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### Race-ing Antitrust

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#### Recommended Citation

Bennett Capers and Gregory Day, *Race-ing Antitrust*, 121 Mich. L. Rev. 523 (2023)

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# RACE-ING ANTITRUST

Bennett Capers\* & Gregory Day\*\*

*Antitrust law has a race problem. To spot an antitrust violation, courts inquire into whether an act has degraded consumer welfare. Since anticompetitive practices are often assumed to enhance consumer welfare, antitrust offenses are rarely found. Key to this framework is that antitrust treats all consumers monolithically; that consumers are differently situated, especially along lines of race, simply is ignored.*

*We argue that antitrust law must disaggregate the term “consumer” to include those who disproportionately suffer from anticompetitive practices via a community welfare standard. As a starting point, we demonstrate that anticompetitive conduct has specifically been used as a tool of oppression while, at other times, minorities are the unintended victims of anticompetitive practices. In turn, this Article leans on Critical Race Theory (CRT) to explore ways that antitrust’s “colorblind” stance has failed communities of color. We also explain why antitrust law is an ideal regime to address systemic racism. Consider that antitrust law is concerned with structures; just as enforcement scrutinizes whether conduct has made a market more or less likely to promote consumer welfare, antitrust should scrutinize whether anticompetitive conduct has made a market more or less likely to benefit all consumers. To put it another way, antitrust’s claimed purpose is to enhance consumer welfare by maximizing allocative efficiency, but it ignores how discrimination is similarly inefficient if resources are misallocated along race lines rather than their most productive uses. Finally, by embracing the intellectual backbone of antitrust law as well as CRT’s lessons about power structures, we make the case that antitrust’s goal should be reimagined to benefit not only the welfare of all consumers but the welfare of communities as well.*

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#### INTRODUCTION

Antitrust law has failed people of color—or, at a minimum, failed to achieve the extent of its promise. Because antitrust's purpose, at least since the 1970s, has been to promote a concept known as “consumer welfare,” antitrust law is unconcerned with whether exclusionary conduct has injured historically marginalized groups.<sup>1</sup> In fact, antitrust presumes that most types of anticompetitive behaviors benefit consumer welfare even though monopolies and trade restraints have—with little attention—disproportionally harmed minority communities.<sup>2</sup>

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1. See *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010) (“[C]onsumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act.”); ROBERT H. BORK, *THE ANTITRUST PARADOX* 63 (Bork Publ'g 2021) (1978) (“The Sherman Act was clearly presented and debated as a consumer welfare prescription.”).

2. See Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337–38 (1983) (explaining that antitrust defendants “virtually always win[]” due to the lack of scrutiny in antitrust's predominant form of analysis, the rule of reason).

Consider a few examples. An array of law schools historically prevented non-white students from enrolling so that white people could monopolize the legal profession,<sup>3</sup> while labor unions banned Black workers from their ranks.<sup>4</sup> More recently, people of color have found themselves the *unintended* victims of anticompetitive practices. When grocery stores merge, it can result in better and cheaper foods for affluent, predominantly white communities.<sup>5</sup> In poorer areas, however, mergers have shuttered local stores to the degree that many low-income neighborhoods lack a single place to buy fresh foods—and as dollar stores replace grocery stores, “food deserts” have spread throughout minority communities.<sup>6</sup> Along the same lines, bank mergers have improved welfare in affluent areas<sup>7</sup> but closed branches in minority neighborhoods.<sup>8</sup> As a result, poor people—disproportionately of color—often have little choice but to patronize more expensive payday lenders and check-cashing stores.<sup>9</sup> Regardless of whether a monopolist’s motivation was primarily business-minded or discriminatory, people of color are too often the ones harmed.<sup>10</sup>

Despite these race effects, the question of whether an anticompetitive act has harmed people of color is absent from antitrust’s framework. Per antitrust’s “consumer welfare” standard, exclusionary conduct must raise prices,

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3. Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 754 (2000) (“First, they enacted both formal Jim Crow segregation laws and informal exclusionary policies to preclude nonwhites from attending law school. Second, they adopted admissions standards and moved legal education to the university setting, in order to drive out alternative forms of legal education serving people of color and immigrants.”).

4. See generally Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. AM. HIST. 189 (1996) (discussing historical racism in labor unions).

5. See CDFI FUND, U.S. DEPT. OF THE TREASURY, SEARCHING FOR MARKETS: THE GEOGRAPHY OF INEQUITABLE ACCESS TO HEALTHY & AFFORDABLE FOOD IN THE UNITED STATES 40 (2012), [https://www.cdfifund.gov/sites/cdfi/files/documents/searchingformarkets\\_report\\_web\\_low\\_res.pdf](https://www.cdfifund.gov/sites/cdfi/files/documents/searchingformarkets_report_web_low_res.pdf) [perma.cc/8RDU-C8PS] (finding that persons of color are more likely to experience a lack of access to grocery stores than people who are white and non-Hispanic); Joseph Farrell & Carl Shapiro, *Scale Economies and Synergies in Horizontal Merger Analysis*, 68 ANTITRUST L.J. 685, 699–700 (2001) (tentatively hypothesizing that no-synergies mergers can increase output and lower price in certain circumstances). *But see* PHILIP H. HOWARD, CONCENTRATION AND POWER IN THE FOOD SYSTEM 8–9 (David Goodman & Michael K. Goodman eds., rev. ed. 2021) (discussing views opposed to Farrell and Shapiro).

6. Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. 1717, 1719–21 (2022) (describing the prevalence of food deserts in marginalized neighborhoods due to anticompetitive practices); see also Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1289, 1295 (2021) (explaining how market concentration has harmed consumers of food in poorer neighborhoods).

7. See MEHRSA BARADARAN, HOW THE OTHER HALF BANKS 146 (2015).

8. See *id.*; Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519, 564–66 (2022).

9. See Jeremy Kress & Rohit Chopra, Comment of FTC Commissioner Rohit Chopra and Professor Jeremy C. Kress (Oct. 16, 2020) (on file with author); see also BARADARAN, *supra* note 7, at 138–61.

10. See Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2388–89, 2407–08 (2021) (explaining the role of white cartels in monopolizing resources for education); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011).

lower quality, or economically harm consumers *collectively* to offend antitrust law.<sup>11</sup> If consumers writ large gained a benefit (e.g., the market is now more innovative), then no violation of antitrust law has typically taken place.<sup>12</sup> Further, many antitrust courts and scholars assume that restraints of trade tend to *improve* consumer welfare, which has enabled defendants to generally win antitrust cases, including in cases resulting in disparate racial harms.<sup>13</sup> Thus, by assessing consumers monolithically, antitrust law protects those with market power and ignores types of anticompetitive acts while turning a blind eye to the welfare of minority communities.<sup>14</sup> Antitrust's indifference to disparate racial effects remains prevalent to the degree that a notable antitrust scholar endorsed this framework in 2021: "Antitrust policy, in contrast to legal policy generally, is not the appropriate tool for pursuing particular goals of social equality . . ." <sup>15</sup> Further, "race and gender equality" may be "essential policy goals, [but] they are best left to the constitutional and statutory institutions intended to address them."<sup>16</sup>

But antitrust's deference to consumers writ large, and indifference to race effects, is neither foreordained nor obvious from the Sherman Act itself. And though many jurists treat antitrust law as fixed, it is not. This Article offers a different way of conceptualizing antitrust law. We assert that antitrust law cannot achieve its true purpose so long as enforcement remains focused solely on consumers collectively, which ignores the steeper costs paid by minorities. In fact, the deference in antitrust's approach is shown to stem from how enforcement has adopted the perspective of majority groups who are more likely to benefit from concentrated markets. An analogy to criminal law or tort law may be useful here. Both criminal law and tort law have a "reasonable man" problem since the reasonable man is usually prefigured as white, middle class,

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11. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 17cv205, 2020 WL 2553181, at \*15 (S.D. Cal. May 20, 2020) ("In deciding whether a plaintiff was injured by a defendant's anticompetitive conduct, the focus is whether the injury results from harm to competition—not the elimination or reduction of competition with rivals, but harm to consumer welfare. Consumer welfare is maximized when economic resources are allocated to their best use and consumers are assured competitive prices and quality of goods or services. 'Accordingly, an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.'" (citations omitted) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995)).

12. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 506–07 (2019) (explaining how defendants survive the rule of reason by proffering procompetitive justifications of their anticompetitive behaviors).

13. See Foer, *supra* note 2, at 337–39.

14. See Theodosia Stavroulaki, *Mergers That Harm Our Health*, 19 BERKELEY BUS. L.J. 89 (2022) (describing how antitrust fails to act when a merger harms only certain consumers rather than consumers in general).

15. Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 811 (2021).

16. *Id.*

heterosexual, able-bodied, and of course, male.<sup>17</sup> Similarly, antitrust has a “reasonable consumer” problem insofar as it uses a standard that is facially neutral but in fact obscures differences along race. In essence, enforcement ignores the economics of being a minority.

To illustrate, consider the higher switching costs (i.e., the costs of changing products or services, among other things) levied on people of color and low-income groups.<sup>18</sup> If a company monopolizes a pharmaceutical market, affluent patients can typically acquire the drug via their insurance plan or pay higher prices. By contrast, less well-off individuals—again, disproportionately people of color<sup>19</sup>—are more likely to (1) forego healthcare due to monopoly rates, (2) sacrifice other necessities to do so, or (3) turn to self-medication.<sup>20</sup> The effect is that people of color must often endure greater costs created by monopoly conduct—that is, an elevated switching cost—yet antitrust courts typically assess conduct by whether monopoly prices impacted consumers as an undifferentiated mass. At best, this framework implicitly assumes that minorities suffer (or benefit) from trade restraints in lockstep with dominant groups. At worst, this framework simply does not care.

A similar dynamic is that antitrust errs against liability because, as the Supreme Court has held, monopolies are often expected to improve consumer welfare.<sup>21</sup> We show, however, that firms in concentrated markets can more

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17. Numerous scholars have called attention to how the “reasonable man” standard, which purports to be neutral, in fact privileges dominant groups. For a sampling, see Lucy Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder?*, 54 WAKE FOREST L. REV. 1049 (2019); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); CYNTHIA LEE, MURDER AND THE REASONABLE MAN (2003); and CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN (2000).

18. Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of Eastman Kodak Co. v. Image Technical Services and a Modest Proposal for Limiting Them*, 52 MD. L. REV. 336, 367 (1993) (describing a switching cost as the cost borne to a consumer when switching to an alternative product).

19. To be sure, there may be areas in this Article where socioeconomic status seems to be a driving factor as much as or even more so than race. However, to disentangle race from class here would be to discount how structural racism, both historically and in the present, contributes to socioeconomic disadvantage for some and socioeconomic advantage for others. As the Critical Race Theory scholar Jonathan Feingold observes, “class is *raced* and race is *classed*.” Jonathan P. Feingold, “All (Poor) Lives Matter”: *How Class-Not-Race Logic Reinscribes Race and Class Privilege*, U. CHI. L. REV. ONLINE, Oct. 30, 2020, at 47, 49.

20. See DAN SIMON, INST. FOR RSCH. ON POVERTY, UNIV. OF WIS.-MADISON, POVERTY FACT SHEET: POOR AND IN POOR HEALTH (2013), <https://www.irp.wisc.edu/publications/fact-sheets/pdfs/PoorInPoorHealth.pdf> [perma.cc/7434-U9AK]; Mithila Rajagopal, *Poverty-Induced Self-Medication*, THE BORGEN PROJECT (May 2, 2015), <https://borgenproject.org/poverty-induced-self-medication> [perma.cc/6AU2-LFBA].

21. *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found

easily, and are more likely to, prioritize dominant groups—notably white consumers. By remaining indifferent to the varying plights of consumers, antitrust law subordinates the welfare of people of color to white majorities and the idealized white consumer. In fact, the very term “consumer” plays favorites along lines of race and class by prioritizing those with resources. Thus, as an initial matter, this Article argues that antitrust law gauges consumer welfare from a white perspective and, as a result, people of color have predictably suffered heightened costs. And yet reimagining antitrust law is possible.

In important part, we assert that antitrust law is ideally suited for the task of remedying systemic inequalities in market systems. Antitrust’s concern lies with structures; just as enforcement delves into whether anticompetitive conduct has made a market more or less likely to benefit consumers, antitrust law *could* ask whether anticompetitive conduct has altered a market’s structure to erode the welfare of specific groups.<sup>22</sup> To put it another way, antitrust’s claimed purpose is to enhance consumer welfare by maximizing allocative efficiency,<sup>23</sup> though it has largely ignored the preexistence of economically inefficient racial structures such as residential segregation;<sup>24</sup> in fact, modern antitrust enables inefficiencies insofar as it permits the misallocation of resources along lines of race rather than their most productive uses.<sup>25</sup> Since racism is a structural inefficiency based on excluding certain types of actors from

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unlawful unless it is accompanied by an element of anticompetitive conduct.”); see also Edward Longe, *Why the Consumer Welfare Standard Must Remain the Bedrock of U.S. Antitrust Law*, THE AM. CONSUMER INST. CTR. FOR CITIZEN RSCH. (Mar. 10, 2021), <https://www.theamerican-consumer.org/2021/03/airlines-show-why-the-consumer-welfare-standard-must-remain-the-bedrock-of-u-s-antitrust-law> [perma.cc/5LTU-9J2K] (“When considering the example of the airline mergers between 2000 and 2010, it becomes clear that the creation of large companies does not necessarily harm consumers. The example of airline mergers should also serve as a reminder to legislatures seeking to change how federal agencies approach antitrust cases that large companies can substantially enhance consumer welfare. Returning to a ‘big is bad’ mentality [in] antitrust risks denying consumers benefits they would otherwise derive from large companies’ existence.”).

22. See Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, Remarks at GCR Interactive: Women in Antitrust (Nov. 17, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1583714/slaughter\\_remarks\\_at\\_gcr\\_interactive\\_women\\_in\\_antitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf) [perma.cc/L4GX-8MXR] (“Antitrust enforcement necessarily addresses fundamental economic and market structures. In the United States, these economic and market structures are historically and presently inequitable. So, when we make decisions about whether and where to enforce the law or how to deploy our enforcement resources, we are making decisions that will have an effect on structural equity or inequity.”).

23. *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010) (“[C]onsumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act.”); Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 563 (2012) (discussing how scholars and courts came to believe that allocative efficiency is the goal of antitrust).

24. Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sept. 26, 2020, 10:45 AM), <https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html> [perma.cc/53A3-8ZX2].

25. Day, *supra* note 6, at 1336.

the market, we argue that enforcement must inquire into whether a market's competitive structure has inflicted unreasonable costs on minorities.<sup>26</sup>

There is one more thing to say before this Article begins in earnest, and that is about the moment we are in. Since the killing of George Floyd, this country has undergone a racial reckoning. Along those lines, the time is ripe for a recognition of antitrust's race problem and for a reimagining of antitrust's possibilities. Cracks have even begun to form in antitrust's framework as enforcers notice the disparate experiences of minorities.<sup>27</sup> In 2020, Commissioner Rebecca Slaughter of the Federal Trade Commission noted that antitrust's "value-neutral" stance is "bizarre."<sup>28</sup> She cited healthcare as an industry in which porous competition has caused Black consumers to incur greater costs such as inadequate treatment,<sup>29</sup> concluding that antitrust must become anti-racist rather than adhering to the façade of neutrality.<sup>30</sup> And in 2021, President Biden sought to increase antitrust enforcement via executive order, acknowledging that some restraints inflict disproportionate costs on "[c]ommunities of color."<sup>31</sup> In a sense, this Article is responding to a moment that has been over a century in the making. Its ambition is nothing short of making antitrust anti-racist.

This Article proceeds in four parts. Part I details examples of anticompetitive acts that have intentionally or unintentionally harmed people of color. Part II reviews antitrust law to explain why the consumer welfare standard has so far failed to remedy anticompetitive conduct that disproportionately harms people of color. Part III relies on theories of racial capitalism to excavate the racial history behind antitrust's emphasis on consumer welfare. It shows that racial discrimination is a historic feature of economic systems, and antitrust is no different. This sheds light on why a supposedly colorblind antitrust law has actually generated disparate effects. Finally, Part IV argues for another way. Relying on Critical Race Theory and returning to the common law that preceded the Sherman Act, as well as the Sherman Act's legislative history, it

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26. Feiner, *supra* note 24 ("Antitrust law is clearly about economic structure, and economic structure in this country has a pretty profoundly racialized effect[.] There is a direct connection between antitrust law and the enforcement of antitrust law and the economic structures that tend to systemically and systematically under-privilege people of color.").

27. See John Mark Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384 (2021); Felix B. Chang, *Ethnically Segmented Markets: Korean-Owned Black Hair Stores*, 97 IND. L.J. 479 (2022) (using an antitrust perspective to understand ethnically segmented markets).

28. Feiner, *supra* note 24.

29. *Id.*; see Stavroulaki, *supra* note 14 (asserting that anticompetitive practices have especially harmed people of color, which creates greater types of humanitarian issues).

30. Rosa Morales, *Can Antitrust Enforcement Be a Tool for Racial Equity?*, LAW360 (Mar. 30, 2021, 6:03 PM), <https://www.law360.com/articles/1370258> [perma.cc/9Q2G-KFW9].

31. *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021) [hereinafter *White House Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy> [perma.cc/2SHP-88DU].



reimagines antitrust in a way that would acknowledge, and benefit, all consumers. Indeed, it goes a step further and argues for a reconceptualization of antitrust's purpose. Instead of the narrow purpose of promoting consumer welfare, antitrust should and can return to its earlier, broader purpose of promoting *community* welfare, whether we are consumers or workers. Put differently, it should return to promoting the welfare of us all.

## I. ANTICOMPETITIVE RACISM

Anticompetitive practices have quietly entrenched inequality and structural racism.<sup>32</sup> While some actors have specifically sought to oppress people of color, at other times, the racialized harms occur as unintended, though often foreseeable, consequences of anticompetitive practices. This Part begins with a few examples, discussing the ways that labor unions and housing activities have historically contributed to racial inequality. It then turns to the present to show how current trade restraints—in markets as diverse as real estate, banking, healthcare, and even prisons—continue to disproportionately harm racial minorities. Many of these exclusionary activities, as we discuss in later parts of this Article, do not fit antitrust's current or former molds.

