ANTITRUST AND RACE

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ABSTRACT

Antitrust law regulates the consolidation and abuse of economic power. One of its core tasks is to ensure that market success is not rigged in favor of undeserving winners against excluded competitors at consumers' and workers' expense. But for their entire enforcement and doctrinal history, antitrust regulators and courts have built a legal infrastructure that assesses the exercise of economic power and its adverse effects as if that power and its effects were "color blind." In fact, corporate concentration, firm dominance, and anticompetitive conduct not only contribute to structural racism, but the very tools regulators use to combat those harms can reinforce racial inequality and disparately impact people of color.

This Article is a framing project, providing a comprehensive overview of antitrust law's relationship to racial inequality. Its goal is to identify the core problem areas and mechanisms by which antitrust has contributed to racial subordination in order to invite both a reckoning and suggestions for antiracist reforms. It first explains how firms' dominance and anticompetitive conduct have rigged market access in ways that create and perpetuate racial inequality. It then situates a novel data set of antitrust cases addressing race since the passage of the Sherman Act within the broader antitrust canon to detail how antitrust enforcers' and courts' "color-blind" approach to competition concerns have not only ignored the realities of racial inequality but also reinforced them. Finally, it proposes a suite of reforms as first steps to integrating analysis of race into antitrust enforcement, from market definition and merger review analyses to assessments of the anticompetitive effects and procompetitive benefits of firm conduct.

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TABLE OF CONTENTS

> *[T]his is what is said in the Sherman . . . [A]ct, that if a business is in the public market . . . it cannot deny access to this public market.*
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> Martin Luther King, Ethics Lecture to the Southern Baptist Theological Seminary (1961)[1]

INTRODUCTION

The legacy and persistence of structural racism has not only shaped the substance and exercise of public rights, but it has also shaped markets of exchange, the rules of competition, and how market participation may selectively frustrate or advance economic opportunity. Antitrust law establishes the core legal infrastructure that regulates the conditions for successful entrepreneurial entry in the marketplace by defining what counts as lawful strategies of competing. As a result, it decides how and when firms can exploit market power—the power to set prices or wages, reduce quality, choice, and innovation, or exclude rivals. Antitrust, like law more generally, is permeated by our history of systemic discrimination against people of color, and its rules contribute to that history. Our current racial reckoning requires that we excavate how the antitrust project has contributed to that history by creating obstacles to nondiscriminatory participation in the

1. MARTIN LUTHER KING, JR., 7 THE PAPERS OF MARTIN LUTHER KING, JR. 204 (2007).

marketplace. And it further requires that we dismantle rules of market participation that are systemically rigged to limit the economic success and well-being of people of color.

Unprecedented levels of corporate concentration due to lax antitrust enforcement make that reckoning all the more timely and urgent. Further, mounting empirical evidence—from leasing arrangements that create food deserts to mobility restraints in employment contracts—shows that firms can and have exercised their market power in ways that disproportionately harm minority-owned rivals as well as workers, consumers, and communities of color. While economic theory describes racial discrimination as a market failure that competitive market forces can correct—because "taste" rather than merit-based decision-making can make discriminatory firms less efficient than nondiscriminatory firms—market power *immunizes* discriminatory firms from those competitive forces, allowing them to profitably pass on inefficiencies to trading partners, workers, and consumers through higher prices, lower pay, or lower quality products and workplace environments. This connection between market power and discrimination reveals how antitrust law—and how it is enforced—can not only entrench racial inequality but also offer a potential remedy.

This Article exposes how courts and enforcers have shaped antitrust doctrine and regulation in ways that have *de facto* granted firms rights to discriminate against people and communities of color through the acquisition and exercise of market power. By at best proceeding as if color blind and at worst actively perpetuating market structures and rules that bolster systemic racism, antitrust regulators have ignored both the market realities that produce racial inequality and how firm dominance and anticompetitive conduct contribute to that inequality. Courts have used their authority to not only place significant obstacles in the way of ensuring free and fair access to markets but also to elide treatment of racial discrimination as a mechanism by which firms fail to compete on the merits. In doing so, courts have failed to see the role that competition can play in both reinforcing and remedying discrimination.

In the first comprehensive study of its kind, the Article collects and reviews antitrust cases since the Sherman Act's passage in which the parties' race or racial exclusions were mentioned and finds that only 168 federal cases concerned race at all, and in each of those cases, race lacked any salience to the antitrust analysis. The Article contextualizes those cases within the broader antitrust canon to explore the impact of antitrust's color-blindness on the success of claims sourced in racial inequality, identifying five doctrinal requirements that present obstacles to those claims' success. Further, it highlights the ways in which government enforcement of the

antitrust laws has been blind to and even reinforced exclusions and anticompetitive harms impacting people of color by simultaneously failing to challenge anticompetitive conduct that disproportionately impacts them and targeting self-help measures and coordination that benefits them.

Making antitrust antiracist will require a profound reexamination and revision of doctrinal requirements and enforcement priorities, but courts and agencies have the power to make significant improvements even without legislative intervention. By restructuring how they define markets to make race salient, antitrust regulators can more accurately assess market power and its anticompetitive effects on people and communities of color for the purposes of reviewing anticompetitive conduct and mergers. Making it easier to prove racist agreements that exclude or discriminate against firms, consumers, and workers of color can help eradicate conduct that restrains economic opportunity in communities of color. Further, by allowing broader defenses to coordination as a form of self-help when people of color organize to further diversity in the market, courts can aid historically-marginalized communities in asserting countervailing power against discriminatory incumbents. Antitrust agencies can marshal their resources to advance racial equality by collecting better demographic data to target anticompetitive conduct that disproportionately impacts people of color, prioritizing enforcement in markets that would be most impactful for communities of color, and designing consent decrees and soliciting feedback from those communities when those decrees are reviewed in judicial proceedings under a public interest standard. But for more far-reaching and systemic reforms, Congress must act to affirmatively ensure fair and equal access to markets by amending the antitrust laws and requiring that antitrust enforcement agencies take a proactive role in achieving racial equality.

In his seminary lectures, Martin Luther King envisioned the market as *itself* a place of public accommodation.[2] The task of our moment is to reimagine what true marketplace diversity could achieve. While some have argued that "[a]ntitrust policy . . . is not the appropriate tool for pursuing particular goals of social equality" and that racial equality goals "are best left to the constitutional and statutory institutions intended to address them,"[3] combatting the effects of consolidated corporate power on people of color cannot be merely a matter of civil rights and antidiscrimination law. Because antitrust law formulates rules that shape access to the marketplace, the conditions of discriminatory price- or wage-setting, and the allocation

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

of bargaining power in negotiating the terms of exchange, it has a central role to play in dismantling structural racism.[4]

This Article provides an accounting of antitrust's complicity in structural racism and a roadmap for its dismantling. It participates in a broader literature seeking to uncover systemic racism in the law, including in policing and criminal law,[5] property and housing law,[6] tax law,[7] banking law,[8] education law,[9] and more. But it also situates itself within the world of administrative law scholarship seeking to unearth administrative agencies' role in perpetuating racial subordination.[10] In expanding this crucial work to the antitrust context, it builds on critical new scholarship exploring how antitrust can apply to racial cartels and discrimination in specific sectors[11] as well as efforts to apply Critical Race Theory to criticize antitrust's consumer welfare standard in favor of a community welfare standard.[12]

The Article contributes to this literature in three ways. First, it lays out the theoretical and empirical case for how corporate concentration, firm

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4. As discussed *infra* in Parts II and III, the Article's approach in advocating for this role is consistent with both antisubordination and anticlassification justifications for antidiscrimination policy.

5. *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW (2010); Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371 (2022); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020).

6. *See generally, e.g.*, SHERYLL CASHIN, WHITE SPACE, BLACK HOOD (2021); RICHARD ROTHSTEIN, THE COLOR OF LAW (2017); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

7. *See generally, e.g.*, DOROTHY BROWN, THE WHITENESS OF WEALTH (2021).

8. *See generally, e.g.*, MEHRSA BARADARAN, HOW THE OTHER HALF BANKS (2015).

9. *See generally, e.g.*, Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382 (2021); LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397 (2019).

10. *See generally, e.g.*, Bijal Shah, Administrative Subordination (unpublished manuscript) (on file with author); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018); *2021–2022 Lecture Series on Race and Regulation*, PENN PROGRAM ON REGUL., https://www.pennreg.org/race-and-regulation/ [https://perma.cc/J49H-UHN6]; *Symposium on Racism in Administrative Law*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (2020), https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/ [https://perma.cc/2CLW-C3CA]; *Symposium on Inclusion, Exclusion, and the Administrative State*, DUKE L.J. (2017), https://scholarship.law.duke.edu/dlj_admin_law_symposium/2017/ [https://perma.cc/TQT8-G3SZ].

11. *See generally, e.g.*, Christopher Leslie, Banking Deserts, Merger Law, and Structural Racism (unpublished manuscript) (on file with author) [hereinafter Leslie, *Banking Deserts*]; Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. 1717 (2022) [hereinafter Leslie, *Food Deserts*]; Daria Roithmayr, Racism Pays: Race and Monopsony Power in Digital Markets, (unpublished manuscript) (on file with author); Felix B. Chang, *Ethnically Segmented Markets: Korean-Owned Black Hair Stores*, 97 IND. L.J. 479, 496–506 (2022); Felix B. Chang, Anisha Rakhra & Janelle Thompson, *Racially Collusive Boycotts: African-American Purchasing Power in the Wigs and Hair Extensions Market*, 102 B.U. L. REV. 1277 (2022); Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010).

12. *See generally* Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523 (2023).

dominance, and anticompetitive conduct can and has exacerbated racial inequality by protecting firms from competition when they discriminate or engage in conduct that has discriminatory effects (Part I). Second, it builds a framework for enforcers to better account for the realities of racial discrimination in shaping market realities for rivals, consumers, and workers of color. That framework draws from an original, foundational data set of antitrust case law dealing with race as well as antitrust's broader enforcement apparatus in order to identify how current doctrine and enforcement places obstacles in the way of successful race-salient antitrust challenges (Part II). By flagging these areas of concern, it seeks to initiate a conversation about reforms, proposing an aggressive slate of actions that agencies and courts could pursue without congressional reforms before turning to legislative avenues for improving antitrust regulation that furthers racial equity (Part III).

I. ANTITRUST AND RACIAL INEQUALITY

Antitrust doctrine, enforcement, and policy have shaped the rise of corporate concentration and firm dominance, as well as the legal salience of firms' conduct, in a way that has contributed to racial inequality. While the causes of systemic racism are many, court and agency decisions pertaining to the rules of market entry, competition, and exclusion have exacerbated racially minoritized individuals' and communities' inability to access and thrive in public markets as rivals to incumbents, as workers (or other input sellers), and as consumers (or other downstream buyers).[13] This Part first explains how racial discrimination can be understood as a market failure with broad social welfare harms. It then describes how corporate concentration, firm dominance, anticompetitive agreements, and other anticompetitive conduct have harmed racially minoritized competitors, workers, and consumers by exacerbating this market failure.

A. Racial Discrimination as a Market Failure

In addition to its moral dereliction and inherent harm, racial discrimination functions as a form of market failure because it results in the allocation of societal resources differently than how a well-functioning market would accord their social-welfare-maximizing value—employers failing to hire high-productivity workers or banks failing to lend to profitable entrepreneurs based on prejudice, resulting in less socially-

13. Alternative categorizations of upstream and downstream market actors are as "trading partners." *See, e.g.*, C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2091–92 (2018).

valuable production, market entry, and innovation than there otherwise would be absent discrimination.[14] Economists estimate the cost of discriminatory practices in education, access to business loans, and other areas to the United States' gross domestic product at roughly $16 trillion.[15]

Because "taste-based" discrimination—or discrimination based on prejudice or preferences—can have adverse economic effects for the discriminator, traditional economic analyses assumed that competitive market forces would correct for them. For example, biased firms paying more than they otherwise would for less qualified or less productive workers receive lower profits than their more productive, non-discriminating competitors, driving those firms from the market until wage differentials between equally productive workers erode.[16]

But taste-based discrimination can flourish when firms are protected from competitive pressures, whether because they are dominant market actors, collude with competitors, impose anticompetitive restraints, or benefit from market power generated from market failures like search and transaction costs, information asymmetries, heterogeneous preferences, or other frictions that reduce efficient matching.[17] Also, firms with market power may be more protected from competitive constraints when trading partners lack institutions, like unions and other broad-based, mass-membership organizations, that assert countervailing power resisting their unilateral price- or wage-setting.[18]

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14. *See, e.g.*, Leslie, *Food Deserts*, *supra* note 11, at 1741; Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Unjustified*, 95 CALIF. L. REV. 669, 679 (2007).

15. DANA M. PETERSON & CATHERINE L. MANN, CITI GPS: GLOB. PERSPS. & SOLS., CLOSING THE RACIAL INEQUALITY GAPS 4 (2020), https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D [https://perma.cc/87VM-S9NS].

16. *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); Kevin Lang & Ariella Kahn-Lang Spitzer, *Race Discrimination: An Economic Perspective*, 34 J. ECON. PERSPS. 68, 69 (2020). Thus, Becker used "taste" to describe such discrimination to emphasize his claim that the reasons for discrimination stemmed from psychological or sociological factors rather than rational economic decision-making. *See* BECKER, *supra* , at 16–18. This Article focuses on the relationship between market power and discrimination, whether that discrimination is intent-based or hidden but disparately impacts people of color.

17. For market frictions creating market power, see, for example, Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RES. S284, S314–17 (Supp. 2022).

18. *See, e.g.*, JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551–52 (2021); Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 654–56 (2021 [hereinafter Hafiz, *Structural Labor Rights*]; Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 30–31 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/system/files/working_papers/w27193/w27193.pdf [https://perma.cc/L8G3-SQCG].

