American economy have largely ducked [conceptual and data selection] problems [long recognized by industrial organization economists]."); Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, at 9, OECD Doc. DAF/COMP/WD(2018)69 (June 6, 2018) ("Existing empirical support for the claim that increasing concentration has led to increased market power . . . offers little support because it is undermined by problems relating to measurement, inference, and identification."), https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf [https://perma.cc/YVS9-YTPM].

[77] While empirical studies have most clearly drawn public attention and raised policy awareness, economists have also been offering compelling theory-based critiques of the consumer welfare standard. *See, e.g.*, Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455 (2018); Mark Glick, *American Gothic: How Chicago Economics Distorts "Consumer Welfare" in Antitrust* (Inst. for New Econ. Thinking, Working Paper No. 99, 2019), https://www.ineteconomics.org/uploads/papers/WP_99-Glick-Consumer-Welfare.pdf [https://perma.cc/NJZ4-VDQK].

[78] *See* United States v. AT&T, Inc., 916 F.3d 1029, 1046–47 (D.C. Cir. 2019); United States v. AT&T Inc., 310 F. Supp. 3d 161, 165 (D.D.C. 2018).

[79] *See AT&T*, 310 F. Supp. 3d at 199.

contract negotiations,[80] thereby fulfilling opponents' predictions about how the merged entity would use its power to exercise leverage.[81] And while AT&T had stated that the transaction would enable it to lower consumer prices,[82] AT&T has increased prices instead, raising some bills by fifty percent.[83] While it may be tempting to dismiss the government's loss as the product of an unlucky judicial assignment,[84] the instance underscored the costs of abandoning the framework of structural power in favor of microeconomic modeling, which prompted the government to center its challenge partly on an argument about whether consumers would pay thirty cents more as a result of the transaction.[85] The fact that the government's economic expert had first conceded that AT&T would lower prices, resulting in hundreds of millions of dollars in consumer savings — contravening how AT&T actually went on to use its

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[80] *See* Klint Finley, *HBO Goes Dark on Dish. Monopolist Move, or Publicity Stunt?*, WIRED (Nov. 1, 2018, 6:40 PM), https://www.wired.com/story/hbo-dark-dish-monopolist-move-publicity-stunt/ [https://perma.cc/XVK3-2MLB].

[81] *See AT&T*, 310 F. Supp. 3d at 211–14 (recounting, before dismissing as speculative, AT&T competitors' testimony about prices and potential service outages due to the merger).

[82] Post-Trial Brief of Defendants AT&T Inc., DIRECTV Group Holdings, LLC, and Time Warner Inc. at 10, *AT&T*, 310 F. Supp. 3d 161 (No. 17-cv-02511), https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.121.0_1.pdf [https://perma.cc/P53S-BBLB], at 6 ("The merger . . . enabl[es] AT&T and Time Warner to reduce consumer prices . . . ."); *id.* at 13 ("[C]ertain merger efficiencies will begin exerting downward pressure on consumer prices almost immediately.").

[83] Jon Brodkin, *AT&T Hits Online TV Customers with Second Big Price Increase This Year*, ARS TECHNICA (Oct. 18, 2019, 2:56 P.M.), https://arstechnica.com/information-technology/2019/10/att-hits-online-tv-customers-with-second-big-price-increase-this-year/ [https://perma.cc/GLY5-QCCJ]; Chris Welch, *AT&T Confirms Drastic Changes to DirecTV Now and Raises Cheapest Plan to $50*, THE VERGE (Mar. 13, 2019, 10:48 AM), https://www.theverge.com/2019/3/13/18263839/att-directv-now-2019-channel-changes-hbo-plan-price [https://perma.cc/HZR6-8LA7].

[84] *See* Brent Kendall, *DOJ's Behind-the-Scenes Struggles With Judge in AT&T Case*, WALL ST. J. (Aug. 8, 2018, 3:30 AM), https://www.wsj.com/articles/dojs-behind-the-scenes-struggles-with-judge-in-at-t-case-1533682305 [https://perma.cc/47SD-3NLD].

