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The Twilight of the Technocrats' Monopoly on Antitrust?

Sandeep Vaheesan

INTRODUCTION

The contributions to the *Yale Law Journal*'s series on the future of antitrust litigation offer necessary correctives to the simplistic theories that have underpinned antitrust law for decades. Challenging the empirically deficient economism that has had an extraordinary influence on antitrust law over the past forty years,[1] some of the leading lights of contemporary antitrust law offer a richer analysis of cutting-edge antitrust issues. These scholars call for legal standards that would help create more competitive markets and offer greater protection to consumers from anticompetitive mergers[2] and business practices.[3] If they are truly friends of American consumers, the federal antitrust agencies and courts would embrace the suggested proposals.

Even as they present worthy policy recommendations, the contributions are disappointingly modest in scope. They seek only to renovate the consumer welfare edifice of antitrust law and show little interest in critically examining the

1. *See* Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 920-33 (2014). For an analysis and critique of economism in American politics and policy generally, see JAMES KWAK, ECONOMISM: BAD ECONOMICS AND THE RISE OF INEQUALITY (2017).

2. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2001 (2018); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1982 (2018).

3. Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2195 (2018); Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2169 (2018).

foundations of this model. Indeed, the silence on the issue of whether consumer welfare is the appropriate goal for antitrust law is deafening in light of the growing discontent with antitrust today. Many commentators[4] and politicians[5] have raised questions about the fundamentals of antitrust and have argued that antitrust law should recognize a broader set of economic and political interests. Yet, the pieces in the series almost entirely ignore this larger public discussion.[6] Rather than contribute to and engage with this growing debate among Americans and our elected officials, the contributing scholars write as though consumer welfare antitrust is cast in stone.

While the champions of consumer welfare may tout its "apolitical" character,[7] the goals of antitrust are unavoidably political. A market economy requires extensive state action and so cannot be purged of political judgments. Seen as a political tool, antitrust law can be interpreted to deepen existing inequalities in

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4. *See e.g.*, Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016); Barry C. Lynn, *America's Monopolies Are Holding Back the Economy*, ATLANTIC (Feb. 22, 2017), http://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358 [http://perma.cc/X299-BH4P].

5. *See, e.g.*, Matthew Yglesias, *Booker Calls on Antitrust Regulators To Start Paying Attention to Workers*, VOX (Nov. 1, 2017, 8:00 AM), http://www.vox.com/policy-and-politics/2017/11/1/16571992/booker-antitrust-letter [http://perma.cc/H73L-K3EZ] ("'It appears that—despite having a clear mandate to promote competition across the economy and extensive enforcement tools at your disposal,' Booker writes in a letter to the Federal Trade Commission and Justice Department obtained by Vox and to be released later today, 'your Agencies have not prioritized the responsibility to ensure that workers have meaningful choices that allow them to fairly bargain among potential employers.'"); Elizabeth Warren, Senator, Keynote Remarks at New America's Open Markets Program: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [http://perma.cc/8YKV-J5CS] ("Now the country needs more competition—and more competitors—to accelerate economic growth, more competition to promote innovation, and more competition to reduce the ability of giant corporations to use their money and power to bend government policy and regulation to benefit themselves.").

6. The one direct response to this debate in the *Yale Law Journal*'s series appeals to a "bipartisan consensus" in support of consumer welfare and dismisses other objectives as unworkable. It assumes that the adoption of a broader set of antitrust goals would require the continued application of the rule of reason or a similar standards-like framework. As a result, the piece states that economists would be expected to identify and balance the often unquantifiable and incommensurable economic and political effects of challenged mergers and business conduct. *See* Hovenkamp & Shapiro, *supra* note 2, at 2020. In rejecting an antitrust with multiple objectives as not feasible, it fails to consider an alternative—a rules-based antitrust system—that would eliminate the need for economists to speculate on impacts on a case-by-case basis.

7. *See, e.g.*, Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS ORG. (forthcoming 2018), http://awards.concurrences.com/IMG/pdf/ssrn-id3058345_1_.pdf [http://perma.cc/ZUE8-LNB5] ("[I]ntroducing issues of political power into antitrust enforcement decisions made by the Department of Justice could dangerously politicize antitrust enforcement.").

wealth and power, maintain existing distributional arrangements, or create a more equitable society. What it cannot be is "apolitical." The questions confronting us, therefore, are who should decide the goals of antitrust—technocrats or democratically-elected representatives in Congress—and what those goals should be.