Due at least in part to lax antitrust enforcement, market concentration, collusion, and anticompetitive restraints are pervasive in a range of markets critical for basic well-being and access to economic prosperity.[19] First, labor market concentration, collusion, and mobility constraints have decreased workers' wages, the quality of work, and labor's share of national income, limiting work as an avenue for economic mobility and increasing economic inequality.[20] The decline in labor's share of income is attributable in

19. For discussion on corporate concentration, see generally, for example, TIM WU, THE CURSE OF BIGNESS (2018); *America's Concentration Crisis*, OPEN MKTS. INST. (2019), http://concentrationcrisis.openmarketsinstitute.org [https://perma.cc/X4KU-TC5M]; Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (2019); Joseph E. Stiglitz, *Market Concentration is Threatening the US Economy*, PROJECT SYNDICATE (Mar. 11, 2019), https://www.project-syndicate.org/commentary/united-states-economy-rising-market-power-by-joseph-e-stiglitz-2019-03 [https://perma.cc/8CHA-5LWM]. For discussion on labor market concentration, see generally, for example, José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167 (Supp. 2022); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, 2 AM. ECON. REV.: INSIGHTS 33 (2020); David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power* (IZA Inst. Lab. Econ., Discussion Paper No. 12276, 2019), http://ftp.iza.org/dp12276.pdf [https://perma.cc/NDD3-CVYH]; Brad Hershbein, Claudia Macaluso & Chen Yeh, *Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data* (Soc'y Econ. Dynamics, Meeting Paper No. 1336, 2019), https://ideas.repec.org/p/red/ sed019/1336.html [https://perma.cc/WAC5-QY8D]; Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation* (IZA Inst. Lab. Econ., Discussion Paper No. 12089, 2019), https://www.iza.org/publications/dp/12089/labor-market-concentration-and-labor-compensation [https://perma.cc/WKL6-4NEH]. For discussion on lax antitrust enforcement, see generally JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019); Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline in Antitrust Enforcement in the United States* (Nat'l Bureau Econ. Rsch., Working Paper No. 30326, 2022), https://www.nber.org/papers/w30326 [https://perma.cc/443H-YUX5]; MARSHALL STEINBAUM, ERIC HARRIS BERNSTEIN & JOHN STURM, ROOSEVELT INST., POWERLESS: HOW LAX ANTITRUST AND CONCENTRATED MARKET POWER RIG THE ECONOMY AGAINST AMERICAN WORKERS, CONSUMERS, AND COMMUNITIES (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Powerless-201802.pdf [https://perma.cc/Y9V8-97EU]. *But see* Hal R. Varian, *Recent Trends in Concentration, Competition, and Entry*, 82 ANTITRUST L.J. 807, 833 (2019) (arguing that while there has been a modest increase in concentration in the last few decades, this has not translated into increased prices or decreased output at the industry level).

20. *See generally, e.g.*, JOSH BIVENS, LAWRENCE MISHEL & JOHN SCHMITT, ECON. POL'Y INST., IT'S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED WAGES (2018), https://files.epi.org/pdf/145564.pdf [https://perma.cc/3DC3-J87K]; *Nonfarm Business Sector: Labor Share for All Workers*, FRED (June 4, 2020), https://fred.stlouisfed.org/series/PRS85006173 [https://perma.cc/MV5V-VM39]; Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 57 J. HUM. RES. S252, S252–55 (Supp. 2022); Qiu & Sojourner, *supra* note 19; Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24307, 2018), https://www.nber.org/papers/w24307 [https://perma.cc/BQQ4-AJQS]; David Card, Ana Rute Cardoso, Joerg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (Supp. 2018); José Azar & Xavier Vives, *Oligopoly, Macroeconomic Performance, and Competition Policy* (CESifo, Working Paper No. 7189, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274558 [https://perma.cc/5CCF-BJUP]; Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180 (2017); Lijun Zhu, *Industrial*

significant part to a decline in competition and an increase in pure profits as well as declining worker power and union density.[21] Reduced pay and benefits, underemployment, and unemployment have multiplier effects in reducing workers' purchasing power, particularly in their local communities and neighborhoods. But corporate concentration and anticompetitive conduct extend well beyond labor markets to the banking, health care, pharmaceutical, food, telecommunications, energy, and other essential goods sectors, raising prices and reducing quality and choice to consumers.[22]

Firm dominance and exercise of market power can not only enable discrimination but can disproportionately impact people of color. This is because anticompetitive firm conduct contributes to and compounds systemic racism and exacerbates racial inequality at the expense of racially marginalized communities with limited resources.[23] The following

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Concentration and the Declining Labor Share, in *Essays on Macroeconomics and Economic Development* 1–55 (2018) (Ph.D. dissertation, Washington University), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2633&context=art_sci_etds, [https://perma.cc/5V4A-KVU6]. For discussion on collusion and mobility restraints, see, for example, Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 80–82 (2021); Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24831, 2018), https://www.nber.org/papers/w24831.pdf [https://perma.cc/T5M9-CSSX]; Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 190–192 (2020).

21. "Pure profits" are what a firm earns in excess of all production costs like capital and labor costs as well as material inputs. *See, e.g.*, Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2421, 2424 (2020); Stansbury & Summers, *supra* note 18, at 1–8; Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1326–27 (2021); *see also, e.g.*, David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 646–48 (2020); Andrea L. Eisfeldt, Antonio Falato & Mindy Z. Xiaolan, *Human Capitalists* 1–7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28815, 2022); Matthew Smith, Danny Yagan, Owen M. Zidar & Eric Zwick, *The Rise of Pass-Throughs and Decline of the Labor Share*, 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29400, 2021).

22. *See generally, e.g.*, PHILIP H. HOWARD, CONCENTRATION AND POWER IN THE FOOD SYSTEM (2016); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2015); Autor et al., *supra* note 21; Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 721–37 (2018); Andrew P. Meyer, *Market Concentration and Its Impact on Community Banks*, FED. RSRV. BANK ST. LOUIS (Apr. 12, 2018), https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks [https://perma.cc/7W8Y-JMUC]; Brent D. Fulton, *Health Care Market Concentration Trends in the United States: Evidence and Policy Responses*, 36 HEALTH AFFS. 1530 (2017).

23. *See, e.g.*, Joshua P. Davis, Eric L. Cramer, Reginald L. Streater & Mark R. Suter, *Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic "Isms")*, 66 ANTITRUST BULL. 359, 363–364 (2021); Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 611–13 (2020). Market power can also protect progressive firms that engage in reverse discrimination, but "courts rarely hold businesses liable for practices that disproportionately burden whites," Ayres, *supra* note 14, at 683, particularly in the antitrust setting. My research found a single case challenging an employer's affirmative action program as reverse discrimination violative of civil rights and antitrust law, and that

subsections detail the mechanisms by which corporate concentration, firm dominance, and firms' anticompetitive conduct have contributed to racial inequality.

B. Corporate Concentration, Firm Dominance, and Racial Inequality

Corporate concentration and the rise of firm monopoly (sell-side) and monopsony (buy-side) power can and have disproportionately impacted people of color both as rivals to incumbents and as workers and other input sellers.[24] Absent inherited wealth, entrepreneurial opportunities and work are exclusive avenues to economic opportunity, but in industry after industry, racially minoritized individuals and firms are unable to compete on an equal playing field with incumbents and confront significant and discriminatory price- and wage-setting power by trading partners.[25] Dominant firms have also profitably engaged in a range of anticompetitive conduct to squeeze racially minoritized consumers, including predatory pricing and lending, price-discrimination, exclusive dealing, and refusals to deal.[26]

First, mergers and firm dominance have increased interfirm inequality and made it harder for minority-owned rivals to enter and successfully challenge incumbents' market position.[27] Because dominant firms are more

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case was dismissed as not supported by the factual allegations or law. Taterka v. Wisconsin Tel. Co., 394 F. Supp. 862, 865 (E.D. Wis. 1975). While the focus of this Article is on how market power can and has prevented competitive forces from disciplining discrimination in ways that have contributed to and exacerbate systemic discrimination against people of color, its prescriptions can apply equally to discrimination against the majority that results in competition harms.

24. *See, e.g.*, sources cited *supra* note 11; STEINBAUM ET AL., *supra* note 19, at 31, 41–43.

25. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 430–32 (Arthur Goldhammer trans., 2014); ESTELLE SOMMEILLER, MARK PRICE & ELLIS WAZETER, ECON. POL'Y INST., INCOME INEQUALITY IN THE U.S. BY STATE, METROPOLITAN AREA, AND COUNTY (2016), https://files.epi.org/pdf/107100.pdf [https://perma.cc/7HAS-JX9J]; Jae Song, David J. Price, Fatih Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q.J. ECON. 1 (2019); Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017); Lisa Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore & Jeffrey P. Thompson, *Recent Trends in Wealth-Holding By Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FEDS NOTES (Sept. 27, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm [https://perma.cc/NDC6-DABT].

26. *See* STEINBAUM ET AL., *supra* note 19, at 31.

27. *See, e.g.*, ROBERT E. WEEMS JR., BUSINESS IN BLACK AND WHITE: AMERICAN PRESIDENTS AND BLACK ENTREPRENEURS IN THE TWENTIETH CENTURY 212–15 (2009); DARRICK HAMILTON & MADELINE NEIGHLY, ROOSEVELT INST. & KIRWAN INST., THE RACIAL RULES OF CORPORATE POWER: HOW EXTRACTIVE CORPORATE POWER HARMS BLACK AND BROWN COMMUNITIES AND HOW RACE-CONSCIOUS SOLUTIONS CAN CREATE AN INCLUSIVE ECONOMY 5–6 (2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Racial-Rules-of-Corporate-Power_Issue-brief_201911-1.pdf [https://perma.cc/KAD4-HG44]; PAMELA NEWKIRK, NEWS MEDIA ALL., RESEARCH REPORT: MINORITY-OWNED MEDIA AND THE DIGITAL DUOPOLY 10 (2022),

shielded from competitive forces, they can more easily price discriminate or choose suppliers and distributors based on discriminatory animus. For example, there is evidence that lead franchisors' market power allows them to profitably discriminate against racially minoritized franchisees, forcing them to operate in "economically distressed" communities and "dangerous locations" where profits are lower.[28] Economists have also found evidence of increasing inequality between "superstar" firms and their competitors, meaning increasing inequality at the top of superstar firms' wage scale relative to competitor firm employees at the bottom of the wage scale.[29] So firm dominance impacts rivals'—including racially-marginalized rivals'—ability to offer competitive wage scales in industries dominated by superstar firms.[30] Further, dominant firms have actively poached talent from minority-owned businesses in ways that limit those businesses' access to critical labor inputs.[31] Black and Brown entrepreneurs suffer discrimination from venture capitalists and investors in raising the funds necessary to profitably compete against incumbents.[32] Minority communities also confront higher costs of capital when receiving business loans due to concentration and reduced competition in the banking sector, the withdrawal of banks from minority communities, and discrimination.[33]

Second, weak merger enforcement has increased employer buyer power and adversely impacted workers of color through reduced compensation and

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http://www.newsmediaalliance.org/ wp-content/uploads/2018/08/FINAL-FORMATTED-REPORT_MInority-Owned-Media-and-the-Digital-Duopoly-_1-24-22.pdf [https://perma.cc/ETL2-VM7S]; Brian S. Feldman, *The Decline of Black Business*, WASH. MONTHLY (Mar. 19, 2017), https://washingtonmonthly.com/2017/03/19/the-decline-of-black-business/ [https://perma.cc/74J8-CFSC] (describing impact of corporate concentration on Black entrepreneurs in insurance, meatpacking, grocery, cosmetics, entertainment, communications, funeral home, and publishing markets).

28. Complaint at 33, 39, Crawford v. McDonald's USA, LLC, No. 1:20-cv-05132 (N.D. Ill. Aug. 31, 2020)*; see also* Susan Berfield, *How McDonald's Made Enemies of Black Franchisees*, BLOOMBERG (Dec. 17, 2021, 6:00 AM), https://www.bloomberg.com/news/features/2021-12-17/black-mcdonald-s-franchise-owners-face-off-with-fast-food-restaurant-over-racism [https://perma.cc/UH3S-W72R]; *Minority Franchising: Is Discrimination a Factor?: Hearing Before the H. Comm. on Small Business*, 103d Cong. 2 (1993).

29. *See* Autor et al., *supra* note 21, at 646–48.

30. *See id.*

31. *See* WEEMS, *supra* note 27; Feldman, *supra* note 27.

32. *See* PETERSON & MANN, *supra* note 15, at 59–61; Reed Albergotti, *Black Start-Up Founders Say Venture Capitalists are Racist, but the Law Protects Them*, WASH. POST (July 22, 2020, 7:00 AM), https://www.washingtonpost.com/technology/2020/07/22/black-entrepreneurs-venture-capital/ [https://perma.cc/PP3D-NFZT]; TIFFANY HOWARD, CTR. POL'Y ANALYSIS & RSCH., THE STATE OF BLACK ENTREPRENEURSHIP IN AMERICA 10–16, (2019), https://www.cbcfinc.org/wp-content/uploads/2019/05/CPAR-Report-Black-Entrepreneurship-in-America.pdf [https://perma.cc/6W8S-ZNNU]; Sarah Lyons-Padilla et al., *Race Influences Professional Investors' Financial Judgments*, 116 PROC. NAT'L ACAD. SCIENTISTS 17225, 17229–30 (2019), https://www.pnas.org/doi/10.1073/pnas.1822052116 [https://perma.cc/DDA9-EQAS].