### A. *Labor Unions, Housing, Race, and Aftereffects*

Back in the heyday of labor unions, labor cartels served as a tool for racial inequality. Starting in the nineteenth century and continuing well into the twentieth century, unions would routinely exclude Blacks and recent immigrants—many viewed as non-white at the time<sup>33</sup>—from membership. Unions justified this exclusion on the claim that Blacks and recent immigrants were willing to work longer hours for less money; in essence, white people feared the competition of minority labor.<sup>34</sup> As one commentator put it, “[u]nionization in the South often led to the redesignating of ‘Negro jobs’ as ‘white man’s work,’ and even to excluding Negroes from entire industries.”<sup>35</sup> In the North, it was much the same, with constant efforts by unions to keep “Negroes out of skilled work,” as Gunnar Myrdal noted in *An American Dilemma*.<sup>36</sup> To exclude people of color, unions used a variety of tactics, including (1) administering discriminatory tests, (2) barring Black workers from job sites, and (3)

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32. See generally Paul Moreno, *Unions and Discrimination*, 30 CATO J. 67, 67–69 (2010).

33. See generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS* (2005).

34. Shamed Dogan, *Unions Ignore Long History of Excluding Minorities from Jobs*, ST. LOUIS POST-DISPATCH (Nov. 13, 2017), [https://www.stltoday.com/opinion/columnists/unions-ignore-long-history-of-excluding-minorities-from-jobs/article\\_ef58bccd-f04a-5172-8dbd-18b8ee5eb9e2.html](https://www.stltoday.com/opinion/columnists/unions-ignore-long-history-of-excluding-minorities-from-jobs/article_ef58bccd-f04a-5172-8dbd-18b8ee5eb9e2.html) [perma.cc/L3K7-7T64].

35. Herbert Hill, *Labor Unions and the Negro: The Record of Discrimination*, 28 COMMENTARY 479, 480 (1959).

36. I GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 292 (Routledge 2017) (1944).

relegating them to inferior positions.<sup>37</sup> For example, in 1909, members of the Brotherhood of Locomotive Firemen refused to work until white people replaced Black firemen.<sup>38</sup> As Booker T. Washington described in *The Atlantic Monthly*:

[D]uring the past few years, several attempts have been made by the members of labor unions which do not admit Negroes to membership, to secure the discharge of Negroes employed in their trades. For example, in March, 1911, the white firemen on the Queen and Crescent Railway struck as the result of a controversy over the Negro firemen employed by the road. The white firemen, according to the press reports, wanted the Negro firemen assigned to the poorest runs. Another report stated that an effort was made to compel the railway company to get rid of the Negro firemen altogether.<sup>39</sup>

Black labor was even restrained by legislation such as the Davis-Bacon Act,<sup>40</sup> which responded to fears that companies were hiring cheaper Black labor rather than white labor. One House member supporting passage cited a businessman who transported Black workers up north, calling them “bootleg labor”—“[h]e puts them in cabins, and it is labor of that sort that is *in competition with white labor* throughout the country.”<sup>41</sup> In response, the Davis-Bacon Act fixed salaries by requiring companies to pay “the local prevailing wage.”<sup>42</sup> This drove up labor prices to the degree that employers found little benefit in hiring nonunionized Black workers.<sup>43</sup> The result was the continued exclusion of Black workers.<sup>44</sup>

Housing is another area where anticompetitive restraints have been used to maintain racial inequality. Historically, collectives of homeowners, homeowners’ associations, and real estate agents banded together to maintain residential segregation along lines of race, sometimes by increasing prices above

37. See Travis Watson, *Union Construction’s Racial Equity and Inclusion Charade*, STAN. SOC. INNOVATION REV. (June 14, 2021), [https://ssir.org/articles/entry/union\\_constructions\\_racial\\_equity\\_and\\_inclusion\\_charade](https://ssir.org/articles/entry/union_constructions_racial_equity_and_inclusion_charade) [perma.cc/T4EY-K6FW] (“From being called racist names to being administered tests designed to ensure their failure, a gamut of discriminatory practices make[s] it difficult for Black workers to enter, remain, and grow in the industry.”).

38. James Gilbert Cassedy, *African Americans and the American Labor Movement*, 29 PROLOGUE 113, 114 (1997).

39. Booker T. Washington, *The Negro and the Labor Unions*, ATLANTIC (June 1913), <https://www.theatlantic.com/magazine/archive/1913/06/the-negro-and-the-labor-unions/529524> [perma.cc/ABJ2-477B].

40. See Dogan, *supra* note 34.

41. Joseph Dean, *The Racist History of Minimum Wage*, MEDIUM (Aug. 17, 2018) (emphasis added), <https://medium.com/the-enclave-of-others/the-racist-history-of-minimum-wage-5dd71ebf0770> [perma.cc/B3AD-6CDZ].

42. *Id.*

43. See Dogan, *supra* note 34 (“This policy has been implemented in many states as well, including Missouri, to force governments to only negotiate with white-dominated unions. This policy remains as a vestige of a racist past, and it harms American workers and taxpayers to this day.”).

44. See *id.*

competitive levels to establish white-only neighborhoods, and other times by simply refusing to sell or rent to racial minorities outright.<sup>45</sup> A common tactic was the racially restrictive covenant, which uses language to the effect of “[s]aid premises shall not be rented, leased, or conveyed to, or occupied by, any person other than of the white or Caucasian race.”<sup>46</sup> Making matters worse, the federal government in the 1930s marked various neighborhoods as desirable or “hazardous” to aid mortgage lending, though “redlining” was largely achieved on racial lines.<sup>47</sup> This practice, combined with restrictive covenants, effectively barred Black buyers from real estate markets.<sup>48</sup>

While the harm to people of color from these restraints of trade may seem a relic of the past—of historical note and little more—the opposite is true. Although the Supreme Court outlawed the enforcement of racial covenants in *Shelley v. Kraemer*,<sup>49</sup> the anticompetitive effects persist; historically segregated neighborhoods remain segregated,<sup>50</sup> and Black persons lack equity on par with white owners to the tune of about \$212,023 per homeowner.<sup>51</sup> And when

45. DARIA ROITHMAYR, *REPRODUCING RACISM* 35–36 (2014) (explaining how neighborhoods maintained racial homogeneity through exclusionary tactics by associations, banks, and real estate boards); see also Eleanor Marie Lawrence Brown, *Why Black Homeowners Are More Likely to Be Caribbean American than African American in New York: A Theory of How Early West Indian Migrants Broke Racial Cartels in Housing*, 61 AM. J. LEGAL HIST. 3, 12–15 (2021) (describing how Caribbean-Americans circumvented racial housing cartels).

46. Nick Watt & Jack Hannah, *Racist Language Is Still Woven into Home Deeds Across America. Erasing It Isn't Easy, and Some Don't Want to*, CNN (Feb. 15, 2020, 12:21 PM), <https://www.cnn.com/2020/02/15/us/racist-deeds-covenants/index.html> [perma.cc/Z8M5-79ZX]; Justin Wm. Moyer, *Racist Housing Covenants Haunt Property Records Across the Country. New Laws Make Them Easier to Remove*, WASH. POST (Oct. 22, 2020, 6:00 AM), [https://www.washingtonpost.com/local/racist-housing-covenants/2020/10/21/9d262738-0261-11eb-8879-7663b816bfa5\\_story.html](https://www.washingtonpost.com/local/racist-housing-covenants/2020/10/21/9d262738-0261-11eb-8879-7663b816bfa5_story.html) [perma.cc/PC5Y-NMKY] (“[The] property ‘shall never be used or occupied by . . . negroes or any person or persons, of negro blood or extraction, or to any person of the Semitic Race, blood or origin, or Jews, Armenians, Hebrews, Persians and Syrians, except . . . partial occupancy of the premises by domestic servants.’” (omissions in original)).

47. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 63–67 (2017); KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT* 64–68 (Heather Ann Thompson & Rhonda Y. Williams eds., 2019) (describing how the legacy of redlining in the 1930s continued to influence mortgage financing decisions in the 1960s); see also Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasting-for-decades.html> [perma.cc/AU5C-KA7X].

48. ROITHMAYR, *supra* note 45, at 35 (“Homeowners worked together with real estate boards and banks to restrict the availability of loans for black buyers and sellers.”).

49. 334 U.S. 1 (1948); see also Nancy H. Welsh, *Racially Restrictive Covenants in the United States: A Call to Action*, 12 AGORA 130, 131 (2018).

50. Aaron Williams & Armand Emamdjomeh, *America Is More Diverse than Ever—But Still Segregated*, WASH. POST (May 10, 2018), <https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities> [perma.cc/KGJ2-39J7]; Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything but Accidental*, SMITHSONIAN MAG. (May 30, 2017), <https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494> [perma.cc/A7R2-RHBL].

51. Brenda Richardson, *Redlining's Legacy of Inequality: Low Homeownership Rates, Less Equity for Black Households*, FORBES (June 11, 2020, 12:08 PM), <https://www.forbes.com/sites/>

Black persons enter rental markets, they often must pay greater rates than white renters for equivalent properties.<sup>52</sup> With respect to labor unions, their racial exclusions help to explain some of the present-day wealth disparities along racial lines—considering that wealth is often obtained intergenerationally—such that today the median white family has eleven-and-a-half times more wealth than the median Black family.<sup>53</sup> This is to say nothing of the other aftereffects of these historical restraints of trade, from the persistence of segregated public schools to unequal social capital to the maintenance of “white spaces.”<sup>54</sup> As Devon Carbado observes, “[w]e all inherit advantages and disadvantages, including the historically accumulated social effects of race.”<sup>55</sup>

### B. Contemporary Practices

Beyond the historical anticompetitive conduct and aftereffects described above, Blacks and other minorities continue to be disproportionately harmed by current anticompetitive actions in a variety of markets, including employment, food access, banking, and healthcare, to name just a few.

For starters, consider restraints of one’s employment. Labor exists in a market like anything else with economic value in that companies compete for people’s labor using wages and benefits.<sup>56</sup> It is common for employers to enforce noncompete clauses or agree not to poach. This latter arrangement is a form of collusion where rival employers promise not to solicit or hire each other’s labor, which depresses wages by limiting workers’ ability to seek better

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brendarichardson/2020/06/11/redlinings-legacy-of-inequality-low-homeownership-rates-less-equity-for-black-households/?sh=257a079d2a7c [perma.cc/EX2U-PD6B] (“The typical homeowner in a neighborhood that was redlined for mortgage lending by the federal government has gained 52% less—or \$212,023 less—in personal wealth generated by property value increases than one in a greenlined neighborhood over the last 40 years.”); see SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD* 105–26 (2021) (mapping the relationship between redlining and economic opportunities).

52. Dirk W. Early, Paul E. Carrillo & Edgar O. Olsen, *Racial Rent Differences in U.S. Housing Markets: Evidence from the Housing Voucher Program*, 59 J. REG’L SCI. 669, 671 (2019).

53. Heather Long & Andrew Van Dam, *The Black–White Economic Divide Is as Wide As It Was in 1968*, WASH. POST (June 4, 2020, 9:19 AM), <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households> [perma.cc/X37W-2FBY].

54. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.–C.L. L. REV. 43, 47–52 (2009).

55. Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1608 (2011).

56. See IIA PHILLIP E. AREEDA, ROGER D. BLAIR, HERBERT HOVENKAMP & CHRISTINE PIETTE DURRANCE, *ANTITRUST LAW* § 352c (5th ed. 2021) (“Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law’s solicitude and the persons most directly concerned—perhaps the only persons concerned—could not challenge the restraint.” (footnote omitted)).

pay or working conditions.<sup>57</sup> Put differently, instead of allowing workers to maximize their welfare and opportunities via free labor markets, noncompete clauses tend to make labor markets *less* free, reducing the bargaining power and employment opportunities of workers.<sup>58</sup>

How does this relate to racial harm? While many firms justify labor restraints by their need to protect trade secrets or intellectual property,<sup>59</sup> the restraints encumber employees far beyond those with access to this information. Per the *New York Times*, no-poaching agreements have bound employees in more than a quarter of the fast-food outlets in the United States—often unknowingly—which has enabled large firms to freeze the salaries of workers who are disproportionately minorities.<sup>60</sup> Indeed, because of how labor restraints are distributed, they disproportionately harm low-income workers, who in turn are disproportionately people of color.<sup>61</sup>

Similarly, anticompetitive agreements in grocery store markets have unevenly impacted minorities. Grocery stores abandoning poorer areas compound such harms by selling their lands encumbered with restrictive covenants that forbid entry of new stores, thus suppressing competition.<sup>62</sup> Given the paucity of real estate in inner cities capable of housing a large grocery store, the racial *and* anticompetitive effects of “scorched-earth” covenants are glaring: “[t]he exiting supermarkets are metaphorically salting the

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57. Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1038 (2019) (explaining the transfer of wealth from labor to employers); see Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 494 (2020) (explaining the dangers of no-poaching agreements and other types of labor cartels).

58. Marinescu & Hovenkamp, *supra* note 57, at 1038.

59. See Day, *supra* note 57, at 522–23 (mentioning that a labor cartel could advance the justification of protecting trade secrets).

60. Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html> [perma.cc/A64S-4]6U].

61. See Tom Spiggle, *President Biden's Recent Executive Order Takes Aim at Non-Competes*, FORBES (July 16, 2021, 10:53 AM), <https://www.forbes.com/sites/tomspiggle/2021/07/16/president-bidens-recent-executive-order-takes-aim-at-non-competes/?sh=7860db8c2cc4> [perma.cc/W6KB-EQGH] (discussing the role of noncompetes in restraining low-income labor, which disproportionately involves people of color); see also Feiner, *supra* note 24 (“One area of competition rulemaking that’s already gotten a lot of attention is the idea of non-competes. I think doing a rulemaking on non-competes, which I’ve supported in the past, could be an important tool to help address some of the structural racism issues because non-competes can disproportionately hinder labor mobility among lower-income workers, and therefore, depress wages, depress opportunity. Again, we know, statistically, that those workers tend to be disproportionately people of color.”).

62. Leslie, *supra* note 6, at 16 (“One major reason that appropriate space for a new supermarket is unavailable in some cities is the purposive use of restrictive covenants by major supermarket chains to preclude major grocers from serving inner-city consumers. Many large chains own the land upon which their supermarkets are built. When these supermarkets sell the land and exit a location, they will often impose a restrictive covenant on the deed of sale that forbids the property from being used as a grocery store for a fixed period of time, frequently measured in decades.”).

fields as they retreat to the suburbs in order to make sure that no other supermarket can spring up and sell food at that location to local residents.”<sup>63</sup> Add to this the anticompetitive mergers discussed in the Introduction, and the harm to poor minority neighborhoods increases—indeed, “between 1978 and 1984, Safeway closed more than 600 stores in inner city neighborhoods. Many of those stores were the primary or only source of reasonably priced (and minimally processed) meat and produce in their neighborhoods”<sup>64</sup>—many of which are left with food deserts,<sup>65</sup> or what scholars are increasingly calling “first food deserts.”<sup>66</sup>

The industry of banking presents similar issues. Bank mergers can lessen competition in two primary ways: banking behemoths have emerged, and local banks have dissolved.<sup>67</sup> These events, according to the White House, benefit affluent people who can avail themselves of national chains offering low rates but have adversely affected those residing in minority neighborhoods.<sup>68</sup> To illustrate some of the effects, for starters, banks in low-income neighborhoods offer less credit at higher prices; second, check-cashing stores and payday lenders have filled the void of shuttered banks; and third, the underbanked population has exploded.<sup>69</sup>

The same is true of healthcare mergers. Not only have acquisitions left many regions with one or two hospitals, but that harm is then compounded due to the consolidation of the insurance market, such that two firms now

63. *Id.* (coining the term “scorched-earth”).

64. Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125, 128 (2001).

65. Leslie, *supra* note 6 (“This context informed the chains’ decisions to close hundreds of inner-city supermarkets, creating food deserts in the process.”); Eisenhauer, *supra* note 64, at 126; Kimberly Morland, Steve Wing, Ana Diez Roux & Charles Poole, *Neighborhood Characteristics Associated with the Location of Food Stores and Food Service Places*, 22 AM. J. PREVENTIVE MED. 23 (2002) (empirically finding that marginalized communities lack “equal access to the variety of healthy food choices available to nonminority and wealthy communities”).

66. See, e.g., Andrea Freeman, “First Food” Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 FORDHAM L. REV. 3053, 3066 (2015).

67. This includes the shuttering of Black-owned banks. For more on the history of Black-owned banks and how their closing contributed to racial inequality, see generally MEHRSA BARADARAN, *THE COLOR OF MONEY* (2017), and *The Community Reinvestment Act: Assessing the Law’s Impact on Discrimination and Redlining: Hearing Before the Subcomm. on Consumer Prot. & Fin. Insts. of the H. Comm. on Fin. Servs.*, 116th Cong. 9–11, 51 (2019) (statement of Mehrsa Baradaran), which notes that largely as a result of bank mergers, between 2008 and 2013 “banks shut 2000 branches—93% of which were located in zip codes where the household income was below the national median.”

68. *White House Fact Sheet*, *supra* note 31 (“Over the past four decades, the United States has lost 70% of the banks it once had, with around 10,000 bank closures. Communities of color are disproportionately affected, with 25% of all rural closures in majority-minority census tracts. Many of these closures are the product of mergers and acquisitions.”).