Given that antitrust law is and will be political, whatever its overarching philosophy, consumer welfare should enjoy no position of privilege on the grounds that it is "apolitical." It can and should be examined against other political interpretations. When subject to scrutiny, consumer welfare fails on at least two grounds—both of which are fatal in a democratic society. First, Congress did seek to protect consumers in passing the antitrust statutes, but its ambitions were broader than that. The legislative histories of the antitrust laws reveal congressional solicitude not only for consumers, but also for producers, workers, businesses, and citizens.[8] Second, consumer welfare embodies an impoverished understanding of corporate power. Monopolies, oligopolies, and cartels do exercise great power over consumers, but the effects of corporate power are not limited to purchasers of goods and services. Large businesses exercise power over us in our capacities as consumers, entrepreneurs, workers, and citizens.

Part I of this Essay situates these other contributions within the wider antitrust debate today and critiques their failure to engage with the criticisms of consumer welfare antitrust advanced by politicians and public intellectuals. Part II shows that antitrust—and market economies in general—are political, making the question not whether antitrust can be insulated from politics but rather who decides its political content and what this political content should be. In light of the unavoidably political character of antitrust, Part III argues that consumer welfare antitrust is deficient on at least two grounds: it is inconsistent with congressional intent and embodies an incomplete understanding of corporate power.

I. A CONSPICUOUS SILENCE ON THE GOALS OF ANTITRUST

The contributions do make commendable policy recommendations which, if implemented, would lead to more competitive markets and associated benefits for consumers, upstream suppliers, and workers.[9] However, the pieces do not question the current fundamental goal of antitrust law and, for the most part, do

8. *See infra* Section III.A.

9. Although the language of consumer welfare would suggest otherwise, the Supreme Court has held that the antitrust laws protect sellers from powerful buyers. *E.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007). In practice though, the government rarely brings cases against monopsonistic and other powerful purchasers. Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1512–13 (2013).

not even discuss the appropriate goals of antitrust. Rather, they take as given the objective of consumer welfare.[10] The authors focus on how to improve the implementation of consumer welfare antitrust, offering constructive ideas on the means, not the ends, of antitrust.

The contributors' failure to examine the appropriate goals of antitrust is troubling. To be sure, consumer welfare antitrust, as presently applied, fails to promote consumer welfare.[11] The courts appear to manipulate analytical frames and rewrite doctrine not to protect consumers, but to preserve the freedom of dominant and other powerful corporations.[12] While the contributors do offer some helpful analysis of the doctrine, their examination is wholly insufficient. Empirical research has documented the harms from monopoly and oligopoly and raised serious doubts about the utility of contemporary antitrust enforcement. Once described as "a comprehensive charter of economic liberty,"[13] con-

10. *See, e.g.*, Baker & Scott Morton, *supra* note 3, at 2202 ("Antitrust enforcement targeting anticompetitive platform MFNs has the potential to increase entry and price competition, and thereby enhance productivity and consumer welfare."); C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group*: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018) (examining antitrust doctrine through the lens of consumer benefits).

11. *E.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 103-04, 118-20 (2014); Gustavo Grullon et al., *Are U.S. Industries Becoming More Concentrated?* 41 (Oct. 2016), http://finance.eller.arizona.edu/sites/finance/files/grullon_11.4.16.pdf [http://perma.cc/2LCH-TPRM]; Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 31 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, Aug. 2017); Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2016-082, 2016).

12. *See* Nicola Giocoli, *Old Lady Charm: Explaining the Persistent Appeal of Chicago Antitrust*, 22 J. ECON. METHODOLOGY 96, 111 (2015) (observing that U.S. courts, when forced to balance short- and long-term consumer effects, emphasize whichever perspective favors antitrust defendants).

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

temporary antitrust law is failing not only American consumers, but also American workers,[14] businesses,[15] and citizens.[16] The contributions to the series do not account for the severity of this failure.

Although current antitrust doctrine has aided and abetted the concentration of numerous markets, the contributors do not seek to evaluate the foundations of this body of law. Powerful businesses are using their might to hurt Americans in myriad ways, and consumer welfare captures at most only a subset of these public harms. Not questioning the goals of antitrust—hardly even acknowledging that these goals are contested—reveals a fixation on the technical trees at the expense of the philosophical forest.

