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## Foreword: Rethinking Antitrust

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## FOREWORD: RETHINKING ANTITRUST

**Susan Navarro Smelcer and Jeffrey L. Vagle\***

After a lengthy period of quiescence, public interest in, and regulatory activity around, antitrust law have taken on a renewed vigor.<sup>1</sup> Policy shops and think tanks have focused on antitrust as the antidote for concentrated agricultural sectors, ascendant technology platforms, wage and employment issues, and more.<sup>2</sup> As of this writing, new leadership in the Federal Trade Commission and the Department of Justice’s Antitrust Division seek to rewrite the rules governing horizontal merger review and publicly seek expanded enforcement roles across the economy.<sup>3</sup>

Why the sudden resurgence of interest around a subject that has been relatively quiet for nearly four decades? In the postwar era, antitrust activity was quite robust—due in no small part to the theory that competition policy, in its goals of spreading economic and

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1. See generally, Jane Monahan, *Turning of the Tide on US antitrust*, BANKER (Nov. 11, 2021, 2:49 PM), <https://www.thebanker.com/Banking-Regulation-Risk/Politics-Economics/Turning-of-the-tide-on-US-antitrust?ct=true>, [https://perma.cc/92PN-ARKB] (“‘There is more dissatisfaction with the antitrust status quo, with the nature of competition in the US marketplace, than at any point in my lifetime,’ Mr. Baer affirms. ‘It is one area where there is more bipartisan dissatisfaction than just about any other area of public policy.’”); Eric Posner, *Antitrust is Back in America*, PROJECT SYNDICATE (Mar. 12, 2021), <https://www.project-syndicate.org/commentary/biden-big-tech-and-the-return-of-antitrust-by-eric-posner-2021-03> [https://perma.cc/D8CF-5U62]; *The Growing Demand for More Vigorous Antitrust Action*, ECONOMIST, <https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action> [https://perma.cc/62NH-GSNW] (Jan. 11, 2022); Lynne Pepall & Dan Richards, *Big-Tech and the Resurgence of Antitrust*, ECONOFACT (Jan. 28, 2019), <https://econofact.org/big-tech-and-the-resurgence-of-antitrust> [https://perma.cc/34JL-JFXG]; Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [https://perma.cc/AK8K-A329].

2. See, e.g., Press Release, U.S. Dept. Agric., Agriculture Department and Justice Department Issue Shared Principles and Commitments to Protect Against Unfair and Anticompetitive Practices (Jan. 3, 2022), <https://www.usda.gov/media/press-releases/2022/01/03/agriculture-department-and-justice-department-issue-shared> [https://perma.cc/JA43-8XST]; Eduardo Porter, *A New Legal Tactic to Protect Workers’ Pay*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/economy/wages-antitrust-law-us.html> [https://perma.cc/5U5X-6TZW].

3. Monahan, *supra* note 1; Posner, *supra* note 1.

political power to the many rather than the few, was a means of fighting authoritarianism.<sup>4</sup> Starting in the late 1970s, however, antitrust theory shifted away from non-economic goals, based instead on benefits to consumers.<sup>5</sup> These shifts in policy have not come from new legislation.<sup>6</sup> Indeed, antitrust’s foundational texts have changed little since their initial writing—a time when steel, oil, and railroads were matters of chief concern.<sup>7</sup> But changing antitrust doctrine, as pronounced by administrative agencies and courts, is rooted in evolving economic theory and tools, with courts interpreting the original statutes through these new lenses.<sup>8</sup> Since the last doctrinal shift, however, economic and political theories have evolved, but antitrust precedent has been slow to change.<sup>9</sup> Recognizing this gap, policymakers, scholars, and advocates have called for a reexamination of original antitrust principles to better address contemporary economic and social issues.<sup>10</sup>

This Symposium Issue begins with two articles that reflect on several aspects of the disconnect between the economic reality of our deeply interconnected economy and economic theory as applied by agencies and courts. In the first Article of this Issue, *Cognitive Foreclosure*, Peter O’Loughlin addresses the shortcomings of rational choice theory—a foundational assumption of microeconomic theory—to effectively regulate (or even describe) consumer behavior in digital markets.

