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Uncloaking the Invisible Hand: Reintroducing Fairness to Antitrust Analyses

Jennifer Coté

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Jennifer Coté (she/her/hers)

Uncloaking the Invisible Hand: Reintroducing Fairness to Antitrust Analyses

20 U.N.H. L. Rev. 195 (2021)

ABSTRACT. Antitrust doctrine adopted the Chicago School's narrow consumer welfare and economic efficiency analysis in the early 1970s. Since then, enforcement has drastically reduced, and market concentration has substantially increased. But the Chicago School is not true to either the intent of the original antitrust legislation – the Sherman Act – nor to the 'economist' they adopted as their ultimate advocate, Adam Smith. The Chicago School has cherry picked Adam Smith's written works to support market deregulation and the existence of a perfectly efficient, rational marketplace, but this is not an accurate rendition of his works. Rather, Adam Smith was a philosopher who emphasized humans are more than *homo economicus*; the market requires morality and social support to function. The absence of fairness and morality from antitrust analyses allows for court decisions like *Ohio v. Am. Express Co.*, mergers like that between AT&T and Time Warner, and monopolies like Amazon to continue existing without challenge.

Adding fairness to the equation is one method of encouraging competition and leveling the playing field. The Sherman Act's legislators and Adam Smith explicitly contemplate fairness and morality. The courts are already equipped to judge fairness in complex economic and business-centered cases. Legislators are currently pushing to give government antitrust enforcers more power to regulate, but the courts must also be prepared to deal with lawsuits challenging anticompetitive behavior. Fairness is one factor easily supported by intent, history, reason, and necessity.

AUTHOR. University of New Hampshire School of Law, J.D. Candidate 2022. Wholehearted gratitude to Professor William Murphy for his guidance and patience throughout turning this paper from a mere idea into a reality, and to the *University of New Hampshire Law Review* staff for their diligence and support.

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INTRODUCTION

Antitrust law, on its face, is boring. Very few members of the public beyond legal and economic academia would deign to admit they found interest in the minutia of merger agreements and contractual provisions designed to compete with other market participants. Yet the past several years have brought antitrust theory to the forefront of popular news topics discussing growing wealth gaps and large companies dominating different market sectors. Monopolies, many agree, are one root of inequality. One company can dominate a sector of the market through different methods, drive the price of a given commodity up, and severely impact the average American. Below the surface of the public's agreement that monopolies are bad, however, are two general and divergent schools of thought for how and when to address monopolization and anticompetitive practices.

A diametric opposition divides the conversation. The Chicago School of Thought focuses on laissez-faire policies, economic efficiency, and consumer welfare. The antitrust scholar group, informally known as the 'Hipster Antitrust' movement, focuses on reinvigorating simultaneous moral, political, and economic considerations.[1] The former argues that low prices make consumers happy, and that antitrust law protects competition, but does not safeguard "inefficient" firms.[2] The latter argues that "rather than merely analyzing whether corporate actions result in lower consumer prices, the law should recognize that the excessive concentration of economic power in a handful of large companies is inherently bad, because it exacerbates other ills, such as income inequality and labor abuses, and gives undue political influence to too few people."[3] Despite antitrust law's origins in "deep suspicion of concentrated private power, [antitrust] now often promote[s] it."[4]

The latter argument is consistent with the spirit of antitrust laws and antimonopoly sentiment promulgated from the late 18th century and the founding fathers to legislators of the Sherman Act of 1890. The applicability of relatively 'old'

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1 *See* Charles E. Elder, *"Hipster Antitrust" Movement Takes Center Stage in Congress*, LEXOLOGY (Aug. 5, 2020), https://www.lexology.com/library/detail.aspx?g=e28ec218-5d59-461c-8559-51c927 00aea2 [https://perma.cc/47KA-Z6J4].

2 *See* Whet Moser, *The Tide is Turning Against Tech's Monopolies – Because of U. of C.*, CHICAGO MAG (Sept. 20, 2017, 10:47 AM), https://www.chicagomag.com/city-life/september-2017/university-of-chicago-big-tech-monopoly/ [https://perma.cc/E6VX-SCW9].

3 *See* Elder, *supra* note 1.

4 David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html?searchResultPosition=3 [https://perma.cc/S4HD-JA6K].

precedent has not diminished in recent years. Growing wealth inequalities have spurred hoary philosophies to new use. Since March 2020, while most Americans have suffered under the economic consequences of the pandemic, U.S. billionaires have amassed more than $1.2 trillion – up more than 44% - in growth.[5] While those affected most by high unemployment rates have fought for comparatively small stimulus checks to assist with living expenses, billionaires' wealth gain over the past 11 months would be enough to pay each of the 331 million Americans $3900.[6] Jeff Bezos, former CEO of Amazon, and current centi-billionaire, saw his wealth grow from $113 billion in March to $189.3 billion.[7] If Bezos's wealth increase alone was distributed across his 810,000 U.S. employees – whose median pay was just over $35,000 in 2019 – he could give a $94,000 bonus to each employee without growing "any 'poorer' than he was 11 months ago."[8]

But how does antitrust law begin to address wealth inequalities and serious concerns over increased market concentration? First, antitrust ought to go beyond the Chicago School's economic efficiency and consumer welfare considerations. Rather, it should contemplate how fairness and morality concerns fit into the judicial analysis and return to the original values imbued in antitrust history. At the legal system's core and sewn into the fabric of law are the "conceptions of fairness, justice, and equality." [9] While the inclusion of "non-economic aims in the substantial assessment of anticompetitive practices" usually results in "all doctrinal hell break[ing] loose[,]" it is only "natural that aiming for fair competition would be expected from antitrust legislation."[10]

This paper will first address the history of antitrust prior to the Chicago School of Thought through the founders' considerations of monopolies when writing the constitution and legislative intent supporting the introduction of the Sherman Act in Part I. Part II will explain the current Chicago School of Thought, the inconsistencies of its position with Adam Smith's work, and the multitude of ways the Chicago School has failed to address consumers and exacerbated inequalities by not considering fairness and morality as part of the analysis. Finally, Part III will

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5 Chuck Collins, *Updates: Billionaire Wealth, U.S. Job Losses and Pandemic Profiteers*, INEQUALITY.ORG (Feb. 24, 2021), https://inequality.org/great-divide/updates-billionaire-pandemic/ [https://perma.cc/NFA4-3FGS].

6 *Id.*

7 *Id.*

8 *Id.*

9 Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, THE CHINESE UNIV. OF H.K., Sept. 2018, at 2 (quoting Judge James Allsop).

10 *Id.*

note the growing movement to reinvigorate antitrust law, and how courts might employ fairness and morality considerations.

I. ANTITRUST HISTORY PRIOR TO THE CHICAGO SCHOOL OF THOUGHT

The threat of monopolies and oligopolies is not a recent concern. The founders, while writing the U.S. Constitution, pushed for an anti-monopoly clause in the document that would govern the nation.[11] It should first be recognized that the monopolies the founders were concerned with were government monopolies; there were no concentrations of industrial power. The Constitution is only concerned with the people versus the government, *but* that does not diminish the founders' concern about the concentration of power, regardless of who held that power.

This vitriol for monopolies was equated to the need for a bill of rights. Thomas Jefferson, in a letter to James Madison, wrote that "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse" and that he did not like the "omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, [and] restriction against monopolies[.]"[12] While Jefferson argued it was better to "abolish . . . Monopolies, in all cases, than not to do it in any[,]" Madison argued monopolies ought be allowed in the limited circumstances where they encourage literary works "and ingenious discoveries."[13] Madison clarified that monopolies were "justly classed among the greatest nuisances in Government."[14] Though Madison ultimately omitted an anti-monopoly clause from the Bill of Rights, he made clear:

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to it part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the world; but are the means of acquiring property strictly so called.[15]

What is clear from Madison's strong assertions about monopolistic behavior

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[11] Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism* 29 (Nw. Univ. Sch. of L. Scholarly Commons, Working Paper No. 214, 2012).

[12] *Id.* at 30 (quoting letter from Thomas Jefferson to James Madison).

[13] *Id.* at 30–31.