[85] *See AT&T*, 310 F. Supp. 3d at 198 & n.23 (discussing the government's theory of harm, which alleged — among other things — that consumers would pay twenty-seven cents more as a result of the transaction); *see also* United States v. AT&T, Inc., 916 F.3d 1029, 1046 (D.C. Cir. 2019) ("Here, however, the government did not present its challenge to the AT&T-Time Warner merger in terms of creating non-price related harms in the video programming and distribution industry, and we turn to the government's challenges to the district court's handling of the quantitative evidence regarding the proposed merger's predicted effect on consumer price."); Roger Parloff, *The Government's Fight over AT&T-Time Warner Deal Is Not About "Bigness,"* YAHOO (Dec. 3, 2018), https://finance.yahoo.com/news/governments-fight-atandt-time-warner-deal-not-bigness-162232672.html [https://perma.cc/L48M-3Y2L] ("Yet as gargantuan as the deal is, Thursday's argument will have almost nothing to do with its 'bigness' or the frightening concentration of power it represents. Instead, as Columbia Law School professor Tim Wu has recently bemoaned, it will revolve around how many more or fewer pennies consumers will spend on their monthly TV subscriptions if the combination is left undisturbed.").

power — raises further questions about how experts on both sides could have gotten it so wrong.[86]

Closer study also suggests that the purported benefits of a price theory–based and consumer welfare–oriented antitrust — that it would deliver a coherent and stable regime — have been overstated.[87] Critics have argued that consumer welfare suffers from conceptual deficiencies and raises serious practical difficulties, arguments that consumer welfare proponents have yet to seriously engage or rebut.[88] More recently, Neo-Brandeisian critiques of the consumer welfare standard, along with empirical research showing that it has delivered higher prices and lower wages, have surfaced disagreement among antitrust experts about the parameters of consumer welfare. Some scholars, for example, have recently argued that consumer welfare may instead connote "trading partner welfare,"[89] accommodating for anticompetitive effects on workers and producers.

Lodging antitrust analysis in economic theory, meanwhile, has yielded a system where "[c]ourts and enforcement agencies retain broad discretion in selecting theoretical models ad hoc, tailoring decisions to the arbiter's relative economic sophistication, intellectual priors, or even desired result"[90] — resonant of the same "ad hoc" nature of enforcement that Chicago School scholars criticized in the pre-Chicago era.[91] And

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[86] *AT&T*, 310 F. Supp. 3d at 198 ("According to the government's expert, Professor Shapiro, EDM would result in AT&T lowering the price for DirecTV by a 'significant' amount: $1.20 per-subscriber, per-month. All told, those savings to AT&T's customers add up to $352 million annually." (citation omitted)).

[87] *See, e.g.*, Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 134 (2011) ("This article chronicles how academic confusion and thoughtless judicial borrowing led to the rise of a label that 30 years later has no clear meaning.").

[88] *See, e.g.*, Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 16–44 (2016); Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, *supra* note 77; Glick, *American Gothic: How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, *supra* note 77; Newman, *supra* note 66.

[89] C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2080 (2018); *see* Hovenkamp, *supra* note 65, at 18 ("The consumer welfare principle says that when evaluating a defendant's activities the policy concern is primarily with the welfare of that entity's consumers."); *id.* at 19 ("[A]ll of the reasons for protecting traditional 'consumers' under the consumer welfare principle apply to suppliers as well."). The fact that several of the scholars now advocating for a more capacious notion of "consumer welfare" have an extensive record of defining it as focused on consumer surplus suggests, at best, that they view non-consumer concerns as an afterthought. *See, e.g.*, Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925, 927 (2010) (stating that "consumer welfare" considers "consumers' surplus alone"); *see also* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 510 (2019) (stating that "consumer welfare advocates focus solely on consumer surplus"). At oral argument in the 2017 Term, Justice Gorsuch also pushed back against the idea that merchants could constitute "consumers" for the purpose of assessing consumer welfare. Transcript of Oral Argument at 4–6, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454).