In particular, O’Loughlin examines the role that behavioral economics may play in antitrust theory and argues for increased attention to the ways in which companies, particularly technology

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4. See, e.g., JEFFRY FRIEDEN, *GLOBAL CAPITALISM: ITS RISE AND FALL IN THE TWENTIETH CENTURY* (2007); Richard N. Cooper, *Capsule Review: Antitrust and the Formation of the Postwar World*, FOREIGN AFFS. (2002) (reviewing WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD* (2002)), <https://www.foreignaffairs.com/reviews/capsule-review/2002-05-01/antitrust-and-formation-postwar-world> [<https://perma.cc/73HK-SQG5>].

5. Stucke & Ezrachi, *supra* note 1.

6. *Id.* The rise of the Chicago School of Economics in the late 1970s led to a decline in antitrust policy and enforcement, “which the Reagan administration endorsed with its enforcement priorities, judicial appointments, and amicus briefs to the Supreme Court.” *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Monahan, *supra* note 1.

companies, can engage in anticompetitive behavior by manipulating their consumers' inherent biases and limited information. This behavior is not new in the digital realm. Similar actions have been the basis of claims against Microsoft in both the United States and the European Union, which have been litigated for years.<sup>11</sup>

But O'Loughlin highlights the increasingly pernicious nature of firms' efforts to exploit cognitive biases when the product used by consumers is a technological black box. These types of products, O'Loughlin argues, allow technology firms to induce "demand-side antitrust foreclosure." Rather than actively foreclosing a rival seller of transparent tape<sup>12</sup> or prescription drugs,<sup>13</sup> firms can induce consumers to foreclose their rivals for them.

Firms' ability to manipulate consumers is especially pronounced on digital platforms. Digital purveyors are "uniquely positioned to totally control . . . and manipulate platform context and interface, product positions, and information" far beyond the capacity of traditional brick-and-mortar stores.<sup>14</sup> This wholesale control over the consumer implicates a variety of cognitive responses that makes consumers more susceptible to manipulation.

Is this behavior anticompetitive? More specifically, does it reach a level of anticompetitive behavior so as to trigger antitrust investigation or enforcement? The answers to these questions depend heavily on which school of antitrust thought is responding. Rational choice theory is the foundation for modern antitrust law. Behavior short of outright deception would be an impossibility for a rational actor. But our understanding of human cognition has shifted over time—and in ways that are difficult to reconcile with our existing understanding of what constitutes actionable anticompetitive behavior.

O'Loughlin's wide-ranging discussion of demand-side foreclosure points to the need to reinterpret the textual bases of antitrust law in

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11. See, e.g., Peter O'Loughlin, *Cognitive Foreclosure*, 38 GA. ST. U. L. REV. 1097, 1120–22 (2022) (discussing the European Commission's 2007 ruling that pre-installation of the Window's Media Player in Windows constituted an abuse of dominance because it served to foreclose other media players); see generally Case T-201/04 Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601.

12. LePage's, Inc. v. 3M, 324 F.3d 141, 145 (3d Cir. 2003) (en banc).

13. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394 (3d Cir. 2016).

14. O'Loughlin, *supra* note 11, at 1131.

light of our evolving understanding of human cognition. How we decide where the boundaries of antitrust lie—and who decides those boundaries—will play a decisive role in the near future of antitrust policy.

In this Issue’s second Article, *The Abuse of Offsets as Procompetitive Justifications*, Ted Tatos and Hal Singer illustrate how a traditional element of antitrust analysis—the consumer welfare standard—has been distorted in its application across platform markets and in ways that harm workers. The consumer welfare standard has been described as “the maximization of wealth or consumer want satisfaction,”<sup>15</sup> which occurs when “economic resources are allocated to their best use . . . and when consumers are assured competitive price and quality.”<sup>16</sup>

Tatos and Singer rightly point out that malleability of this standard poses a danger to consumers within the Supreme Court’s prevailing approach to evaluating anticompetitive harms: the Rule of Reason.<sup>17</sup> When courts evaluate allegedly anticompetitive conduct—such as a collaboration between competitors or the imposition of non-compete requirements on vendors—courts will ask whether the allegedly anticompetitive behavior can be redeemed by any procompetitive benefits.<sup>18</sup> These countervailing procompetitive benefits can be thought of as “offsets.”<sup>19</sup>

Courts and agencies have only credited procompetitive offsets that occur within the same market for the same group of consumers. For

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15. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

16. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

17. Ted Tatos & Hal Singer, *The Abuse of Offsets as Procompetitive Justifications: Restoring the Proper Role of Efficiencies after Ohio v. American Express and NCAA v. Alston*, 38 GA. ST. U. L. REV. 1179, 1185–95 (2022).