69. See Marco Di Maggio, Angela Ma & Emily Williams, *Life Below Zero: Predatory Overdrafts, Payday Lending and the Underbanked* 1–2, 9 (May 11, 2020) (unpublished manuscript), [https://scholar.harvard.edu/files/ewilliams/files/life\\_below\\_zero.pdf](https://scholar.harvard.edu/files/ewilliams/files/life_below_zero.pdf) [perma.cc/PT6C-RQ7K]; see also BARADARAN, *supra* note 7, at 111, 141, 152.

issue the majority of policies.<sup>70</sup> Certainly affluent patients and their families can benefit from the efficiencies of large hospital systems. For these (insured) patients, transportation to such hospitals or any marginal increase in costs is unlikely to result in financial hardship; in return, these affluent patients may benefit from better care. But such benefits are unlikely to redound to minority patients who are especially prone to lose their local hospitals and who do not have the same access to transportation or ability to pay higher costs.<sup>71</sup> Because of their positionality, Black and brown patients are more likely to experience consolidation as a financial hardship, forcing many to go bankrupt, enter debt collections, or forgo treatment.<sup>72</sup> As a result of concentrated markets, “Black families spend a greater share of their household income on health care premiums and out-of-pocket costs than the average American family. And of the thirty million uninsured individuals in the United States, half are people of color.”<sup>73</sup>

At this moment when mass incarceration and racial criminal injustice issues have finally become part of the national conversation, it is worth mentioning how anticompetitive practices in prison markets harm people of color—already targets of disproportionate policing and unequal justice. Prison markets are notoriously anticompetitive because states generate revenue by outsourcing carceral markets to private firms with the promise of monopolistic control.<sup>74</sup> Whereas inmates had once been given a choice of

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70. Martin Gaynor, Farzad Mostashari & Paul Ginsburg, Opinion, *Health Care’s Crushing Lack of Competition*, FORBES (June 28, 2017, 12:14 PM), <https://www.forbes.com/sites/realspin/2017/06/28/health-cares-crushing-lack-of-competition/?sh=56175a6214ff> [perma.cc/B9FT-MSRP] (“Meanwhile, the top two insurers control more than 50% of the market in most of the United States. Premiums are higher in more consolidated markets. Researchers found that simply adding one more insurer to an ACA marketplace reduces premiums for everyone by an average of 4.5%.”).

71. See Joseph P. Williams, *Code Red: The Grim State of Urban Hospitals*, U.S. NEWS (July 10, 2019, 11:23 AM), <https://www.usnews.com/news/healthiest-communities/articles/2019-07-10/poor-minorities-bear-the-brunt-as-urban-hospitals-close> [perma.cc/FTE6-C6N7].

72. See Feiner, *supra* note 24 (“One area I think about in antitrust all the time is health care. We focus a lot on health care, and I think that is good and important. We focus on it because access to health care is important to people. But when you drill down even further, it’s not just that all people need access to health care. It is more difficult for lower income people to bear increased marginal costs in health care, or to overcome lack of access for the challenges faced by lack of competition, and because we also know that lower-income people are disproportionately people of color or, more accurately, people of color are disproportionately lower income, you can see that those health care disparities have a racial effect as well as an economic effect. And you can see the evidence of a lot of that in the really tragic and shocking statistics about racial disparities in health outcomes.”).

73. Dani Kritter, *Antitrust as Antiracist*, CALIF. L. REV. ONLINE: BLOG (Mar. 2021), <https://www.californialawreview.org/antitrust-as-antiracist> [perma.cc/HG5B-2W6D].

74. See, e.g., Catherine E. Akenhead, Note, *How States Can Take a Stand Against Prison Banking Profiteers*, 85 GEO. WASH. L. REV. 1224, 1233 (2017) (explaining the monopoly power exerted by states over prison populations).

competitively priced goods,<sup>75</sup> modern prisons auction the privilege to sell books, shoes, commissary items, and similar products to singular private companies in exchange for a flat fee or cut of the monopoly profits.<sup>76</sup> In fact, many inmates can only read emails or books upon paying a monopolist for access to an e-reader—keep in mind that prisoners earn less than \$1 per hour.<sup>77</sup> Since the system incarcerates Black and brown people at substantially greater rates, prisons in effect generate supracompetitive profits by selling monopoly access to society's poorest and most marginalized. On top of this, their labor is constrained by a monopsony, depriving incarcerated people of any bargaining power at all.

Nor are these the only anticompetitive acts that contribute to racial inequality. Another prime example concerns technology.<sup>78</sup> Hardly a luxury any longer, viable internet and other technologies have become necessary to modern school and work.<sup>79</sup> But telecommunications mergers have reduced competition to the degree that 25 percent of people in primarily low-income

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75. See *Wheeler v. Beard*, No. Civ.A. 03-4826, 2005 WL 1217191, at \*2 (E.D. Pa. May 19, 2005) (“According to plaintiffs, prior to the adoption of Department of Corrections Policy No. DC-ADM 815, which is a systemwide policy governing inmate property, inmates were permitted to purchase items from a variety of vendors of their own choosing, including national retailers such as J.C. Penney, Boscov’s, Woolworth, and Walmart.”).

76. See, e.g., Kevin Sawyer, *Report: Prison Commissaries Have Legal Monopoly*, SAN QUENTIN NEWS (July 10, 2019), <https://sanquentinnews.com/report-prison-commissaries-have-legal-monopoly> [perma.cc/T587-2LJB] (reviewing the legal monopoly enjoyed by states over prison commissaries).

77. See, e.g., Mei-Ling McNamara, *US States Move to Stop Prisons Charging Inmates for Reading and Video Calls*, GUARDIAN (Jan. 13, 2020, 2:00 AM), <https://www.theguardian.com/global-development/2020/jan/13/us-states-move-to-stop-prisons-charging-inmates-for-reading-and-video-calls> [perma.cc/G5TK-JPHZ] (discussing the monopolization of e-reader markets in prisons).

78. See Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 79 (2010). One could also add to the list anticompetitive acts in the entertainment industry. See, e.g., Hosea H. Harvey, *Race, Markets, and Hollywood’s Perpetual Antitrust Dilemma*, 18 MICH. J. RACE & L. 1, 16 (2012) (“Market research indicates that African-Americans are only 13 percent of the population but 25 percent of the market for commercial films. Yet, throughout the 1990s, films that feature African-American actors were underdistributed to all audiences, regardless of the audience’s color or the movie’s topic. The data-analysis presented later suggests that this history of excluding or limiting African-American opportunity in the industry stems from its lack of competition.” (footnote omitted)).

79. See S. DEREK TURNER, *DIGITAL DENIED 2* (2016), [https://www.freepress.net/sites/default/files/legacy-policy/digital\\_denied\\_free\\_press\\_report\\_december\\_2016.pdf](https://www.freepress.net/sites/default/files/legacy-policy/digital_denied_free_press_report_december_2016.pdf) [perma.cc/L63Y-Q22A] (“[C]ommunities of color find themselves on the wrong side of the digital divide for home-internet access . . . in a manner that income differences alone don’t explain.”); see also Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443 (2016); Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697 (2006).



neighborhoods lack adequate internet—known as the digital divide—while services have improved in affluent areas.<sup>80</sup>

And there are other examples. Universities—as a result of an antitrust exception carved out by university lobbyists—collude on determining need-based financial aid packages for accepted students, which likely disproportionately impacts minority students.<sup>81</sup> Also, the National College Athletic Association (NCAA) has long enjoyed protections from antitrust laws; while recent cases indicate that this landscape is finally eroding,<sup>82</sup> the conventional landscape has permitted colleges to fix student-athlete compensation, which not only disproportionately harms Black student-athletes, but transfers wealth to predominantly white universities and students.<sup>83</sup> According to one study of public “Power Five” universities, “Black athletes[] lost wages of between approximately \$17.3 billion and \$21.5 billion between 2005 and 2019, in 2020 dollars, or approximately \$1.2–\$1.4 billion per year.”<sup>84</sup>

So if anticompetitive conduct imposes greater costs on people of color, why are matters of race absent from antitrust’s scheme? After all, antitrust’s purpose is to benefit consumers, yet antitrust law seems to ignore the welfare of racial minorities.

## II. ANTITRUST, CONSUMER WELFARE, AND RACISM

The Sherman Antitrust Act of 1890 is called the “Magna Carta of free enterprise,”<sup>85</sup> though it has helped to entrench dominant groups’ status to the detriment of marginalized people. This is because antitrust scrutinizes whether conduct has created an economic injury such as increased prices, restricted output, or lowered quality, which assumes that consumers are largely homogenous—that is, they universally benefit or suffer. What the antitrust laws miss is that some acts inflict greater costs on racial minorities and, by

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80. See Christopher G. Reddick, Roger Enriquez, Richard J. Harris & Bonita Sharma, *Determinants of Broadband Access and Affordability: An Analysis of a Community Survey on the Digital Divide*, CITIES, November 2020, at 1 (2020) (explaining the digital divide).

81. Section 568 of the Improving America’s Schools Act of 1994 exempts from antitrust law the ability of institutions that admit all students on a need-blind basis to collaborate on financial aid formulas. See 15 U.S.C. § 1 note (Application of Antitrust Laws to Award of Need-Based Educational Aid); see also *United States v. Brown Univ.*, 5 F.3d 658, 662 (3d Cir. 1993). A recent lawsuit accuses universities of circumventing this exemption by considering some students’ ability to pay in the admissions process. See Stephanie Saul & Anemona Hartocollis, *Lawsuit Says 16 Elite Colleges Are Part of Price-Fixing Cartel*, N.Y. TIMES (Jan. 14, 2022), <https://www.nytimes.com/2022/01/10/us/financial-aid-lawsuit-colleges.html> [perma.cc/3PJE-45LZ].

82. See Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

83. See Ted Tatos & Hal Singer, *Antitrust Anachronism: The Interracial Wealth Transfer in Collegiate Athletics Under the Consumer Welfare Standard*, 66 ANTITRUST BULL. 396, 397 (2021).

84. *Id.* at 420.

85. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”).

favoring dominant parties such as monopolists, cartels, and labor monopolists, offer people of color little relief when victimized by anticompetitive conduct. This Part traces the Sherman Act's history to explain the rise of "consumer welfare" and then analyzes why antitrust ignores the specialized harms inflicted on people of color.

#### A. *The Sherman Act's History and Rise of Consumer Welfare*

The history of antitrust and its modern deference to defendants sheds light on why the enterprise ignores the greater costs inflicted on minority communities. On its face, the Sherman Act bars two types of activities—restraints of trade and monopolizations. However, the language Congress chose in 1890 is deliberately brief and open ended: section 1 prohibits "every" trade restraint, while section 2 condemns the monopolization of "any" part of commerce or trade.<sup>86</sup> As the Supreme Court put it, the Sherman Act, due to its vagueness, "cannot mean what it says."<sup>87</sup> The reason why Congress codified such broad language, according to the Court, was so that future courts could define the Sherman Act's scope based on the common law of competition.<sup>88</sup> However, this landscape spawned confusion, lack of predictability, and, important to this story, an antitrust revolution led by economists.

In the 1960s, a vocal group of scholars asserted that enforcement was unprincipled and motivated by populism. For these scholars, antitrust was too often used to protect small businesses for the sake of achieving political or social goals.<sup>89</sup> Their concerns were not without merit. By pursuing unlimited objectives, courts could and did condemn procompetitive behaviors.<sup>90</sup> For instance, a company could incur antitrust liability when its low prices drove inefficient firms out of business, and it therefore amassed "too much" political

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86. 15 U.S.C. §§ 1–2.

87. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687 (1978). In fact, almost immediately upon its enactment, the Court recognized that Congress could not have intended the Sherman Act to be interpreted literally. *See, e.g., United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

88. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("[C]ourts should interpret [the Sherman Act] in the light of its legislative history . . ."); *see also* 21 CONG. REC. 2460 (1890) (statement of Sen. John Sherman) (stating that courts should construe antitrust's parameters).

89. *See* BORK, *supra* note 1, at 111 ("[I]t seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity."); *see also* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 207 (2008) ("There is nothing left of the old pre-Chicago, social/political, big business is bad, small business is good, rationale for antitrust.").

90. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.").

power—even though consumers tend to benefit from cheaper goods.<sup>91</sup> It was also common for populism to drive antitrust, given the volume of lawsuits targeting large companies for merely being large or notorious.<sup>92</sup> Another problem caused by heavy-handed enforcement, these scholars insisted, was that restraints of trade *are rarely harmful in actuality* but rather “stimulat[e] competition” and “are in the consumer’s best interest.”<sup>93</sup> These observations led to a prevailing belief that courts were confusing vigorous competition or the acquisition of power with anticompetitive conduct, considering that consumers seemed to benefit from many of the condemned activities.<sup>94</sup>

This state of affairs motivated economists, particularly from the University of Chicago (the “Chicago School”), to propose antitrust’s reform—a movement that truly came to prominence in the 1970s. One of their chief contributions came from Robert Bork, who argued that the original purpose of antitrust law was—and should remain—“consumer welfare” defined in economic terms.<sup>95</sup> They insisted that enforcement ought to cease prioritizing small businesses or pursuing social and political goals, noting that antitrust should exclusively identify offenses by whether consumers suffered *economically*.<sup>96</sup> An ostensible virtue of measuring welfare with prices, they claimed, is that courts could more objectively identify antitrust violations.<sup>97</sup> And the Supreme Court listened, adopting the groundwork for consumer welfare in

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91. See generally Harry First, *Bork and Microsoft: Why Bork Was Right and What We Learn About Judging Exclusionary Behavior*, 79 ANTITRUST L.J. 1017 (2014) (explaining Bork’s renovation of antitrust law based on efficiency rather than protecting small firms).

92. See BORK, *supra* note 1, at 3–5.

93. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

94. See, e.g., *Brown Shoe*, 370 U.S. at 344 (asserting that people must sometimes pay higher prices so that small companies may survive).

95. Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 232 (1995) (“Robert Bork offered the strongest version of this argument, asserting that the Sherman Act affirmatively ‘displays the clear and exclusive policy intention of promoting consumer welfare.’” (quoting BORK, *supra* note 1, at 59)); see also William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 460 n.3 (2020) (detailing Bork’s influence in creating the consumer welfare standard).

96. See Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 300 (“Almost twenty-five years ago, a small group of ‘radical’ scholars led by Robert Bork and Ward Bowman of Yale Law School, simplified the problem by redefining the disagreement about competition policy. They concluded that the economic logic of efficiency is the only realizable and neutral mechanism for serving the goal of competition. All other elements balanced under the ‘rule of reason’ are really forms of populism—an anti-competitive social policy that should be discarded.”).

97. See John O. McGinnis & Andrew M. Meerkins, *Dworkinian Antitrust*, 102 IOWA L. REV. 1, 2 (2016) (discussing antitrust’s reliance on measures which judges can apply “objectively”).

1977.<sup>98</sup> Now, plaintiffs must show that consumers incurred an economic injury such as high prices, low quality, or insufficient choice to state a claim.<sup>99</sup>

A second shift was spurred by Frank Easterbrook, another Chicagoan. He penned a seminal article in 1984 highlighting the dangers of Type I errors (i.e. false positives), which occur when a court mistakenly finds an offense even though the challenged act benefited consumers.<sup>100</sup> His argument was that antitrust's overenforcement inflicts greater costs on society than allowing some anticompetitive practices to evade condemnation—especially since many restraints are thought to improve consumer welfare, considering that restraints can, for example, lead to economies of scale and reduce costs for consumers.<sup>101</sup> As another example, the Supreme Court has recited economics literature to find that a type of exclusionary agreement, resale price maintenance, tends to foster efficiencies and competition.<sup>102</sup>

Easterbrook's logic persuaded antitrust judges to disfavor liability—and thus prefer Type II errors (false negatives)—unless an act's anticompetitive impact clearly is warranted by its procompetitive efficiency.<sup>103</sup> As a result, courts today tend to assess section 1 exclusionary practices under a doctrine commonly referred to as the “rule of reason,” which errs against liability in

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98. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2406 (2013) (discussing the importance of *GTE Sylvania*).

99. *Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr.*, No. 11-1290, 2011 WL 6935276, at \*7 n.8 (D.N.J. Dec. 30, 2011) (“In all cases, the relevant question is instead whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole.” (quoting Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 *ANTITRUST L.J.* 311, 362 (2002))).

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

101. *Id.* at 2–3 (“If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”).

102. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

103. Christine A. Varney & Jonathan J. Clarke, Tribute, *Chicago and Georgetown: An Essay in Honor of Robert Pitofsky*, 101 *GEO. L.J.* 1565, 1568 (2013) (explaining the influence of Easterbrook's research about Type I errors in antitrust enforcement and interpretation); Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 *WM. & MARY L. REV.* 75, 79 (2010) (“Courts, agencies, and academics have reacted to antitrust's unusual vulnerability to error by adopting a bias in favor of false negatives (Type II errors). Believing that procompetitive behavior erroneously condemned will result in a permanent loss of the behavior's benefit, and reasoning that anticompetitive conduct wrongly permitted will be ephemeral due to the market's self-correcting nature, the law seeks to err on the side of underenforcement. This principle has proven to be remarkably influential with respect to antitrust scrutiny of dominant-firm behavior, in particular.” (footnotes omitted)).

contrast to the other approach of “per se illegality.”<sup>104</sup> To apply the rule of reason, the typical court compares an act’s costs to its benefits, and then dismisses the complaint so long as the defendant presents a valid justification for restraining trade.<sup>105</sup> In contrast, per se illegality bans certain types of activities that harm consumers in almost every instance.<sup>106</sup> As an example, an agreement among competitors to sell their goods at a certain (usually above-market) price (i.e., price-fixing), is per se illegal in that no justification can save the defendant,<sup>107</sup> whereas one can justify an agreement to do business exclusively with a partner (i.e., exclusive dealing), under the rule of reason since legitimate business reasons might support the latter deal.<sup>108</sup>

The takeaway is this: due to the Chicago School’s influence, antitrust is particularly lenient to defendants. This is evident in how the rule of reason, first, applies in most instances and, second, favors defendants.<sup>109</sup> Further, courts have increasingly taken types of conduct out of the per se illegality bucket and placed them in the rule of reason’s domain, making antitrust even more deferential.<sup>110</sup> The effect is that antitrust tends only to find fault in cases of per se illegality, which are fewer and further between.<sup>111</sup> And when courts apply this framework, as explained next, they do so in a “colorblind” way.