[90] Wright, *supra* note 50, at 241.

[91] *See* Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 364 (1965) (decrying the "schizophrenia afflicting basic antitrust policy").

the "rule of reason" standard under which courts now assess the vast majority of conduct has been widely criticized by judges, enforcers, and scholars for delivering an antitrust regime that is unwieldy, indeterminate, and unadministrable.[92] The fact that plaintiffs lose the overwhelming majority of cases governed by the rule of reason suggests the primary respect in which the current system provides stability is through shielding defendants from liability.[93]

Growing signs that the current approach to antitrust has failed even on its own terms, then, have created an opening for Neo-Brandeisian scholars to revisit foundational questions and make the case for recovering an approach to antitrust that is rooted in its antimonopoly values. While some have argued that debating the goals of antitrust is largely an academic exercise without much bearing on enforcement trends,[94] the broad mandate and sweeping language of the antitrust statutes means that their enforcement hinges on the underlying normative vision.[95] Where the Post-Chicago School absorbed the Chicago School's ideological commitments, the New Brandeisians reject them — holding that the major problem we face today is not just a lack of enforcement, but the current theory of antitrust.[96] Since Chicago introduced a new normative conception of antitrust, challenging its dominance will require offering an alternative normative vision of what the law stands for and how it can be operationalized. Attempts to reform an ideological project through technical fixes are likely to fail.[97]

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[92] *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 173 (2013) (Roberts, C.J., dissenting) ("[T]he majority declares that such questions should henceforth be scrutinized by antitrust law's unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the 'likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.'" (quoting *id.* at 149 (majority opinion))); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 916 (2007) (Breyer, J., dissenting) ("How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*."); Rohit Chopra, Fed. Trade Comm'r, Comment at FTC Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf [https://perma.cc/9L4W-YG87]; Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1421–73 (2009).

[93] *See, e.g.*, Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828–30 (2009) (observing that between 1999 and 2009, defendants won more than ninety-nine percent of the time).

[94] *See, e.g.*, Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2474 (2013) ("The volume and complexity of the academic debate . . . creates an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy.").

[95] *See* David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2166–69 (2013) (noting that enforcement of antitrust laws requires "confront[ing] competing aims and expectations about what the law is supposed to achieve and how it should go about doing so," *id.* at 2166).

[96] Khan, *supra* note 13, at 131.

[97] *See* Khan, *supra* note 54, at 978–79.

The reaction of several Post-Chicago scholars to the New Brandeis project further highlights this key difference. While Neo-Brandeisians tend to advocate an approach to antitrust that is democratic in both its aims and its enforcement (pp. 127–30),[98] the Post-Chicago response seems to exhibit a reflexive fear or distrust of greater democratization.[99] Professor Herbert Hovenkamp, considered "the dean of American antitrust,"[100] has derided the surge in public attention as "movement antitrust," warning that elected officials seem to be shifting their antitrust views to appeal to the "*illiterati*" rather than hewing to the wisdom of the "antitrust *cognoscenti*."[101] Professor Carl Shapiro has cautioned that the "populist sentiments" driving renewed focus on corporate concentration pose "a fundamental danger" and that antitrust reform efforts should remain strictly focused on "channeling more of the benefits of economic growth to consumers."[102] While these responses may not speak for the full range of Post-Chicago perspectives, they suggest that Post-Chicago reform efforts will continue to embrace Chicago's normative conception of antitrust — as a technocratic enterprise squarely focused on increasing consumer welfare and in which decisionmaking power rests with a small number of academic and policy elites. The New Brandeis School that Wu and others seek to build parts company with this vision.