18. As Tatos and Singer explain, this is the second step in the burden-shifting “rule-of-reason” analysis used by courts to assess the legality of potentially anticompetitive conduct under the Sherman Act. First suggested in *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918), the modern rule of reason first requires the plaintiff to demonstrate that the defendant’s conduct is anticompetitive. Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50 (2019). The burden then shifts to the defendant to offer a procompetitive justification. *Id.* The plaintiff must then “demonstrate that the restraint is not reasonably necessary to achieve the restraint’s objectives or that the defendant’s objectives could be achieved by less restrictive means.” *Id.* at 50–51. Finally, the court then evaluates whether the procompetitive benefits outweigh the anticompetitive harm. *Id.* at 51.

19. Tatos & Singer, *supra* note 17, at 1185–91.

example, Tatos and Singer note that “balancing the harm to consumers from higher prices . . . against benefits to shareholders from an increase in the price of a company’s stock” would be not only absurd but cut against the very purpose of the Sherman Act.<sup>20</sup>

But here is where the amorphous boundaries of the consumer welfare standard make the analysis difficult to pin down. Despite the obvious absurdity inherent in this argument, Tatos and Singer observe that defendants may turn to a logical fallacy introduced by the Supreme Court’s 1986 decision in *NCAA v. Board of Regents*.<sup>21</sup> Here, Tatos and Singer argue that the Court “laid the groundwork for judicial acknowledgment of consumer demand for intercollegiate athletics as a potential offset for worker harms, even though that offset did not take the form of lower prices, higher output, or improved quality [within the same market].”<sup>22</sup>

Courts’ resistance to this obvious absurdity has been further weakened by the Supreme Court’s 2016 decision in *Ohio v. American Express*. As Tatos and Singer explain, *American Express* adopted an understanding of multisided markets that widened an already-cracked door to claims that procompetitive offsets *outside* of the market directly affected by anticompetitive conduct. There, the Court credited arguments that courts should consider the benefits to consumers derived from harm imposed on merchants by American Express.

Tatos and Singer’s arguments ring loudly for a statutory repeal of *American Express* and clearly illustrate how the fluidity of the consumer welfare standard harms student-athletes. But they also sound a clear warning for courts’ analyses of potentially offsetting benefits across markets. This is especially true for newly emerging digital markets that, by their very nature, constitute multisided platforms. Tatos and Singer’s Article raises many unanswered questions about how courts will analyze these markets. Who is the consumer? Whose welfare matters when determining who can and will be harmed?

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20. *Id.* at 1189.

21. *Id.* at 1198 (discussing *NCAA v. Board of Regents*).

22. *Id.* at 1199.

In this Issue's final piece of scholarship, Student Note, *COPPA and Educational Technologies: The Need for Additional Online Privacy Protections for Students*, Diana Skowronski, J.D. Candidate, 2023, argues that the emergence of technology-related issues, such as data privacy, requires regulatory protections that our current laws and policies fail to achieve. Recent scholarship has explored the possibility of antitrust law as a possible solution to the problems that have accompanied the explosive growth of networked technologies, especially given the enormous economic and social power that has been consolidated within a relatively few large technology firms.

Skowronski, however, contends that certain areas like data privacy require their own comprehensive privacy laws, as market competition alone is unlikely to solve these unique problems. Skowronski's Student Note serves as a reminder that the future of antitrust may not be antitrust at all. Rather, issues that we are discussing today as potential antitrust issues worthy of enforcement may be better addressed through a more narrowly tailored regulatory regime.

Where will antitrust enforcement move next? The problems raised by contemporary markets, firms, and technologies prompt questions about regulation's role in a swiftly changing political, legal, social, and technological landscape. These issues force us to reexamine the models that we have relied on in the past and ask: Do they still serve us well? The integration of networked technologies into many facets of everyday life has brought with it network effects and competitive dynamics that were not foreseen when the original antitrust statutes were drafted. Will the continued consumer welfare framing smooth any bumps in the road ahead, or does it miss noneconomic factors that may result in more harm than a rise in consumer prices? The participants in the Symposium fully engaged in this important debate, highlighting some of the key areas of contention between the differing schools of thought on competition policy. We hope this Issue will also play a part in further advancing this conversation.