33. Robert Mann, Bank Competition, Local Labor Markets, and the Racial Employment Gap (August 8, 2022), (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4013042 [https://perma.cc/EW97-3N5W]; *see infra* note 49 and accompanying text.

workplace quality, fewer exit options when they face discrimination, and un- and underemployment.[34] For example, corporate concentration in the health care and supermarket industries has increased the hospitals' and supermarkets' buyer power over workers, subjecting essential workers to depressed pay, low-quality working conditions, and limited outside options, a reality that has most adversely impacted workers of color.[35] Nursing in particular is a highly racialized profession in many areas, with nurses of color suffering across-the-board pay disparities relative to white nurses, a problem only exacerbated by health care and hospital mergers placing downward pressure on nurses' wages.[36] This wage suppression reduces the supply of nurses, which makes everybody worse off through more expensive and lower quality care.[37]

Systemic discrimination against workers of color compounds these effects. Employers with monopsony power can more easily act on

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34. Mark Stelzner & Kate Bahn, Discrimination and Monopsony Power (July 2020) (unpublished manuscript), https://equitablegrowth.org/working-papers/discrimination-and-monopsony-power/ [https://perma.cc/B2QR-9MYR]; IOANA MARINESCU & JAKE ROSENFELD, WORKRISE NETWORK, WORKER POWER AND ECONOMIC MOBILITY 4, 7–9 (2022), https://www.workrisenetwork.org/sites/default/files/2022-07/wr-worker-power-final-pdf-v2.pdf [https://perma.cc/GBS5-FLD3]; Tomaz Cajner, Tyler Radler, David Ratner & Ivan Vidangos, *Racial Gaps in Labor Market Outcomes in the Last Four Decades and Over the Business Cycle* (FEDS, Working Paper No. 71, 2017), https://papers.ssrn.com/abstract=2996084 [https://perma.cc/AC8Q-SK2N]. For the antitrust agencies' failure to assess the labor market effects of mergers, see, for example, Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020); Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37 (2020) [hereinafter Hafiz, *Interagency Merger Review*]; Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381 (2019) [hereinafter Hafiz, *Labor Antritrust's Paradox*]; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019); Hemphill & Rose, *supra* note 13; Naidu et al., *supra* note 20.

35. *See, e.g.*, LISA DUBAY, JOSHUA AARONS, K. STEVEN BROWN & GENEVIEVE M. KENNEY, URB. INST., HOW RISK OF EXPOSURE TO THE CORONAVIRUS AT WORK VARIES BY RACE AND ETHNICITY AND HOW TO PROTECT THE HEALTH AND WELL-BEING OF WORKERS AND THEIR FAMILIES (2020), https://www.urban.org/sites/default/files/publication/103278/how-risk-of-exposure-to-the-coronavirus-at-work-varies.pdf [https://perma.cc/5RJA-UP8N]; Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021); SARU JAYARAMAN, FOOD LAB. RSCH. CTR., SHELVED (2014), https://laborcenter.berkeley.edu/pdf/2014/Food-Retail-Report.pdf [https://perma.cc/KDS5-RSY6].

36. *See, e.g.*, Marina Zhavoronkova, Rose Khatter & Mathew Brady, *Occupational Segregation in America*, CTR. FOR AM. PROGRESS (Mar. 29, 2022), https://www.americanprogress.org/article/occupational-segregation-in-america/ [https://perma.cc/E4CA-TES6]; Prager & Schmitt, *supra* note 35; Christina DePasquale, *Hospital Consolidation and Monopsony Power in the Labor Market for Nurses*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (June 11, 2020), https://www.competitionpolicyinternational.com/hospital-consolidation-and-monopsony-power-in-the-labor-market-for-nurses/ [https://perma.cc/MUX3-EPXU]; Jean Moore & Tracey Continelli, *Racial Ethnic Pay Disparities Among Registered Nurses (RNs) in U.S. Hospitals: An Econometric Regression Decomposition*, 51 HEALTH SERVS. RSCH. 511 (2016).

37. *See, e.g.*, Andrew Jacobs, *'Nursing Is in Crisis': Staff Shortages Put Patients at Risk*, N.Y. TIMES (Oct. 21, 2021), https://www.nytimes.com/2021/08/21/health/covid-nursing-shortage-delta.html [https://perma.cc/GN3M-MYC9]; VICKY LOVELL, INST. FOR WOMEN'S POL'Y RSCH., SOLVING THE NURSING SHORTAGE THROUGH HIGHER WAGES (2006), https://people.umass.edu/econ340/rn_shortage_iwpr.pdf [https://perma.cc/KJ4X-HU6J].

discriminatory animus,[38] reducing the number, quality, and pay of available jobs to racially minoritized workers.[39] Black and Brown workers have fewer exit options than comparable white workers due to weak social safety net protections and lower average levels of wealth to survive without a job.[40] For example, the mean (median) net worth for Black and Hispanic families in 2019 were $142,500 ($24,100) and $165,500 ($36,100), respectively, as compared to $983,400 ($188,200) for white families.[41] Less personal wealth decreases workers' reservation wage—the wage they would be willing to accept for employment—and makes it harder to quit, decreasing workers' bargaining leverage. And a persistent Black-white two-to-one unemployment rate gap means that Black workers have fewer resources for support if they quit due to facing suppressed pay, unsafe conditions, or discrimination.[42] Female workers of color have even fewer outside options, largely due to the undervaluation of work predominantly supplied by women, resulting in significant wage gaps.[43] Hispanic and Black women earn 57 and 64 cents, respectively, for every dollar earned by white, non-Hispanic men in 2020.[44] LGBTQ+ workers of color also suffer wage gaps and are more likely to be unemployed or underemployed relative to straight and cisgender peers.[45]

Third, corporate concentration and firm dominance can harm racially minoritized consumers by allowing firms to more easily collude and unilaterally engage in anticompetitive conduct ranging from predatory pricing and lending, price-discrimination, exclusive dealing, refusals to

38. *See, e.g.*, BECKER, *supra* note 16, at 39; Stelzner & Bahn, *supra* note 34, at 4–5.

39. *See, e.g.*, Patrick M. Kline, Evan K. Rose & Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers* (Nat'l Bureau of Econ. Rsch., Working Paper W29053, 2022), https://www.nber.org/papers/w29053 [https://perma.cc/Y8XC-GT6H]; Devah Pager, Bart Bonikowski & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

40. MARINESCU & ROSENFELD, *supra* note 34, at 7–9, 11–16; Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finance*, FEDS NOTES (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html [https://perma.cc/6RCX-QCUQ].

41. Bhutta et al., *supra* note 40.

42. Olugbenga Ajilore, *The Persistent Black-White Unemployment Gap Is Built into the Labor Market*, CTR. FOR AM. PROGRESS (Sept. 28, 2020), https://www.americanprogress.org/article/persistent-black-white-unemployment-gap-built-labor-market/ [https://perma.cc/3QNB-GRYU].

43. *See, e.g.*, Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR REV.: J. WORK & POL'Y 3, 20 (2021); Robin Bleiweis, Jocelyn Frye & Rose Khattar, *Women of Color and the Wage Gap*, CTR. FOR AM. PROGRESS (2021), https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/ [https://perma.cc/F5J7-29YL].

44. Bleiweis et al., *supra* note 43.

45. *See, e.g.*, *The Wage Gap Among LGBTQ+ Workers in the United States*, HRC FOUND., https://www.hrc.org/resources/the-wage-gap-among-lgbtq-workers-in-the-united-states [https://perma.cc/W9CK-U5AK] (last visited Apr. 17, 2023).

deal, and self-preferencing. For example, corporate consolidation in the health care industry has allowed significant market segmentation and price discrimination, enabling hospitals to charge disproportionately higher rates to private insurance companies relative to Medicare rates,[46] and making health coverage significantly more burdensome for Black families, who spend a higher share of their household income on health care and out-of-pocket expenses than the average American family.[47] Black borrowers and depositors face greater difficulty accessing banking services, confront higher borrowing rates when they do, and are more aggressively pursued in debt-collection lawsuits ending in default.[48] This is in part due to bank concentration through mergers and subsequent branch closures in racially minoritized neighborhoods, resulting in scarcity in those neighborhoods that reduce access to credit and small business loans.[49] Black and Hispanic individuals and families also face higher rates for home mortgages from mortgage providers compared to equally-qualified white mortgagees[50] as well as more expensive car loans and auto insurance premiums relative to those living in white neighborhoods.[51] Local supermarket monopolies have meant higher food prices and reduced choice and quality in racially

46. *See, e.g.*, OPEN MKTS. INST., THE ROLE OF HOSPITAL MONOPOLIES IN AMERICA'S HEALTH CARE CRISIS (2019), https://www.openmarketsinstitute.org/publications/role-hospitals-americas-health-care-crisis [https://perma.cc/77LZ-XH6U]; CHRISTOPHER M. WHALEY, BRIAN BRISCOMBE, ROSE KERBER, BRENNA O'NEILL & AARON KOFNER, NATIONWIDE EVALUATION OF HEALTH CARE PRICES PAID BY PRIVATE HEALTH PLANS: FINDS FROM ROUND 3 OF AN EMPLOYER-LED TRANSPARENCY INITIATIVE, RAND CORP. (2020), https://www.rand.org/pubs/research_reports/RR4394.html [https://perma.cc/8F35-FJZV].

47. JAMILA TAYLOR, CENTURY FOUND., RACISM, INEQUALITY, AND HEALTH CARE FOR AFRICAN AMERICANS (2019), https://tcf.org/content/report/racism-inequality-health-care-african-americans/ [https://perma.cc/A9ZU-7J4E].

48. See Kristen Broady, Mac McComas & Amine Ouazad, *An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges in Accessing Banking Services*, BROOKINGS INST. (Nov. 2, 2021), https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/ [https://perma.cc/K2QY-V3EB]; PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf [https://perma.cc/FE9W-JZTV].

49. *See, e.g.*, BARADARAN, *supra* note 8; Leslie, *Banking Deserts*, *supra* note 11; Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519 (2022).

50. STEINBAUM ET AL., *supra* note 19, at 31; *see generally* Patrick Bayer, Fernando Ferreira & Stephen L. Ross, *What Drives Racial and Ethnic Differences in High-Cost Mortgages? The Role of High Risk Lenders*, 31 REV. FIN. STUD. 175 (2018) (finding Black and Hispanic borrowers roughly twice as likely to have high-cost mortgages due to market segmentation).

51. Ian Ayres, Opinion, *Guess How Much Cheaper Your Auto Loan Would Be If Dealers Had to Play Fair*, WASH. POST (June 26, 2019, 3:48 PM), https://www.washingtonpost.com/opinions/2019/06/26/guess-how-much-cheaper-your-auto-loan-would-be-if-dealers-had-play-fair/ [https://perma.cc/2K4U-LAQ4] (collecting studies); Julia Angwin, Jeff Larson, Lauren Kirchner & Surya Mattu, *Minority Neighborhoods Pay Higher Car Insurance Premiums Than White Areas With the Same Risk*, PROPUBLICA (Apr. 5, 2017), https://www.propublica.org/article/minority-neighborhoods-higher-car-insurance-premiums-white-areas-same-risk [https://perma.cc/A9HW-UEJ5].

minoritized communities relative to those who moved to the suburbs during "white flight."[52] Finally, the dominance of Big Tech platforms and their self-preferencing has enabled their use of discriminatory algorithms to segment consumers and workers by race in advertising for goods and services, limiting price- and wage-competition as well as choice for users based on race.[53]

C. Anticompetitive Agreements and Racial Inequality

Firms with market power below monopoly thresholds can also engage in anticompetitive and discriminatory contracting practices that reinforce and perpetuate racial inequality.[54] First, the legacy of restrictive covenants and redlining have incorporated racially discriminatory restraints and exclusions in housing markets, but redlining is also well-documented in the banking, retail, and supermarket industries.[55] By using restraints in property agreements as a form of exclusion, contracting parties can agree not to serve certain neighborhoods based on their minority composition rather than economic criteria. In other words, property-based restraints can function as discriminatory market allocation mechanisms, carving out neighborhoods to segment markets and offer different prices and rates for goods and services. "Going dark" and "scorched-earth" subleases that exclude competitors from occupying commercial real estate in minority

52. Leslie, *Food Deserts*, *supra* note 11, at 1727–35.

53. *See, e.g.*, Jinyan Zang, *Solving the Problem of Racially Discriminatory Advertising on Facebook*, BROOKINGS INST. (Oct. 19, 2021), https://www.brookings.edu/research/solving-the-problem-of-racially-discriminatory-advertising-on-facebook/ [https://perma.cc/NV4N-6N78]; Alina Köchling & Marius Claus Wehner, *Discriminated by an Algorithm: A Systematic Review of Discrimination and Fairness by Algorithmic Decision-Making in the Context of HR Recruitment and HR Development*, 13 BUS. RSCH. 795 (2020) (collecting studies); Joseph Blass, *Algorithmic Advertising Discrimination*, 114 NW. U. L. REV. 415 (2019). Tech platforms can also use data and algorithmic design to better meet the needs of consumers of color by providing differentiated offerings. However, this Article's focus is on whether antitrust is sufficiently equipped to remedy circumstances where machine-learning biases function in a discriminatory manner that harms rather than benefits consumers.

54. Courts generally understand "market power" to mean "the ability to raise prices above those that would be charged in a competitive market," NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.38 (1984), but it also includes the ability to exclude, reduce quality, convenience, or innovation, or otherwise adversely change the terms of trade below competitive levels. *See, e.g.*, JONATHAN BAKER, WASH. CTR. FOR EQUITABLE GROWTH , MARKET POWER IN THE U.S. ECONOMY TODAY (2017), https://equitablegrowth.org/market-power-in-the-u-s-economy-today/ [https://perma.cc/Y8QH-V9XU]. "Monopoly" or "monopsony power," on the other hand, is a legal threshold of market power high enough to subject firms to liability under the Sherman Act's monopolization prohibition (Section 2) and has primarily been determined by market share thresholds. *See, e.g.*, Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241 (1987).