III. ANTITRUST'S INSTITUTIONAL TURN

In recent decades, antitrust scholarship and policy discussion have tended to focus far more on substantive doctrine than on the institutional features of antitrust law and policy.[103] This lopsided attention

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[98] *See also* Khan, *supra* note 13, at 131; Sanjukta Paul & Sandeep Vaheesan, *Make Antitrust Democratic Again!*, THE NATION (Nov. 12, 2019), https://www.thenation.com/article/antitrust-monopoly-economy [https://perma.cc/9PE9-SFH7].

[99] *See* First & Waller, *supra* note 5, at 2562 (observing "the strong preference" among antitrust practitioners "for keeping antitrust away from democratic control and firmly in the hands of antitrust professionals").

[100] James B. Stewart, *Antitrust Suit Is Simple Calculus*, N.Y. TIMES (Sept. 9, 2011), https://www.nytimes.com/2011/09/10/business/att-and-t-mobile-merger-is-a-textbook-case.html [https://perma.cc/YY4U-KD26].

[101] Hovenkamp, *supra* note 5, at 588, 593; *see also id.* at 593 ("The danger that the political process will force government policy off the rails is real.").

[102] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 745–46 (2018).

[103] There are several significant exceptions. For some of the most trenchant work on institutional antitrust, see, for example, DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT, at xi–xvi (2011); Harry First, Eleanor M. Fox & Daniel E. Hemli, *The United States: The Competition Law System and the Country's Harms*, *in* THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES 329, 329–83 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013); Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039 (2005); Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006); Rebecca Haw, *Amicus Briefs and the Sherman Act:*

seems to reflect, in part, the degree to which economic analysis now dominates antitrust. The major questions in antitrust often take the form of inquiring whether doctrine adequately reflects sound economic reasoning. Yet the institutional structure of antitrust has been critical to the transformation of its substantive rules. Indeed, the extraordinary latitude that courts enjoy in crafting antitrust policy helped account for both the relative swiftness with which Chicago's descriptive and normative claims reoriented antitrust — as well as the stubbornness with which even now-refuted theories remain firmly embedded in case law.[104] Looking ahead, reforming the institutional structure of antitrust offers a potentially rich pathway for Neo-Brandeisian efforts to both democratize antitrust and remedy its doctrinal deficiencies. At minimum, engaging with institutional questions should be a key facet of the movement's scholarly agenda.

It is no secret that antitrust law is treated by courts as "exceptional."[105] Given that the foundational antitrust statutes are written in sweeping language, scholars and judges have long argued that lawmakers who passed the Sherman Act delegated to the judiciary broad powers to craft the substantive rules of antitrust law.[106] Although academics who have closely studied the legislative history note that the text of the Sherman Act drew on specific and longstanding common law

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Why Antitrust Needs a New Deal, 89 TEX. L. REV. 1247 (2011); Hyman & Kovacic, *supra* note 95; William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015); and William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997).

104 *See, e.g.*, Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1713–41 (2013) (describing how courts continue to misapply the recoupment requirement).

105 Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1191 (2014) ("Antitrust is a peculiar area of law, one that has long been treated as exceptional by the courts."); *see, e.g.*, Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 270 (1986) ("[I]n the words of a distinguished jurist, in 'the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law,' an authority so broad that 'the only comparable examples' are 'the economic role they formerly exercised under the fourteenth amendment, and the role they now exercise in the area of civil liberties.'" (quoting United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954))); Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in This Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 621 (2005) ("[A]lthough textualists have sometimes been described as striving 'with missionary zeal to narrow the focus of consideration to the statutory text and its "plain meaning"', this is hardly true in antitrust law." (citation omitted) (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 922 (1992))).