The contributions also suggest that the antitrust establishment has become an antitrust monastery. In recent years, the antitrust debate has extended beyond the antitrust bar, economics departments, and law schools and has entered popular discourse. Commentators spanning the ideological spectrum have called for a reevaluation of the objectives of antitrust law.[17] Politicians, including some Republicans, have criticized current antitrust practice and called for a fundamental rethinking of the field.[18] The Democratic Party appears poised to make antitrust

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14. José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* 17-18 (NBER Working Paper No. 24,147, 2017), http://ssrn.com/abstract_id=3088767 [http://perma.cc/95DU-B98U] (finding that local labor markets are highly concentrated in much of the country and that high concentration is associated with lower wages); Simcha Barkai, *Declining Labor and Capital Shares* 26 (2016), http://home.uchicago.edu/~barkai/doc/BarkaiDeclining LaborCapital.pdf [http://perma.cc/7FA9-9LRJ]; Mike Konczal & Marshall Steinbaum, *Declining Entrepreneurship, Labor Mobility, and Business Dynamism: A Demand-Side Approach*, ROOSEVELT INST. 27 (2016), http://rooseveltinstitute.org/wp-content/uploads/2016/07/Declining-Entrepreneurship-Labor-Mobility-and-Business-Dynamism-A-Demand-Side-Approach.pdf [http://perma.cc/AAR3-YJE4].

15. Ian Hathaway & Robert E. Litan, *What's Driving the Decline in the Firm Formation Rate? A Partial Explanation*, BROOKINGS INSTITUTION (2014), http://www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf [http://perma.cc/G9PE-73WV].

16. Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSP. 113, 122-25 (2017) (noting the significant political power of U.S. corporations).

17. *E.g.*, Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, AM. CONSERVATIVE (Sept. 19, 2017), http://www.theamericanconservative.com/articles/amazon-facebook-google-conservative-anti-monopoly-movement [http://perma.cc/88BY-2T5B]; Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES (Apr. 18, 2016), http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html [http://perma.cc/DCU4-MVPP].

18. *E.g.*, Brian Beutler, *How Democrats Can Wage War on Monopolies—and Win*, NEW REPUBLIC (Sept. 16, 2017), http://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win [http://perma.cc/5UDW-VJ2U]; Ryan Cooper, *Even Republicans Are Getting Fed Up with Monopolies. Here's Why.*, WEEK (Mar. 31, 2016), http://theweek.com/articles/613950/even-republicans-are-getting-fed-monopolies-heres-why [http://perma.cc/G3NW-6PLQ].

a core element of its agenda moving forward,[19] with a number of candidates and elected officials championing antimonopoly enforcement.[20] Despite these developments, the contributors write as though the antitrust enterprise can somehow remain "above" politics and insulated from events and ideas outside the community of antitrust specialists.[21]

II. ANTITRUST LAW IS NOT AND CANNOT BE "APOLITICAL"

Antitrust law is unavoidably political. Of course, the *enforcement* of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.[22] Rather, antitrust is political in its *content*. In designing a body of law, Congress, federal agencies, and the courts must answer the basic questions of whom the law benefits and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single "correct" answer and cannot be resolved through "neutral" methods or decided with an "apolitical" answer.[23]

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law's aims and its methods, suggesting there is no "apolitical," universal concept of

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19. Senator Amy Klobuchar and nine other Democratic Senators recently introduced a bill to strengthen and restore the original intent of the Clayton Act's merger provisions. *See* Press Release, Senator Amy Klobuchar, Klobuchar, Senators Introduce Legislation to Modernize Antitrust Enforcement (Sept. 14, 2017), http://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=7F1EC9A3-5D28-4757-9F60-8CEAD9111971 [http://perma.cc/5TP9-3PY9]; Chuck Schumer, *A Better Deal for American Workers*, N.Y. TIMES (July 24, 2017), http://www.nytimes.com/2017/07/24/opinion/chuck-schumer-employment-democrats.html [http://perma.cc/J5CJ-NF2J].

20. David Dayen, *Anti-Monopoly Candidates Are Testing a New Politics in the Midterms*, INTERCEPT (Oct. 1, 2017), http://theintercept.com/2017/10/01/anti-monopoly-candidates-are-testing-a-new-politics-in-the-midterms [http://perma.cc/7UCN-4ZMT].

21. *See* Hovenkamp & Shapiro, *supra* note 6, at 2024 n. 128 (characterizing the political power of corporations as being outside the realm of "competition concerns").

22. If anything, the current antitrust regime, with its nebulous legal standards and opaque processes, is a recipe for politically motivated enforcement decisions. *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1448-56 (2009). For an example of lobbying appearing to influence enforcement decisions, see Justin Elliott, *The American Way*, PROPUBLICA (Oct. 11, 2016), http://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust [http://perma.cc/L3GY-BHZ5].