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104. See *Leegin Creative Leather*, 551 U.S. at 899–900 (reviewing use of the rule of reason and per se illegality within antitrust’s common law framework).

105. See *New England Carpenters Health Benefits Fund v. McKesson Corp.*, 573 F. Supp. 2d 431, 435 (D. Mass. 2008) (“The First Circuit has held that the rule of reason requires an onerous multi-part showing: [1] that the alleged agreement involved the exercise of power in a relevant economic market; [2] that this exercise had anti-competitive consequences; [3] and that those detriments outweighed efficiencies or other economic benefits.”).

106. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (“This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.”).

107. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984) (“Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an ‘illegal *per se*’ approach because the probability that these practices are anticompetitive is so high . . .”).

108. *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987) (“Because of the clear benefits to a competitive economy of permitting firms to choose with whom to deal, ‘exclusive dealer agreements’ of the type at issue here are scrutinized under the Rule of Reason.”).

109. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (“Courts dispose of 97% of cases at the first stage, on the grounds that there is no anticompetitive effect. They balance in only 2% of cases.”); see also Foer, *supra* note 2, at 337–38 (noting that defendants “virtually always win[]” antitrust lawsuits under the rule of reason).

110. See *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008) (explaining that most cases are assessed under the rule of reason); see also, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

111. See generally Abbe Gluck, Case Note, *Preserving Per Se*, 108 YALE L.J. 913 (1999).

B. *Antitrust's Blindness*

Antitrust's inattention to race and other differences—its self-imposed blindness—is a feature of enforcement. Since the Chicago Revolution, antitrust courts, enforcers, and scholars have described enforcement as egalitarian due to how it ostensibly treats all consumers the same. Bork's view of antitrust's driving goal maintained that the standard of consumer welfare “treat[s] all members of society equally.”<sup>112</sup> To him, consumer welfare reflected the “total welfare” of society “as a class,” meaning that the analysis is supposed to tabulate everyone's change in welfare to determine whether a net gain or loss occurred.<sup>113</sup> In this sense, antitrust law is intended to gauge all consumers in the same colorblind way.

Even though modern antitrust does not adhere to all aspects of Bork's vision, it remains faithful to colorblindness. As a result, when anticompetitive practices inflict greater costs on communities of color, courts ignore this form of harm as beyond antitrust's scope. *FTC v. Superior Court Trial Lawyers Association* illustrates this willful blindness.<sup>114</sup> At issue was whether a group of lawyers had entered a conspiracy to commit price fixing and engage in a boycott that constituted unfair methods of competition.<sup>115</sup> In their defense, the lawyers noted that their boycott was the only way to protest the District of Columbia's practice of underpaying lawyers to represent indigent defendants.<sup>116</sup> The affected attorneys further pointed out that this practice of underpaying lawyers almost certainly harmed the quality of legal representation offered to their clients, who were primarily indigent and Black—an observation the Court accepted.<sup>117</sup> The Court also acknowledged that the lawyers would have been unable to increase their fees without the boycott—and thus, the boycott would likely benefit indigent defendants. But it did not matter. Antitrust law *must* condemn the boycott anyway.<sup>118</sup> Backed by precedent,<sup>119</sup>

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112. Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 720 (2014) (discussing BORK, *supra* note 1).

113. *Id.*

114. 493 U.S. 411 (1990).

115. *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 418–19.

116. *Id.* at 419, 421.

117. *See id.* at 421 (“The dissent from the decision to file the complaint so demonstrates. So, too, do the creative conclusions of the ALJ and the Court of Appeals. Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the pre-boycott rates were unreasonably low, and that the increase has produced better representation for indigent defendants.”).

118. *Id.* at 421–22 (“Moreover, given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate, we may also assume that without the boycott there would have been no increase in District CJA fees at least until the Congress amended the federal statute. These assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements.”).

119. *See, e.g., Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 690 n.16 (1978) (noting that antitrust is concerned with objective measures and, in turn, ignores whether a challenged arrangement “would be socially preferable”).

Justice Stevens wrote that “[t]he social justifications proffered for respondents’ restraint of trade thus do not make it any less unlawful.”<sup>120</sup> To the Court, the plight of poor, mainly Black defendants is necessarily irrelevant to antitrust law.

Modern scholarship has also discussed and even justified the lack of concern for race in antitrust’s analysis. As noted in the Introduction, an antitrust scholar recently noted that “[a]ntitrust policy . . . is not the appropriate tool for pursuing particular goals of social equality” involving “race and gender.”<sup>121</sup> Another article explains that antitrust law cannot currently solve distributional issues because no precedent exists for it to place greater weight on poorer members of society relative to affluent consumers.<sup>122</sup> When antitrust courts assess a merger in the healthcare industry, for example, they must equally weigh the utility of consumers generally—regardless of whether a specific consumer is rich or poor or high- or low-risk. Indeed, “unless the [enforcing agencies] adopted an alternative notion of consumer welfare standard,” they must equally measure a merger’s impact on all patients, “despite its negative impact on the vulnerable populations that need access.”<sup>123</sup>

The point is that antitrust’s framework is founded on “colorblind” economic theory, which has led courts and scholars to reject consideration of race or other socioeconomic differences. While premising antitrust law in economic theory was supposed to make enforcement more rigorous, it has fostered the interests of dominant groups while failing marginalized people, as the next Section demonstrates.

### C. Consumer Welfare and Structural Racism

Anticompetitive practices have inflicted disproportionately significant costs on people of color, yet antitrust’s analysis has yet to recognize this phenomenon. In fact, markets are often structured in ways where people of color can be expected to suffer disproportionately, considering that (1) people of color incur greater switching costs, (2) antitrust favors dominant groups, (3) racial minorities are frequently marginalized or ignored by competing firms

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120. *Superior Ct. Trial Laws. Ass’n*, 493 U.S. at 424.

121. Hovenkamp, *supra* note 15, at 811.

122. See Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, COMPETITION POL’Y INT’L, Autumn 2006, at 3, 11 (“[C]onsider how a consumer surplus standard handles distributional issues. Consumer surplus can provide a very . . . poor approximation to a welfare measure that weights impacts using ordinary notions of distributional preferences. One reason is that rich and poor consumers may be differentially affected by an antitrust decision; distributional concerns would suggest weighting the impact on the poor more heavily, but a consumer surplus standard insists that they count equally. If a central goal of antitrust enforcement is to redistribute income, then why treat rich and poor consumers alike? Another problem with using consumer surplus to embody a preference for wealth redistribution from rich to poor is that the owners and workers of firms are people too. Use of a consumer surplus standard entails treating all consumers as equally deserving at the margin, yet treating the same people unequally in their roles as workers and capital owners.”).

123. Stavroulaki, *supra* note 14, at 120.

in a market and (4) racism might lie beyond enforcement's scope as noneconomic behavior. Antitrust, as the "Magna Carta of free enterprise," has indeed solidified dominant power structures just like the actual Magna Carta did.<sup>124</sup>

### 1. Switching Costs Are Greater for Marginalized Groups

Antitrust measures consumer welfare without understanding how anti-competitive practices levy elevated switching costs on people of color. The issue is that courts apply the rule of reason by comparing the restrained market to a hypothetically competitive version of it in order to measure whether consumers lost surplus or welfare.<sup>125</sup> For example, if the price of orange juice increased due to a monopoly, a consumer can theoretically choose to (1) pay monopoly prices, (2) switch to apple juice, or (3) purchase nothing at all; the welfare loss is the difference between one's first and second choice, which presumptively harms all consumers in similar ways. Casting doubt on this framework is that while affluent consumers may usually choose their preferred alternative, lower-income people are more likely to be forced to resort to their worst-case scenario—again, a higher switching cost.<sup>126</sup>

To illustrate, whereas bank mergers have enabled predatory lenders to proliferate in minority neighborhoods (as discussed earlier), affluent areas tend to suffer the relatively minor injury of reduced selection of banks or even benefit from the favorable rates of large institutions.<sup>127</sup> In essence, a bank's closing may impose a higher cost on poorer people—who are again disproportionately people of color—when switching to an alternative.<sup>128</sup> This dynamic is also true in pharmaceutical markets where high-income patients can generally afford the monopolized drug (often via insurance) while people of color are more likely to suffer deprivations of care or even self-medicate—again, increasing switching costs.<sup>129</sup>

124. See Tom Ginsburg, Opinion, *Stop Revering Magna Carta*, N.Y. TIMES (June 14, 2015), <https://www.nytimes.com/2015/06/15/opinion/stop-revering-magna-carta.html> [perma.cc/HQB7-PCEP] ("In reality, Magna Carta was a result of an intra-elite struggle, in which the nobles were chiefly concerned with their own privileges. When they referred to the judgment of one's peers, for example, they were not thinking about a jury trial. . . . The reference to one's peers meant that nobles could not be tried by commoners, who might include judges appointed by the king.").

125. The term "consumer surplus" is often defined as the difference between the price paid by a consumer and the price the consumer was willing to pay. See Newman, *supra* note 12, at 506, 509 (explaining the use and questions of procompetitive justifications in the rule of reason).

126. See Jacobs, *supra* note 18, at 345, 354–55 (explaining switching costs).

127. *Id.*; see Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495, 498, 509–14, 532 (2006); BARADARAN, *supra* note 7, at 146; Kress, *supra* note 8, at 35.

128. Kress & Chopra, *supra* note 9.

129. Sydney Lupkin, *A Decade Marked by Outrage over Drugs Prices*, NPR (Dec. 31, 2019, 1:16 PM), <https://www.npr.org/sections/health-shots/2019/12/31/792617538/a-decade-marked-by-outrage-over-drug-prices> [perma.cc/L62D-EGGH]; see Bianca Schmid, Regina Bernal & Nilza Nunes Silva, *Self-Medication in Low-Income Adults in Southeastern Brazil*, 44 REVISTA DE



But this dynamic of unequal switching costs is missing from antitrust's analysis. Consider but one example. Warner Chilcott preserved its Doryx monopoly (a drug that treats painful skin conditions) by changing the pill's structure from a capsule into a tablet; this triggered a renewed FDA approval requirement for producers of the generic version of Doryx, delaying the entry of generic versions into the market.<sup>130</sup> The court held that the "product hop" did not violate antitrust law because consumers may reasonably prefer a tablet.<sup>131</sup> It used evidence of Doryx's sales declining after Warner Chilcott raised prices to find that the market had partially self-corrected, but at no point did the court question whether reduced sales might actually be a sign of low-income persons foregoing treatment or opting for poorer substitutes.<sup>132</sup> This is critical, considering that people of color use significantly fewer medications due to high prices.<sup>133</sup> Whereas antitrust could delve into the fate of racial minorities, it chooses instead to start from the perspective of privileged parties—indeed, those who can decide whether to pay high prices—under the guise of consumers generally.

## 2. Power Disparities between Monopolists and People of Color

Antitrust law benefits dominant parties. Because consumer welfare is often expected to increase when the activities of large firms go unchecked,<sup>134</sup> the rule of reason errs against condemning exclusionary practices so long as defendants can cite an efficiency gained from restraining trade.<sup>135</sup> We show, however, that antitrust's colorblind and *laissez-faire* stances stack the deck against people of color by (1) favoring dominant companies, (2) disregarding the power disparities between minorities and those with market power, and (3) ignoring those who lack enough resources to constitute a consumer.

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SAÚDE PÚBLICA, no. 6, 2010, at 1 (explaining the relationship between self-medication and the inability to pay for healthcare); see also *Disconnection*, SOC. SERVS. DATABASE, INC., <https://www.socialservicesdatabase.com/utilities/disconnection> [perma.cc/WDH2-UJ46] (describing a law in Georgia allowing people who owe validated medical costs to avoid a disconnection of utilities services for thirty days).

130. Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd., 838 F.3d 421, 429 (3d Cir. 2016).

131. *Id.* at 437–38.

132. *Id.* at 437 (“[W]hen Defendants increased the price of Doryx, its sales decreased, and the sales of other tetracyclines increased.”).

133. Becky Briesacher, Rhona Limcangco & Darrell Gaskin, *Racial and Ethnic Disparities in Prescription Coverage and Medication Use*, HEALTH CARE FIN. REV., Winter 2003, at 63, 73–74; see also CAMPAIGN TO REDUCE DRUG PRICES & PROTECT OUR CARE, HOW HIGH DRUG PRICES HURT BLACK AMERICANS (2021), <https://www.protectourcare.org/wp-content/uploads/2021/07/POC-Report-How-High-Drug-Prices-Hurt-Black-Americans-.pdf> [perma.cc/W34X-42KD].

134. Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 772–93 (2005) (describing the flaw in assuming that many firms render the most efficient prices).

135. See Stephen J. Matzura, Comment, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDENER L.J. 975, 1013 (2009) (describing the deference in the rule of reason).

For example, Little Caesars required its franchises not to poach each other's workers, which prevented their employees—mostly low-income restaurant managers and service workers—from seeking better wages or opportunities in a free market.<sup>136</sup> In response, one restaurant manager sued, alleging that Little Caesars's no-poaching rule violated the Sherman Act. Applying the rule of reason, the court dismissed the complaint. Specifically, the court held that Little Caesars did not offend antitrust law in light of Little Caesars's claim that the anticompetitive conduct reduced friction among its franchises and thus improved interbrand competition (e.g., the anticompetitive arrangement enabled Little Caesars to offer cheaper pizzas in competition against Pizza Hut and similar rivals).<sup>137</sup> Although minorities were disproportionately injured, the cost-saving inured to Little Caesars was deemed to have justified the no-poaching scheme.<sup>138</sup> In that case, antitrust's permissiveness toward procompetitive behavior that results in lower prices enabled a national chain to build market power off, and extract wealth from, low-income labor.<sup>139</sup>

Moreover, antitrust's deference to those with market power impedes competition from minority-operated small businesses that are more likely to cater to people of color.<sup>140</sup> It also disfavors the viability of companies that people of color typically own.<sup>141</sup> Since some observers claim antitrust's original goal was to "disperse economic power,"<sup>142</sup> the manner in which Black businesses and people have lost under the consumer welfare standard should be alarming. Nevertheless, antitrust lacks an inquiry into whether a firm has dis-

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136. *Ogden v. Little Caesar Enters., Inc.*, 393 F. Supp. 3d 622, 628 (E.D. Mich. 2019).

137. *Id.* at 632, 635 ("[T]he agreement in this case, between franchisor and franchisee, is a 'vertical agreement' that only restricts 'intra-brand' competition, which has the effect of actually promoting 'inter-brand' competition by restraining franchisees under the same brand from harming each other.").

138. *Id.* at 637 ("The facts alleged in the complaint, no matter how generously construed, fall far short of the required showing to sustain an antitrust claim, principally because the plaintiff has not put forth any allegations to define the scope of any relevant market, or to show that any anti-competitive effects of the agreements are not negated by the pro-competitive effects on interbrand competition.").

139. *Cf.* Karen Hoffman Lent & Kenneth Schwartz, *The Antitrust and Antiracism Nexus*, N.Y. L.J., June 8, 2021 (describing how antitrust ignores small businesses and "especially small business owners of color").

140. *Id.* ("However, lower prices can harm small independent and minority owned businesses, which are unable to compete with the concentrated financial power of the merged company. Following the merger, black-owned businesses flounder and fail.").

141. *Id.*; Kimberly Adams, *What's Causing the Collapse of Black-Owned Businesses?*, MARKETPLACE (Apr. 14, 2017), <https://www.marketplace.org/2017/04/14/black-owned-independent-businesses> [perma.cc/L57R-KMPK] (linking market concentration with the "collapse" of black-owned businesses).

142. Zach Freed & Stacy Mitchell, *ILSR Submits Recommendations for Antitrust Reform to Congressional Committee*, INST. FOR LOC. SELF-RELIANCE (May 11, 2020), <https://ilsr.org/ilsr-stacy-mitchell-letter-judiciary-committee> [perma.cc/QX4E-NH3X] (asserting that antitrust must "reaffirm" that the law's purpose is to disperse economic power).

proportionately injured people of color. The result is that antitrust law absolves most defendants of liability even when defendants' conduct exploits power gaps between dominant and marginalized groups.

It should also be noted that the term "consumers" prioritizes those with economic power, which favors white majorities. For an antitrust lawsuit to succeed, consumers must suffer an "antitrust injury" such as high prices; however, if an anticompetitive act harms nonconsumers, such as community members or stakeholders, then it would seldom if ever affect antitrust's analysis.<sup>143</sup> Recall that mergers have deprived low-income neighborhoods of grocery stores—here, antitrust's concern would lie with whether consumers as a collective must pay elevated prices or receive lower qualities of food, which ignores whether minority neighborhoods will suffer a reduction of jobs or increased urban blight.<sup>144</sup> After all, antitrust law scrutinizes competition's effects on people acting as consumers (or even producers).

### 3. The Marginalization of Black Consumers

A claimed goal of antitrust law is to improve the quality and selection of goods available to consumers, and yet the marginalization of consumers who are racial minorities has long gone ignored.<sup>145</sup> Antitrust law assumes that competition improves welfare, which misses how markets have often supplied white people with desired products while simultaneously ignoring minority consumers. In fact, antitrust law defers to those with market power because inefficient markets are presumed to self-correct, but this dynamic is less likely to occur when the demands of minority consumers have gone unmet.<sup>146</sup> The expectation that concentrated markets will foster consumer welfare may generally hold with respect to only white consumers.

To highlight how competition ignores marginalized groups, it is common for firms to calculate that the cost of introducing a new product targeting minority groups is unwarranted if enough minorities will buy their pre-existing goods anyway. The effect is that a market is often considered competitive

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143. See Noah Joshua Phillips, *FTC Commissioner: Is Antitrust the Next Stakeholder Capitalism Battleground?*, FORTUNE (Sept. 26, 2020, 7:00 AM), <https://fortune.com/2020/09/26/ftc-antitrust-laws-corporations-stakeholders> [perma.cc/CL5G-MF6Y] (asking whether antitrust will expand to include interests of stakeholders).