[14] *Id.*

[15] *Id.* at 36, citing James W. Ely, *To Pursue Any Lawful Trade or Avocation: The Evolutions of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 931 (2006) (quoting JAMES MADISON, PROPERTY (Mar. 29, 1792), *reprinted in* 1 THE FOUNDER'S CONSTITUTION: MAJOR THEMES 598, 598 (Phillip B. Kurland & Ralph Lerner eds., 1987)).

and citizens' rights against that behavior is the consistent attitude that monopolies are 'evils.' This moral characterization indicates that as early as the late 18th century – and likely earlier – monopolies were intrinsically connected to aspects of fairness. Neither founder's comments were predicated on how monopolies might benefit consumer welfare or overall decrease prices; their opinions were founded on what was beneficial for the greater good. Madison asserted, "[m]onopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions."[16]

The true advent of antitrust law in the United States, however, emerged in the late 19th century. Emerging antitrust policy during this time period was based largely on moral and political forces.[17] Wealth was concentrated in a select few wealthy capitalists looking to further gain market power and accumulate more wealth across a developing nation. Early legislation seeking to break up these trusts were "fought not by economists, but in the political and moral sphere."[18] The first major antitrust policy was enacted in 1890: the Sherman Act was a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[19] As one of several core antitrust laws, its goal is to "protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[20] Penalties under the statute – both civil and criminal – are severe, with criminal penalties reaching up to $100 million for corporations, or double the amount for conspirators of antitrust violations gained from illegal acts or double the amount lost by those affected by the antitrust violations if prosecuted under federal law.[21]

Section 2 of the Sherman Act explicitly makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[22] This Section is used to break concentrations of power, and guard

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16 *Id.* (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 614–18 (1971) (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)).

17 William Murphy & Raymond Friel, *Free or Fair: a New Paradigm for Competition Policy?*, 27 COM. L. PRAC. 207, 208 (Nov. 2020).

18 *Id.*

19 *The Antitrust Laws*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/A7EQ-8H4D].

20 *Id.*

21 *Id.*

22 15 U.S.C. § 2.

"against the use of monopoly to unfairly block competition, fix prices, gain a competitive advantage or destroy a competitor."[23] By taking action under Section 2 of the Sherman Act, as opposed to Section 1, enforcers do not have to prove an agreement to participate in price rigging; rather, "the fact that a company possesses and abuses a high degree of market power warrants antitrust scrutiny under Section 2."[24] Before the 1970s, Section 2 was successful in bringing monopolization cases against many corporations, including Standard Oil, but the modern Chicago School theory has made it extremely difficult for plaintiffs to bring a case under this Section.[25]

The Chicago School is responsible for taking Section 2 as a functional law and converting it into a practically unusable, unfeasibly elevated standard. This high standard – showing an anticompetitive effect, proving the monopoly has market power, employing expensive economists, and hoping that a judge might weigh the factors in favor of the plaintiff for once – has been acutely analogized to saying:

> We can't prosecute a mob boss simply for being a mob boss and stealing from the neighborhood – even though the law bars these activities. Instead, we would also have to show that he is the *only* mob boss in town *and* that he is burning down the offices of his competitors. But showing burned down buildings and video evidence of the arson still wouldn't be enough for the court: we'd have to pay an economist large amounts of money to validate that the mob boss profited from his scheme more than the victims lost. And the economist would insist on using expensive cameras and other instruments to measure the heat of the fire. Together, this discourages prosecutors from taking cases against mob bosses in the first place.[26]

The Sherman Act's legislative history makes clear that this was never intended. In fact, "[l]egislative history reveals that the idea that 'Congress designed the Sherman Act as a "consumer welfare prescription,"' is wrong."[27] During the passage of the Sherman Act, Senator John Sherman related a king's political power with a king's power over "the production, transportation, and sale of any of the necessities of life."[28] Monopolistic overcharging was characterized as "robbery" and "extortion

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[23] *What You Need to Know About Section 2 of the Sherman Act*, AM. ECON. LIBERTIES PROJECT (Oct. 8, 2020), https://www.economicliberties.us/our-work/section2-explainer/# [https://perma.cc/DQ6P-FJU8].

[24] *Id.*

[25] *See id.*

[26] *Id.*

[27] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 739 (2017) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

[28] *Id.* at 740 (quoting 21. CONG. REC. 2457 (statement of Sen. Sherman)).

which makes the people poor."[29] Other senators condemned trusts as thievery from the people and in the case of a beef trust, it "robs the farmer on one hand and the consumer on the other."[30]

The essence of the legislators' arguments was one of fundamental fairness; the system of wealth transfer and distribution was so heavily skewed towards already wealthy individuals while a citizen of 'regular' wealth did not benefit. Furthermore, this feeling of inequality was largely one of principle. In choosing to explicitly "denounce unjust redistribution," Congress showed what truly angered the public was less about "the reduction in their wealth than by the way in which the wealth was extracted."[31] This wealth transfer from the pockets of the average American to corporations participating in uncompetitive practices was the primary issue, one which the public was principally against.

The Sherman Act's effectiveness against abuse in the marketplace was notably tested in *Standard Oil Co. v. United States* (1911). There, the government filed an action against Standard Oil and 37 other corporations for monopolizing the petroleum industry and using unfair competition practices, namely predatory pricing through cutting local prices and squeezing out competition.[32] The Court concluded that the defendants' actions violated antitrust laws, as their collective actions indicated "substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product."[33] In coming to its holding, the Court recognized that:

> The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly

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[29] *Id.* at 740–41 (quoting 21 CONG. REC. 2614 (statement of Sen. Coke) and 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman)).

[30] *Id.* at 741 (quoting 21 CONG. REC. 4101 (statement of Rep. Heard) and 21 CONG. REC. 4098 (statement of Rep. Taylor)).

[31] *Id.*

[32] Standard Oil Co. v. United States, 221 U.S. 1, 42–43 (1911). More specifically, the record showed a series of averments that the court grouped into several different categories: "Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil…; the division of the United States into districts… so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed," and "enormous and unreasonable profits" as a result of the monopoly.

[33] *Id.* at 77.

> gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable result of the monopolistic control over its production and sale.[34]

At least some of the government's motivation in *Standard Oil* was a concern for fairness. The practices the company employed to cut prices below all other firms, squeeze out competitors, and then raise the prices once more was classified as an evil – something so wholly unfair the entire company was broken up by the Court. While economics played a role in coming to a conclusion, the Court's holding was not solely based on a question of what will create the lowest cost for consumers, as modern antitrust theory asks.

II. MODERN ANTITRUST THEORY & THE CHICAGO SCHOOL OF THOUGHT

By the 1970s, a group of neoclassical economists dubbed the Chicago School of Thought emerged, purporting to have economic efficiency and consumer welfare as their primary goals. Powerful figures who identified as part of the Chicago School were offered roles in presidential administrations, appointed to the bench, and given Nobel prizes in economics. President Ronald Reagan's appointee to the Department of Justice's Antitrust Division, William Baxter, was unconcerned with large mergers or "with fairness to small competitors;" rather, he was exclusively focused on economic efficiency.[35] This change in legal thought and practice focused on short-term consumer interests and considered low prices as sufficient to show competition.[36]

Influential antitrust scholar and champion of the Chicago School, Robert Bork, described this approach to antitrust as a "judge-friendly theory of economics that allowed judges to dismiss antitrust cases quickly."[37] Bork's book, *The Antitrust Paradox*, argues that the government places an overemphasis on the role of competition in the economy; government regulation is used as a means to level "the playing field for the benefit of poorly run companies."[38] These "bad" companies, Bork argued, allowed the government to keep prices higher for the sake of

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[34] *Id.* at 52.

[35] Stacy Mitchell, *Monopoly Power and the Decline of Small Business*, INST. FOR LOC. SELF-RELIANCE, Aug. 2016, at 11.

[36] Khan, *supra* note 27, at 716.

[37] Colino, *supra* note 9, at 3.

[38] Derek Thompson, *America's Monopoly Problem: How Big Business Jammed the Wheels of Innovation*, THE ATLANTIC (Oct. 2016), https://www.theatlantic.com/magazine/archive/2016/10/americas-monopoly-problem/497549/ [https://perma.cc/9A4D-Q4J3].

competition instead of letting the "most-efficient companies" dominate the markets.[39] And so long as a merger – either horizontal or vertical – would ultimately lower prices for the consumer, it did not matter what degree of market concentration or what sort of unfair competition practices the company may have engaged in.[40] In assuming that markets behaved with perfect efficiency and dubbing predatory pricing as a "phenomenon that probably does not exist," it is no surprise that Bork believed the only question that needs to be asked in antitrust suits is "[w]hat will most lower prices for consumers?"[41] The answer to that question for Bork is more mergers: let the "most-efficient companies" dominate the market and build their market concentration.[42] Thus, antitrust law had shifted from "principally protecting competition to principally protecting consumers."[43]

The Reagan administration used Bork's denunciation of a fairness consideration and judicial affirmations of efficiency as a "blueprint" to "rewrite the plot of antitrust along the lines of neoclassical economics and *laissez-faireism*, a blueprint which was used to execute a 'coup against prevailing antitrust thinking.'"[44] Motivated by fear of arbitrariness, fairness in antitrust cases has been entirely rejected since the late 1970s.[45]

A. *Inconsistent Reading of Adam Smith's Economic Works*

What is strange beyond the flaws and inaccuracies of subsuming lower prices and consumer welfare is the Chicago School's near idolization of Adam Smith as the definitive advocate for self-interest and rational behavior in the market. Adam Smith, author of *The Wealth of Nations* and *The Theory of Moral Sentiments*, was a Scottish philosopher whose economic thoughts later rooted the works of David Ricardo, Karl Marx, John Maynard Keynes, Milton Friedman, and many others.[46] While he is often identified as the "father of modern capitalism," Adam Smith was not an economist – he was a philosopher – and the term capitalism "did not enter

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[39] *Id.*

[40] *See id.*

[41] Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, THE ATLANTIC (Aug. 2018), https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/ [https://perma.cc/6NHY-WH3Q].