55. *See, e.g.*, BARADARAN, *supra* note 8, at 47; Leslie, *Food Deserts*, *supra* note 11, at 1733–1734; Feldman, *supra* note 27; Denver D'Rozario & Jerome D. Williams, *Retail Redlining: Definition, Theory, Typology, and Measurement*, 25 J. MACROMARKETING 175 (2005); Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125 (2001).

neighborhoods create barriers to entry and reduce competition based on market division, dramatically limiting consumers' access in those neighborhoods to competitively-priced goods and services.[56]

Another significant way that anticompetitive agreements have exacerbated racial inequality is in the employment context. Employers use a range of agreements to limit competition in labor markets from straightforward wage-fixing (agreeing to the same compensation or compensation range) and no-poaching agreements (agreeing not to recruit from each other) to more subtle agreements to share information, which can facilitate collusion to suppress wages and benefits. These agreements have been used in industries like hospital services and meat processing where workers are disproportionately workers of color.[57]

Employers' use of vertical no-poaching, noncompete, and other mobility restrictions also reduce outside options for workers of color, limiting their bargaining power and ability to play employers off each other for higher wages, benefits, and quality work environments, including less racially hostile ones.[58] Employers' pervasive use of mandatory arbitration provisions and other restrictions to collective litigation compounds the problem by limiting workers' ability to hold employers accountable and make visible to workers practices that reduce their bargaining power.[59]

Employers have also restructured work to disadvantage minority workers through the process of fissuring, or vertical disintegration.[60] When

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56. *See, e.g.*, Leslie, *Food Deserts*, supra note 11, at 1735–62. "Going dark" is when supermarkets close stores in locations they own and leave the buildings vacant. *Id.* at 1738. "Scorched-earth" subleases are agreements between supermarket lessees closing a location and sublessees forbidding any sublessees from operating a grocery store at that location during the long-term lease. *Id.* at 1740–41.

57. *See, e.g.*, Michael Hirtzer & David McLaughlin, *U.S. Opens Antitrust Probe on Chicken-Industry Labor Practices*, BLOOMBERG (Mar. 4, 2022, 10:08 AM), https://www.bloomberg.com/news/articles/2022-03-04/u-s-opens-antitrust-probe-on-chicken-industry-labor-practices#xj4y7vzkg [https://perma.cc/93HG-TP64]; Press Release, U.S. Dep't of Just., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021), https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses [https://perma.cc/CYS2-ZEUE]; Steven Greenhouse, *Suit Claims Hospitals Fixed Nurses' Pay*, N.Y. TIMES (June 21, 2006), https://www.nytimes.com/2006/06/21/us/suit-claims-hospitals-fixed-nurses-pay.html [https://perma.cc/WTU3-4MX8].

58. *See, e.g.*, Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J. L. & ECON. 53 (2021); Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility (Oct. 13, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 [https://perma.cc/M23L-4BRL] (finding noncompete earnings effects for nonwhite women and Black men more severe as compared to white men).

59. *See, e.g.*, Hafiz, *Structural Labor Rights*, *supra* note 18, at 683; Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205 (2017); KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC (2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/7D3G-7TDT].

60. *See* DAVID WEIL, THE FISSURED WORKPLACE (2014). Vertical integration can also be harmful to workers of color when it gives their employer more market power. I thank Christopher Leslie for emphasizing this point.

employers shift from directly employing workers to contracting at arms-length with labor input providers—whether through franchising, subcontracting, outsourcing, or using temporary staffing agencies—those workers suffer wage penalties and are more likely to suffer wage theft, unsafe working conditions, and broader employer noncompliance with labor and employment law.[61] Workers in industries that have fissured—from private security and hospitality to janitorial work and fast-food—are more often from racially minoritized communities, and workers who suffer wage penalties in these industries are disproportionately Black and Brown.[62]

The process of securing higher profits from extractive wage cuts to downstream workers can result from use of *either* product or labor market restraints in agreements between lead firms and downstream firms and labor input providers, restraints that are largely immune from antitrust scrutiny.[63] Product market restraints—such as requiring franchisees to purchase inputs like tomato sauce from franchisors at supracompetitive prices—can reduce downstream firms' budgetary discretion and demand for labor as a complementary input, squeezing their labor costs.[64] And upstream firms

61. *See, e.g.*, WEIL, *supra* note 60, at 43–158; Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LAB. L. 1 (2022); Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317 (2021); David Card, Ana Rute Cardoso, Joerg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (Supp. 2018); Erling Barth, Alex Bryson, James C. Davis & Richard Freeman, *It's Where You Work: Increases in the Dispersion of Earnings Across Establishments and Individuals in the United States*, 34 J. LAB. ECON. S67 (Supp. 2016); Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. RELS. REV. 287 (2010); Matthew Dey, Susan Houseman & Anne Polivka, *What Do We Know About Contracting Out in the United States? Evidence from Household and Establishment Surveys*, *in* LABOR IN THE NEW ECONOMY 267–304 (Katharine G. Abraham, James R. Spletzer & Michael Harper eds., 2010). For non-compliance in franchised industries, see, for example, Verified Petition, *People v. Domino's Pizza, Inc.*, No. 450627/2016, 2020 WL 2747803 (N.Y. Sup. Ct. May 27, 2020); CATHERINE RUCKELSHAUS, REBECCA SMITH, SARAH LEBERSTEIN & EUNICE CHO, NAT'L EMP. L. PROJECT, WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK (2014), https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf [https://perma.cc/D4GP-YS8F].

62. *Labor Force Statistics from Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Aug. 7, 2018), https://www.bls.gov/cps/contingent-and-alternative-arrangements-faqs.htm [https://perma.cc/KH9D-4NW9]; DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 19–20 (2017), https://files.epi.org/pdf/125116.pdf [https://perma.cc/HFU4-VS3H]; RUCKLESHAUS ET AL., *supra* note 61, at 10, 14–15, 22.

63. *See, e.g.*, Brian Callaci, Sérgio Pinto, Marshall Steinbaum & Matt Walsh, Vertical Restraints and Labor Markets in Franchised Industries (Mar. 30, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155571 [https://perma.cc/74HW-Q9J6]; Hafiz, *supra* note 61; Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65, 67–76 (2019).

64. *See, e.g.*, Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. (forthcoming 2023); Hafiz, *supra* note 61; Tirza Angerhofer & Roger D. Blair, *Collusion in the Labor Market: Intended and Unintended Consequences*, COMPETITION POL'Y INT'L ANTITRUST CHRON. 7, 12 (June 12,

have used no-poach and noncompete provisions in franchising and other labor supply agreements requiring downstream firms to restrict worker mobility in industries most heavily staffed by racially minoritized workers.[65] As a result, antitrust's lax approach to regulating vertical agreements has disproportionately impacted racially minoritized workers in those industries.

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In sum, corporate concentration and firm dominance have contributed to racial inequality. They reinforce the wealth of incumbents at the expense of market entrants, workers, and consumers of color and have disproportionately burdened their ability to compete on the merits, lowering compensation and workplace quality while increasing prices and reducing the quality of goods and services in a range of sectors. Compounding the effects of firm dominance are anticompetitive agreements, especially in labor markets, that disproportionately restrain workers' ability to use voice and exit to improve their income, workplace quality, and safety.[66] But while antitrust enforcement could reduce or even eliminate the anticompetitive effects of firm buyer and seller power, both antitrust doctrine and enforcement have thus far utterly failed to recognize the racial dimension of imperfect competition.

II. COLOR-BLIND ANTITRUST

Despite the adverse effects of concentrated markets, firm dominance, and anticompetitive agreements on communities of color, antitrust regulation has proceeded as if color blind in both its doctrinal evolution and in agency enforcement policy. For the purposes of this Article, "color blind" refers to courts and enforcers' failure to identify under a traditional antitrust analysis the ways in which race is salient to how markets actually function, or that race *has* economic salience in marketplaces. While a search of all antitrust cases since the Sherman Act's passage retrieved over a thousand cases in which race-related issues were mentioned, only a subset of those

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2020), https://www.competitionpolicyinternational.com/collusion-in-the-labor-market-intended-and-unintended-consequences/ [https://perma.cc/2HK2-9FV9].

65. *See generally* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, 68 MGMT. SCI. 143 (2022); EVAN STARR, ECON. INNOVATION GRP., THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS 12 (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf [https://perma.cc/K8BA-2UZ2]; ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL'Y INST., NONCOMPETE AGREEMENTS 2 (2019), https://www.epi.org/179414 [https://perma.cc/G86Y-BXKL]; Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, J. HUM. RES.: MONOPSONY S324, S326 (Supp. 2022).

66. For voice and exit as sources of countervailing power, see MARINESCU & ROSENFELD, *supra* note 34; Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. CHI. L. REV. 469 (2023).

concerned race-based exclusions or anticompetitive conduct directed at or by racial minorities. When such exclusions were alleged, those facts were treated as having no salience to the economic analysis. The antitrust agencies have equally operated as if the design of market rules selectively allowing and disfavoring competitive strategies were color-blind and have either ignored, failed to challenge, or actively reinforced exclusions and anticompetitive harms on people of color. Congress, the Executive Branch, and scholars have recently turned their attention to building an antiracist antitrust. But they have neither done a comprehensive accounting of antitrust's contribution to shaping markets at the expense of people of color nor have they developed a robust reworking of how to transform antitrust law and enforcement to integrate race.

A clarifying note before diving into the canon. Critics may agree with this Article's contentions that discrimination harms are social harms, but may believe they are not *antitrust* harms. Alternatively, or perhaps in addition, antidiscrimination advocates of the anticlassification or antibalkanization persuasion may argue that color-blind law enforcement in the antitrust setting (and beyond) may either best remediate discrimination harms or, regardless of its alleviation of those harms, is the morally or socially superior policy in not reproducing race-based distinctions or divisiveness.[67] The Article discusses the theoretical and constitutional nuances of adopting its race-salient prescriptions in Part III, but for situating this Part's discussion of why antitrust enforcement's color-blindness is worth documenting, two points are in order. First, excavating the history of antitrust's approach to race in regulating competition is valuable as part of a larger accounting and dissection of the role of law in systemic discrimination. Second, whether under an antisubordination, anticlassification, or antibalkanization theory, the Article argues that limiting equal access to market participants, goods, and services, reducing market diversity, and price-discriminating against groups of consumers or workers *is* an antitrust harm even if enforcers have yet to consistently recognize it as such.

67. Anticlassification advocates view antidiscrimination harm as the classification of any individual by race, while antibalkanization theorists identify the harm as social divisiveness that can result from extreme racial stratification and unconstrained racial remedies. These approaches are generally contrasted with an antisubordination approach, which identifies racial stratification as the antidiscrimination harm and seeks race-salient remedies for racial subordination. *See generally* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1280–84 (2011); Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955 (2012); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 UNIV. MIA. L. REV. 9 (2003).

A. Color-Blind Antitrust Doctrine

Antitrust law condemns anticompetitive conduct that excludes rivals and harms workers and consumers. The Sherman Act prohibits agreements that unreasonably restrain trade, including exclusionary agreements (Section 1), and the unlawful acquisition and maintenance of monopoly or monopsony power (Section 2).[68] The Clayton Act prohibits a more detailed range of conduct, including exclusive dealing and mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly" (Sections 3 and 7).[69] Passed with the Clayton Act to strengthen the Sherman Act's regulation of firm dominance, the Federal Trade Commission (FTC) Act's Section 5 prohibits "unfair methods of competition," including conduct that violates or threatens an incipient violation of the Sherman Act, Clayton Act, or the "spirit" of those laws.[70] And the Robinson-Patman Act prohibits certain forms of price discrimination and, targeting the spread of chain stores at small businesses' expense, prevents distributors from charging different prices to different retailers if that reduces competition.[71]

But while racial minorities have been excluded from and harmed by market conduct in ways that are squarely within the purview of these statutes, antitrust doctrine interpreting those statutes has neither addressed racial motivations nor harms to people of color as an explicit concern. This is true both in the case law and as a matter of enforcement, even in cases in which harm to people of color was explicitly alleged. Instead, enforcers have primarily regarded the rules of market participation as if they were neutral and universally applicable, viewing antitrust harms as cognizable only when they adversely impact a narrow understanding of "consumer welfare,"[72] treating consumers or trading partners on an aggregate basis in broad "relevant" antitrust markets that ignore how systemic discrimination and redlining have constructed consumer and worker choice and preferences, retail development, access to credit and services, and, ultimately, firms' ability to price and wage discriminate against people of color.

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68. 15 U.S.C. §§ 1, 2.

69. 15 U.S.C. §§ 13, 14, 18. The Celler-Kefauver Act (1950) amended the Clayton Act to strengthen its prohibition of anticompetitive mergers and acquisitions. Pub. L. No. 81-899, 64 Stat. 1125 (1950).

70. 15 U.S.C. § 45(a)(1); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 228–29 (1980).

71. 15 U.S.C. § 13; Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000).

72. For a critique of antitrust's "race-blind" reliance on the consumer welfare standard, *see* Capers & Day, *supra* note 12.