23. *See* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 99-101 (2016) (arguing that economic experts "are not neutral technocrats, but political agents who engage in moral and political judgment").

antitrust. Rather than aspire for an impossible utopia of "apolitical" antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a "spontaneous order" is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile.[24] This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy through the creation and protection of property rights[25] and the enforcement of contracts.[26] As sociologist Greta Krippner writes, "there can be no such excavation of politics from the economy, as this is the substratum on which all market activity—even 'free' markets—rests."[27] In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally conducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law's sole protected group, *how* should the law protect consumers? Antitrust could protect consumers' short-

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24. PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN 46 (2014).

25. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 473 (1923) ("Not only does the law of property secure for the owners of factories their labor; it also secures for them the revenue derived from the customers. The law compels people to desist from consuming the products of the owner's plant, except with his consent; and he will not consent unless they pay him money. They can escape, of course, by going without the product. But that does not prevent the payment being compulsory, any more than it prevents the payment of the government tax on tobacco from being compulsory.").

26. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 37 (2013).

27. GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 145 (2012).

term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.[28]

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different configurations of state action and different sets of beneficiaries.[29] More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,[30] the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is qualitatively different from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers' interest in competitively-priced goods,[31] freedom for small proprietors,[32] and dispersal of private power.[33] The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.[34] It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.[35] Recognizing this goal of decentralization, the federal judiciary adopted strict limits on business

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28. *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 575 (2012).

29. By way of example, antitrust law today grants expansive freedom to monopolists to use their (state-established) property rights to exclude competitors and injure consumers. *See* Ramsi A. Woodcock, *Inconsistency in Antitrust*, 68 U. MIAMI L. REV. 105, 107 (2013).

30. The Celler-Kefauver Antimerger Act of 1950 extended the coverage of the Clayton Act's merger provisions to corporate asset acquisitions. 15 U.S.C. § 18 (1958).

31. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940).

32. Simpson v. Union Oil Co., 377 U.S. 13, 20-21 (1964).

33. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

34. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

35. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

conduct with anticompetitive potential, including mergers[36] and exclusionary practices.[37]

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a rightward shift in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,[38] these institutions curtailed the reach of antitrust law, scaling back its objectives[39] and rewriting legal doctrine to preserve the autonomy of powerful businesses—all in the name of protecting consumers.[40]

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the meaning of consumer welfare is still not settled. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.[41] The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic surplus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.[42]

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36. *E.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

37. *E.g.*, Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

38. Marc Allen Eisner & Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 273-74 (1990); Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J. L. & PUB. POL'Y 239, 247-48 (1999).

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

40. *See e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

41. *See e.g.*, Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 632 (1989).

42. *E.g.*, Kenneth Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL'Y INT'L 29 (2006). Case law generally holds that antitrust law should protect consumers, not promote economic efficiency. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 213-30 (2008).

C. *Who Should Decide the Political Content of Antitrust?*

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an "apolitical" antitrust jurisprudence is futile at best and a cynical effort to conceal political choices at worst. The choice is not between "apolitical" antitrust and "political" antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively "the technocrats") or democratically-elected members of Congress should decide this political content.[43]

Over the past forty years, technocrats have dominated antitrust law.[44] Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.[45] They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress's legislative judgments.[46] By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Americans to influence the content of antitrust law.[47]

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.[48] This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, "an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability."[49] Although proponents of technocratic

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43. As they do with any complicated body of law, technocrats have an important role to play in the administration and enforcement of antitrust law. The question is whether they should be permitted to decide not only the means but also the ends of antitrust.

44. *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2545 (2013) (discussing "antitrust's move away from more democratically controlled institutions toward greater reliance on technical experts").

45. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), while acknowledging that Congress acted to prevent the Department of Justice and the Federal Trade Commission from seeking to have it overturned); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010).

46. First & Waller, *supra* note 44, at 2549, 2559.

47. For instance, the Supreme Court has interpreted the Federal Arbitration Act to permit corporations to use arbitration clauses to block class action lawsuits, which permit ordinary people to seek redress for antitrust violations and also shape the law. Am Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

48. First & Waller, *supra* note 44, at 2559.

49. *Id.* at 2544.

antitrust may characterize it as "pure" or "scientific," the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.[50]

This congressional indifference to antitrust is not inevitable. Despite prolonged quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.[51] The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

III. THE CONSUMER WELFARE MODEL IS NOT ANCHORED IN CONGRESSIONAL INTENT AND REFLECTS A NARROW CONCEPTION OF MONOPOLY AND OLIGOPOLY

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not "above politics." It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress's original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society.