[42] *Id.*

[43] Thompson, *supra* note 38.

[44] Colino, *supra* note 9, at 3.

[45] *Id.*

[46] *Adam Smith*, LIBR. OF ECON. & LIBERTY, https://www.econlib.org/library/Enc/bios/Smith.html [https://perma.cc/N5RL-GWES].

into widespread use until the late nineteenth century."[47] Smith used the phrase "commercial society," not capitalism, which emphasizes "his belief that the economic is only one component of the human condition."[48] The Chicago School invokes Adam Smith to argue against government intervention and instead let the "invisible hand" guide the market to "find its equilibrium without government or other interventions forcing it into unnatural patterns."[49] But this view of Smith does not acknowledge his work as a whole. Instead, it extracts affirming theories while ignoring Smith's emphasis on sympathy, conscience, benevolence, and human nature's value in the market.

George Stigler, a Nobel laureate in economics and Chicago School believer who has been labeled Adam Smith's "best friend" for his close affinity to Smith's theories, associates Smith with "economics 'properly done.'"[50] Two facets of Smith's thought stand as the standard depiction of the Chicago approach: "the efficacy of the system of natural liberty and the dim view of the abilities of the state to improve on the outcomes associated with natural liberty."[51] More specifically, this "system of natural liberty" is one founded principally in self-interest.[52] The advice Stigler gleaned from Smith is that "the conduct of economic affairs is best left to private citizens – that the state will be doing remarkably well if it succeeds in its unavoidable tasks of winning wars, preserving justice, and maintaining the various highways of commerce."[53] While government action is not wholly foreclosed (it may be necessary when an individual "does not know, or does not have the power to advance, his own interests"), Stigler asserts that Smith "deeply distrusted the state" and instances needing intervention were limited.[54]

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[47] Jack Russell Weinstein, *Adam Smith*, INTERNET ENCYCLCOPEDIA OF PHIL., https://iep.utm.edu/smith/#:~:text=Smith%20was%20not%20an%20economist,beings%20come%20to%20know%20them [https://perma.cc/7MEQ-5THU].

[48] *Id.*

[49] Christina Majaski & Michael Sonnenshein, *Invisible Hand Definition*, INVESTOPEDIA (last updated Sept. 28, 2020), https://www.investopedia.com/terms/i/invisiblehand.asp [https://perma.cc/DLP6-K28V].

[50] Steven G. Medema, *Adam Smith and the Chicago School*, THE ELGAR COMPANION TO THE CHI. SCH. (forthcoming Aug. 2007) (manuscript 2–3).

[51] *Id.* at 4.

[52] *Id.* at 5.

[53] *Id.* at 8 (quoting George Stigler, Presidential Address to the American Economic Association (Dec. 29, 1964)).

[54] Medema, *supra* note 50, at 9.

This view of Adam Smith, however, is "not homogenous."[55] This version of Smith is known as "Chicago Smith" – a Smith whose work is read to correspond "rather closely with [the Chicago School's] own rational choice-based analysis of competitive market structures in an a-institutional context."[56] There is another version of Smith known as "Kirkaldy Smith."[57] Kirkaldy Smith is a depiction more attuned in the "Scottish enlightenment mentality" and more complex than Chicago Smith in that the Kirkaldy reading makes room for all of Smith's writings and historical background.[58]

Kirkaldy Smith's rational individual is not exclusively a *homo economicus* – a "figurative human being characterized by the infinite ability to make rational decisions . . . [who] will attempt to maximize their utility for both monetary and non-monetary gain."[59] Rather, Smith viewed man as one motivated both by self-interest primarily in the marketplace *and* as one concerned about the well-being of others.[60] In order for laissez-faire to work beneficially, human nature's social instinct for "sympathy, desire for approval, conscience, and benevolence" were vital.[61] While self-interest was and is a significant factor in market balance, it is by no means the *only* factor. To assert that Smith was an unconditional promoter of self-interest as a regulator ignores the complexity of Smith's writings, particularly that he "took no pains to conceal his dislike for some of the forms in which self-interest manifests itself in trade and industry."[62] The Kirkaldy Smith is not single-minded, but influenced by a variety of social and moral factors.

Moreover, Kirkaldy Smith is not so quick to dismiss government intervention. Scholars identifying with Kirkaldy Smith over Chicago Smith point out that if Smith had "adopted the term 'laissez-faire' as an appropriate label for his own policy views, he undoubtedly would not have interpreted it literally as a condemnation of all government interference with the activities of private individuals."[63] Indeed, much

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[55] *Id.* at 5.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Medema, *supra* note 50, at 10; James Chen & Charles Potter, *Homo Economicus*, INVESTOPEDIA (Mar. 1, 2021), https://www.investopedia.com/terms/h/homoeconomicus.asp#:~:text=Homo%20economicus%2C%20or%20economic%20human,monetary%20and%20non%2Dmonetary%20gains [https://perma.cc/HK5H-NERM].

[60] *See* Medema, *supra* note 50, at 11.

[61] *Id.*

[62] *Id.* at 12.

[63] *Id.* at 13.

of Smith's government aversion was rooted in his belief not just that government action was unnecessary, but also that "'government action would usually make matters worse' – an artifact of governments lacking 'both the knowledge and the motivation to do a satisfactory job in regulating an economic system.'"[64] Smith described politicians as "insidious crafty animal[s]" and presumed incompetence and corruption.[65] Yet these 'crafty animals' ought still be permitted to take action when government intervention was the best option and could be "'entitled to wider responsibilities' if it improved 'its standards of competence, honesty, and public spirit.'"[66] Is Kirkaldy Smith the solution to America's antitrust conundrum? Few legal scholars pushing for a more robust antitrust movement would argue so, but it is clear that Smith's legacy in the Chicago School is already inconsistent with Smith's own work.

Beyond the Adam Smith dichotomy, a simple analysis of Smith's thoughts in his early work, *The Theory of Moral Sentiments*, reveals a more complex assessment of humans' self-interest. On sympathy, Smith asserts:

> We run not only to congratulate the successful, but to condole with the afflicted; and the pleasure which we find in the conversation of one whom in all the passions of his heart we can entirely sympathize with, seems to do more than compensate the painfulness of that sorrow with which the view of his situation affects us.[67]

Human nature compels us to relate with one another in degrees of happiness, in sorrow, in pride, in grief. Ignoring this fundamental factor in humankind is merely one way the Chicago School can assert self-interest as a sole motivating factor in the market. Smith quite literally argues with the Chicago School's own interpretation of Smith: "Those who are fond of deducing all our sentiments from certain refinements of self-love, think themselves at no loss to account, according to their own principles, both for this pleasure and this pain."[68] Plainly put, those who only account for human beings as creatures of selfishness ignore an innate call to empathy. It is not necessary for the economy to always benefit the greatest number of consumers; consumers – the same human beings innately empathetic – are not terribly affected to see the benefits benefit others.[69]

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[64] *Id.* at 14.

[65] *Id.*

[66] *Id.* at 15–16.

[67] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, 13 (George Bell & Sons, 6th ed. 1864) (1759).

[68] *Id.* at 10.