Aside from a rare set of cases discussed below, the antitrust canon has entirely ignored the realities of race. By failing to see race as salient in antitrust's doctrinal evolution, courts have elided treatment of racial discrimination as a mechanism by which firms fail to compete on the merits, preventing the achievement of social welfare-maximizing outcomes that competition law is meant to promote. This Article is the first to comprehensively review the intersection of antitrust adjudication and race within and beyond that canon, uncovering antitrust cases in which the parties' race, racial exclusions, or racially-discriminatory harms were at issue in the underlying facts or in the language of a judicial opinion. It presents two findings. First, it finds that, since the Sherman Act was passed, only 168 federal antitrust cases concerned race at all, and in each of those cases, race lacked any salience to the antitrust analysis.[73] In other words, race was either merely mentioned or was alleged to explain exclusionary conduct, but the antitrust courts made no connection between the racial dimensions of the underlying claims and its reasoning or decision regarding antitrust liability. Second, in contextualizing those findings within the broader antitrust canon, it concludes that rivals, workers, and consumers faced five main obstacles to successfully asserting or defending against antitrust claims sourced in racial inequality, obstacles that were purely the creation of judge-made law and were in no way required by the antitrust statutes themselves. Those were doctrinal requirements regarding: (1) antitrust market definition; (2) market power; (3) collusion and group boycotts; (4) the rule of reason analysis of firm agreements, conduct, and mergers; and (5) threshold issues and remedies.

Market Definition. One of the biggest challenges for an antiracist antitrust is judicial doctrine on market definition. For antitrust cases not involving *per se* unlawful conduct, current law requires parties to show market power and/or harm in a "relevant" antitrust market, which courts understand to involve two components: a geographic market and a product (or service) market.[74] Without showing harm in a relevant market in these

73. The author searched all federal cases on Lexis Nexis that included the search terms ("antitrust" or "Sherman Act" or "Sherman Anti-Trust Act" or "Norris-LaGuardia" or "Clayton Act") and ((race or racial) but not ("racketeering," "racing," or "RACs")), further narrowing the search by selecting "Antitrust & Trade Law" under "Practice Area & Topics," retrieving 3,605 decisions. Searching for "race OR racial" within those results retrieved 1,158 decisions. The author then read each case and identified 217 decisions that concerned alleged federal antitrust claims and included some claim of race-based discrimination, domination, exclusion, or collusion. Removing subsequent decisions in the same filed case yielded 168 cases. *See* Appendix A (providing a table of cases).

74. *See generally* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007). *Per se* unlawful conduct includes price- or wage-fixing agreements, bid-rigging, market allocation agreements, and horizontal group boycotts. Where such conduct is alleged, plaintiffs need not define a relevant market. ABA ANTITRUST LAW SECTION, MARKET POWER HANDBOOK: COMPETITION

cases, an antitrust claim cannot succeed, so market definition is arguably the most dispositive determinant of whether an antitrust claim may proceed.[75] Markets are defined through a demand-substitution analysis based on an undifferentiated consumer's view "of which products or geographic locations would be acceptable alternatives" and examines aggregate effects of switching on a hypothetical monopolist.[76] In general, it is much harder to establish harm under broad as compared to narrow market definitions. For example, establishing harm for conduct pertaining to a firm's sale of a generic, tradable good in a national market is much more difficult than showing harm from the same conduct pertaining to a heterogeneous, nontradable good[77] sold by a single manufacturer or brand in a local market because more competitors may be included in the former, and consumers can more easily switch as between generic goods if the price from one seller goes up relative to others.

Current antitrust analysis generally does not inquire into market segmentation based on race, the characteristics of racially minoritized consumers, or how markets may be localized and divided due to redlining, racial exclusion, or other historical factors that impact the preferences of people of color.[78] Even worse, while the antitrust agencies' own guidance recognizes that sellers and buyers can price discriminate against subgroups of consumers in specific geographic, product, and/or service markets,[79] my research revealed only one case where the antitrust agencies enforced the antitrust laws based on conduct in a price-discrimination submarket based on race.[80] Courts have only rarely recognized as potentially cognizable race-

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LAW AND ECONOMIC FOUNDATIONS 5–9, 11–31 (2005); 7 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1509a (3d ed. 2010) (collecting cases). Some case law holds that market definition is not required when there is direct evidence of market power or anticompetitive effects in the form of supracompetitive prices, but no Supreme Court precedent squarely establishes that principle. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1018–20 (6th Cir. 1999).

75. Baker, *supra* note 74; Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

76. Baker, *supra* note 74, at 132.

77. A purely "nontradable" good or service can only be consumed in the economy in which it is produced. Real estate is a good example, but goods with high transportation costs or commodities produced to meet geographic-specific uses have nontradable characteristics. For an overview, see, for example, Timothy Besley, Nicola Fontana & Nicola Limodio, *Antitrust Policies and Profitability in Nontradable Sectors*, 3 AM. ECON. REV.: INSIGHTS 251 (2021).

78. Such an analysis may be possible under prior market definition tests, like the "price-characteristics" test that asks whether there may be peculiar characteristics, uses, and functions of different goods that may differentiate them from the perspective of consumer choice. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593–94 (1957); David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 300–03 (2020).

79. *See, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 3, 4.1.4 (2010) [hereinafter HMG].

80. That case was Manischewitz's indictment for price-fixing matzo products. *See* United

salient price-discrimination markets—four times in the dataset of cases collected.[81] In one of those cases, a Tennessee district court dismissed as a named plaintiff a Black funeral director that brought a class action together with white funeral directors against a white-owned vertically-integrated life insurance company and funeral home because that plaintiff was "not in competition" with defendants due to "voluntarily limit[ing] their funeral business[es] to persons of the colored and white races respectively."[82] But the Tennessee court's recognition of a racially-segmented market became the basis for precluding a racially minoritized rival's antitrust challenge to a white incumbent's exclusionary conduct.

More generally, doctrine on geographic and product or service market definition has made it more challenging for plaintiffs of color and government enforcers to challenge anticompetitive conduct based on race-salient competition harms. First, while current law on *geographic* market definition is not inconsistent with assessing anticompetitive harms in minority-dominant neighborhoods, courts have routinely rejected parties' attempts to circumscribe the effects of firms' conduct in those neighborhoods. Specifically, geographic markets are understood as "the market area in which the seller operates and to which the purchaser can practicably turn" and must "'correspond to the commercial realities' of the industry and be economically significant."[83] But, with a couple famous exceptions, courts are suspicious of narrow geographic markets or geographic submarkets, which has in general meant that they ignore the harmful effects of anticompetitive conduct on racially marginalized communities.[84] For example, when supermarkets moved to the suburbs to

States v. B. Manischweitz Co., CRIM. No. 90–119, 1990 WL 86441 (D.N.J. May 23, 1990) (indictment issued Mar. 19, 1990). I thank Michael Carrier for highlighting this point. While my research focused only on publicly-available case filings, it is possible that the agencies have privately negotiated to condition mergers on avoiding harms in race-salient price-discrimination markets.

81. *See* R.J. Coulter Funeral Home, Inc. v. Cherokee Life Ins. Co., 32 F.R.D. 358, 362 (E.D. Tenn. 1963) (holding that white and Black funeral businesses are in different markets "not in competition as they voluntarily limit their funeral business to persons of different races."); COMPACT v. Metro. Gov't of Nashville & Davidson Cnty., 594 F. Supp. 1567, 1571–72 (M.D. Tenn. 1984) (defining relevant market as the "discrete market for minority architectural services"); Spanish Broad. Sys., Inc. v. Clear Channel Commc'ns, Inc., 242 F. Supp. 2d 1350, 1358–59 (S.D. Fla. 2003) (recognizing advertising allocated to Spanish-language radio as relevant market); Yong Ki Hong v. KBS Am., Inc., 951 F. Supp. 2d 402, 419 (E.D.N.Y. 2013) (suggesting in dicta that Korean video broadcasters and suppliers could be cognizable market).

82. *R.J. Coulter Funeral Home*, 32 F.R.D. at 361–62.

83. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Brown Shoe Co., Inc., v. United States, 370 U.S. 294, 336–37 (1962) (quoting Am. Crystal Sugar Co. v. Cuban-Am. Sugar Co., 152 F. Supp. 387, 398 (S.D.N.Y. 1957)).

84. The exceptions are *Aspen Skiing* and *Eastman Kodak*. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.20 (1985), the Court defined the relevant geographic market as the "Aspen area" rather than national or international destination ski resorts. In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481–82 (1992), the Court recognized a single-brand market of Kodak

follow white flight, many imposed restrictive covenants to limit supermarket competitors from taking their place in inner cities, creating food deserts.[85] Supermarket owners and lessees refused to lease or sublease to supermarket operators indefinitely or for the duration of long-term leases to reduce competition and incentivize customers to patronize newer suburban stores.[86] While such contracts can violate the antitrust laws if shown to cause harm in a relevant market, courts have refused to view neighborhoods identified as food deserts as relevant geographic markets, defining the cognizable market instead as an entire metropolitan area. Courts have presumed that consumers can commute to the suburbs, ignoring commuting costs, financial obstacles to car ownership, and difficulties in accessing or efficiently using public transportation.[87]

The food desert example can be more broadly extended to *all* circumstances in which the existence or effects of redlining, restrictive covenants, and other restrictions limit the ability of consumers or workers in minority communities to "shop around" for competitive options. By focusing on aggregate consumers, courts have ignored how firms can exploit the fact that choice between products and services—or what would be viewed as truly substitutable products and services—may differ for subgroups of consumers based on geographic preferences, and more specifically, access to public transportation or car ownership, commuting distance and/or prevalence of employer discrimination or hostile work environments in certain areas, and access to credit, nondiscriminatory trading partners, and customers they hope to service in specific areas.

Focusing on the aggregate consumer makes sense as long as a hypothetical monopolist in the relevant market cannot price discriminate against any subgroup of consumers or workers because the presence of a sufficient number of consumers or workers who can "shop around" will prevent a profitable price increase (or wage decrease) on *any* consumers or workers. But when a hypothetical monopolist *can* price discriminate against subgroups of consumers or workers—as is often the case with respect to consumers and workers from racially minoritized communities—failure to recognize the existence of a relevant submarket ignores the potential harm

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photocopier parts in a case alleging tying between Kodak's parts and photocopier services/repairs. For more examples of court narrow market definition rejections in cases involving racial discrimination allegations, see, for example, *Seidenstein v. Nat'l Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985); Hu v. Huey, 325 Fed. App'x. 436, 439 (7th Cir. 2009). Judicial rejection of narrow market definition is in part due to court interpretations of the Celler-Kefauver Act. In *Brown Shoe*, the Supreme Court noted that the Act deleted the word "community" from the original description of the relevant geographic market in Clayton Act, Section 7. 370 U.S. at 320 n.35. I thank John Newman for pointing me to this discussion in *Brown Shoe* and Celler-Kefauver's amendments to Section 7.

85. *See* Leslie, *Food Deserts*, *supra* note 11, at 1727–41.

86. *Id.* at 1735–41.

87. *Id.* at 1737–41 (collecting cases).

firms with market power can cause to those subgroups. Indeed, the antitrust agencies' Horizontal Merger Guidelines explicitly recognize such markets as "price discrimination markets," but they have yet to define such markets in race-salient ways.[88]

For the same reason that enforcers can err in their geographic market definition analysis by ignoring the effects of structural racism on consumer and worker choice, so, too, can they err in their *product* or *service* market definition. A focus on aggregate consumers and workers ignores sellers' or purchasers' own exploitation of consumer, buyer, and employer preferences through deliberate market segmentation strategies.[89] Specifically, by failing to recognize firms' ability to price discriminate, courts ignore firms' race-salient pricing strategies and marketing behavior targeting racial minorities' preferences for certain products and services. But they also ignore consumers' and workers' switching costs and lock-in effects that may tie them to particular products, employers, suppliers, or distributors. For example, some consumers may view generalized supermarkets or hair salons as adequate substitutes for Asian grocery stores or hair braiding salons, respectively, but others may not.[90] Or consumers with limited access to credit may purchase access to mobile wireless service on a prepaid rather than postpaid basis and may prefer wireless over traditional wireline phones, but courts have ignored that distinction and viewed the relevant product market to be retail mobile wireless telecommunications services more generally.[91]

Thus, improperly defining geographic and product or service markets can not only dilute assessments of anticompetitive harm from firm conduct on racially minoritized communities, but it can also ignore real consumer preferences, particularly in the service sector. For example, over half of the antitrust cases collected in the data set were racial discrimination and antitrust challenges brought by workers against employers, primarily in the health care industry and for denial of staffing privileges.[92] In most cases, even though the plaintiffs alleged they were the only or one of few physicians or caregivers of color in the residential area, courts refused to recognize the relevant labor market as confined to that area, insisting that

88. *See, e.g.*, HMG, *supra* note 79, § 4.1.4 ("If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a [small but significant and non-transitory increase in price, or] SSNIP. Markets to serve targeted customers are also known as price discrimination markets.").

89. I thank Pat McCoy for this very helpful insight.

90. *See, e.g.*, Chang, *supra* note 11, at 496; Chang et al., *supra* note 11; Ferzana Havewala, *The Dynamics Between the Food Environment and Residential Segregation: An Analysis of Metropolitan Areas*, 103 FOOD POL'Y (2021).

91. *See, e.g.*, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

92. *See infra* Appendix A.

specialized physicians "compete in a nationwide market for jobs."[93] But by defining the market so broadly, the courts not only doomed the caregiver plaintiff's ability to bring an antitrust claim by making it nearly impossible to show anticompetitive harm in a nationwide market by their singular exclusion, but they also ignored the local effects that such exclusions can have on racially minoritized patients who have been shown to disproportionately suffer worse care and health outcomes when treated by white doctors as compared to doctors of their own race (and would face real commuting costs if local access to doctors of color were foreclosed).[94]

Market Power. Antitrust law currently understands market power as a firm's power to exclude or as its power over price, its "ability to raise prices above those that would be charged in a competitive market."[95] In antitrust cases not involving *per se* unlawful conduct, plaintiffs must show that antitrust defendants have market power, or in firm dominance cases, monopoly or monopsony power.[96] Market power is generally inferred from a high enough market share in a relevant market along with some analysis of barriers to entry and expansion as indicative of other firms' ability to defeat a defendant's attempted exercise of market power.[97]

The "market share / market definition paradigm" has been criticized as circular, lacking a "coherent way to choose a relevant market without first formulating one's best assessment of market power," even though "the entire rationale for the market definition process is to enable an inference about market power."[98] This circularity can compound the inaccuracies of market power analyses when it comes to determining race-salient effects of anticompetitive conduct. First, if underlying market definition analysis focuses only on the aggregate consumer or worker and ignores the ability of firms to target geographic submarkets and racially-specific subgroups of

93. *See, e.g.*, Reddy v. Good Samaritan Hosp. & Health Ctr., 137 F. Supp. 2d 948, 969 (S.D. Ohio 2000).