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50. Ariel Ezrachi & Maurice E. Stucke, *The Fight Over Antitrust's Soul*, J. EUR. COMPETITION L. & PRACTICE (2017), http://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpx070/4600093 [http://perma.cc/L9LT-MD28].

51. Klobuchar, *supra* note 19; David Weigel, *Breaking from Tech Giants, Democrats Consider Becoming an Antimonopoly Party*, WASH. POST (Sep. 4, 2017), http://www.washingtonpost.com/powerpost/breaking-from-tech-giants-democrats-consider-becoming-an-antimonopoly-party/2017/09/04/3edc7e92-8f56-11e7-84c0-02cc069f2c37_story.html [http://perma.cc/2Z94-HV8S].

A. *In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare*

The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.[52] The Congresses that passed these landmark statutes recognized that economics and politics are inseparable. Congress originally sought to structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers. Consumer welfare antitrust reflects, at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record. Contrary to Robert Bork's historical analysis, the legislative histories show *no* congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.[53]

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.[54] Key members of the House and Senate condemned the prices that powerful corporations charged consumers as "robbery"[55] and "extortion."[56] The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.[57] In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.[58]

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52. *See generally* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (arguing that Congress passed antitrust laws in order to limit unfair transfers of wealth from consumers to firms with market power, among other goals); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989) (reviewing the various historical political and economic theories behind the enactment of federal antitrust legislation).

53. *See* James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 278-81 (1991).

54. Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 314-15; John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 304-05 (1988).

55. 21 CONG. REC. 2614 (1890) (statement of Sen. Coke).

56. *Id.* at 2461 (statement of Sen. Sherman).

57. *E.g.*, *id.* at 4103 (statement of Rep. Fithian).

58. Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153-54 (1981); Lande, *supra* note 52, at 101-05.

Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the antitrust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.[59] In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.[60] Senator John Sherman warned his colleagues that "[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[61]

B. The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an emaciated conception of corporate power. With its foundation in neoclassical economics, the consumer welfare model privileges short-term consumer interests. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and does not account for long-term dynamics. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, prizes short-term price harms to consumers and sellers and discounts longer-term injuries.[62]

Furthermore, the consumer welfare model legitimizes the existing distribution of resources by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A wealthy consumer commands power in the market; a poor consumer, in comparison, has little or no clout in the market.[63]

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59. May, *supra* note 52, at 297-98.

60. 51 CONG. REC. 9086 (1914) (statement of Rep. Kelly).

61. 21 CONG. REC. 2457 (1890).

62. Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 19-20 (2016).

63. *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 248 n.66 (1985) ("Wealth maximization measures welfare only by what people actually buy, not by what they would like to have. As a result, the purchase 'vote' of the wealthy person who does not care to have, say, a new house and that of a poor person who would like to have one very much but

The consumer welfare model, moreover, affords little or no importance to corporations' ability to dictate the development of entire markets. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws "protect[] *competition*, not *competitors*."[64] Although the expression is arguably empty,[65] it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,[66] which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.[67] Under consumer welfare antitrust, businesses can use their muscle to exclude rivals and strangle economic opportunity so long as this exclusion is not likely to injure consumers. In practical terms, consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning.[68]

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory decisions.[69] The ongoing—and frenzied—contest between states and cities to attract Amazon's second headquarters is indicative of a giant business's weight.[70]

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cannot afford one receive the same weight in the wealth maximization welfare calculation: zero.").

64. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

65. *See* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 81 (2004) ("[T]he mantra that 'the antitrust laws are designed to protect competition, not competitors' is an empty slogan. There can be no competition without competitors.").

66. The European Commission, for instance, has held that competitors are entitled to protection from predatory and other exclusionary practices by dominant firms. *E.g.*, Case 85/76, Hoffmann-La Roche v. Comm'n, 1979 E.C.R. 464.

67. Consider the power of Google: its monopoly in search allows it to decide who is seen—and not seen—on the internet, with dramatic consequences for society. *See* Oren Bracha & Frank Pasquale, *Federal Search Commission—Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1173-76 (2008).