144. See Hovenkamp, *supra* note 15, at 35 (describing antitrust's concern for labor as the focal point of wage-fixing schemes, but antitrust's dismissal of labor's welfare when not the direct target of anticompetitive conduct).

145. See Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr., No. 11-1290, 2011 WL 6935276, at \*7 n.8 (D.N.J. Dec. 30, 2011) ("In all cases, the relevant question is instead whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole."); see also U.S. DEP'T OF JUST., ANTITRUST ENFORCEMENT AND THE CONSUMER (2015), <https://www.justice.gov/atr/file/800691/download> [perma.cc/9F4G-2U4F].

146. Day, *supra* note 6, at 1336; see also Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557, 559 (2010) ("Antitrust law understands the market to self-correct where monopoly conditions attract capital, thus yielding competition, lower prices, and greater social welfare.").

when it meets the interests of white people. For example, mainstream cosmetic companies had mostly ignored darker-skinned people until Fenty arrived in 2017 to serve all skin types, the success of which compelled heritage brands *for the first time* to create lines of products dedicated to people of color.<sup>147</sup> Consider also internet streaming that had historically failed to satisfy the demands of Black viewers despite competition among Netflix, Amazon Prime, and Hulu. It was not until 2015, when Netflix sought to court people of color, that the market focused on providing programming of interest to Black consumers.<sup>148</sup> Specifically, the etching away at Netflix's market share compelled it to increase diversity on screen and behind the camera.<sup>149</sup>

Even still, other markets that are currently described as competitive remain unresponsive to Black demands.<sup>150</sup> For example, research has found that Black patients receive worse healthcare—an already concentrated market<sup>151</sup>—and suffer worse health outcomes compared to white patients even when controlling for factors such as health insurance and poverty.<sup>152</sup> It seems that healthcare companies' colorblind approach subordinates the unique needs and demands of Black patients.<sup>153</sup> Far from a conjecture, consider a concrete

147. Judith Evans & Leila Abboud, *Beauty Brands Face Backlash on Race*, FIN. TIMES (Oct. 23, 2020), <https://www.ft.com/content/ef79585c-43b3-47f5-9d27-b5899cbc8970> [perma.cc/G2PJ-MG6S].

148. See Ben Smith, *How Netflix Beat Hollywood to a Generation of Black Content*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/business/media/netflix-hollywood-black-culture.html> [perma.cc/5GZD-G29J]; Kori Hale, *Disney Pursuing Netflix for Black Viewers with Increased Hulu Stake*, FORBES (Mar. 14, 2019, 8:45 AM), <https://www.forbes.com/sites/kori-hale/2019/03/14/disney-pursuing-netflix-for-black-viewers-with-increased-hulu-stake/?sh=8f5677b340e5> [perma.cc/V63D-Y5JU].

149. See Yohana Desta, *How Black Netflix Employees Changed Netflix's Approach to Black Content*, VANITY FAIR (July 6, 2020), <https://www.vanityfair.com/hollywood/2020/07/netflix-memo-black-employees> [perma.cc/JER8-P8QQ] (describing Netflix's failure to cater to black viewers).

150. See, e.g., Amy O'Connor, *Moment of Change: How the Insurance Industry Can Bridge the Diversity Gap, Be an Ally*, INS. J. (Jan. 15, 2021), <https://www.insurancejournal.com/news/national/2021/01/15/597417.htm> [perma.cc/GNX5-GGYF] (reviewing the importance of increased diversity in insurance to better serve black consumers); U.S. DEP'T OF HEALTH & HUM. SERVS., SEX, RACE, AND ETHNIC DIVERSITY OF U.S. HEALTH OCCUPATIONS (2011–2015) (2017), <https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/data-research/diversity-us-health-occupations.pdf> [perma.cc/GF6V-7825] (reviewing the diversity problems in American healthcare).

151. Brent D. Fulton, *Health Care Market Concentration Trends in the United States: Evidence and Policy Responses*, 36 HEALTH AFFS. 1530 (2017); Emily Gee & Ethan Gurwitz, *Provider Consolidation Drives Up Health Care Costs*, CTR. FOR AM. PROGRESS (Dec. 5, 2018), <https://www.americanprogress.org/issues/healthcare/reports/2018/12/05/461780/provider-consolidation-drives-health-care-costs> [perma.cc/7GP2-473S].

152. Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 HUM. RTS., no. 3, 2018, at 19.

153. *Id.*; see also Austin Frakt, *Bad Medicine: The Harm That Comes from Racism*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html> [perma.cc/VL8C-U4KB] ("Racial discrimination has shaped so many American institutions that perhaps it should be no surprise that health care is among

example. Models in medical textbooks have seldom been illustrated using black or brown skin; the implication is that consumers of medical services and knowledge are prefigured as white. For example, one medical student, on his first day of medical school, noticed that “all of the diagnostics were grounded in white skin. Red bumps from rashes. Blue lips from oxygen deprivation. Such colors are masked by melanin, meaning these diagnostics don’t work for much, even most, of the world’s population.”<sup>154</sup> In effect, antitrust law errs against liability because monopolies are expected to attract competition and thus self-correct, yet the above examples show how markets are less likely to respond to minority consumers until competition increases beyond a level required for white people.

Consider as well some of the downstream implications for antitrust law. By measuring the welfare of consumers collectively, a court would likely find a challenged act to be procompetitive if the majority of consumers benefitted. Thus, if a specific minority group incurs net costs when the majority group has gained wealth, then antitrust’s framework would declare that the conduct is legal. It is, in other words, a mere numbers game in which antitrust values majorities over minorities. Even more, many courts follow the “total welfare” model whereby antitrust’s analysis includes the monopolist’s welfare in judging whether an act violated antitrust law—here, if the monopolist gains more than consumers have lost, then the act survives the rule of reason.<sup>155</sup> In effect, a minority group must show that their loss exceeded the value gained by the dominant group *and monopolist*.

In sum, the above landscape casts doubt on core tenets of antitrust law that a monopoly should either enhance consumer welfare or self-correct. Rather certain types of anticompetitive conduct may levy predictable harms on only minority groups as antitrust deems the act to be procompetitive. It indeed implies that *laissez-faire* enforcement in which consumers are treated homogeneously will unevenly fail people of color until courts recognize how markets prioritize white majorities.

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them. Put simply, people of color receive less care—and often worse care—than white Americans.”).

154. Mark Wilson, *Medical Textbooks Are Designed to Diagnose White People. This Student Wants to Change That*, FAST CO. (July 16, 2020), <https://www.fastcompany.com/90527795/medical-textbooks-are-designed-to-diagnose-white-people-this-student-wants-to-change-that> [perma.cc/EU2S-JRR4].

155. See Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 850–52, 857 (2000) (describing “total welfare,” which Bork envisioned); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 474–81 (2012).

#### 4. The Mysterious Economics of Racism

Anticompetitive racism may also exceed antitrust's scope because the Sherman Act governs only "trade" or "commerce," defined broadly as economic behavior.<sup>156</sup> The corollary is that noneconomic behavior lies beyond antitrust's purview.<sup>157</sup> This raises questions about whether antitrust may apply to anticompetitive conduct of a political or social nature—as opposed to economic activity—that nonetheless affects others economically.<sup>158</sup> Another way of stating this is as follows: racism is theorized to lack economic sense because profit-minded firms should adopt whichever strategies create the most revenue rather than abiding by racial cues—a position advanced by the intellectual founder of the consumer welfare standard, which the next Part explores.<sup>159</sup> And yet experience shows that firms have occasionally put race over profits and engaged in acts motivated by racial exclusion rather than economics. A notable example comes from the banking industry, where institutions acknowledge that racially discriminatory lending practices and credit allocation have operated to the industry's financial detriment.<sup>160</sup> Since many of these conducts would seem to be beyond antitrust's purview, it means that the exclusion of Black businesses, for example, would evade antitrust's scope so long as a cartel's goal was racist rather than economic.<sup>161</sup>

An example might be useful. A union protested the Russian invasion of Afghanistan by adopting facially anticompetitive practices against certain ships operating in the Soviet Union.<sup>162</sup> However, the defendant union's political activity was ruled to lie beyond antitrust's reach—even though economic

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156. Gregory Day, *Monopolizing Free Speech*, 88 *FORDHAM L. REV.* 1315, 1330 (2020) ("From a textual standpoint, the Sherman Act is limited to condemning practices that harm 'trade' or 'commerce,' as section 1 of the Sherman Act bans '[e]very contract, combination in the form of trust or otherwise . . . in restraint of trade or commerce' . . ." (emphasis omitted)).

157. See *Barr v. Nat'l Right to Life Comm.*, No. 70-420-ORL-CIV-Y, 1981 WL 2143, at \*5 (M.D. Fla. July 27, 1981) ("The lower courts have also exempted activity which was non-economic in purpose from coverage by the Sherman Act.").

158. See Roithmayr, *supra* note 3, at 728–30 ("Conversely, race-conscious distribution is understood to be anticompetitive and inefficient, because race is not thought to be related to productivity. According to the conventional story, the colorblind market will produce the most efficient outcome, because it distributes opportunities and resources exclusively on the basis of ability." (footnote omitted)).

159. See *infra* notes 194–209 and accompanying text.

160. See Adedayo Akala, *Cost of Racism: U.S. Economy Lost \$16 Trillion Because of Discrimination*, *Bank Says*, NPR (Sept. 23, 2020, 2:42 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/23/916022472/cost-of-racism-u-s-economy-lost-16-trillion-because-of-discrimination-bank-says> [perma.cc/K2Z2-NWAM] (discussing the economic inefficiencies of racism and the linkage to banking).

161. See *Org. of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R.*, 579 F. Supp. 574, 604 (N.D. Ill. 1983) (citing cases where courts have dismissed antitrust claims due to the protests' intent being political, not economic).

162. *Walsh v. Int'l Longshoremen's Ass'n*, 488 F. Supp. 524, 526 (D. Mass. 1980), *vacated*, 630 F.2d 864 (1st Cir. 1980).

harm was intended—because the union received “no apparent economic benefit.”<sup>163</sup> A similar result occurred when the National Association for Women (NOW) boycotted certain states, which the Eighth Circuit held was “noncommercial” activity due to NOW’s lack of economic competition against the states.<sup>164</sup> In a more well-known case, pro-life activists sought to levy economic injuries on NOW, which responded by suing them for antitrust violations.<sup>165</sup> The court held in favor of the protestors, ruling that antitrust cannot touch political or social practices among noncompetitors even if the boycott was an “economic device” intended to cause harm.<sup>166</sup>

Based on this precedent, efforts of white majorities to injure minority businesses would unlikely implicate antitrust law so long as the parties are not direct competitors. Even when organizers of a racial boycott stand to profit, courts have dismissed actions when the “primary purpose” was political.<sup>167</sup> Antitrust law would thus seem to ignore anticompetitive racism so long as protestors were primarily driven by discriminatory objectives rather than economic ones.

Although this concern may seem theoretical when it comes to Black businesses—most of which already struggle to survive, thus obviating the need for targeting—historical precedent suggests otherwise. Consider the story of the Black community in the Greenwood section of Tulsa, Oklahoma, that was so prosperous it was dubbed “Black Wall Street.” The Black community “created entrepreneurial opportunities for themselves, which housed an impressive business center that included banks, hotels, [cafés], clothiers, movie theaters,

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163. *Allied Int’l, Inc. v. Int’l Longshoremen’s Ass’n*, 492 F. Supp. 334, 338 (D. Mass. 1980), *rev’d on other grounds*, 640 F.2d 1368 (1st Cir. 1981).

164. NOW boycotted various states for refusing to enact the Equal Rights Amendment, which drew Missouri’s ire. Because an economic “group boycott” is considered per se illegal under the antitrust laws, Missouri asserted that NOW had illegally injured local restaurants, hotels, and businesses. *Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301, 1302, 1315–16 (8th Cir. 1980) (“Essentially, the National Organization for Women, Inc., (NOW) organized a convention boycott against all states that had not ratified the proposed Equal Rights Amendment (ERA). The impact was such that the Missouri motels and restaurants catering to the convention trade, and the Missouri economy as a whole, were suffering revenue losses.” (footnote omitted)).

165. *Nat’l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 938 (N.D. Ill. 1991), *aff’d*, 968 F.2d 612 (7th Cir. 1992), *rev’d on other grounds*, 510 U.S. 249 (1994).

166. *Id.* at 940.

167. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–14 (1982) (“It is not disputed that a major purpose of the boycott in this case was to influence governmental action.” Further, “[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case.”); Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037, 1062 (2010) (“The presence of economic interest on the part of at least one prominent boycott organizer was widely discussed. A *New York Times Magazine* profile of Charles Evers, a central figure in the Claiborne County boycott, noted that ‘some of the most bitter criticism of Evers has stemmed from his performance as a businessman’ and the fact that ‘he opened his stores in unseemly proximity to the time when white competitors were being hit by the boycotts he had initiated.’” (quoting Walter Rugaber, “*We Can’t Cuss White People Anymore. It’s in Our Hands Now*,” N.Y. TIMES MAG, Aug. 4, 1968, at SM12)).

and contemporary homes.”<sup>168</sup> The community also boasted “a remarkable school system that superiorly educated Black children.”<sup>169</sup> At a time when Oklahoma had only two airports, six Black families owned their own planes.<sup>170</sup> Concerned that Black businesses were doing too well, a white mob responded by looting and burning down Black businesses, homes, and more. Historians believe as many as 300 Blacks were killed during what became known as the Tulsa Riots and that more than 1,250 homes were burned down.<sup>171</sup> Clearly, the conduct was designed to suppress competition, indeed to eliminate it altogether. It was “pure envy, and a vow to put progressive, high achieving African Americans in their place.”<sup>172</sup> But precisely because the primary motivation for the riot was racial resentment and not economic benefit, it would likely fall outside the aegis of antitrust law.

And of course, it wasn’t just Tulsa. On November 3, 1885, approximately “500 armed white men visited the home and business of every single Chinese person living in Tacoma, Washington” and “marched them through the mud to the outskirts of town.”<sup>173</sup> The next day, “Chinese-owned businesses and homes were set on fire to ensure that the people driven out would not feel welcome to return.”<sup>174</sup> Or consider the nationwide protests against Chinese restaurants from 1890 to 1920 that Jack Chin has written about, primarily fueled by anti-immigrant sentiment.<sup>175</sup> Antitrust law, as it stands now, is arguably indifferent to all of this. That said, we can explain in Part IV why antitrust enforcement could provide a meaningful remedy along with constitutional tools and other bodies of law.

While modern antitrust law is decidedly “colorblind”—or at least purports to be—dissenting voices have started to emerge. Late 2020 marks possibly the first time an enforcer publicly acknowledged the disparate effects of anticompetitive practices on Black and brown communities. Rebecca Slaughter, as discussed in the Introduction, asserted that antitrust law must become anti-racist.<sup>176</sup> Her stance was that the veneer of neutrality would foster dominant power structures, and thus, antitrust must acknowledge the anticompetitive effects imposed on Black and brown communities. But current antitrust

168. Josie Pickens, *Black Wall Street and the Destruction of an Institution*, EBONY (May 31, 2013), <https://www.ebony.com/black-history/destruction-of-black-wall-street> [perma.cc/AKV6-MWR3].

169. *Id.*

170. Kimberly Fain, *The Devastation of Black Wall Street*, JSTOR DAILY (July 5, 2017), <https://daily.jstor.org/the-devastation-of-black-wall-street> [perma.cc/MK54-ZFXG].

171. Yuliya Parshina-Kottas et al., *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html>.

172. Pickens, *supra* note 168.

173. Robert L. Tsai, *Racial Purges*, 118 MICH. L. REV. 1127, 1127 (2020) (book review).

174. *Id.*

175. Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681 (2018).

176. See *supra* notes 27–31 and accompanying text.



analysis includes no concern for matters of race and class, which could be considered unsurprising due to the lack of attention paid to this issue from generations of antitrust scholarship.

In fact, antitrust's failure to acknowledge the varying plights of affluent white consumers versus minorities—or even poorer or “lesser” whites—is perhaps predictable. The next Part delves into the intellectual backbone of antitrust law to show why enforcement, or business law writ large, has implicitly and expressly rejected concern for racial minorities. The term “consumer,” as we explain next, presupposes dominant persons, which implicitly frames antitrust law as a tool designed to foster the welfare of primarily white consumers.

### III. THE WHITENESS OF ANTITRUST

In May 2020, White House economic adviser Kevin Hassett made a statement that went viral—but probably not in the way he, or the Trump Administration, intended.<sup>177</sup> Speaking to CNN about the economic downturn resulting from the Covid-19 pandemic, Hassett stated, “[o]ur human capital stock is ready to get back to work.”<sup>178</sup>

The backlash was swift. For many, the phrase human capital stock, coming from a White House economic adviser, seemed to equate laborers, factory workers, and service industry workers with livestock.<sup>179</sup> Even more problematically, given this country's racial history, many could not help noticing that his statement—Hassett himself is white—also conjured race<sup>180</sup> and a period when Blacks were consigned to a type of “stock” to support not only the economy of the South but indeed the entire United States. Even to the extent it prompted images of factory workers, race still seemed present given our historical association of factory work with second- or third-generation European

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177. Aaron Rugar, “Human Capital Stock”: White House Adviser Kevin Hassett Uses Dehumanizing Term for US Workers, VOX (May 26, 2020, 6:00 PM), <https://www.vox.com/2020/5/26/21270863/kevin-hassett-human-capital-stock-coronavirus> [perma.cc/YVP6-H36K].

178. *Id.*

179. *Id.* (noting the phrase “conjured up images of livestock”).

180. *Id.*

immigrants, groups that were often considered “inferior white races”<sup>181</sup> and had to *become* white,<sup>182</sup> and many who are still perceived as not *really* white.<sup>183</sup>

The point here is not to demonize Hasset. Rather, the point is simply that Hasset’s phrasing surfaced an uncomfortable, if seldom acknowledged, truth. As discussed below, our economic system has always been raced, from who was considered capital, to who benefited from this capitalization, to the creation of the Sherman Act itself. The point too is to set the stage for two other observations: That understanding racial politics can thicken our understanding of modern antitrust law. And that the consumer in the “consumer welfare” standard—the very individual modern antitrust law has been interpreted to protect—was likely prefigured as white.