94. See, e.g., Louis A. Penner et al., *The Effects of Oncologist Implicit Racial Bias in Racially Discordant Oncology Interactions*, 34 J. CLINICAL ONCOLOGY 2874 (2016); Susan Persky, Kimberly A. Kaphingst, Vincent C. Allen Jr. & Ibrahim Senay, *Effects of Patient-Provider Race Concordance and Smoking Status on Lung Cancer Risk Perception Accuracy Among African-Americans*, 45 ANN. BEHAV. MED. 308, 313–15 (2013); Erin C. Strumpf, *Racial/Ethnic Disparities in Primary Care: The Role of Physician-Patient Concordance*, 49 MED. CARE 496, 501–02 (2011).

95. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.38 (1984). *See generally* Krattenmaker et al., *supra* note 54, at 245–48. In buy-side cases, market power is understood as the ability to reduce prices or wages below those charged in a competitive market. *See, e.g.*, Hemphill & Rose, *supra* note 13, at 2082–87.

96. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (SECOND) (student ed. 1984) (collecting cases).

97. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26–31 (1984); Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L.J. 3 (1992).

98. Kaplow, *supra* note 75, at 440.

consumers and workers, any market power analysis will be underinclusive and discount the anticompetitive effects of conduct on those subgroups.

Second, "entry barrier analysis [also] assumes the definition of a relevant market,"[99] and even worse, traditionally focuses on structural barriers (governmental regulations, resource scarcity, network effects) or conduct-related barriers (a firm's exclusive dealing and tying contracts that lock up access to critical suppliers or distributors),[100] while presuming easy access to credit and ignoring the realities of taste-based discrimination by contracting parties that can limit entry or expansion.[101] Thus, this analysis ignores entry barriers most salient to minoritized individuals and communities. It undercounts the firms' ability to profitably increase prices or lower wages to and in those communities by failing to recognize how discrimination has limited those communities' access to competitive goods and services or the credit needed to start competing businesses in response to high prices or low wages, entrenching incumbents.[102]

Thus, current judicial approaches to assessing market power are prone to discounting the effects of anticompetitive conduct on racially minoritized individuals and communities.

Cartels, Collusion, and Group Boycotts. A third obstacle that antitrust doctrine places to an antiracist antitrust is its treatment of cartel agreements and group boycotts. Specifically, current law makes proving an agreement to exclude competitors very difficult, especially when that exclusion is racially motivated. This is primarily because racially-motivated exclusions are often hidden or privately-held, but they can also be the product of unconscious bias and easier to preserve through culture rather than needing to be agreed to through an explicit meeting of minds. But current law also categorically prohibits racially minoritized individuals and firms from engaging in more explicitly coordinated forms of economic self-help by engaging in horizontal coordination to assert countervailing power against dominant incumbents.[103] By making it difficult to prove exclusionary cartels and by subjecting minority-owned resistance and organizing to antitrust

99. Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 46 (2014).

100. *Id.* at 49.

101. For challenges in access to credit in concentrated banking markets, *see, e.g.*, Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 61 J. FIN. 437, 437–40 (2006). For evidence of courts ignoring the realities of racially discriminatory contracting in the context of antitrust claims, *see infra* Appendix A.

102. *See, e.g.*, Benjamin v. Aroostook Med. Ctr., 937 F. Supp. 957, 966–67 (D. Me. 1996) (denying antitrust claim to doctor alleging discrimination for failing to show that the hospital had monopoly power).

103. This Article focuses on economic self-help, although group boycotts may also be expressive and political. For calibrating protections for expressive boycotts under antitrust and First Amendment law, see Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037 (2010).

liability, the doctrine reinforces existing market structures that favor incumbents at the expense of, among others, racially minoritized rivals, consumers, and workers.

First, current law treats cartel conduct such as price- and wage-fixing agreements, bid-rigging, market allocation agreements, and horizontal group boycotts as *per se* unlawful. This means that the mere existence of such agreements violates the antitrust laws and defendants may not assert any justifications (such as combatting racial discrimination) as defenses.[104] But while explicit agreements on paper are easy enough to prove if discoverable, it is much harder to get a court to infer an agreement from parallel behavior or evidence that often consists of merely winks and nods.[105] For example, conscious parallelism—firms raising prices at the same time—is insufficient to establish the existence of an agreement.[106] Plaintiffs must also identify facilitating practices or "plus factors," like corporate concentration and actions against self-interest, that "'tend[] to exclude the possibility' that the alleged conspirators acted independently," to get factfinders to infer agreements, and those hurdles have proven significant.[107]

Such hurdles can often be insurmountable for racially minoritized plaintiffs seeking to use the antitrust laws to challenge collusion that excludes them from markets. Indeed, under current doctrine, the mere allegation of race-based discrimination could make it even more difficult for a plaintiff to prove an agreement because each colluder's refusal to deal with the plaintiff could be explained as the result of firms' independent racial animus as opposed to the result of an agreement with their competitors.[108]

So plaintiffs seeking to establish that a cartel sought to exclude them, even in part based on racist motivations, or that a cartel increased prices,

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104. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–98 (1985).

105. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco, 509 U.S. 209, 227–28 (1993); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553–54, 564–70 (2007); *In re* Text Messaging Antitrust Litig., 782 F.3d 867 (7th Cir. 2015); Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1724–67 (2020); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1196–98 (2013).

106. *See Brooke Group*, 509 U.S. at 227; *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 627–28 (7th Cir. 2010).

107. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)); Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581 (2021).

108. One exception is *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981), where a district court enjoined as violating the Sherman Act a campaign by the Knights of the KKK and others to exclude Vietnamese fishermen from commercial fishing in Galveston Bay. The court focused on the actual marketplace effects of the cartel's conduct as negating the need to establish a *per se* unlawful agreement. *Id.* at 1010; *see* John Mark Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384, 386–88 (2021).

lowered wages, or reduced access or quality to racially minoritized communities, can face high discovery costs and evidentiary burdens to prove a conspiracy. For example, in *Llacua v. Western Range Association*, the Tenth Circuit rejected plaintiff shepherds' antitrust claims for failing to establish that an agreement to fix the wages of foreign shepherds could be inferred between ranchers where they each offered the same lowest possible legal wage for job openings.[109] Similarly, in *Rowe Entertainment v. William Morris Agency*, the Southern District of New York dismissed Black concert promoters' antitrust claims alleging that white booking agents and concert promoters conspired to exclude them from the concert promotion business.[110] While plaintiffs cited instances of defendants' racial animus to support inference of an agreement, the court found them "isolated and unconnected," concluding it could not discern a "rational economic motive . . . for a booking agency to conspire with white concert promoters to restrain trade by not dealing with [B]lack concert promoters."[111] Courts have even applied higher standards to proving an antitrust conspiracy relative to a conspiracy to discriminate under the civil rights laws, dismissing a Black anesthesiologist's Sherman Act claims against hospital defendants for denying him staff privileges but allowing his Sections 1981 and 1985 civil rights conspiracy claims to proceed on grounds that a reasonable jury could conclude that the defendants intentionally discriminated against him on the basis of race.[112]

Second, antitrust doctrine prohibits as *per se* unlawful horizontal coordination for the purposes of economic self-help as a general matter, including when that coordination is between racially minoritized individuals and firms against dominant incumbents.[113] Because such coordination is a *per se* violation of Section 1 of the Sherman Act, it could not be defended on the basis that it furthered competition, including procompetitive market entry and diversity or countering dominant firm or cartel power to reduce prices or increase wages downstream.

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109. 930 F.3d 1161, 1177–82 (10th Cir. 2019); *see also* Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1176–77 (E.D. Va. 1995) (dismissing antitrust claims by African-American, Hispanic, and disabled persons alleging a co-op and its board of directors conspired to fix building unit prices for failing to establish an agreement).

110. 1999 U.S. Dist. LEXIS 7786, at *14–26 (S.D.N.Y. May 25, 1999).

111. *Id.* at *20, 23. For additional examples, see *TRI, Inc. v. Boise Cascade Off. Prods.*, Civil No. 00–1464 (RHK/AJB), 2001 U.S. Dist. LEXIS 17800, *14–19 (D. Minn. Oct. 15, 2001); Chicago Ridge Theatre Ltd. P'ship v. M & R Amusement Corp., No. 82 C 3141, 1987 U.S. Dist. LEXIS 6476 (N.D. Ill. July 15, 1987).

112. Ford v. Cascade Health Servs., Civil No. 03–6256–TC, 2006 U.S. Dist. LEXIS 44970, at *36–37 (D. Or. June 29, 2006).

113. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 605–06 (1972); COMPACT v. Metro. Gov't of Nashville & Davidson Cnty., 594 F. Supp. 1567, 1576–77 (M.D. Tenn. 1984).

The canonical case holding that horizontal coordination cannot be justified to counter the power of dominant firms is *United States v. Topco Associates, Inc.*, where the Supreme Court rejected the argument that the execution of a discount private-label program through allocating markets by a cooperative association of small- and medium-sized independent supermarket chains was justified by the need to compete with larger chains like Safeway, Kroger, and A&P.[114] Writing for the Court, Justice Marshall reversed the district court's ruling "that[,] by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains" because "Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy."[115]

Topco appears to foreclose racially minoritized firms from colluding to assert stronger bargaining leverage against dominant firms or cartels. For example, citing *Topco*, a Tennessee district court found *per se* unlawful a joint venture of Black architectural firms' (COMPACT's) agreement to only bid together for public contracts seeking minority business participation—thus eliminating competitive bidding between its members—"with the purpose of ameliorating the effects of racial discrimination against black architects in Tennessee."[116] The court held that, because the defendants "intended to increase their bargaining power by eliminating competition between themselves," "the arrangement falls squarely within the *per se* rule."[117] Importantly, the court defined the relevant market as "a discrete market for minority architectural services" rather than as the general market for architectural services, despite COMPACT's assertion of that broader market definition.[118] By isolating the firms' conduct to that narrow market, the court simultaneously enhanced the Black firms' combined market power (which would have been insignificant in the broader market for architectural services) and eclipsed full consideration of COMPACT's alleged procompetitive reasons for coordinating in the first place: to efficiently compete at scale with white

114. 405 U.S. at 605–06.

115. *Id.* at 610–11.

116. *COMPACT*, 594 F. Supp. at 1569, 1576–77.

117. *Id.* at 1576–1577 (citing *Topco*, 405 U.S. at 607–08). In cases where racially minoritized plaintiffs coordinated to boycott firms as consumers or workers rather than as rivals, the Supreme Court has protected those boycotts. For example, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), the Court understood the boycotts as primarily socially and politically motivated, and thus either protected under the First Amendment or antitrust law's labor exemption, whether they were directed at government actors to desegregate schools or improve housing, or at white-owned businesses to hire more Black employees. For fuller discussion, see Chang et al., *supra* note 11, at 1287–90.

118. *COMPACT*, 594 F. Supp. at 1572.

incumbent firms for public contracts in the broader market. The court did so despite its acknowledgement that "[t]he majority of architectural services in Middle Tennessee are performed by white-owned firms" through "a system in which public contracts" were awarded to "white firms[] serving as prime contractors, with subcontracts awarded to minority firms" that "never procure more than a token share of the entire project."[119]

These precedents and others also limit workers classified or misclassified as independent contractors—including, importantly, in fissured industries—from coordinating and boycotting trading partners or employers, including if they are coordinating to increase their pay, improve their working conditions, or make other economic demands that reduce racial inequality.[120]

Rule of Reason Analysis. Courts have allowed firms to present defenses—termed "procompetitive justifications"—to justify otherwise anticompetitive conduct, balancing those justifications with any anticompetitive effects of challenged conduct under a "rule of reason" analysis to determine liability in three main categories of cases: (1) certain horizontal and all vertical agreements under Section 1 of the Sherman Act, including joint ventures; (2) unilateral exclusionary conduct by firms with monopoly or monopsony power; and (3) mergers and acquisitions under Section 7 of the Clayton Act.[121]

In conducting this rule of reason analysis, courts have created three obstacles to antiracist antitrust. First, courts have applied "ancillary restraints" doctrine—a judicial doctrine subordinating an anticompetitive restraint as "ancillary" to, and thus worthy of reviewing, a collaboration's procompetitive purpose—in a manner that allows justifications for firm conduct that excludes racially minoritized firms but refuses to allow procompetitive justifications for antiracist firm conduct on the part of minoritized firms, as in *COMPACT*. The primary mechanism enabling this about-face is courts' categorization of defenses to racially minoritized firm coordination as "non-economic" civil rights-related defenses under Supreme Court precedent that precludes consideration of any "non-economic" defenses to anticompetitive conduct.[122] Second, courts have

119. *Id.* at 1571.

120. *See, e.g.*, L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 96–98, 101–03 (1962); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 144–45 (1942); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); Hafiz, *Labor Antitrust's Paradox*, *supra* note 34, at 387; Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018).

121. *See generally* AREEDA & HOVENKAMP, *supra* note 74, ¶¶ 1442–50, 1500–11, 1620–27; Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81 (2018). Cases brought pursuant to Clayton Act § 3 and the Robinson-Patman Act are also reviewed under the rule of reason.