[69] *See id.* ("Man, say they, conscious of his own weakness, and of the need which he has for the assistance of others, rejoices whenever he observes that they adopt his own passions, because he

Perhaps most applicable to an argument for reapplying a fairness and morality pillar to the overall economic analysis is Adam Smith's passage in his same book, which contains an early reference to the invisible hand:

> It is to no purpose, that the proud and unfeeling landlord views his extensive fields, and without a thought for the wants of his brethren, in imagination consumes himself the whole harvest that grows upon them. The homely and vulgar proverb, that the eye is larger than the belly, never was more fully verified than with regard to him. The capacity of his stomach bears no proportion to the immensity of his desires, and will receive no more than that of the meanest peasant. The rest he is obliged to distribute among those, who prepare, in the nicest manner, that little which he himself makes use of, among those who fit up the palace in which this little is to be consumed, among those who provide and keep in order all the different baubles and trinkets, which are employed in the economy of greatness; all of whom thus derive from his luxury and caprice, that share of the necessaries of life, which they would in vain have expected from his humanity or his justice. . . . The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species. When Providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who seemed to have been left out in the partition.[70]

Under the Chicago School's approach, self-interest and the invisible hand would guide the landlord to join with every other powerful landlord, concentrate the "necessaries of life," and ensure that none of the inhabitants were able to develop their own necessaries. With this approach, the landlord is motivated only by a want of wealth and power. Though Smith's musings could arguably fall under ill-reasoned trickle-down economics,[71] Smith's intention with reference to the

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is then assured of that assistance; and grieves whenever he observes the contrary, because he is then assured of their opposition. But both the pleasure and the pain are always felt so instantaneously, and often upon such frivolous occasions, that it seems evident that neither of them can be derived from any such self-interested consideration.").

[70] *Id.* at 264–65.

[71] *See generally* Kimberly Amadeo, *Why Trickle-Down Economics Works in Theory But Not in Fact*, THE BALANCE (Mar. 29, 2021), https://www.thebalance.com/trickle-down-economics-theory-effect-does-it-work-3305572 [https://perma.cc/9VT5-GQFY]. Trickle-down economics is seen by many economists as a theory that works in theory but not in practice. This does not undermine Smith's position – his is one working within the theory.

invisible hand was not one of selfishness, but of overcoming that selfishness because human nature demands sympathy, or at the very least to be bent to societal values. Smith believed these powerful actors would be compelled to share their wealth with the less wealthy simply because an invisible hand – one of fairness and morality – guides them to split the "necessaries of life" "amongst all its inhabitants" as if the earth were equally divided.[72]

To understand Adam Smith's work, one must consider what each individual struggles with:

> including those that emphasize the relationship of morality and economics. Smith asks why individuals should be moral. He offers models for how people should treat themselves and others. He argues that scientific methods can lead to moral discovery, and he presents a blueprint for a just society that concerns itself with its least well-off members, not just those with economic success. Adam Smith's philosophy bears little resemblance to the libertarian caricature put forth by proponents of laissez faire markets who describe humans solely as homo economicus.[73]

There are external forces that overcome tendencies of self-interest and disfigure a *homo economicus* beyond recognition. But for Adam Smith, the "market is a mechanism of morality and social support."[74]

B. Where the Chicago School Has Failed Consumers

It is not enough to simply muse about the inconsistencies between the Chicago School's approach to economics and Adam Smith's theories of self-interest and conclude that there are more factors at play for individual actors in the market. The past several decades are filled with examples of how the Chicago School's failure to account for morality and fairness has led to consequences which injure the public, even if prices for consumers were low. The law presumes that all market actors act rationally, but competition "can pressure companies to engage in unethical or criminal behavior, if doing so yields the firm a relative competitive edge."[75] Firms, whether they wish to act rationally or irrationally, are forced into a corner; "as competition increases, and profit margins decrease, firms have greater incentive to engage in unethical behavior that improve their costs (relative to competitors). Other firms, given the cost disadvantage, face competitive pressure to follow; such competition collectively leaves the firms and society worse off."[76] The choice to

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[72] Smith, *supra* note 67, at 264–65.

[73] Weinstein, *supra* note 47.

[74] *Id.*

[75] Maurice E. Stucke, *Is Competition Always Good?*, 1 J. OF ANTITRUST ENF'T 162, 183 (2013).

[76] *Id.*

compete fairly or participate in anticompetitive practices is not much of a choice for even rational market participants when the playing field is vastly unequal.

C. Ohio v. Am. Express Co.

In 2018, the Supreme Court delivered a significant blow to hopes of progressive antitrust enforcement when they found in favor of a firm participating in anticompetitive practices by placing theory before the facts of the case.[77] Ruled by a 5-4 opinion authored by Justice Thomas, the Court in *Ohio v. Am. Express Co.* found the defendant had not violated federal antitrust law and essentially held that "even though, in practice, Amex hurt competition and inflicted harm on consumers, . . . the company was not, in theory, powerful enough to do so."[78] The plaintiffs in *Ohio v. Am. Express Co.*, composed of several states and the federal government, brought a case against Amex under a claim that Amex's anti-steering provisions – a clause which "prohibits businesses from encouraging customers to use a lower cost card when they try to pay with an American Express card" – violated Section 1 of the Sherman Act.[79]

The plaintiffs argued that the issues of credit cards should be treated as two markets: one for cardholders, one for merchants.[80] After seven weeks of trial, the district court found in favor of the government with thorough factual findings – none of which the Supreme Court engaged with.[81] Justice Breyer, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, noted in dissent that in five years, Amex "raised the prices it charged merchants on 20 separate occasions" without increasing benefits or cutting credit card prices for cardholders "in tandem with the merchant price increases."[82] Further, the district court found that Amex clearly held relevant market power because they did not lose any "meaningful market share" when they raised prices.[83]

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[77] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2279 (2018).

[78] Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html%20%5baccessed%2015%20August%202018 [https://perma.cc/WLF9-DN8D].

[79] Ben Dwyer, *American Express Anti-Steering Supreme Court Case*, CARDFELLOW (May 14, 2019), https://www.cardfellow.com/blog/american-express-anti-steering-supreme-court-case/#:~:text=American%20Express'%20merchant%20agreement%20includes,with%20an%20American%20Express%20card [https://perma.cc/8MDS-YF6V]; *Am. Express Co.*, 138 S. Ct. at 2283.

[80] *Am. Express Co.*, 138 S. Ct. at 2283.

[81] *Id.* at 2293 (Breyer, J., dissenting).

[82] *Id.*

[83] *Id.*

The plaintiffs and Amex both acknowledged the anti-steering provisions were vertical restraints – "restraints 'imposed by agreement between firms at different levels of distribution'" – which are considered under a "rule of reason."[84] The majority engaged with the three-step burden-shifting analysis to determine whether the anti-steering provisions violated the rule of reason; the first step requires plaintiffs to carry the initial burden of proving an anticompetitive effect resulted from Amex's anti-steering provision.[85] The Court never went beyond this first step. In determining that the plaintiffs had not carried their burden, the Court stated that "focusing on merchant fees alone misses the mark because the product that credit card companies sell is transactions, not services to merchants" and evidence of increased prices does not demonstrate "an anticompetitive exercise of market power."[86] In order to carry their burden, the plaintiffs would have had to prove the provisions "increased the cost of credit card transactions above a competitive level, reduced the number of credit card transactions, or otherwise stifled competition in the credit card market."[87] Failure to make this showing resulted in judgment for Amex.

The government had filed the lawsuit seeking "to restore market competition over credit card merchant fees by eliminating a contractual barrier with anticompetitive effects."[88] It was also brought in part in recognition of governments across the globe bringing similar lawsuits or regulation in response to "concerns about the high fees that credit card companies often charge merchants by regulating such fees directly."[89] The Court's decision here has a further reaching effect than merchants. The decision could have been used to actually address such consumer harm and welfare as the Chicago School purports to protect. It might have "address[ed] the fundamental economic policy challenge of our time: reducing income inequality."[90] Instead it reinforced a "silent reverse Robin Hood system transferring billions of dollars from working and middle class Americans who use cash, debit, and prepaid cards, to the wealthy through elite platinum and black

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84 *Id.* at 2284.

85 *Id.*

86 *Id.* at 2287.

87 *Id.*

88 *Id.* at 2290 (Breyer, J. dissenting).

89 *Id.*

90 Aaron Klein, *Why the Supreme Court's Decision in Ohio v. AmEx will Fatten the Wealthy's Wallet (at the Expense of the Middle Class)*, BROOKINGS INSTITUTE (June 25, 2018), https://www.brookings.edu/research/ohio-v-amex/ [https://perma.cc/2LNQ-4F75].

cards."[91] When presented with direct evidence of anticompetitive practices, Justice Thomas and the majority, like the Chicago School, wanted "proof of lower market wide output."[92] Fixating on output ignores welfare altogether; in fact, "lack of information can cause output to increase (as when consumers would buy 'patent medicines' containing toxic poisons before drug-labeling laws were passed). Yet that output increase comes at the expense of consumer welfare."[93] This error, propagated by the Chicago School, allowed for the Court to ignore every goal of antitrust law.