#### A. Racial Capitalism and the Whiteness of the Sherman Act

There is now a rich literature linking slavery to the evolution of capitalism—indeed, as foundational to it—and scholars are increasingly theorizing “racial capitalism,” which rejects as insufficient the notion of capitalism as “an economic system *simpliciter*.”<sup>184</sup> Instead, “racial capitalism” holds that capitalism has always depended on the exploitation of groups of people, whether along lines of race or caste, and as such, racialized exploitation and capitalism are mutually constitutive.<sup>185</sup> Three things are worth noting about “racial capitalism.” *First*, “racial capitalism” uses the term “racial” in a way that goes beyond current definitions of race. For example, Cedric Robinson, the thinker most associated with “racial capitalism,” uses the term to describe the way colonialism, imperialism, and in turn, capitalism exploited groups such as the Irish, Slavs, Jews, and Roma by relying on notions of racial difference.<sup>186</sup> In other words, racial capitalism’s influence reaches beyond the enslavement of

181. See, e.g., Bruce Baum, *On the History of American Whiteness*, 39 REVS. AM. HIST. 488, 491 (2011) (book review).

182. See generally ROEDIGER, *supra* note 33 (detailing how during the late nineteenth and early twentieth centuries, various immigrant groups—including Italians, Greeks, Poles, Hungarians, and Slavs—were placed on a racial pecking order below whites, but above people of color, and existed in a state of in-betweenness); MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR* (1998); NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010); IGNATIEV, *supra* note 33; KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998).

183. Adam Serwer, ‘Anglo-Saxon’ Is What You Say When ‘Whites Only’ Is Too Inclusive, ATLANTIC (Apr. 20, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/anglo-saxon-what-you-say-when-whites-only-too-inclusive/618646> [perma.cc/7XM7-AGSN].

184. Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 CRITICAL HIST. STUDS. 163, 164 (2016).

185. *Id.*

186. CEDRIC J. ROBINSON, *BLACK MARXISM 2* (Univ. of N.C. Press 2000) (1983). The seeds of “racial capitalism” can also be found in the work of W.E.B. Du Bois, who treated the plantations of Mississippi, the counting houses in Manhattan, and the mills in Manchester, England as part of a single system that relied on race and the “wages of whiteness.” See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS* (4th ed. 2022).

Blacks and the expropriation of land from Native Americans<sup>187</sup> and decisions like *Johnson v. McIntosh*.<sup>188</sup> It also prompts the exploitation of labor from “inferior white races.” *Second*, racial capitalism links the exploitation of racial others with the exploitation of the white working class, arguing that the first facilitated the latter. As the historian Walter Johnson observes, “[t]he history of racial capitalism . . . is a history of wages as well as whips, of factories as well as plantations, of whiteness as well as blackness, of ‘freedom’ as well as slavery.”<sup>189</sup> *Third*, racial capitalists argue that capitalism’s entanglement with racial oppression continues in the present.<sup>190</sup> What has gone relatively unexamined and undertheorized until now is the linkage of race and the development of antitrust law. But the linkage is there.

Part of this is simply a consequence of who was “at the table” when the Sherman Act was passed by the fifty-first Congress and signed into law by President Harrison in 1890. At the time, Congress’s members included 88 senators, 332 representatives, and 9 nonvoting delegates.<sup>191</sup> Of those 429 members, only three were African American, and they were representatives.<sup>192</sup> Moreover, because the Sherman Act was initiated in the Senate—its name comes from Senator Sherman, who proposed the bill—this is where it was primarily debated, without input from anyone of color at all. None of this is meant to suggest that the Sherman Act at its inception was racist. But it is meant to suggest that it necessarily embedded racialized thinking by omission. Even still, the potential for the Sherman Act to be anti-racist was there. Its language was certainly capacious enough, as was its common law and legislative history, to permit courts to apply the Sherman Act in a way that recognizes not only different consumers but communities as well, as we show in Part IV.<sup>193</sup> This potential, however, went unfulfilled. And with the turn to

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187. See ROBINSON, *supra* note 186, at 187; see also K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006 (2016).

188. 21 U.S. (8 Wheat.) 543 (1823).

189. Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOST. REV. (Feb. 20, 2018), <https://bostonreview.net/forum/walter-johnson-to-remake-the-world> [perma.cc/C2TJ-TMXV]. Or as Nancy Fraser puts it, the “subjection of those whom capital expropriates is a hidden condition of possibility for the freedom of those whom it exploits. Absent an account of the first, we cannot fully understand the second.” Fraser, *supra* note 184, at 166.

190. See, e.g., Nancy Fraser, *Is Capitalism Necessarily Racist?*, POLITICS/LETTERS (May 29, 2019), <http://quarterly.politicsslashletters.org/is-capitalism-necessarily-racist> [perma.cc/9BS9-GBUZ] (arguing that even if “nonracial capitalism might be possible in principle, it appears to be barred in practice, thanks to a toxic combination of sedimented dispositions, exacerbated anxieties, and cynical manipulations”).

191. See *Congress Profiles: 51st Congress (1889–1891)*, HIST., ART & ARCHIVES, <https://history.house.gov/Congressional-Overview/Profiles/51st> [perma.cc/J5TE-RMRA].

192. See *Black-American Members by Congress*, HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress> [perma.cc/C2EX-9AHY].

193. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) (“In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the

Bork's "consumer welfare" standard, one could argue it was suppressed altogether.

B. *Bork's Racial Politics and Modern Antitrust Law*

Racialized thinking also lies just below the surface of *modern* antitrust law, which owes its analysis to the influence of the Chicago School and the turn to "consumer welfare" as the primary *raison d'être* for antitrust law. As discussed in Part II, the language of the Sherman Act is brief, and for years courts seemed to rely on several metrics to determine whether an action amounted to a violation. All this began to change in 1978, when Robert Bork, then associated with the Chicago School, published *The Antitrust Paradox*.<sup>194</sup> He argued:

Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of [antitrust law]—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.<sup>195</sup>

For Bork, what Congress had in mind in 1890 was clear. Pointing to several "major structural features"—for example, the *per se* rule against cartels and the distinction between cartels and mergers—Bork extrapolated not just an overarching goal but a single rationale: "consumer welfare" in the form of economic efficiency.<sup>196</sup> It is this rationale, Bork concluded, that "makes that law effective in achieving its goals, renders the law internally consistent, and makes for ease of judicial administration."<sup>197</sup> The impact of his argument was probably larger than Bork could have imagined.<sup>198</sup> Within a few years, antitrust jurisprudence had evolved to track Bork's "consumer welfare" approach.<sup>199</sup>

In many respects, Bork's inferring a single goal of "consumer welfare" seems racially neutral. Most would argue that it *is* neutral, even salutary. But Bork's commitment to consumer welfare is less neutral when one considers who would likely play the role of a consumer. Based on Bork's scholarship, at a minimum, it can be inferred that the term "consumer welfare" was never

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statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed." (footnote omitted).

194. BORK, *supra* note 1.

195. *Id.* at 47.

196. *Id.* at 64–66.

197. *Id.* at 66.

198. Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19, S20 (2014).

199. *Id.*

intended to redress or even understand the varying plights of people, consumers, or communities.

*The Antitrust Paradox* is not the only book Bork is known for. There is also his *Slouching Toward Gomorrah*,<sup>200</sup> published nearly ten years after his failed confirmation hearing to the Supreme Court.<sup>201</sup> In the chapter “The Dilemmas of Race,” Bork blames Black–white relations on “race hustlers” and “modern liberals” and “some university professors of black studies, who teach resentment and fear.”<sup>202</sup> He criticizes “cultural relativism [for insisting] that no culture is superior to any other in preparing individuals to succeed in a complex commercial society.”<sup>203</sup> He describes affirmative action as “really a euphemism for quotas . . . a perfect prescription for racial animosity”<sup>204</sup> and complains that its beneficiaries include “women, Hispanics, Aleuts, Pacific [I]slanders, and American Indians”<sup>205</sup> all leading to “the systematic denigration of white, heterosexual males.”<sup>206</sup> Suggesting that antitrust should be applied without concern for race or discrimination, he opines that it “is doubtful . . . that much discrimination occurs . . . . Any fair-minded observer would have to admit that this country has undergone a drastic decline in racism. Discrimination is alleged much more often than it exists.”<sup>207</sup> He adds that the “prevalence of discrimination is to be doubted because it is economically irrational.”<sup>208</sup> He laments that affirmative action will destroy “what America means.”<sup>209</sup>

In fact, Bork was well aware of the prevalence of discrimination in the American legal system but insisted individual liberty should take precedence. Nor were Bork’s views new: As early as 1963, Bork had written the article “Civil Rights—A Challenge” for the *New Republic*.<sup>210</sup> There, he voiced his opposition to the Civil Rights Act of 1964, an act designed to address the legally sanctioned exclusion of racial minorities from businesses and other opportunities. These exclusions—the inequities of white-only lunch counters, restrooms, and water fountains, not to mention the violent police response to

200. ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* (rev. paperback ed. 2003).

201. The Senate rejected Bork’s nomination by a 58–42 vote on October 23, 1987. Linda Greenhouse, *Bork’s Nomination Is Rejected, 58–42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), <https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html> [perma.cc/72TE-3BQP].

202. BORK, *supra* note 200, at 229–30.

203. *Id.* at 230.

204. *Id.* at 231.

205. *Id.* at 233.

206. *Id.* at 235.

207. *Id.* at 237. He later adds, “[i]t is ironic that racism and sexism have been discovered to be the deep, almost ineradicable, sickness of this culture at precisely the time when they have been successfully overcome. If they have not entirely disappeared, they are mere wisps of their former selves, except when it comes to white, heterosexual males.” *Id.* at 247.

208. *Id.* at 237.

209. *Id.* at 249.

210. Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21.

peaceful marchers—were made ubiquitous by Martin Luther King, Jr., and other civil rights leaders. Well aware of these practices, Bork chose to make his opposition to the legislation clear.

There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate.

....

... It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them.<sup>211</sup>

His views on race were arguably one reason why his confirmation hearing failed. Speaking in opposition to Bork's confirmation, Senator Edward Kennedy famously noted that Bork had "consistently demonstrated his hostility towards equal justice for all . . . . In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women, and in our America there should be no seat on the Supreme Court for Robert Bork."<sup>212</sup> Former President Jimmy Carter even weighed in, sending a letter to the Senate Judiciary Committee: "[A]s a Southerner who has observed personally the long and difficult years of the struggle for civil rights for black and other minority peoples, I find Judge Bork's impressively consistent opinions to be particularly obnoxious."<sup>213</sup>

To be sure, Bork's racial views do not automatically mean that his inferring a legislative intent of "consumer welfare" from the Sherman Act's "major structural features"—his reading of tea leaves, really<sup>214</sup>—was necessarily colored by his social values. But one can conclude that Bork intended "consumer welfare" to exclude any concern or recognition for race effects. And it certainly seems likely that his normative view of antitrust was mediated by his normative view of "what America means," to return to the language he used in "The Dilemmas of Race."<sup>215</sup> And while Bork's conception of "consumer welfare" is

211. *Id.* at 22, 24.

212. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 33–34 (1987) (statement of Sen. Edward M. Kennedy).

213. *Id.* at 4249 (Letter from Jimmy Carter to Sen. Joseph Biden).

214. The number of scholars who have debunked Bork's interpretation of the legislative history is long. 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).

215. BORK, *supra* note 200, at 249.

again different from how the term is used today,<sup>216</sup> the seed for the Court's current approach to "consumer welfare"—that is, a deferential and ostensibly colorblind institution—is clearly in Bork's *The Antitrust Paradox*.

C. *Envisioning the (White) Consumer at the Heart of the "Consumer Welfare" Standard*

There is another way in which racialized thinking is likely embedded in antitrust law. Quite simply, Bork's conception of "consumer welfare," as well as the Court's narrower conception of "consumer welfare," likely both assumed a particular kind of consumer—an idealized consumer—much in the way criminal law and tort law conceived a particular kind of "reasonable man."

One way to understand this idealized consumer is through the history of advertising and the longstanding ways in which the industry at the time of antitrust's reformation conceptualized "consumers" as a class. Consider that it is now commonplace to see people of various races in advertisements. But that was not always so. Prior to the mid-1970s, TV commercials were almost uniformly white.<sup>217</sup> There were two exceptions. The first exception was for products like Aunt Jemima pancake mix and Uncle Ben's rice that included Blacks as "magical experts"—Aunt Jemima knew the secret to pancakes, Uncle Ben the secret to perfect rice—but these ads were targeted to white consumers.<sup>218</sup> Moreover, as Deseriee Kennedy observes, these ads "were designed to provide a point of departure from which consumers could measure themselves and their status in American life."<sup>219</sup> The second exception was for niche market products, such as ads for Black beauty products that would run during the one or two television shows targeted to Black audiences, such as *Soul Train*, a counterpart to *American Bandstand*.<sup>220</sup> Even these niche market ads, airing during Black programs, were unusual enough that the *New York Times* ran a story in 1968 titled, "The Negro Makes a Start in Commercials."<sup>221</sup> Be-

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216. See *supra* notes 103–105 and accompanying text.

217. See Alonzo Kittrels, *Back in the Day: Past Generations Paved Way for Today's TV Ads*, PHILA. TRIB. (Apr. 14, 2018), [https://www.phillytrib.com/lifestyle/back-in-the-day-past-generations-paved-way-for-today-s-tv-ads/article\\_0665b807-5d7c-5f55-8eaf-245171490170.html](https://www.phillytrib.com/lifestyle/back-in-the-day-past-generations-paved-way-for-today-s-tv-ads/article_0665b807-5d7c-5f55-8eaf-245171490170.html) [perma.cc/9VTH-Z9Q8]; see also JASON CHAMBERS, MADISON AVENUE AND THE COLOR LINE I (2008).

218. See Craig Chamberlain, *How Has the Portrayal of African Americans in Advertising Changed over the Last Century?*, ILL. NEWS BUREAU (Feb. 26, 2008, 9:00 AM), <https://news.illinois.edu/view/6367/198806> [perma.cc/T6TF-UQ8R] (interview of Jason Chambers).

219. Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 644 (2000).

220. *Id.* at 655. There were also print ads for Black-targeted magazines such as *Ebony* and *Jet*.

221. Philip H. Dougherty, *The Negro Makes a Start in Commercials*, N.Y. TIMES, Oct. 13, 1968, at F16.

yond these two categories, Blacks were entirely invisible in mainstream television advertising.<sup>222</sup> So were Asians and Latinx individuals.<sup>223</sup> Racial minorities were not who businesses had in mind when they thought about consumers. Blacks “did not exist as consumers for their products.”<sup>224</sup> Or put differently, consumers were prefigured as white.<sup>225</sup> It is not surprising that sociocultural anthropologist Shalini Shankar describes mainstream advertising during this period as “elevat[ing] middle-class whiteness as the ultimate consumer aspiration.”<sup>226</sup>

To further contextualize this, it may help to think about O.J. Simpson. To many Americans, Simpson’s name conjures his arrest, prosecution, and acquittal in connection with the murder of his wife Nicole Brown Simpson and her friend Ron Goldman in 1995;<sup>227</sup> Simpson attempting to flee in his white Bronco while TV crews captured every moment from helicopters; the bloody glove and his attorney shouting, “if it doesn’t fit, you must acquit”;<sup>228</sup> the lead officer Mark Furman being confronted on cross-examination about his history of racism and use of the “n” word;<sup>229</sup> as well as the scenes across the country following news of his acquittal. But long before Simpson was accused of murder, indeed long before he even married Nicole Brown Simpson, he had another claim to fame. Not only was he a famous football player, he was also one of the first Blacks to appear in a mainstream television advertisement—a commercial for Hertz rental cars—aimed at all consumers.<sup>230</sup> The year was

222. Cf. *Race Becomes More Central to TV Advertising*, NBC NEWS (Mar. 1, 2009, 4:31 PM), <https://www.nbcnews.com/id/wbna29453960> [perma.cc/6NCX-X6LH].

223. *Id.*; see Kennedy, *supra* note 219, at 678.

224. CHAMBERS, *supra* note 217, at 1.

225. At the same time, these advertisements also contributed to the social construction of race and the meaning of whiteness. For more on the social construction of race, see Stuart Hall, *The Whites of Their Eyes: Racist Ideologies and the Media*, in GENDER, RACE, AND CLASS IN MEDIA 89, 89–91 (Gail Dines & Jean M. Humez eds., 2d ed. 2003). As Hall notes, “amongst other kinds of ideological labour, the media construct for us a definition of what race is, what meaning the imagery of race carries, and what the ‘problem of race’ is understood to be. They help to classify out the world in terms of the categories of race.” *Id.* at 90 (emphasis omitted). Of course, the social construction of race has long been one of the central concerns of Critical Race Theory. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 5–6 (1994).

226. Shalini Shankar, *Nothing Sells Like Whiteness: Race, Ontology, and American Advertising*, 122 AM. ANTHROPOLOGIST 112, 114 (2020).

227. For an overview of the Simpson case, see Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System—Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233 (1996).

228. David Margolick Los Angeles, *Simpson’s Lawyer Tells Jury That Evidence ‘Doesn’t Fit’*, N.Y. TIMES, Sept. 28, 1995, at A1.

229. Under oath, Fuhrman denied using the word “n” word in the past decade. Audiotape recordings of Fuhrman using the word approximate forty times contradicted his denial. See Jeffrey Toobin, *A Horrible Human Event*, NEW YORKER, Oct. 23, 1995, at 40, 41–42.

230. Frank Schwab, *Hertz Made Advertising History with O.J. Simpson’s Airport Runs*, YAHOO! NEWS (June 13, 2016), <https://www.yahoo.com/news/hertz-made-advertising-history-with-o-j-simpson-s-airport-runs-140015008.html> [perma.cc/9PAE-5YF4].