122. *See* Nat'l Soc'y of Pro. Eng'rs (NSPE) v. United States, 435 U.S. 679, 691–96 (1978); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462 –64 (1986).

engaged in selective multi-market balancing, assessing procompetitive justifications in markets outside the market of a challenged anticompetitive restraint in order to immunize agreements and conduct harmful to people of color.[123] And third, courts have eroded the unilateral refusal to deal doctrine to immunize dominant firms' exclusionary conduct at the expense of minority-owned firms and communities of color.

First, when deciding how and whether to balance the anticompetitive effects of firm conduct with procompetitive benefits, Supreme Court precedent in *National Society of Professional Engineers* (*NSPE*) and *Indiana Federation of Dentists* has encouraged courts to credit benefits and undervalue harms to competition with regard to conduct that disproportionately harms minoritized workers and consumers, but then to discredit benefits relative to harms from conduct that encourages racially minoritized firm entry and competition that favors market diversity and the expansion of goods and services to consumers and workers of color.[124] This selective use of precedent puts a judicial thumb on the scale in favor of discriminatory firms and against horizontal coordination between racially minoritized firms to overcome racial inequality.

In *NSPE* and *Indiana Federation of Dentists*, the Supreme Court held that antitrust law does not countenance justifications under the rule of reason based on "public interest" concerns outside the "competitive significance" of restraints.[125] In *NSPE*, a group of professional engineers formed a trade association and issued an ethics rule refusing to negotiate or discuss fees with clients until after a potential client selected an engineer, purportedly to ensure public safety in preventing engineers from undercutting each other's bids at the expense of safe construction.[126] *Indiana Federation of Dentists* involved a policy promulgated by an Indiana dentists' organization requiring its members to withhold x-rays from dental insurers seeking to evaluate patients' claims for benefits, purportedly to ensure patients a high quality of care and avoid erroneous denial of insurance claims based on x-rays alone.[127] In both cases, the Supreme Court rejected these purported justifications as not cognizable under the rule of reason.

NSPE and *Indiana Federation of Dentists* have been used to, for example, prohibit defenses to a strike by attorneys representing indigent defendants for higher pay. The Supreme Court cited *NSPE* in holding that

123. *See, e.g.*, Hafiz, *Labor Antitrust's Paradox*, *supra* note 34, at 392–99 (collecting cases).

124. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 114–32 (1984); COMPACT v. Metro. Gov't of Nashville & Davidson Cnty., 594 F. Supp. 1567, 1573–75 (1984); Yong Ki Hong v. KBS Am., Inc., 951 F. Supp. 2d 402 (E.D.N.Y. 2013).

125. *NSPE*, 435 U.S. at 692; *Ind. Fed'n of Dentists*, 476 U.S. at 463.

126. *NSPE*, 435 U.S. at 682–85.

127. *Ind. Fed'n of Dentists*, 476 U.S. at 462–65.

improving the quality of representation of disproportionately Black and Brown defendants in the District of Columbia was not "an acceptable justification for an otherwise unlawful restraint of trade."[128] This despite the fact that low compensation rates to attorneys forced them to take on too many cases and dissuaded other attorneys to volunteer as court-appointed attorneys, evidence suggesting that the District was exercising monopsony power at the expense of attorneys and their clients downstream suffering lower-quality representation.[129] The attorneys' exercise of countervailing power *could* have reduced that monopsony, lifting wages to draw in more attorneys and improving downstream representation to clients. But the Court refused to consider such procompetitive defenses.

NSPE has been cited as precedent to preclude defenses to collaboration between racially minoritized firms on grounds that the collaboration was primarily "non-economic." Specifically, in *COMPACT*, the district court cited *NSPE* to justify its refusal to "weigh the value of COMPACT's avowed goal to overcome racial discrimination in ascertaining the competitive significance—and legality—of the coalition's similar prohibition on competitive bidding and other restrictive covenants."[130] Again, this is despite the fact that COMPACT asserted economic grounds for their coordination, namely, "increased productive capacity . . . [to] more effectively pursue general contractor positions and/or larger subcontractor opportunities on government construction projects," which the court recognized enabled the firms to "join together to produce that which is beyond the productive capacity or inclination of its individual members," thus increasing output.[131]

But *NSPE* and *Indiana Federation of Dentists* need not preclude *all* challenged conduct aimed at overcoming racial exclusions. This is because public interest justifications pertaining to racial inclusiveness, diversity of market participants, and promotion of minority-owned businesses can further competition goals understood within the ambit of *NSPE* and *Indiana Federation of Dentists*' "competitive significance" standard. Specifically, conduct to further racial justice goals can achieve procompetitive benefits, including: (1) facilitating entry and expanding markets that better serve workers and consumers; and (2) enabling countervailing power against dominant or colluding firms that offsets existing market power and moves

128. FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 423 (1990).

129. *See* Newman, *supra* note 108, at 389–90.

130. COMPACT v. Metro. Gov't of Nashville & Davidson Cnty., 594 F. Supp. 1567, 1573–75 (1984) (discussing *NPSE*, 435 U.S. at 692).

131. *Id.* at 1574.

prices closer to competitive prices.[132] Each of these effects can further traditional economic conceptions of efficiency and thus may be viewed as having "competitive significance" rather than as "noncompetitive" justifications.

Agreements between racially minoritized firms can be procompetitive. As discussed, discriminatory exclusions of racially minoritized firms function as market failures that actively harm social welfare and reduce allocative efficiencies. Where such exclusions occur, agreements between racially-excluded firms can strengthen their bargaining leverage against discriminatory buyers or sellers while enabling their ability to achieve economies of scale and scope otherwise unattainable absent such agreements. Groups of minoritized input providers, consumers, workers, distributors, or retailers combining to boycott discriminatory firms to demand nondiscriminatory treatment have a much stronger impact than individual refusals to deal do, and pooling resources, distribution and support networks, client lists, and even product lines can allow scaling and expansion that would be much more challenging for individual firms alone. Agreements that increase bargaining leverage against exclusionary incumbents can, in turn, facilitate market entry, increasing competition and output, encouraging innovation, enhancing information for market participants regarding consumer and worker preferences in new markets

132. Countervailing power can only be understood as procompetitive under traditional antitrust analysis to the extent it reduces market power upstream and lowers downstream prices to consumers, increasing output and enhancing allocative efficiency. *See, e.g.*, John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1493–512 (2012). While antitrust law has focused more on countervailing power's anticompetitive effects, see, for example, *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), courts have allowed mergers to proceed based on defendants' claims that their customers could assert sufficient countervailing power to prevent the firm's ability to raise prices. *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991); United States v. Country Lake Foods, Inc., 754 F. Supp. 669 (D. Minn. 1990). For a full discussion, see John Kirkwood, *Buyer Power Today*, *in* ALBERT A. FOER, LIBER AMICORUM, A CONSUMER VOICE IN THE ANTITRUST ARENA 221, 223 (Nicolas Charbit & Sonia Ahmad eds., 2020). More recently, defendant health insurers in the Anthem/Cigna and Aetna/Humana mergers argued that their mergers should be approved because they would increase their relative bargaining leverage to extract larger discounts from hospitals and other providers with market power and pass on the resulting savings to consumers through lower premiums and deductibles. United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C. 2017); United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017). Because courts rejected the merging parties' claims as unsupported, they never squarely reached the issue of whether countervailing power could be a cognizable justification for an otherwise anticompetitive merger. Thus, while countervailing power has not been upheld in recent cases as a procompetitive justification, that argument is gaining steam with increased concerns about monopsony power. In the labor setting, evidence suggests that the negative effects of labor market concentration on wages is attenuated in the presence of unions, which is consistent with the simple model of countervailing power. *See* Benmelech et al., *supra* note 20; Prager & Schmitt, *supra* note 35; Ioana Marinescu, Ivan Ouss & Louis-Daniel Pape, *Wages, Hires, and Labor Market Concentration*, 184 J. ECON. BEHAV. & ORG. 506 (2021).

with unpredictable demand, and increasing choice as well as the quality of goods and services on offer.[133]

Facilitating entry and achieving these outcomes are standard cognizable procompetitive benefits under antitrust law.[134] And in the context of race-salient antitrust, enhanced competition has the added benefit of punishing firms for any misperceptions resulting from racial stereotyping or outright price- and wage-discrimination against minorities, in the process correcting market failures that artificially reduce output and innovation. Further, conduct that enables minoritized firm entry can pressure incumbent firms that can more easily attain economies of scope to expand production or service in markets they had previously underserved.

For example, the makeup industry has notoriously underserved consumers of color in the range of foundation and powder shades on offer, with major brands like Revlon and Maybelline offering minimal if any options for non-Caucasian skin. Indeed, mainstream incumbents ignored as "niche" existing and potential consumer demand for more shade and texture options. Those firms' greater advertising budgets and distribution through national drugstores shaped and continue to shape beauty standards for people of color, using marketing campaigns and distributional advantages to scale the sale, for example, of skin bleaching creams that encouraged skin "whitening," which in turn pressured Black-owned firms to introduce their own bleaching products in order to enter the drugstore market.[135] Until recently, with the meteoric rise of Fenty Beauty, Black-owned brands struggled to compete with incumbents despite offering an increasingly broad product selection.[136]

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133. *See, e.g.*, Mirit Eyal-Cohen, *The Illusory Promise of Free Enterprise: A Primer to Promoting Racially Diverse Entrepreneurship*, 70 EMORY L.J. 1577 (2021); Kisha Lashley & Timothy G. Pollock, *Dancing with Giants: How Small Women- and Minority-Owned Firms Use Soft Power to Manage Asymmetric Relationships with Larger Partners*, 31 ORG. SCI. 1313 (2020); Theodore Metaxas, Marie Noëlle Duquenne & Dimitris Kallioras, *'Small and Medium Sized Firms' Competitiveness and Territorial Characteristics/Assets: An MLR Approach*, 50 J. DEVELOPING AREAS 231 (2016).

134. *See, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §§ 3.35–.36 (2000).

135. See Melissa L. Baird, *'Making Black More Beautiful': Black Women and the Cosmetics Industry in the Post-Civil Rights Era*, 33 GENDER & HIST. 557, 559–60 (2021); Cheryl Wischhover, *The Fenty Effect Means Everyone Offers 40 Foundation Shades Now*, RACKED (May 30, 2018, 2:20 PM), https://www.racked.com/2018/5/30/17409524/fenty-effect-foundation-40-shades [https://perma.cc/GX79-GEF7].

136. *See, e.g.*, *id.*; Molly Fleming, *Missed Opportunity: Why is the Beauty Industry Still Failing Women of Colour?*, MARKETINGWEEK (May 9, 2019), https://www.marketingweek.com/beauty-industry-failing-women-colour/ [https://perma.cc/C3WG-EXBM]; Nadra Nittle, *Before Fenty: Over 100 Years of Black Makeup Brands*, RACKED (Jan. 23, 2018, 9:32 AM), https://www.racked.com/2018/1/23/16901594/black-makeup-brands-history [https://perma.cc/4zWQ-VPBH]. Fenty's rise was possible due in no small part to vertical conduct. Founded and launched by superstar Rihanna, Fenty revolutionized the beauty industry by offering an unprecedented forty (now

Thus, racially minoritized firms coordinate for "non-economic" racial justice and public interest objectives, but also for economic objectives. Coordination among Black-owned cosmetic companies could have increased their bargaining leverage against, for example, drugstores that have exclusive agreements with or allocate premium shelf space to dominant brands like Revlon, making it easier for them to demand nondiscriminatory sales and distribution terms from retailers.[137] And building consumer demand for diversified products can encourage incumbent firms to expand product lines where—perhaps due to their own lack of corporate diversity, racial bias, or sheer market entrenchment—they underestimate or misperceive consumer demand. Such expansion can increase output and innovation on product formulas, textures, and shades, reducing costs to consumers.[138]

Case law since *NSPE* and *Indiana Federation of Dentists* has recognized that the line between "non-economic" and "economic" considerations can be porous.[139] And the Third Circuit's decision in *United States v. Brown University* illustrates how race-salient justifications can sound in competitive significance.[140] In that case, Ivy League schools allegedly agreed to distribute financial aid only to financially needy students and to determine collectively the amount of aid they would award commonly-admitted students. While this alleged agreement has many of the attributes of horizontal price-fixing—conduct usually subject to the *per se* rule—the defendants convinced the Third Circuit to remand the case for a full rule of reason analysis to assess their defense that the agreement was necessary "to achieve the twin objectives of advancing equality of access to higher education and promoting socio-economic and racial diversity within the nation's most elite universities."[141] The court viewed these defenses as

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fifty) foundation shades and is now valued at an estimated $3 billion. *See* Madeline Berg, *Fenty's Fortune: Rihanna Is Now Officially a Billionaire*, FORBES (Aug. 4. 2021, 6:30 AM), https://www.forbes.com/sites/maddieberg/2021/08/04/fentys-fortune-rihanna-is-now-officially-a-billionaire/?sh=10bf90b37c96 [https://perma.cc/G3RA-RVHD]. While Rihanna's brand power was undoubtedly a reason for Fenty's success, she benefited from partnering with LVMH, a dominant luxury conglomerate that owns Louis Vuitton, Dior, and, importantly, Sephora, a prominent cosmetics retailer. The collaboration gave Fenty access to instant worldwide distribution outlets and a leading luxury brand owner's marketing power. In a feat since labeled the "Fenty Effect" (to capture the profitability of beauty inclusivity), the brand's success pushed cosmetics brands to expand their foundation ranges, making forty shades the current industry standard. *Id.*

137. For a consumer-led effort to do the same, see, for example, THE 15 PERCENT PLEDGE, https://15percentpledge.org/ [https://perma.cc/2YJX-BS5X] (last visited April 18, 2023) (requesting businesses dedicate 15% of shelf space to Black-owned brands).