If the Court had considered other factors – namely factors of fairness and morality – they might have considered the effects their decision would have on exacerbating inequality in America. Amex wrote into merchant contracts that they could not charge customers more for using Amex despite the higher merchant cost.[94] While merchants have the decision whether or not to take a certain type of credit card, those that accept Amex require "merchants to charge the same price [which] means that customers who use cheaper forms of payment are in effect subsidizing AmEx card holders."[95] These merchant fees have profited Amex by more than $5 billion during only one quarter.[96] Those $5 billion profits get shared with cardholders through cash back, frequent flier miles, hotel points, and other more enticing rewards, allowing a wealthy family who charges $80,000 to credit cards with a 1.5% cash back to earn nearly "two weeks of total earnings for the median American family who earns $60,000 a year."[97]

These cards with multitudes of beneficial rewards are used primarily by wealthier customers. The lowest income individuals will use cash, prepaid cards, and then debit cards before resorting to credit cards and even so, credit cards with any sort of rewards are reserved for wealthier individuals.[98] And now, new alternatives to companies like Amex, Discovery, Visa, etc. will face a high barrier to entry; if they cannot "provide substantial benefits to wealthier customers" and merchants cannot "price discriminate on payment forms" then those wealthier customers have no reason to use alternative payment options. Merchants spread

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[91] *Id.*

[92] John Newman, *Ohio v. American Express: The Good, The Bad, and the Ugly*, CONCURRENTIALISTE (July 16, 2018), https://leconcurrentialiste.com/ohio-v-amex/ [https://perma.cc/3FJF-ANYH].

[93] *Id.*

[94] Klein, *supra* note 90.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

the cost of card fees across all customers and therefore the majority of cardholders contribute to the luxuries of wealthy people with every transaction they make throughout their day, likely without realizing it. A fairness principle would have asked the Court to do the same kind of thorough analysis many critics of the *Ohio v. Am. Express Co.* decision made. This type of analysis – one based in exploring how an anticompetitive practice can intensify inequalities and ultimately raise prices for consumers (ironic considering the Chicago School's goals) – would have easily allowed the Court to find that Amex's anti-steering provisions violated federal antitrust law.

D. AT&T and Time Warner Merger

The government also failed to block attempts at reclaiming robust antitrust enforcement when it allowed AT&T and Time Warner – a "telecom giant" and "multinational mass media and entertainment conglomerate" – to merge.[99] The government here argued that "were this merger allowed to proceed, the newly combined firm likely would – just as AT&T/DirecTV has already predicted – use its control of Time Warner's popular programming as a weapon to harm competition."[100] Specifically, were the merger to be permitted, the "merger would give the merged company the market power to weaken competing distributors' ability to compete by raising their costs, would allow the merged company to impede emerging and growing rivals, and furthermore, would result in increased likelihood of oligopolistic coordination."[101]

The merger, however, was blessed by Judge Leon on the court of appeals, and the resulting merged company "will have unparalleled market power over both content creation and distribution."[102] By consistently conflating internet *platforms* with internet *providers*, the Court came to a concerning conclusion.[103] Every internet

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[99] Colino, *supra* note 9, at 6.

[100] Complaint at 2, U.S. v. AT&T, 310 F. Supp. 3d 161 (D.D.C. 2018) (No. 1:17-cv-02511), https://www.justice.gov/atr/case-document/file/1012916/download [https://perma.cc/8XZF-UDV7].

[101] *Id.* at 15.

[102] Nilay Patel, *The Court's Decision to Let AT&T and Time Warner Merge is Ridiculously Bad*, THE VERGE (June 15, 2018, 4:47 PM), https://www.theverge.com/2018/6/15/17468612/att-time-warner-acquisition-court-decision [https://perma.cc/P2WX-KSD8].

[103] *Id.* Patel goes into detail about the 170-page opinion delivered by Judge Leon. Judge Leon characterizes Google and Facebook as similar examples to AT&T and Time Warner. *But* that is a

> foundational error[.] Judge Leon thinks Facebook and Google are vertically integrated, data-informed competitors to AT&T and Time Warner. And that is sort of true, in that Google owns YouTube and pays for some premium content there, and Facebook is doing whatever doomed video thing Facebook is always

platform requires internet providers. Judge Leon, identifying Facebook and Google as similar examples to Time Warner and AT&T, fails to recognize that while Facebook and Google will in many cases rely on AT&T or some other internet provider for their services to be used, this merger "step[s] ahead of [every other internet platform] in line by marrying Time Warner's content to AT&T's network."[104] And so it seems only inevitable that "[c]urrent regulatory trends are favoring the concentration of economic power into a small number of larger businesses. Sadly, there is ample history that when businesses obtain monopoly power they become less interested in innovation or passing on margin improvements to consumers."[105]

The government argued that the proposed merger would substantially harm competition "by slowing the growth of emerging, innovative online distributors."[106] While the arguments in court were weak on both sides, critics outside of the court recognized that AT&T would have the ability to "preinstall its own [content] services and exclude them from data caps."[107] This business model forces content services to compete with preinstalled content services through the same internet provider; one firm essentially both competes with and only exists because of the other firm. Market behavior of this kind should be considered an unfair competition practice. Platform provision and subsequent competition with the very platform a firm is forced to use allows the providing firm to monopolize by squeezing out every competitor.

Once again, the Chicago School of Thought is utilized in a court considering the anticompetitive effects of some action – in this case a mega-merger – to downplay the injury on consumers. Robert Bork, as previously discussed, is primarily concerned with economic efficiencies and allowing large firms to thrive.[108] Antitrust is perceived as a threat to large firms thriving and thus "[s]tripped of any social or moral purpose, antitrust lost its mojo, and was progressively relegated to

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> doing. But neither Facebook nor Google owns the ultimate distribution layer of the consumer connection to the internet… Tech companies might have vertically integrated the creation and production of content with consumer-facing apps and services, but they all depend on internet connections to reach their audiences… AT&T and Time Warner aren't trying to catch up to Netflix by merging; they're trying to step ahead of them in line by marrying Time Warner's content to AT&T's network.

[104] *Id.*

[105] Colino, *supra* note 9, at 7 (quoting Jonathan Aberman in Richard Levick, *The AT&T-Time Warner Merger: Is Bigger Better?*, FORBES (July 10, 2018, 3:56 PM), https://www.forbes.com/sites/richardlevick/2018/07/10/the-att-time-warner-merger-is-bigger-better/?sh=1482177e69b4 [https://perma.cc/N2R4-55TT]).

[106] Patel, *supra* note 102.

[107] *Id.*

[108] *See* Colino, *supra* note 9, at 7.

little more than pursuing the most blatant forms of collusion."[109] Cases like *Ohio v. Am. Express Co.* and the AT&T merger with Time Warner reflect that "[b]y trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency."[110] The market economy, whether the Chicago School acknowledges it or not, requires "trust, fairness, and pro-social behavior" to function.[111] But as these cases have shown, antitrust policy continues to ignore these values, and treats market participants as amoral, self-interested profit-maximizers."[112] Chicago School purists missed the elementary lessons on fairness. Fairness considerations for them "contaminat[e] antitrust . . . [and] would amount to undesirable arbitrariness in enforcement."[113]

E. Amazon

The rapid success of internet platform giant Amazon, at more than 46% control of U.S. e-commerce, is yet another example of how modern antitrust policy and theory fails to protect consumers and promote competition.[114] In nearly every economic market, Amazon has at least some presence, and in many its presence has obliterated competing firms. One simple example is Amazon's effect on the e-book market. Its business model consisted of selling e-books below cost. While many would refer to that as predatory pricing, the "government perceived Amazon's cost cutting as benign, focusing on the profitability of e-books in the aggregate and characterizing the company's pricing of bestsellers as 'loss leading.'"[115] When Amazon began selling Kindles, wholesale publisher prices did not drop, nor did the price of manufacturing Kindles.[116] Rather, Amazon chose to deliberately price the e-books and device below the purchase and manufacturing cost.[117] This approach allowed them control and the ability to monopolize nearly 90% of the e-book market.[118]

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109 *Id.*

110 Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 594 (2012).

111 *Id.* at 595.

112 *Id.*

113 Colino, *supra* note 9, at 8–9.

114 Khan, *supra* note 27, at 755.

115 *Id.* at 756.

116 *Id.* at 757.