1975.<sup>231</sup> Even with this breakthrough, advertisements assuming white consumers remained the norm. As one Black advertising agency CEO recently noted, “[y]ou never saw Black love . . . . You never saw Black families.”<sup>232</sup> In 1982, years after the Court adopted the consumer welfare model, the infrequency of Blacks as consumers in TV ads was still significant enough to prompt an article in the *New York Times*.<sup>233</sup> In short, advertising largely prefigured consumers as white, and this conception of the ideal consumer sheds light on the way antitrust cases likely employed the concept as well.

At the same time consumers were prefigured as white, *labor was prefigured as Black, brown, or not fully white*. This produced a dichotomy between labor and consumers, which was predictably tied to race—and again, this was reflected in advertising. Consumers were white, while Blacks existed as “workers, servants, or mammies.”<sup>234</sup> Kennedy writes that prior to the civil rights movement, a consistent theme in advertisements was “Blacks as laborers, agricultural workers, [and] servants.”<sup>235</sup>

The association of people of color and recent immigrants with labor—or “human capital stock” to return to Hasset’s phrasing—was also historical. At the start of the industrial revolution, factories needed unskilled labor and found it in recent immigrants from Italy, Ireland, and Eastern Europe. Indeed, according to one study, by 1920, immigrants and their children comprised over half of the workers in manufacturing and amounted to more than two-thirds of all workers, if one includes third-generation immigrants in the calculus.<sup>236</sup> Jumping ahead to the 1970s when consumer welfare took hold, it was again easy to visualize a racial minority when one thought of labor. According to census data, nearly a quarter of all laborers were either Black or Hispanic, a percentage far exceeding their representation in the population.<sup>237</sup> Perhaps more tellingly, only about 6 percent of white men were laborers; for Blacks and Hispanic men, the percentage was 15.79 and 10.10, respectively.<sup>238</sup> The numbers were equally extreme in the service industry.<sup>239</sup> And they remain so

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231. *Id.*

232. Will Jones, *Chicago Black-Owned Advertising Agency Reflects on Popular 70s TV Commercials*, ABC7 (Feb. 28, 2021), <https://abc7chicago.com/black-owned-burrell-communications-group-vintage-ads-chicago/10374467> [perma.cc/K7AE-6PYN].

233. Phillip H. Dougherty, *Frequency of Blacks in TV Ads*, N.Y. TIMES, May 27, 1982, at D19.

234. Kennedy, *supra* note 219, at 644.

235. *Id.* at 642–43; *see also* CHAMBERS, *supra* note 217, at 6 (noting that after World War I, Blacks tended to be depicted as “cooks, porters, or agricultural laborers” in advertisements).

236. Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution from 1880 to 1920*, 38 SOC. SCI. RSCH. 897, 904–05, 913 (2009).

237. BUREAU OF THE CENSUS, U.S. DEP’T OF COM., 1970 CENSUS OF POPULATION: DETAILED OCCUPATION OF EMPLOYED PERSONS BY RACE AND SEX FOR THE UNITED STATES 739–45 tbl. 223 (1973), <https://www2.census.gov/library/publications/decennial/1970/pc-s1-supplementary-reports/pc-s1-32.pdf> [perma.cc/TT92-Q9C6].

238. *Id.*

239. *Id.*

now. For low-status jobs such as working in food plants, race is even more marked, so much so that social scientists have coined the term “brown color” worker to discuss occupations in which recent Latinx immigrants make up most of the labor force.<sup>240</sup>

Because the conception of consumers as white was so prevalent, the real impact of the consumer welfare approach to antitrust law was predictable. Simply put, it was easy for those in power to view consumers as white and labor as non-white. For example, confronted with the concentration of markets such as banks or hospitals or grocery stores, it was easy for courts to simply focus on whether consumers writ large—again, prefigured as white—would benefit or be harmed, and ignore that consumers may be situated differently along lines of race and class. All of this should complicate the notional race neutrality of antitrust’s emphasis on “consumer welfare.” It should complicate how we view antitrust and the jurisprudence that has developed around it. And it should prompt us to ask what it would mean to reimagine antitrust in a way that would benefit everyone. That task is taken up in the next Part.

#### IV. REIMAGINING ANTITRUST

Until we reckon with the ideological frame that cripples our [antitrust] enforcement tools, our attempts to revitalize enforcement will fall short of the rehabilitation that is needed to address today’s market power problem.

—Lina M. Khan<sup>241</sup>

The question always lurking in the background of CRT is this: What would the legal landscape look like today if people of color were the decision-makers?

—Roy Brooks<sup>242</sup>

We are gifted by an ability to imagine a different world—to offer alternative values—if only because we are not inhibited by the delusion that we are well served by the status quo.

—Charles R. Lawrence<sup>243</sup>

In “Unlocking Antitrust Enforcement,” a recent collection of features published in the *Yale Law Journal* on the future of antitrust,<sup>244</sup> some of the

240. See Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 304 (2004).

241. Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L.J.F. 960, 978 (2018).

242. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85–86 (1994).

243. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2239 (1992).

244. *Collection: Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916, 1916–2202 (2018) (collecting contributions from antitrust scholars).

most well-respected antitrust scholars offered proposals for revitalizing antitrust enforcement, which has in many ways been anemic since the Bork revolution, and now seems even more so in the face of the sweeping market power many firms enjoy. Indeed, the calls for some antitrust enforcement—any antitrust enforcement—have extended beyond the pages of law reviews. Debates about antitrust enforcement have become mainstream<sup>245</sup> and now appear in newspapers and magazines, from *Teen Vogue*<sup>246</sup> to an article by Bork's son in the *National Review*.<sup>247</sup> President Biden has even called for more antitrust enforcement tools.<sup>248</sup> For many, the antitrust regime is desperately in need of an infusion of new ideas, and the published articles offered several laudable ones. As Lina Khan, at the time the Director of Legal Policy at the Open Markets Institute and a Visiting Fellow at Yale Law School, put it in her overview of the *Yale Law Journal* collection, many of the contributions were “timely and valuable.”<sup>249</sup>

However, Khan, who would go on to become the Chairperson of the FTC, also noted that the offered proposals seemed to take the current “consumer welfare” approach of antitrust law, along with the increasing reliance on the rule of reason, as a given.<sup>250</sup> The proposals, Khan wrote, “pick at the symptoms of an ideology rather than the ideology itself.”<sup>251</sup>

What was needed, Khan made clear, is something more. Specifically, she called for a different way of thinking that would get “to the heart of why the current regime is crippled, enabling us to tackle the underlying theories and assumptions that have defanged antitrust.”<sup>252</sup> But in calling for a different way of thinking, Khan may have yet to grasp the full scope of the problem. The problem, for her, is that our anemic antitrust laws allow the proliferation of monopolies and oligopolies—entities that “depress wages and salaries, raise consumer costs, block entrepreneurship, stunt investment, retard innovation, and render supply chains and complex systems highly fragile.”<sup>253</sup> This is all

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245. Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656–57 (2020) (book review) (observing that “antitrust has one again been thrust to the forefront of public conversation, prompting front page headlines, congressional hearings and investigations, magazine covers, and discussion at a presidential debate” (footnotes omitted)).

246. Jacqui Germain, *Facebook Is a Monopoly—Here’s Why That Matters*, TEEN VOGUE (Oct. 20, 2021), <https://www.teenvogue.com/story/facebook-monopoly-communications> [perma.cc/M2XP-WCM6].

247. Robert H. Bork Jr., *The Coming Antitrust Boomerang on Inflation*, NAT’L REV.: CAPITAL MATTERS (Jan. 12, 2022, 6:30 AM), <https://www.nationalreview.com/2022/01/the-coming-antitrust-boomerang-on-inflation> [perma.cc/Z3EC-RYHX].

248. Jim Tankersley & Alan Rappaport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2021), <https://www.nytimes.com/2021/12/25/business/biden-inflation.html> [perma.cc/5X9N-HCJG].

249. Khan, *supra* note 241, at 963.

250. *Id.* at 963–64.

251. *Id.* at 964.

252. *Id.*

253. *Id.* at 960–61.

true. But our current market structure, and antitrust's current inability to rein it in, also contributes to a perhaps more disconcerting harm, given this nation's troubling history. It entrenches and reifies racial inequality. Instead of being a tool to remedy inequality and "make America what America must become,"<sup>254</sup> it functions as a tool that allows inequality to calcify.

Even with this in mind, it may seem strange, in an Article on antitrust, to turn to Critical Race Theory (CRT), which is usually associated with "race" cases and constitutional law. But this misapprehends the scope of CRT, which has had "profoundly important things to say about law"<sup>255</sup> more broadly, and on occasion, about corporate power and income inequality specifically.<sup>256</sup> Indeed, one of CRT's central tenets is that "both the procedure and substances of American law . . . are structured to maintain white privilege"<sup>257</sup> and to "keep insiders in power."<sup>258</sup> In other words, one of the key interventions of CRT is to show that "colorblind" laws can function to "further insider privileges along the lines of race, gender, and class while marginalizing and obscuring social, political, and economic inequality."<sup>259</sup> Or as Kimberlé Crenshaw more bluntly puts it, the law is "thoroughly involved in constructing the rules of the game, in selecting the eligible players, and in choosing the field on which

254. JAMES BALDWIN, *THE FIRE NEXT TIME* 8 (Modern Library ed. 2021) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

255. CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 1 (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig eds., 2022).

256. See, e.g., DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2021); ROITHMAYR, *supra* note 45; Cheryl L. Wade, *African-American Entrepreneurs: Integration, Education, and Exclusion*, 32 W. NEW ENG. L. REV. 483 (2010); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901 (2003); Leonard M. Baynes, *The Q-626 Report: A Study Analyzing the Diversity of the 626 Largest Businesses, and the 105 Largest Minority-Owned Businesses, in Queens*, 80 ST. JOHN'S L. REV. 1007 (2006); Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235 (2004); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003); Andre L. Smith, *Race, Law, and the Free Market: A Critical Law and Economics Conception of Racism as Asymmetrical Market Failure*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 39 (2012); Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (2017); Steven A. Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the "Liberia" Problem*, 70 EMORY L.J. 1657 (2021).

257. Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 1 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

258. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2250 (2017).

259. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 25 (2019); see also Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2-3 (1991); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1758 (2001).

the game must be played.”<sup>260</sup> Bringing CRT to bear on antitrust would bring into sharp relief a key argument of this Article, that antitrust, like capitalism itself, has always been entangled with race. The goal of antitrust’s current commitment to “consumer welfare” may not explicitly be to “monopolize whiteness,” to borrow a term from Erika Wilson, who uses it to describe how insiders adopt “neutral” rules that maintain their status and reduce opportunities for outsider groups.<sup>261</sup> But it certainly undergirds and “locks in” a hierarchy associated with whiteness.<sup>262</sup>

So how can CRT be brought to bear on antitrust? Put differently, how can CRT help reshape the current ideology of antitrust rather than merely “pick at the symptoms”? And what might our proposed standard—a *community welfare standard* grounded in CRT—resemble? These questions are taken up below. But first, we show that antitrust could be adept at addressing race.

### A. Race, Antitrust, and Economic Efficiency

Antitrust is well-suited to incorporate race in assessing whether conduct is anticompetitive. This is because antitrust law is already designed to ask whether an exclusionary practice caused a market to improve (or diminish) consumer welfare; as such, we demonstrate that systemic racism fits antitrust’s purpose in that it affects a market’s *structural* treatment of people. To the degree that antitrust is ultimately about promoting economic efficiency, it should have in its crosshairs systemic racism, which is a source of market failure causing an inefficient allocation of resources. And antitrust law is, as we explain, more than capable of providing a remedy.

Antitrust is concerned with not just whether a firm has eroded the competitive process but also if it has made a market’s framework less efficient. Consider the consumer welfare standard. A successful lawsuit is required to show that excluded competition caused consumers to suffer an antitrust injury such as higher prices.<sup>263</sup> Importantly, the defendant must have typically acted with such power that it altered the *market’s structure* enough to raise

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260. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRITICAL RACE THEORY].

261. Wilson, *supra* note 10, at 2385 (using the term to explore how insiders promulgated college admission rules).

262. See generally ROITHMAYR, *supra* note 45.

263. William H. Page & John E. Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff*, 82 IOWA L. REV. 127, 127 (1996) (“To be entitled to relief under the antitrust laws, it is not enough for a plaintiff to show that it was harmed by the defendant’s illegal conduct. Under the antitrust injury doctrine, ‘a plaintiff can recover only if the loss stems from [a] competition-reducing aspect or effect of the defendant’s behavior.’ For example, the overcharge to purchasers in a price-fixing case is antitrust injury because it stems from the defendants’ monopolistic output restriction.” (alteration in original) (footnote omitted) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990))).

prices;<sup>264</sup> after all, a firm in a competitive market cannot increase prices—even after dispatching a rival—if enough firms remain to undersell it.<sup>265</sup> The implication is that antitrust law scrutinizes whether anticompetitive behavior has affected a market’s structure such that dominant firms may now charge higher prices or decrease quality.<sup>266</sup>

In making this calculation, antitrust law must define the relevant market.<sup>267</sup> Put differently, to determine whether a defendant possessed sufficient power to increase prices, the court must first understand the market’s metes and bounds (e.g., whether the market is defined as orange juice, juice, beverages, or even juice sold on a worldwide scope versus in certain regions).<sup>268</sup> The court is thus required to describe the market’s structure in order to assess whether reduced competition resulted in restricted output or higher prices.

The consequences of discrimination can be materially similar to a conventional antitrust injury. Scholars describe structural racism as the “normalization and legitimization of an array of dynamics—historical, cultural, institutional and interpersonal—that routinely advantage whites while producing cumulative and chronic adverse outcomes for people of color.”<sup>269</sup> Even if dominant actors lack racist intentions, the market guides their behaviors in ways imposing greater costs on people of color.<sup>270</sup> Said differently, an aspect

264. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) (explaining that a firm must possess market power to demand supracompetitive prices because, absent market power, consumers could merely buy from a cheaper rival—because consumers may patronize the cheaper company, the market should correct when the high-priced firm decreases its prices to the market level, illustrating the importance of market power).

265. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007) (“When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers.”).

266. The term “market structure” is not to be confused with antitrust’s emphasis on structural factors before the consumer welfare standard. During that time, antitrust courts assumed that unconcentrated markets perform more efficiently than concentrated markets and, therefore, a monopoly or oligopoly would perform worse than a competitive market. The belief today is that some markets benefit consumers as a monopoly. The difference is that modern courts must assess whether anticompetitive conduct has altered the market’s structure so that consumer welfare has diminished, as opposed to an antiquated view of antitrust where the market’s structure was dispositive.

267. Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 438–39 (2010) (describing the importance of the market definition question).

268. See generally Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1305 (2017) (discussing the importance of market power and the challenges of the market definition question).

269. KEITH LAWRENCE & TERRY KELEHER, *STRUCTURAL RACISM—CHRONIC DISPARITY: STRONG AND PERVASIVE EVIDENCE OF RACIAL INEQUALITIES* (2004), <http://www.intergroupresources.com/rc/Definitions%20of%20Racism.pdf> [perma.cc/5Y34-7M56].

270. Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 183 (2013) (“This opposition entails a systematic articulation of the persistence of White racial dominance that occurs not only *in spite of* social and legal developments that attempt to facilitate greater equality, but *specifically because* these developments contain

of racism involves how social and economic *structures*—rather than individual actors—disfavor certain races, levying elevated costs on them in a systematic manner. Going back to the example of no-poaching agreements, the anticompetitive conduct embellished systemic racism and manipulated wages to anticompetitive levels at the same time.<sup>271</sup>

Given the parallels between systemic racism and the types of structural harms falling under antitrust’s purview, enforcement *should* involve matters of race. The key is that antitrust law is intended to redress injuries arising from anticompetitive conduct; the same is true of systemic racism, where exclusionary practices can alter a market’s structure whereby Black and brown communities suffer greater costs. As explained earlier, anticompetitive practices have specifically excluded people of color and rendered disparate impacts in predictable and inefficient ways. Since anticompetitive acts can reroute resources to dominant parties (i.e., inefficient) rather than their most productive ends (efficient) to the detriment of marginalized groups, structural racism—whether intended or not—can produce the same systemic inefficiencies regulated by antitrust law. At issue is that antitrust concerns itself with consumers writ large, ignoring the specialized types of injuries levied by anticompetitive conduct on brown and Black people. It is indeed an arbitrary construction to deem certain foreseeable victims of anticompetitive conduct to be irrelevant. If nothing more, antitrust enforcement actions should disaggregate the term “consumer” and recognize that consumers are differently positioned, especially along lines of race. Doing so would not only contribute to understanding the systemic burdens inflicted on racial minorities but it could also play a crucial role in addressing and dismantling structural racism.<sup>272</sup>

Along this line, the CRT scholar R.A. Lenhardt has called for “race audits,”<sup>273</sup> which she describes as “a mechanism for unpacking the systems and structures that produce and perpetuate racial disadvantage.”<sup>274</sup> One can imagine applying something similar in any antitrust analysis. This attention to disparate racial outcomes alone could address some of the racial harms identified in Part I.

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residual privileges and limitations that nonetheless continue to structurally benefit Whites and subordinate people of color and other marginalized communities.”).

271. See *supra* notes 52–57 and accompanying text.

272. Supporting this contention, Commissioner Rebecca Slaughter has even noted that the FTC must acknowledge the impossibility of colorblind enforcement; instead, antitrust “necessarily addresses fundamental economic and market structures” and “these economic and market structures are historically and presently inequitable.” Slaughter, *supra* note 22, at 4.

273. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1534 (2011) (proposing that jurisdictions conduct race audits, a voluntary evaluative measure for identifying racial inequality).