68. Google's search monopoly allows it to exercise powers traditionally associated with governments and decide the fate of entire sectors of the economy. Google may, on occasion, use—or attempt to use—this power for desirable ends, but it is not subject to public accountability and faces few checks on its discretion. *See, e.g.*, David Dayen, *Google Is So Big, It Is Now Shaping Policy to Combat the Opioid Epidemic. And It's Screwing It Up*, INTERCEPT (Oct. 17, 2017), http://theintercept.com/2017/10/17/google-search-drug-use-opioid-epidemic [http://perma.cc/Y8FT-CY76]; Andrea Peterson & Jonnelle Marte, *Google to Ban Payday Loan Advertisements*, WASH. POST (May 11, 2016), http://www.washingtonpost.com/news/the-switch/wp/2016/05/11/google-to-ban-payday-loan-advertisements [http://perma.cc/N2HF-Q7PU].

69. Zingales, *supra* note 16, at 122-24.

70. Karen Weise & Spencer Soper, *Amazon Second HQ Bid Ignites 'Sadistic' Frenzy Across North America*, BLOOMBERG (Oct. 12, 2017), http://www.bloomberg.com/news/articles/2017-10-12

In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.[71] Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and managed to preserve their institutional power.[72] An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.[73] Large businesses also set the parameters of political debate through control of the media,[74] sponsorship of supportive figures and organizations,[75] and marginalization of critical voices.[76] Consumer welfare antitrust itself is, at least in part, a product of big business's reaction against the relatively vigorous antitrust program of the postwar decades.[77]

With its narrow analytical frame, the consumer welfare model of antitrust accepts and legitimizes many forms of state-supported corporate power. Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

/amazon-second-hq-bid-ignites-sadistic-frenzy-across-north-america [http://perma.cc/M5LF-3HYD].

71. *See generally* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010) (reviewing the financial sector's rise to power and successful resistance to meaningful reform).

72. *See* Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1328, 1446 (2013).

73. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

74. Michael J. de la Merced & Nicholas Fandos, *Fox's Unfamiliar but Powerful Television Rival; Sinclair*, N.Y. TIMES DEALBOOK (May 3, 2017), http://www.nytimes.com/2017/05/03/business/dealbook/sinclair-media-expansion-fox-conservative-media.html [http://perma.cc/A9WZ-2FLY].

75. Eric Lipton & Brooke Williams, *How Think Tanks Amplify Corporate America's Influence*, N.Y. TIMES (Aug. 7, 2016), http://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html [http://perma.cc/8G54-NE3S]; Lee Fang, *The Scholars Who Shill for Wall Street*, NATION, Oct. 23, 2013, http://www.thenation.com/article/scholars-who-shill-wall-street [http://perma.cc/U3W7-K9UH].

76. *See* Matthew Yglesias, *A Leading Google Critic's Firing from a Google-Funded Think Tank, Explained*, VOX (Aug. 30, 2017), http://www.vox.com/policy-and-politics/2017/8/30/16226616/barry-lynn-google-new-america [http://perma.cc/LHP5-GR3J].

77. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 108, 116 (2008).

IV. CONCLUSION

A market economy is a political construct and arises from extensive state action. By regulating state-enabled market activity, antitrust law shapes the distribution of wealth and power in society. Consumer welfare antitrust, therefore, is a political choice that disregards important manifestations of corporate power and thereby tolerates the monopolistic and oligopolistic domination of markets and society. The contributions to the *Yale Law Journal* series on the future of antitrust litigation offer valuable ideas on how to improve the administration of consumer welfare antitrust. They, however, fail to grapple with the deeper question of whose interests should be advanced by antitrust law.

The United States is in a period of staggering inequality[78] and widespread insecurity[79] and is also in the midst of intellectual and political ferment. In this environment, ordinary Americans, commentators, and members of Congress are questioning the decades-old conventional wisdom supporting a range of public policies, including the prevailing interpretation of antitrust. In light of these popular currents, the American public appears ready to challenge the technocrats' monopoly on the political content of antitrust law and push for a competition policy that tames concentrated private power.

Sandeep Vaheesan is Policy Counsel at the Open Markets Institute. *The author thanks Teddy Downey, Frank Pasquale, and Marshall Steinbaum for thoughtful feedback on earlier drafts of this Response.*

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

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78. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519, 520-21 (2016).

79. *See* BD. OF GOVERNORS OF FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2016, at 2 (2017) ("Forty-four percent of adults say they either could not cover an emergency expense costing $400, or would cover it by selling something or borrowing money . . . .").