117 *Id.*

118 *Id.*

Book publishers feared Amazon could lead to a permanent reduction to a consumer's willingness to pay a certain price for any book. In response, they began working with Apple to publish e-books at the publisher's own price, and Apple would receive 30% of the profit.[119] This led to a lawsuit against Apple, alleging price collusion.[120] Arguments that the DOJ should be investigating Amazon's pricing strategies failed, as the DOJ found "'persuasive evidence lacking' to show that the company had engaged in predatory practices."[121] Instead, the government found that "'from the time of its launch, Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles.'"[122]

One explanation for how Amazon was able to get away with textbook predatory pricing was by characterizing cost cutting as loss leading. Amazon argued that the reduction in price for the e-book and Kindle was temporary and used to sell more of those products, not harm e-book competitors and raise prices.[123] Loss leading versus predatory pricing can be determined by considering "intensity" and "intent," which motivate the cost cutting tactics.[124] Here, the Court found Amazon did not aim to "drive out competing e-book sellers and acquire the power to increase e-book prices."[125] Such logic might be applicable to a physical store, but courts are wholly unequipped to deal with the changing landscape of internet retail.

As Lina Khan in her widely respected article *Amazon's Antitrust Paradox* explained, if a consumer goes to Walmart because of a heavy discount on the price of socks one day, it does not follow that the same consumer will return to Walmart because of the sock purchase – but they may return because they are now aware Walmart has good prices.[126] However, if a consumer goes to Amazon to purchase the discount version of a bestseller book, they will be inclined to return for many reasons, not just because it is a "good bargain."[127] One reason is that e-book sellers, including Amazon, use "digital rights management" (DRM) to "limit the types of devices that can read certain e-book formats[,]" and therefore a Kindle purchaser

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[119] *Id.* at 758.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 760.

[124] *Id.* at 759.

[125] *Id.* at 760.

[126] *Id.*

[127] *Id.*

must continue to order from Amazon's platform.[128]

Another reason is that buying and browsing on Amazon gives Amazon information about the consumer's "reading habits and preferences, data [which] the company uses to tailor recommendations and future deals." [129] Because this consumer decided to purchase the Kindle and e-book when prices were slashed below any profitability for Amazon, they are unknowingly (or perhaps knowingly) locked in to only purchasing from Amazon in the future. They are highly unlikely to go and purchase a Nook for instance and repurchase the books they bought on Amazon so they can continue reading on their new device, or to purchase an e-book for the first time "even if that company is slashing prices."[130] While Amazon may have initially lowered bestseller prices of e-books "to sell more e-books generally, that tactic has also positioned Amazon to dominate the market in a way that sets it up to raise future prices. In this context, the traditional distinction between loss leading and predatory pricing is strained."[131]

The current antitrust framework – specifically the predatory pricing framework in this instance – fails to grasp the degree of harm slashing prices coupled with sheer market power can have on consumer welfare and the broader economy. If courts considered this issue under a pre-Chicago School lens, they would recognize "the harm to the diversity and vibrancy of ideas in the book market" or "the risk that Amazon may retaliate against books that it disfavors – either to impose greater pressure on publishers or for other political reasons."[132] Where publishers were once able to "take risks with heavier books that might not be as popular . . . [and] subsidize them with best sellers[,]" now "Amazon's demand for discounts has made it harder to cross-subsidize this way, leading to consolidation among book publishers and reduced diversity."[133] This utter power Amazon is able to exert over just one market it controls begins to show how dangerous the lack of antitrust enforcement and the court system's willingness to overlook anticompetitive practices can be. A question about fairness beyond the simple question of efficiency and whether prices are low would force courts to undertake a more thorough review of the facts and motivations. Here, a court could have easily found that the risk of total market domination by Amazon was high, and it would be both an unfair competitive practice raising the entry bar for new participants in

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[128] *Id.*

[129] *Id.* at 761.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 767.

[133] Meyer, *supra* note 41.

the market and would ultimately injure consumers in a variety of ways.

Amazon's anticompetitive prices that ought to have been blocked by courts long ago is not isolated to just the e-book marketplace. Yet another example amongst many is Amazon's acquisition of Quidsi, one if its early rivals. One of Quidsi's subsidiaries was Diapers.com. In 2009, Amazon expressed an interest in acquiring Quidsi, which they declined.[134] In response, Amazon used price bots to monitor Quidsi's prices and adjust Amazon's prices to match its competitor while slashing diaper and baby product pricing by 30%.[135] Through several other cost cutting strategies, Quidsi predicted that Amazon was "on track to lose $100 million over three months in the diaper category alone."[136] Quidsi investors "grew wary" and its owners entered talks with Walmart to sell the business, but Amazon intervened with "an aggressive counteroffer."[137] Largely out of fear, Quidsi made a deal with Amazon.[138] Amazon, in only a matter of months of eliminating one of its only key rivals, began drastically raising prices and reducing benefits.[139] Consumers grew frustrated with the "much less generous" platform and online forum users "said they would be taking their business from Amazon and returning to Diapers.com – which, other users pointed out, was no longer possible."[140]

Thus, one of the key options for consumers – to take their business elsewhere – was eliminated. The ability to 'vote with one's dollar' or to prefer a certain brand over another for more than cost alone has become nearly impossible.[141] There is always a trade-off when a consumer purchases goods. One typical trade-off might be between "the more sustainable, ethical, fair-trade option or the cheaper, potentially dodgier one."[142] For instance, a consumer looking to purchase skincare

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[134] Khan, *supra* note 27, at 769.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 770.

[139] *Id.*

[140] *Id.* at 771.

[141] Gabi Aoun, *Vote with Your Dollar*, KIND HUMANS (Oct. 23, 2020), https://kindhumans.com/kindhumans-blog/vote-with-your-dollar/#:~:text=The%20opportunity%20to%20participate%20in,that%20are%20important%20to%20you [https://perma.cc/NEU4-SFAS]. (By vote with one's dollar, I mean "spending your money with brands whose practices align with your values and the issues that are important to you.").

[142] Matt Beard, *The Dilemma of Ethical Consumption: How Much are Your Ethics Worth to You?*, THE GUARDIAN (Jan. 31, 2020, 2:00 PM), https://www.theguardian.com/commentisfree/2020/feb/

may choose to spend his or her money on a brand like The Ordinary. The Ordinary is known for not testing on animals or allowing their products to be sold in countries requiring animal testing and is therefore one of the few vegan brands. Furthermore, its parent company, DECIEM also does not participate in animal testing.[143] However, Estée Lauder recently acquired DECIEM for $1 billion and a majority stake in the company with an agreement to purchase the remaining interest after three years.[144] Estée Lauder is not cruelty free and both allows and encourages its products to be sold in countries where animal testing is required.[145] Strict vegans, or those ethically opposed to animal cruelty, may find that their use of their dollars in the market no longer reflects their interest in cruelty free skincare.

This is not meant to argue that Estée Lauder is participating in anticompetitive practices, but rather to stand as one prominent example of how consumers have seen their ability to 'vote with their dollar' reduced due to pervasive horizontal integration across many markets. One fundamental, moral aspect of competitive markets "is that individual desires are collectively expressed as market demand, which, in turn, is a signal to producers to supply the desired goods or services. However, where we have one seller (monopoly) or one buyer (monopsony), there is no 'collective' desire but instead the desire of the monopolists or monopsonist."[146]

A more relevant example is Amazon's recent acquisition of Whole Foods. At one point, the CEO of Whole Foods, John Mackey, "was at the vanguard of a movement to make business more ethical."[147] Mackey's ideals with Whole Foods included

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01/the-dilemma-of-ethical-consumption-how-much-are-your-ethics-worth-to-you [https://perma.cc/PB2D-B3K5].

[143] *Is the Ordinary Cruelty-Free & Vegan in 2021? (What You Need to Know!)*, ETHICAL ELEPHANT (Feb. 25, 2021), https://ethicalelephant.com/the-ordinary-cruelty-free-vegan/ [https://perma.cc/8QCE-Z65U].

[144] Kristin Larson, *What Estée Lauder's Acquisition Means for Deciem and the Ordinary*, FORBES (Feb. 24, 2021, 6:00 AM), https://www.forbes.com/sites/kristinlarson/2021/02/24/what-the-estee-lauder-acquisition-means-for-deciem-and-the-ordinary/?sh=4e56e4d92109 [https://perma.cc/87JQ-GS3R]; *The Estée Lauder Companies to Increase Its Ownership in DECIEM*, BUSINESSWIRE (Feb. 23, 2021, 6:45 AM), https://www.businesswire.com/news/home/20210223005352/en/The-Est%C3%A9e-Lauder-Companies-to-Increase-Its-Ownership-in-DECIEM [https://perma.cc/2RRJ-BRE8].

[145] *The Ordinary – Cruelty Free & Vegan Policy 2021*, CRUELTY FREE UK (2021), https://crueltyfree.uk/the-ordinary-is-cruelty-free/ [https://perma.cc/AAZ9-STWE].