274. R.A. Lenhardt, *According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER RACE & JUST. 741, 761 (2013).

### B. A Critical Race Theory Approach to Antitrust

The ambition of this Article is to imagine how a CRT approach could address some of the symptoms of our antitrust ideology and address the underlying ideology itself via a community welfare standard. The goal is not a detailed framework for every antitrust issue. That is beyond the scope of this Article. But this Article's broad ambition is to reimagine an antitrust ideology from a CRT perspective. It is to ask the question Robert Bork asked in *The Antitrust Paradox*, albeit in a different register. "What is the point of [antitrust law]—what are its goals?"<sup>275</sup> Since "[e]verything else follows from the answer we give,"<sup>276</sup> how should we identify its core project? And it is to take up Lina Khan's challenge, made exactly fifty years after *The Antitrust Paradox* was published, to rethink antitrust and to "tackle the underlying theories and assumptions that have defanged antitrust."<sup>277</sup>

So how might a CRT approach change antitrust? More precisely, how might CRT's commitment to confronting "the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation)"<sup>278</sup> inform how courts should interpret the Sherman Act, or for that matter the Clayton Act? How might CRT's "commitment to radical critique of the law . . . and . . . radical emancipation by the law"<sup>279</sup> or its "fundamental interrogation of all power" help reshape antitrust?<sup>280</sup> And what form might antitrust take, given CRT's observation that capitalism has "[u]nderdeveloped Black America"<sup>281</sup> and that one goal of CRT is to address the material inequalities of communities?<sup>282</sup> In recent years, CRT scholars have rededicated themselves to showing the work CRT can do by providing concrete examples "of the capacity of CRT to reconstruct legal doctrine."<sup>283</sup> As such, what suggestions might CRT offer for reconstructing antitrust doctrine? For that matter, given that the country is projected to become, by the year 2044, a "majority-minority" country with people of color making up more than half of the population;<sup>284</sup> given that it is possible to imagine a

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275. BORK, *supra* note 1, at 47.

276. *Id.*

277. Khan, *supra* note 241, at 964.

278. Cornel West, *Foreword* to CRITICAL RACE THEORY, *supra* note 260, at xi.

279. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899.

280. Capers, *supra* note 259, at 27.

281. See MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA* 47–59, 141–46 (Haymarket Books 2015) (1983).

282. See Sheila R. Foster, *Foreword: Critical Race Lawyering*, 73 FORDHAM L. REV. 2027 (2005); cf. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 473 (1976) (describing inequalities).

283. CRITICAL RACE JUDGMENTS, *supra* note 255, at 11.

284. See SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, REPORT NO. P25-1143, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 9 (2015), <https://census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> [perma.cc/R78Q-D2QS] (projecting a majority-minority country by the year 2044). Projections



future Supreme Court, and lower courts, that reflect the “full diversity of the population along a variety of lines, including race, sex, class, and disability,”<sup>285</sup> to say nothing of a future, more diverse Congress, what might the related, though still nascent, intellectual movement of Afrofuturism have to say about antitrust?<sup>286</sup>

To be sure, CRT “eschew[s] the notion of a fully unified school of thought.”<sup>287</sup> CRT scholar Athena Mutua describes CRT as “a work in progress.”<sup>288</sup> Kimberlé Crenshaw, one of the most well-known CRT scholars, makes a similar point, stating:

CRT is not so much an intellectual unit filled with natural stuff—theories, themes, practices and the like—but one that is dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era. In the same way that Kendall Thomas reasoned that race was better thought of as a verb rather than a noun, I want to suggest that shifting the frame of CRT toward a dynamic rather than static reference would be a productive means by which we can link CRT’s past to the contemporary moment.<sup>289</sup>

That said, CRT’s broad goals do shed some light on what a CRT approach to antitrust might look like, especially when coupled with another of CRT’s central tenets: that in thinking through reforms, we should constantly “look to the bottom” and consider the perspective of the most vulnerable.<sup>290</sup> Indeed, CRT scholars Lani Guinier and Gerald Torres emphasize how looking to the bottom can benefit us all since those on the bottom—Blacks in particular—are so often like “the miner’s canary: their distress is the first sign of a danger

further indicate that by the year 2060, whites will make up just 44% of the U.S. population, while people of color will make up 56%. *Id.* Specifically, Hispanics will make up 29% of the population, Blacks will make up 14%, Asians will make up 9.3%, Native Americans and Pacific Islanders will make up 1%, and multiracial individuals will make up 6.2%. *Id.* at 9–10. The Census Bureau also projects that by 2060, 64% of all children in the United States will be children of color. *Id.* at 10–11.

285. Capers, *supra* note 259, at 49.

286. For a description of how Afrofuturism can reshape law, see *id.* See also Ngozi Okidegbe, *Of Afrofuturism, Of Algorithms*, 9 CRITICAL ANALYSIS L., no. 1, 2022, at 35; Rasheedah Phillips, *Race Against Time: Afrofuturism and Our Liberated Housing Futures*, CRITICAL ANALYSIS L., no. 1, 2022, at 16.

287. Capers, *supra* note 259, at 24; see also CRITICAL RACE THEORY, *supra* note 260, at xiii (noting that “there is no canonical set of doctrines or methodologies to which [CRT scholars] all subscribe”); Gonzales Rose, *supra* note 258, at 2248–49 (observing that part of CRT’s “richness and insight stems from its diversity and internal debates” (footnote omitted)).

288. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 331 (2006).

289. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1261 (2011) (footnote omitted).

290. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (defining “[l]ooking to the bottom” as “adopting the perspective of those who have seen and felt the falsity of the liberal promise”); see also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992).

that threatens us all.”<sup>291</sup> At the same time, CRT insists that we also “look to the top” to see how laws and norms maintain the power of dominant groups.<sup>292</sup>

Given these principles, it is clear that CRT would offer a vision of antitrust that is grounded in eradicating inequality along lines of race, gender, disability, and other forms of subordination. The second commitment follows from and builds on the first. CRT would offer a vision of antitrust that considers not only the welfare of consumers and the opportunities for small businesses but also the welfare of workers and labor. To be sure, implicit in the current “consumer welfare” approach is a disinterest in the plight of differently situated consumers, such as Black and brown consumers. But the standard also betrays an indifference to the workers—again, many Black and brown—who make consumption possible. There is a reason why Eric Posner has titled his recent book, *How Antitrust Failed Workers*.<sup>293</sup> Thus, a CRT approach to antitrust would both attend to the welfare of all consumers—rich and poor, Black and white—however differently situated, to make sure they are treated fairly and equitably, *and* attend to the welfare of labor. After all, CRT takes anti-racism and antisubordination as its core goals, and both are imbricated with consumers and labor. Quite simply, both the welfare of all consumers and the welfare of all workers would factor into any antitrust cost-benefit analysis.

But even this doesn’t fully capture what a CRT approach would bring to antitrust. Others, like Tim Wu, have called for a neo-Brandeisian approach to antitrust.<sup>294</sup> For her part, Sanjukta Paul argues for a return to the “moral economy” origins of antitrust law.<sup>295</sup> But the CRT approach we limn out in this Article goes a step further. Recall that CRT is committed to looking to the bottom and attending to the most vulnerable. Indeed, for those committed to true equality, one tenet is “it’s all of us or none of us.”<sup>296</sup> CRT would offer nothing less than a radical reimagining of antitrust that also attends to the welfare of entire communities.<sup>297</sup>

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291. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* 11 (1st Harvard Univ. Press paperback ed. 2003).

292. Carbado, *supra* note 55, at 1614; *see also* Devon W. Carbado, *Race to the Bottom*, 49 *UCLA L. REV.* 1283, 1285 (2002); *cf.* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

293. ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* 30–41 (2021) (describing the dearth of monopsony cases in antitrust).

294. TIM WU, *THE CURSE OF BIGNESS* 127–37 (2018).

295. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 *YALE L.J.* 175 (2021).

296. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW* (10th anniversary ed. 2020).

297. CRT has long been concerned with communities. *See, e.g.*, Anthony V. Alfieri, *Community Prosecutors*, 90 *CALIF. L. REV.* 1465, 1480 (2002) (“Critical Race Theory is embodied by the ideas of identity, empowerment, and community.”); *see also* Elizabeth M. Iglesias, *Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, in *CROSSROADS, DIRECTIONS, AND A NEW*

Specifically, we advocate for a community welfare vision of antitrust law whereby courts would resist making arbitrary distinctions of who should matter. Whereas courts value the majority of consumers (and perhaps producers) while giving primacy or deference to those with market power, it makes little sense for courts to exclude the multitudes of minority groups, stakeholders, workers, and community members who foreseeably suffer from exclusionary conducts—especially if the status quo privileges the most affluent and powerful. If labor, for instance, would lose under a challenged act, nothing in the Sherman Act, its legislative history, or authority would suggest that this class should be denied an antitrust remedy. If a community would suffer from the closure of local, small businesses or from unemployment or blight, a community welfare standard would permit a court to consider this and respond accordingly.

Speaking more concretely, an emphasis on community welfare would disaggregate the term “consumer.” Recall that antitrust’s analysis lumps all consumers together in quantifying their collective welfare. But this formula, as we explained, ignores whether a minority group suffered different or greater costs, allowing a majority group’s welfare to control the analysis. We again turn to the concept of foreseeability. If a challenged act levies foreseeable harm to a certain community, it should alter the procompetitive presumption. Returning to the example of food deserts, Christopher Leslie found that grocery stores exiting poorer neighborhoods sell their lands encumbered with non-compete clauses; the logical effect concerns the dearth of grocery stores left in minority communities.<sup>298</sup> When a type of anticompetitive conduct can so clearly be expected to harm specific communities, it deserves to lose the presumption of procompetitiveness found in the rule of reason. This would indeed help to disaggregate the term “consumer” and think of communities as a whole.

It is likewise critical that courts scrub their deference to anticompetitive practices.<sup>299</sup> At least where anticompetitive conduct produces foreseeable and uneven effects on marginalized groups—such as when necessities or essential goods are involved—enforcement should adopt a seldom-used standard

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CRITICAL RACE THEORY, *supra* note 257, at 310. Because of this emphasis on communities, our recommended approach also shifts the academic focus from the industry leviathans and market behemoths—Facebook and Amazon and the rest—to argue for an antitrust enforcement that also cares about the smaller, more quotidian anticompetitive acts of smaller players that also cause harm, especially to minority communities.

298. Leslie, *supra* note 6, at 16 (“Scholars have recognized that ‘[t]he presence of a covenant preventing an otherwise ideal site from being used as a grocery store can contribute to the emergence or continuation of a food desert.’ And the imposition of scorched-earth covenants by exiting supermarkets is unfortunately common. For example, as of 2010, Walmart had locked up 250 of its former sites with restrictive covenants that precluded competitors from using the space even though Walmart had abandoned these stores.” (alteration in original) (footnotes omitted)).

299. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (noting that restraints of trade tend to improve consumer welfare).

called the “quick look.”<sup>300</sup> This would effectively swap the burden, compelling those with market power to prove that the act did not actually harm consumers.<sup>301</sup> By using this preexisting approach, it would help to reprogram antitrust by stripping antitrust of its deference for those with market power and ignorance of marginalized groups.

Another important aspect of community welfare would be to abrogate a state’s antitrust immunity. Currently, a state is completely immune from antitrust review as a matter of federalism.<sup>302</sup> This has enabled states and their agencies to restrain trade in markets for lotteries, carceral goods and services, African hair-braiding, and other areas in which people of color are primarily harmed.<sup>303</sup> At least when a state entails a market participant, antitrust enforcement must recognize that states wield more anticompetitive power over marginalized groups than private companies do—a state can indeed erect insurmountable barriers to entry.<sup>304</sup> Given this Article’s objective of recognizing race and power dynamics in antitrust’s framework, it is imperative that antitrust courts review the efforts of states to extract supracompetitive wealth from low-income communities—but as it currently stands, states act within a zone of antitrust immunity.

Our vision is concededly radical and would upend antitrust’s current emphasis on consumer welfare and its privileging of the rule of reason. But in another respect, our approach to antitrust is a project of reconstruction. Indeed, it is a part of the broader CRT project of spearheading a Third Reconstruction,<sup>305</sup> one that would reach the unfulfilled racial justice aspirations of

300. See, e.g., *Cal. Dental Ass’n v. FTC.*, 526 U.S. 756, 770 (1999); see also *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (“Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces. Under this standard, the undisputed evidence supports a finding of anticompetitive effect.” (citation omitted)).

301. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 777 (2012) (“The defining characteristic of the quick look, however, is its ability to shift a burden from the plaintiffs to the defendants without ‘elaborate industry analysis.’”).

302. See Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1389–90 (2016) (explaining antitrust federalism and a state’s antitrust immunity).

303. See, e.g., ANGELA C. ERICKSON, INST. FOR JUST., BARRIERS TO BRAIDING (2016), [https://ij.org/wp-content/uploads/2016/07/Barriers\\_To\\_Braiding-2.pdf](https://ij.org/wp-content/uploads/2016/07/Barriers_To_Braiding-2.pdf) [perma.cc/T65V-KL7M] (discussing the anticompetitive nature of restrictions on hair braiding and the effects on Black and immigrant communities).

304. See generally Gregory Day, *Antitrust Federalism and the Prison-Industrial Complex*, 107 MINN. L. REV. (forthcoming 2023) (describing the higher barriers to entry as well as oppressiveness when states restrain trade).

305. E.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1475–78 (2016) (joining other scholars and activists in calling for a Third Reconstruction to address institutional racism and inequality); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Color-*

the “the First and Second Reconstructions.”<sup>306</sup> Our CRT approach to antitrust excavates, exposes, and reinforces the broad egalitarian concerns that were built into the original foundation of antitrust law, starting with its common law origins, and continuing in the Sherman Act itself. Consider the *Case of Monopolies*, with its emphasis on banning monopolies as tending to the impoverishment of workers and therefore harmful to the commonwealth.<sup>307</sup> Or the emphasis on “the interest of the public” in determining the reach of antitrust law in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, a common law counterpart to the Sherman Act.<sup>308</sup> Consider too some of the language from the Sherman Act’s legislative history. Senator Sherman, for example, spoke not of protecting consumers but of protecting the country as a whole.<sup>309</sup> Early cases after the passage of the Sherman Act in 1890 also support this broader reading. As just but one example, *United States v. Addyston Pipe & Steel Co.* explicitly expressed concern with how anticompetitive acts could harm the ability of workers to earn a livelihood, “with the risk of becoming a public charge.”<sup>310</sup> In short, in terms of what CRT would contribute to antitrust—a commitment not just to all consumers but to communities as well so that all of us are protected—the bones of what we are proposing are already there. Indeed, the fact that the Sherman Act has been understood as “the paradigmatic ‘common-law statute,’ entailing a delegation of lawmaking power by Congress to the courts that spans the field of antitrust,”<sup>311</sup> is precisely what makes recovering these earlier principles and reimagining antitrust so possible.

There is one more thing to say. As CRT scholar Paul Butler recently noted, it has almost “become an essential part of the canon of critical race theory”<sup>312</sup> to reference the Black lesbian poet Audre Lorde’s warning that “the master’s

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*blindness in Post-Slavery America*, 54 ALA. L. REV. 483, 501 (2003) (positing that a Third Reconstruction could forge “a world in which the theory of race ha[s] been debunked once and for all, and universal humanity and brotherly love would reign as the supreme values undergirding our Constitution, our communities, and our lives”).

306. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 765 (1994) (identifying CRT as, in many ways, being engaged in a project of reconstruction and finishing “the unfinished revolutions of the First and Second Reconstructions”). Other CRT scholars and fellow travelers have similarly called for a Third Reconstruction.

307. *The Case of Monopolies* (1603) 77 Eng. Rep. 1260, 1263; 11 Co. Rep. 84 b, 86 b.

308. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] AC 535 (HL) 566 (appeal taken from Eng.).

309. 21 CONG. REC. 2456–63 (1890).

310. 85 F. 271, 279 (6th Cir. 1898).

311. Paul, *supra* note 295, at 180; Khan, *supra* note 245, at 1678 (noting that “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”).

312. Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master’s House, and the Master Wouldn’t Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1984 (2022).

tools will never dismantle the master's house."<sup>313</sup> "They may allow us temporarily to beat him at his own game," according to Lorde, "but they will never enable us to bring about genuine change."<sup>314</sup> But Lorde was not suggesting that the master's tools have no role to play. Rather, as the rest of her speech makes clear, she was asking us to reject the dominant ways of thinking and doing that "keep the oppressed occupied with the master's concerns."<sup>315</sup> Here, what we are proposing uses the master's tools we have at our disposal—the common law background to the Sherman Act and its intellectual backbone—to reimagine and rebuild antitrust law *beyond* "the master's concerns." In fact, we are even using a tool left by Bork himself, since in his words, at least, he advocated for a goal of "consumer welfare" that included the total welfare of society, however cramped and exclusionary his vision of society may have been.<sup>316</sup> In a very real sense, our CRT approach to antitrust would mean just that, a true commitment to the total welfare of all of society. One day, it might even mean a more multicultural perspective on market logic or even a communitarian vision of market logic that fosters equity over equality and that rejects capitalistic notions of efficiency altogether.<sup>317</sup> But for now, antitrust law should borrow from the teachings of CRT to at least foster society's welfare in a manner that includes those who have historically been left at the bottom. Such an approach, if taken seriously and with attention to addressing race and inequality, would make antitrust truly inclusive. And it would benefit us all.

#### CONCLUSION

Antitrust has a race problem. But as we have demonstrated, this problem is not inevitable. Change is possible. We have mined the history of antitrust law and consumer welfare—then leaned on CRT's lessons—to reimagine antitrust. Our goal in proposing a community welfare vision is to restructure enforcement to benefit us all, including marginalized groups. The task, now, is simply to begin.

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313. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 100, 102 (Penguin Books 2020) (1984).

314. *Id.*

315. *Id.* at 103; see, e.g., Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 *ARIZ. L. REV.* 113 (2005); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 680 (1995) ("Through jury nullification, I want to dismantle the master's house with the master's tools.").

316. For whatever reason, those who wanted antitrust to promote "the wealth of nations" didn't actually construct the analysis to do so—again, labor and communities were excluded.

317. A special thanks to Etienne Touissant for suggesting we think this way.