106 *See, e.g.*, William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–73 (1982); Farber & McDonnell, *supra* note 105, at 657–58 (identifying an intellectually diverse set of scholars — including Judge Easterbook, Professor John Manning, Professor Einer Elhauge, Areeda, and Hovenkamp — who "view the antitrust laws, not as statutory mandates, but as delegations of lawmaking power to the courts," *id.* at 657).

doctrines — providing courts with a set of prohibited trade practices[107] — in practice the "standardless delegation" theory of antitrust has prevailed.[108] As a result, the Supreme Court "has long-since ceased interpreting the Sherman Act as a statute" and instead "begun treating it as a license to create substantive, common law rules."[109] Not only have judges supplanted their traditional interpretive task of statutory gap-filling with judicial lawmaking, but they have "violat[ed] every conceivable canon of statutory interpretation" along the way.[110] Even the most ardent textualists show "casual disregard" for the text of the antitrust laws, and statutory text generally receives only passing mention in antitrust cases.[111] "[C]ontrol over the meaning of the antitrust laws" now rests "firmly in the grip of this unelected judiciary."[112]

Several of the flaws that Wu identifies in current antitrust law trace back to (or at least were enabled by) this institutional structure. For one, an antitrust system where legal rules are devised exclusively by Article III judges who approach antitrust as a domain of "law made by judges as they see fit" bears signs of democratic illegitimacy.[113] The fact that the Court one day declared that "Congress designed the Sherman Act as a 'consumer welfare prescription,'" — thereby overriding a clear legislative record with a fictitious account that remains law today[114] — exemplifies this hazard. Coupling this freewheeling interpretive approach with an exclusive reliance on case-by-case adjudication has yielded a system of antitrust rules that is unpredictable and indeterminate, undermining traditional rule-of-law principles.[115]

The current structure also reveals significant institutional misalignments. For example, antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them.[116] Courts have sought to compensate for this institutional deficiency by relying on amicus briefs and third-party experts for the economic reasoning justifying antitrust rules, partially mirroring how administrative agencies solicit and review comments on proposed

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107 Arthur, *supra* note 105, at 270–91.

108 Andrew S. Oldham, *Sherman's March (In)to the Sea*, 74 TENN. L. REV. 319, 324 (2007) (describing substantive antitrust law as a "common law monstrosity that federal courts have created atop the Sherman Act[]").

109 *Id.* at 340.

110 *Id.* at 321.

111 Farber & McDonnell, *supra* note 105, at 621.

112 First & Waller, *supra* note 5, at 2551.

113 *Id.* at 2549.

114 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 27, at 66).

115 *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. (forthcoming 2020) (on file with the Harvard Law School Library).

116 Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 3 (2011).

rulemaking.[117] In practice, then, antitrust adjudications have quasi-adopted a key feature of administrative rulemaking, even while foregoing its procedural safeguards and informational benefits.[118] The fact that the Supreme Court's antitrust jurisprudence informally relies on this "hybrid" rulemaking[119] — with its attendant constraints and tensions — further suggests that the current institutional structure of antitrust is not best suited to delivering a sound and coherent body of law.

A final factor that renders these institutional questions ripe for further study is that the current structure of antitrust enforcement is at odds with lawmakers' intended design. Numerous scholars have documented how the Supreme Court's decision in *Standard Oil Co. of New Jersey v. United States*[120] — where the Court introduced the distinction between "reasonable" and "unreasonable" restraints of trade[121] — prompted a wave of activity among lawmakers who viewed the Court's opinion as a judicial power grab.[122] Within four years Congress had passed the Clayton Act — which banned specific types of business conduct, thereby curbing judicial discretion — and the Federal Trade Commission Act, which created an administrative agency tasked with shaping antitrust rules. Lawmakers assigned the Federal Trade Commission (FTC) expansive information-gathering authorities and a broad mandate to police "unfair methods of competition," reflecting a vision of an agency that would continuously track business conduct and "make explicit those unexpressed standards of fair dealing" that Congress had outlined.[123]

Despite this broad mandate and expansive set of tools, the FTC has largely neglected to play an administrative, norm-creating role, instead opting to pursue antitrust enforcement exclusively through adjudication.[124] As Wu briefly notes, the FTC retains latent competition rulemaking authority that enables the Commission to devise market-specific

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117 Haw, *supra* note 103, at 1248–49.

118 *Id.* at 1259.

119 *Id.* at 1267.