[146] William Murphy & Raymond Friel, *Free or Fair: a New Paradigm for Competition Policy?*, 27 COMMERCIAL LAW PRACTITIONER 207, 212 (Nov. 2020).

[147] Ben Schiller, *Now That Whole Foods Belongs to Amazon, What Happens to Conscious Capitalism?*, FAST COMPANY (June 21, 2017), https://www.fastcompany.com/40432785/now-that-whole-foods-belongs-to-amazon-what-happens-to-conscious-capitalism [https://perma.cc/HP7J-CPKT].

"conscious capitalism – where a firm has a purpose beyond profit."[148] Its sale to Amazon – a company with a "reputation for squeezing its suppliers … and for pushing its workers harder than most (in one notorious case, warehouse workers suffered heat exhaustion and had to receive medical attention)" – has for many consumers represented a divergence from its original mission statement.[149] Many consumers had bought into the idea of Whole Foods as 'conscious capitalism' and a way to ethically consume under capitalism by reducing one's carbon footprint and buying local. However, Amazon's purchase had customers questioning their grocery habits. If their original goal was to shop at a more environmentally friendly grocery store, Whole Foods is now owned by a company emitting "51.17 million metric tons of carbon dioxide."[150] If they originally shopped at Whole Foods because it paid workers livable wages, they were now aware of the grueling conditions its parent company's employees worked in.[151] This reduction in consumer choice based on a large firm acquisition emphasizes a need for courts to consider what effect a merger or anticompetitive practice may pose to consumer choice and that either can injure consumers in ways other than price alone.

Amazon at this point is unbeatable. Its total size and ability to psychologically intimidate its competitors into submission have made it difficult, if not impossible, to compete with it. Numerous contenders have approached the challenge, only to be acquired by large firms.[152] Even large firms like Target have failed on its online

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[148] *Id.*

[149] *Id.*

[150] Katie Arcieri & Stephanie Tsao, *Amazon's Emissions Increase 15% in 2019 Amid Efforts to Reduce Carbon Footprint*, S&P GLOBAL (Aug. 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/amazon-s-emissions-increase-15-in-2019-amid-efforts-to-reduce-carbon-footprint-59261693#:~:text=In%20June%2C%20Amazon%20self%2Dpublished,million%20metric%20tons%20in%202018 [https://perma.cc/93V5-3GCP].

[151] *See* Joel Stice, *Here's How Much Whole Foods Workers Really Make*, MASHED (Mar. 27. 2020, 11:36 AM), https://www.mashed.com/197210/heres-how-much-whole-foods-workers-really-make/ [https://perma.cc/2XVG-PHMN]; Michael Sianto, *'I'm not a robot': Amazon workers condemn unsafe, grueling conditions at warehouse*, THE GUARDIAN (Feb. 5, 2020, 3:00 AM), https://www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse [https://perma.cc/LMS9-BNZF].

[152] Alex Perry, *Former Amazon 'Rival' Jet.com is Dead Because Walmart Doesn't Need it Anymore*, MASHABLE (May 19, 2020), https://mashable.com/article/jet-walmart-shutdown-ecommerce/ [https://perma.cc/C32Y-9279] (Jet.com, an e-commerce site associated with Walmart, was favored as a competitor against Amazon but did not survive long because being shut down).

platform to pose any threat to Amazon's dominance.[153] In fact, the top two through ten U.S. companies in retail e-commerce's sale shares combined do not begin to approach Amazon's dominance in that market.[154] The Chicago School encourages this behavior that has led to great inequality and consumer harm across the U.S. and the globe. Their push for "efficient" firms to go unregulated and be allowed to "thrive" has extinguished innovation and diversity in the marketplace, thereby raising the barriers of entry to the market so high that large firms are effectively granted a right to monopolize.

III. MOVEMENT TO REINVIGORATE ANTITRUST LAW & REINTRPDUCING FAIRNESS AND MORALITY CONSIDERATIONS

Market competition is based on three factors: moral, economic, and political.[155] The Chicago School's tunnel vision on economic theory "has resulted in a failure to deal with markets in their totality and with a holistic approach."[156] Growing concerns about market concentration and wealth inequality do not exist in a vacuum. A movement to address significant issues of disparity in the U.S. through antitrust law as one prescription to the problem is emerging in legislation, in academia, and in the popular mindset of the public. Using fairness considerations comes as both an advantageous solution and a precursor to potentially more problems:

> Stiglitz[157] has suggested that "policies aimed at reducing market power can accordingly play some role in the reduction of inequality," which would contribute towards reaping morally desirable results through the application of antitrust. At the same time, fairness considerations should not be seen as a blank check for capricious, arbitrary enforcement. Fairness sceptic George Stigler once described the f word as "a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice."

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[153] Kiri Masters, *Target, Eschewing Amazon's Open Marketplace, is Making Strides in e-Commerce*, FORBES (Feb. 24, 2020, 2:19 PM), https://www.forbes.com/sites/kirimasters/2020/02/24/target-emerges-as-8th-largest-ecommerce-retailerheres-how-their-marketplace-strategy-is-entirely-different-to-amazon-and-walmart/?sh=39488734470a [https://perma.cc/UXU7-3CZJ].

[154] *Id.* (While Amazon dominates ecommerce at 38.7% of online sales, Walmart (5.3%), eBay (4.6%), Apple (3.7%), Home Depot (1.7%), Wayfair (1.5%), Best Buy (1.3%), Target (1.2%), Costco (1.2%), and Macy's (1.1%) combined only account for 21.7% of overall market sales).

[155] Murphy, *supra* note 17, at 208.

[156] *Id.*

[157] Joseph Stiglitz is an acclaimed, Nobel Memorial Prize recipient in the field of economics focused in fields of "income distribution, risk, corporate governance, public policy, macroeconomics and globalization." *Joe Stiglitz*, INST. FOR NEW THINking, https://www.inete conomics.org/research/experts/jstiglitz [https://perma.cc/EZC6-8ZPR].

> Without some bright lines, the pursuit of fair competition could turn into chaotic *à la carte* enforcement.[158]

Recognition that markets are not perfectly competitive and that the invisible hand meant to "provide the freedom of choice that allows individual consumption decisions to guide societal resources" does not exist so rationally leads to the conclusion that there are more factors at play – like important humanitarian elements and changing society values – than just economic theory.[159]

A working competitive market requires the contemporaneous operation of *homo moralicus* and *homo economicus*.[160] Aversion to a morality pillar is comprehensible. Morality is not a black or white interpretation. Rather, it almost exclusively lives in a grey space:

> With no shared view on morality, and an unwillingness to deal with what appear to be religious imperatives dressed up as some sort of human morality, it is entirely understandable why, unlike the emergence of behavior economics in economic theory, there has been little to convince competition lawyers and regulators to shift from the objective justification of classical economics. But it is suggested that morality in the modern landscape may be more accurately recast as fairness.[161]

Reducing antitrust analyses to objective economic calculations lets courts view economics as "a value-free science" and not as one informed by "years of socialization and the internalization of social, moral, ethical, and legal norms."[162]

Fairness as part of the antitrust analysis is not a new concept. In fact, the Department of Justice (DOJ) in its 2010 merger guidelines acknowledged market power is not confined to economic harms; rather, it can manifest as "non-price harms, including in the form of reduced product quality, reduced product variety, reduced service, or diminished innovation."[163] The Obama Administration also opposed the mega-merger of its time between Comcast and Time Warner for reasons of market access, not necessarily price concerns.[164]

The federal legislature has also taken steps to restore the antimonopoly goals of antitrust law. The Subcommittee on Antitrust, Commercial and Administrative

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[158] Colino, *supra* note 9, at 19.

[159] Murphy, *supra* note 14, at 210.

[160] *Id.* at 212.

[161] *Id.*

[162] Stucke, *supra* note 110, at 608–09.

[163] Khan, *supra* note 27, at 721 (citing *Horizontal Merger Guidelines*, U.S. Dep't Just. & FTC (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/5X4U-WWU6]).

[164] *Id.*

Law, as part of a bipartisan effort, addressed the dominance of internet platforms like Apple, Amazon, Facebook, and Google. Through the investigation into online competition, the subcommittee undertook a review of "existing antitrust laws, competition policies, and current enforcement levels to assess whether they are adequate to address market power and anticompetitive conduct in digital markets."[165] The report recognized that Courts have narrowly construed consumer welfare as "the sole goal of antitrust law" and thus "limited the analysis of competitive harm to focus primarily on price and output rather than the competitive process – contravening legislative history and legislative intent."[166] The report went on to acknowledge that the Federal Trade Commission (FTC) was created to prohibit unfair competition methods, and enabled the FTC to "'make rules and regulations for the purpose of carrying out the [FTC Act] provisions,' as well as broad investigative authority to compel business information and conduct market studies."[167] These provisions were established to

> reach beyond the other antitrust statutes, "to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete." Lawmakers delegated to the FTC the task of defining what constituted an "unfair method of competition," recognizing that an expert agency equipped to continuously monitor business practices would be best positioned to ensure the legal definition kept pace with business realities.[168]

These roles have been largely neglected. The DOJ and the FTC conducted a wholescale disavowal of legislative directives, congressional intent, and antitrust law, which the report recognized as a significant reason behind failing to address market concentration and monopolization.[169]

Politicians in congress and in the 2020 presidential election used antitrust legislation as a platform for their campaign. Elizabeth Warren, former presidential candidate and current senator for Massachusetts, coauthored a bill named the Anti-Monopoly and Competition Restoration Act.[170] Her proposed legislation focuses not only on regulating merger-acquisition activity, but also on "any companies with

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[165] INVESTIGATION OF COMPETITION IN DIGIT. MKTS., SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE COMM. ON THE JUDICIARY 6 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf#page=6 [https://perma.cc/TP83-3GAW].

[166] *Id.* at 391.

[167] *Id.* at 401.

[168] *Id.*

[169] *See id.* at 402.

[170] Lauren Hirsch, *Elizabeth Warren's Antitrust Bill Would Dramatically Enhance Government Control Over the Biggest US Companies*, CNBC (Dec. 7, 2019, 10:09 AM), https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html [https://perma.cc/9L89-FX6Z].

buying power, which could include corporations with market share as low as 25% . . . [and] all companies with more than $40 billion in sales."[171] The bill explicitly acknowledges that antitrust laws "were created to protect fair, open, and competitive markets and to prevent corporations from abusing their power to stifle competition."[172] As part of her presidential platform, Senator Warren wanted to appoint regulators to use the existing antitrust laws to unwind anticompetitive mergers amongst the largest tech companies, including Amazon, Facebook, and Google.[173] This proposition acknowledged that it wouldn't "solve every problem we have with our big tech companies," but that:

> Small businesses would have a *fair* shot to sell their products on Amazon without the fear of Amazon pushing them out of business. Google couldn't smother competitors by demoting their products on Google Search. Facebook would face real pressure from Instagram and WhatsApp to improve the user experience and protect our privacy. Tech entrepreneurs would have a fighting chance to compete against the tech giants.[174]

Senator Warren's platform was based fundamentally on what could level the playing field for competitors and give them a fair chance in the marketplace. Her platform is evidence of the growing concern over fairness in the marketplace and using antitrust as a means to address that concern.

Other likeminded senators have brought similar bills before Congress. Senator Amy Klobuchar's recent bill, entitled the Competition and Antitrust Law Enforcement Reform Act and "cosponsored by Judiciary Subcommittee on Antitrust and Commerce Committee members Richard Blumenthal (D-CT), Cory Booker (D-NJ), Ed Markey (D-MA), and Brian Schatz (D-HI), promises to empower federal enforcers with the tools to fight against anticompetitive conduct." Specifically, the bill endeavors to "increase enforcement resources," "strengthen prohibitions against anticompetitive mergers . . . [by] updat[ing] the legal standards for permissible mergers [and] shift[ing] the burden to the merging parties to prove their merger will not violate the law," "prevent harmful dominant firm conduct," "establish a new, independent FTC division to conduct market studies and merger retrospectives," and "implement additional reforms to enhance antitrust

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171 *Id.*

172 *Id.*

173 Elizabeth Warren, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/A6BZ-FJTQ].

174 *Id.* (emphasis added).

enforcement."[175] The legislation is a sweeping proposal to reinvigorate antitrust's effectiveness in part by preventing monopolies before they are established. Harmful competitive actions and "exclusionary conduct can be stopped before it is too late, and the harm is locked in. It extends the reach of the law so that blocking others from a fair chance to compete is a violation, even before a monopoly results."[176]

Returning to antitrust's original values – particularly those values completely ignored by courts today – requires recognition that American "[a]ntitrust has moved too far from democratic institutions and toward technocratic control, in service to a *laissez-faire* approach to antitrust enforcement."[177] Congress originally strove to balance and blend the fundamental values of antitrust law and "protect our economic system from undue concentrations and exercises of economic power and their 'destructive consequences in a free society.'"[178] Supporters of the current antitrust status quo treat neoconservative economic values as a "neutral set of scientifically objective economic laws" when they ought to be recognized as the "values-laden political, social, moral and economic ideologies they are. By doing so, we can return to balancing and blending in our antitrust analyses the fundamental American political, social, moral, and economic values that Congress has paid homage to for more than a century."[179] The dominant economic goal in the U.S. is to create a healthy, stable, and sustainable capitalistic economic system – to do that, "values such as competitive fairness, level economic playing fields, economic justice, a healthy diversity of competitors, and reduced economic concentration are actually crucial economic values."[180] Each factor – social, political, economic, and moral – is vital to reforming antitrust law, but this paper has focused on the easiest factor to accomplish and which courts are already prepared to handle.

Recognizing that fairness or morality ought to be at least part of a court's consideration in an antitrust suit is the first step, and while characterizing fairness as a steadfast rule faithful to antitrust's goals' roots seems more difficult, courts are fully equipped to make fairness assessments in court. In the same way "athletic

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[175] *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement*, AMY KLOBUCHAR MINNESOTA (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement [https://perma.cc/ARU3-7X2E].

[176] *Id.*

[177] Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179, 239 (2018).

[178] *Id.*

[179] *Id.* at 240–41.

[180] *Id.* at 241.

contests distinguish between fair and foul play, the law distinguishes between fair and unfair methods of competition."[181] Antitrust law already plainly contemplates fairness and as one treatise provides,

> On ethical, religious, and social sources, American law has developed a minimum level or standard of fairness in competitive rivalry. The law of unfair competition has developed as a kind of Marquis of Queensbury code for competitive infighting. To pursue the analogy, it would be equally as unacceptable for the contestants in a prize-fight to agree privately to 'throw the fight' as it would be for one contestant to insert a horseshoe in his glove."[182]

Courts are prepared to determine fairness. For example, the entire fairness doctrine is used when the presumption of the business judgment rule is defeated.[183] Under the entire fairness test, courts consider whether a transaction is fair as to process and price:

> Fair dealing encompasses questions of process, including how the transaction is timed, initiated, structured, negotiated, and disclosed, and how the approvals of the directors and the stockholders are obtained. Fair price relates to the economic and financial terms of the transaction, including any relevant factors that affect the intrinsic or inherent value of the corporation, such as the market value and assets of the corporation, a pro forma analysis or other valuation metrics, and possibly a solvency opinion to ensure that the transaction will not render the corporation insolvent. The fair dealing and fair price components are not viewed in isolation, but, rather, in conjunction. Entire fairness requires the court to strictly scrutinize all aspects of a transaction to ensure fairness.[184]

Courts already consider complicated questions of economics and business actions under a fairness consideration. To be clear, this is just one example of how the courts are already prepared to resolve complicated matters of fairness but is not necessarily the solution for fairness in antitrust law. Rather, the entire fairness rule is used to show that the Chicago School unnecessarily fears arbitrariness in antitrust analysis and that courts ought not to make a wholesale disavowal of fairness considerations in antitrust suits as a result.[185] Reintroducing fairness back to antitrust analyses is neither new nor difficult for courts. This would substantially level the marketplace and change the outcome of cases that proponents of the

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181 Maurice E. Stucke, *Is Competition Always Good?*, 1 J. OF ANTITRUST ENF'T. 162, 171 (Feb. 4, 2013).

182 *Id.* at 172 (quoting 1 *McCarthy on Trademarks and Unfair Competition* § 1:23 (4th ed, West 2012)).

183 Patrick M. Birney & Shant H. Chalian, *Financially Distressed Businesses: Revisiting the Business Judgment Rule and the Entire Fairness Doctrine*, NAT'L L. REV. (May 20, 2020), https://www.natlawreview.com/article/financially-distressed-businesses-revisiting-business-judgment-rule-and-entire [https://perma.cc/X3ME-5D7R].

184 *Id.*

185 Colino, *supra* note 9, at 3.

Hipster Antitrust movement consider wrongly decided.

CONCLUSION

A perfectly efficient and rational marketplace is a myth, yet the Chicago School relies on that myth – alongside an invisible hand – to take due care of the economy. It is simply not enough. Antitrust law was originally proffered as a solution to monopolies based on social, moral, political, and economic goals. The bleak future of antitrust law in America might still be saved, however, if legislators and the courts seriously consider reformulating their analysis. They might start by asking whether the action before them is fair.