120 221 U.S. 1 (1911).

121 *Id.* at 1; *see also id.* at 87–89 (Harlan, J., concurring in part and dissenting in part).

122 Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 233 (1980) ("The initial task for the legislature was to recover the power to control antitrust policies. It was to prevent subversion of the legislative intent by district courts that either were unsympathetic or otherwise preoccupied, and, conversely, to broaden antitrust enforcement beyond the substantive limitations that were coming to be perceived in the Sherman Act. It will be recalled that Senator Newlands, in his first address on the subject, spoke of the need to establish an administrative tribunal 'as the servant of Congress.'").

123 *Id.* at 237 (quoting FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part*, 302 U.S. 112 (1937)).

124 *Cf.* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1839 (2015) (noting that in "its original antitrust capacity," the FTC "has not been legislative at all, issuing

rules and clarify the conditions under which business practices constitute an "unfair method of competition" (p. 134).[125] Reorienting the FTC to serve an administrative function in antitrust would rebalance the institutional structure away from the courts, allowing the FTC to make full use of its extensive data-collection authority and promoting market rules that better keep pace with new business practices. This shift, moreover, could subject antitrust to far greater public accountability and democratic checks. Alternative institutional reforms could likely also help rehabilitate antitrust in ways New Brandeis thinkers support. Key will be viewing the institutional dimension as an important site of reform.

CONCLUSION

Writing the annual Supreme Court Foreword in 1984, Frank Easterbrook celebrated that the Court's most recent antitrust opinions "read like short treatises on microeconomic analysis."[126] Antitrust law and analysis since then has continued to become increasingly technocratic, captive to a highly limited form of economics, and unmoored from its democratic roots. Breaking with this trend, *The Curse of Bigness* aims to renew antitrust as a tool for checking and distributing concentrated private power — a legal project that Wu reminds was once seen as critical for safeguarding a democratic republic. By distilling antitrust to these core values, Wu has helped contribute to a public conversation about the risks of extreme economic concentration and the need to recover the antimonopoly philosophy of thinkers like Justice Brandeis. This conversation, in turn, is taking place against the backdrop of a broader "law and political economy" movement that is interrogating how laws that structure markets and our economy can be reconstituted to promote egalitarian and democratic ends.[127] Although *The Curse of Bigness* places antitrust at the center of the antimonopoly

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virtually no substantive rules"); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PENN. J. BUS. L. 645, 651–52 (2017).

[125] *See also* Chopra & Khan, *supra* note 115; Justin Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 262 (2014); Vaheesan, *supra* note 124, at 645.

[126] Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 59 (1984).

[127] *See, e.g.*, KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014) (book review); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law and Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. (forthcoming 2020) (on file with the Harvard Law School Library); David Singh Grewal, Amy Kapczynski & Jedediah Purdy, *Law and Political Economy: Toward a Manifesto*, LPE BLOG (Nov. 6, 2017), https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto [https://perma.cc/ U3MH-WZHX].

agenda, a host of other legal reforms and interventions — including renewing labor law and protecting workers' organizations, reinvigorating public utility regulations, and adopting public options — will also be needed to achieve the antimonopoly goals of rebalancing power and checking private domination.[128]

The task now facing New Brandeisian reformers is to translate their critiques into a positive vision, including legal rules and analytical frameworks that should govern how courts and enforcers assess what the antitrust laws prohibit. In rejecting a strictly welfare-based theory of antitrust, Neo-Brandeisians have an opportunity to design an antitrust regime that reflects republican values and democratizes the institutional structure of antitrust. Realizing this vision will be no easy task, but the moment for it is ripe.

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[128] *See, e.g.*, GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY (2019) (describing and championing "public options"); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016) (detailing how an emerging "new labor law" could help secure greater economic and political equality); Rahman, *supra* note 33 (identifying public utility principles as key for confronting private control of essential goods and services); Vaheesan, *supra* note 7 (arguing that antitrust laws should enable workers to organize).