138. *See, e.g.*, *supra* notes 135–36 and accompanying text.

139. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (holding that overcoming information asymmetries counted as "economic" justification for defendant's otherwise anticompetitive advertising restrictions). I thank David Olson for pointing me to this example.

140. 5 F.3d 658 (3d Cir. 1993).

141. *Id.* at 665.

"economic" (as opposed to "non-economic") because it understood the achievement of diversity at member institutions as improving their educational quality and enhancing the consumer appeal of their educational services—in other words, it made them more competitive.[142]

While *Brown University* is the sole decision recognizing enhanced diversity as a procompetitive defense, it does not contradict the Supreme Court's precedent. The Third Circuit was careful to situate the universities' diversity goals within a competition framework to avoid contravening *NSPE* and *Indiana Federation of Dentists*' "competitive significance" standard.[143] So the contrast is more properly between *Brown University* and contrary decisions like *COMPACT*, revealing how judicial policing of the line between "non-economic" and "economic" justifications can differentially allow or limit coordination between market actors to promote diversity and combat racial inequality.

Second, some courts have engaged in "multi-market balancing," allowing defendants to assert justifications for anticompetitive conduct that harm racially minoritized consumers, workers, and rivals in one market by pointing to offsetting benefits in other markets.[144] While Supreme Court precedent arguably prohibits allowing procompetitive effects in one market to excuse anticompetitive effects in another,[145] courts have nevertheless ignored this prohibition, primarily in cases involving restraints on pay and mobility of Black and Brown workers. For example, in cases challenging NCAA rules capping aid to athletes and prohibiting compensation for athletes' name, image, and likeness, courts have explicitly considered the NCAA's justifications for horizontal labor market restraints on NCAA athlete compensation that sound in amateurism, "a key driver of college sports' popularity with *consumers* and *fans*" in the *downstream* market for college sports games.[146] Indeed, in his concurrence in the *NCAA v. Alston* case, Justice Kavanaugh observed the incongruity of the fact that the NCAA's proposed justification would be taken seriously given that "[t]he NCAA's business model would be flatly illegal in almost any other industry

142. *Id.* at 674–75.

143. *Id.* at 664–65. In fact, the procompetitive defenses asserted in *NSPE* and *Indiana Federation of Dentists* could themselves be reverse engineered to support a competitive goal: their restraints allowed members to more effectively compete for clients and patients on quality rather than price.

144. See Hafiz, *Labor Antitrust's Paradox*, *supra* note 34, at 394–96; Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119 (2017); Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397 (2015).

145. United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963); United States v. Topco Assocs. Inc., 405 U.S. 596, 609–11 (1972).

146. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1058 (9th Cir. 2015) (emphasis added); *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257–61 (9th Cir. 2020), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021); Hal Singer & Ted Tatos, *Intro to Antitrust and Race Symposium*, 66 ANTITRUST BULL. 327, 327 (2021).

in America," noting that, because of NCAA's wage-fixing, "the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing."[147]

Similarly, when McDonald's imposed no-poaching provisions in its franchising agreements, prohibiting franchisees from poaching each other's low-wage, disproportionately Black and Brown workers in a labor market, the court considered procompetitive benefits to consumers in the output market for fast food.[148] Focusing on consumers at the expense of workers, despite precedent prohibiting multi-market balancing, reveals a judicial willingness—a value judgment by courts—to balance downstream consumers' interests against workers', especially Black and Brown workers.

Third, in the context of dominant firms' unilateral conduct, courts have significantly weakened unilateral refusal to deal doctrine at the expense of racially minoritized firms and communities. In fact, judicial protection of firm decisions to discriminate in their dealings has not merely been a matter of economic policy but *social* policy, originating in their explicit decision to understand the antitrust laws as not mandating interracial exchange in the marketplace. In the first recorded antitrust decision mentioning race, the Second Circuit held in *Great Atlantic & Pacific Tea v. Cream of Wheat* (1915) that a grain byproduct manufacturer that changed its practice of selling to both wholesalers and retailers to instead only selling to wholesalers was free to do so even if the refusal was "the result of whim, caprice, prejudice, or malice," including "because he had some personal difference with him, political, racial, or social."[149] This language directly defies civil rights law dating from 1866—Section 1981 of the Civil Rights Act—that explicitly prohibits private racial discrimination in the making and enforcement of contracts.[150] Still, in subsequent refusal to deal challenges, even though no race-based reasons for refusals were alleged, courts cited *Cream of Wheat*'s language that enshrined protections to racially discriminate and expanded on it, emphasizing that refusing to deal based on race was "purely [one's] own affair, with which nobody else had any concern,"[151] that "[t]here is nothing unfair in declining to sell,"[152] and that "[i]t is the right, long recognized, of a trader engaged in a strictly private

147. *Alston*, 141 S. Ct. at 2167–68 (Kavanaugh, J., concurring).

148. *See* Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 U.S. Dist. LEXIS 105260, at *20 (N.D. Ill. June 25, 2018).

149. 227 F. 46, 49 (2d Cir. 1915).

150. 42 U.S.C. § 1981(a); see George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303.

151. Baran v. Goodyear Tire & Rubber Co., 256 F. 571, 573 (S.D.N.Y. 1919).

152. Mennen Co. v. FTC, 288 F. 774, 781 (2d Cir. 1923).

business, freely to exercise his own independent discretion as to the parties with whom he will deal."[153]

While references to race-based rights of refusal disappeared in antitrust decisions after the 1950s, the Supreme Court has expanded firms' rights of refusal by other means, insisting on duties to deal on a nondiscriminatory basis in only rare circumstances. This approach culminated in the Court's 2004 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* decision, which narrowed the circumstances under which plaintiffs can successfully sue dominant firms for refusals to deal. *Trinko* concerned allegations that Verizon—a dominant incumbent local exchange carrier—filled its rivals' requests to access its operations support system slowly, prioritizing its own access over theirs at the expense of those rivals and their customers.[154] The Court allowed dominant firm self-preferencing, imposing a duty to deal only if market access were otherwise unavailable and/or the firm ceased a prior course of dealing.[155] But because racially minoritized firms have been historically excluded from markets, facing entry challenges due to discrimination, they are disproportionately more likely to lack a prior course of dealing as compared to white firms and thus face an uphill battle in proving refusal to deal claims. The prior-course-of-dealing requirement thus makes it harder for new minority-owned firms with high start-up costs to enter because such firms need low-cost market access most, even if other, more expensive forms of market access are available, like more expensive logistics and distribution lines.

Threshold Issues and Remedies. Finally, courts have placed considerable obstacles in the way of successfully asserting antitrust claims as a threshold matter, from establishing burdensome requirements to enter the courthouse door to formulating doctrinal standing requirements limiting the types of plaintiffs that can challenge firms' anticompetitive conduct and agreements. As for remedies, while courts are required to consider public interest factors when reviewing Department of Justice (DOJ) consent decrees reached in the Antitrust Division's enforcement actions, they have failed to assess the impact of settlements on minority-owned businesses and racially minoritized communities.

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153. Brosious v. Pepsi-Cola Co., 155 F.2d 99, 102 (3d Cir. 1946); *see also* Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 86 F. Supp. 716, 725 (W.D.N.Y. 1949); Klein v. Lionel Corp., 138 F. Supp. 560, 565–66 (D. Del. 1956).

154. 540 U.S. 398, 401–05 (2004).

155. *Id.* at 409–11. For criticisms of *Trinko*, see Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006); Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 INNOVATION POL'Y & ECON. 125 (2020); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions, and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107 (2020).

First, antitrust litigation is notoriously expensive and complex—discovery costs and expert fees alone cost millions of dollars.[156] In addition to these costs, plaintiffs face substantial restrictions to accessing the courts, including high pleading standards, mandatory arbitration and class waiver provisions in most consumer and employment contracts, and hefty class certification requirements.[157] Such costs are suffered most heavily by those at the bottom of the income distribution, but racially minoritized plaintiffs have disproportionately higher poverty rates relative to whites.[158]

If this were not enough, antitrust courts have established a separate standing requirement specific to antitrust cases—"antitrust standing"—that allows only properly-situated plaintiffs to bring antitrust claims.[159] Antitrust standing doctrine requires courts to consider, among other things, whether the plaintiff's alleged injury "is of the type that the antitrust statute was intended to forestall," "the directness or indirectness of the asserted injury," and "the existence of more direct victims" of alleged antitrust violations.[160] Antitrust standing doctrine has been used in a range of contexts to block antitrust challenges in lawsuits alleging discrimination against people of color.[161]

Two cases are illustrative. First, in 1977, the NAACP brought an antitrust class action on behalf of women and minority group members against an association of leading commercial banks in New York for refusing in concert to provide New York City any financial or data processing services until the City withdrew or modified its affirmative action program to increase diversity hiring by city contractors.[162] But the court found that the named plaintiffs lacked antitrust standing because they were not present or prospective employees of the banks nor were they financial services suppliers or consumers, so their injury was not

156. *See* Danyll W. Foix & Carl W. Hittinger, *United States: Private Antitrust Litigation*, GLOB. COMPETITION REV. (Oct. 12, 2021), https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2022/article/united-states-private-antitrust-litigation [https://perma.cc/7EVE-2Y7N]; Albert H. Choi & Kathryn E. Sprier, *Class Actions and Private Antitrust Litigation* (Univ. of Mich. L. Sch. Scholarship Repository Law & Econ. Working Paper, Paper No. 180, 2020), https://repository.law.umich.edu/law_econ_current/180/ [https://perma.cc/YN92-XADR].

157. For pleading standards, see, for example, Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55 (2010). For arbitration and class action waivers, see, for example, Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015). For burdensome class certification standards, see, for example, Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969 (2010).

158. *Racial and Ethnic Disparities in the United States: An Interactive Chartbook*, ECON. POL'Y INST., https://www.epi.org/anti-racist-policy-research/disparities-chartbook/#incomecharts [https://perma.cc/5G42-48NX] (last visited Apr. 18, 2023).

159. Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983).

160. Associated Gen. Contractors, 459 U.S. at 540–45 (1983).

161. *See, e.g.*, Leslie, *Food Deserts*, *supra* note 11, at 1770 (collecting cases).

162. NAACP v. N.Y. Clearing House Ass'n, 431 F. Supp. 405 (S.D.N.Y. 1977).

sufficiently direct and instead presented a "claim . . . of racial and sexual discrimination . . . in the guise of a Sherman Act violation."[163] The court found it "questionable whether Congress intended the antitrust statutes, with their treble damages provision, to impose liability for discrimination based on race or sex."[164] But the court entirely ignored the possibility that the banks' conspiracy to avoid hiring under the affirmative action plan was an unlawful labor market restraint violative of the antitrust laws.[165] And a core justification for antitrust standing doctrine is that there are more direct victims better suited to prosecute the claim.[166] But here, no other plaintiffs challenged the banks' conduct, likely because those most directly affected by it were the intended beneficiaries of the affirmative action program *just like plaintiffs*. Without a better-situated plaintiff than those named, the application of antitrust standing doctrine prevented enforcement against conduct that, as alleged, would be clearly unlawful as a horizontal agreement between competitors.[167]

Second, in *Dyer v. Conoco, Inc.*, plaintiff property owners in Mont Belvieu, Texas, sued an association of petroleum companies that instituted a buyout program to purchase residential properties adversely affected by their industrial operations, but excluded homeowners in the predominantly Black Pablo Street community from the program.[168] Pressured by the city, the association created a separate program for Pablo Street residents conditioning the receipt of funds on sellers' promise to relocate more than two miles away.[169] The plaintiffs alleged that, by conspiring together, the association "eliminated competition for their product and forced the plaintiffs to accept, on a nonnegotiated, take-it-or-leave-it basis, a lower price for their properties than they would have received if the individual companies had competed and negotiated with each plaintiff to purchase his or her property."[170] The Fifth Circuit held that the plaintiffs lacked standing because they suffered no harm: their properties lacked value as residential real estate, and the association was not interested in using them for their only value to them, as hydrocarbon storage facilities.[171] But in its antitrust standing analysis, the court ignored the fact that there were no other plaintiffs that could have alleged harm resulting from the petroleum firms' price-fixing agreement with regard to liability payouts, so the conduct was

163. *Id.* at 410–11.
164. *Id.* at 411.
165. Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 870–71 n.271 (1977).
166. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 737 (1977).
167. I thank Christopher Leslie for highlighting this point.
168. No. 93-2801, 1995 U.S. App. LEXIS 43101 (5th Cir. Feb. 21, 1995).
169. *Id.* at *3–4.
170. *Id.* at *11–12.
171. *Id.* at *17–18.

never remedied, and the plaintiffs lacked an alternative means to challenge the cartel.

These cases reveal that, when racially minoritized plaintiffs sue firms for antitrust violations sourced in racial exclusions, courts have viewed their injuries as either diffuse or nonexistent, understanding the harm they suffer from defendants' conduct as merely indirect. And they fail to justify their reasoning by positing a more direct plaintiff at the expense of remedying the uncontroversial illegality of defendants' alleged conduct.

Finally, as to remedies, when courts review DOJ settlements in merger cases, they are required under the Tunney Act to evaluate those settlement conditions under a "public interest" standard, considering how the entry of judgment would impact "competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth."[172] Because the DOJ resolves most merger cases through consent decrees, the courts have significant power to ensure that the agency's merger enforcement accords with public policy.[173] But in applying the standard, courts have entirely failed to assess the racial impact of the Department's consent decrees on people and communities of color in a single case.[174] This is unusual because courts routinely assess the effects of consent decrees on a range of stakeholders impacted.[175] Thus, even though the DOJ has conditionally approved mergers in a number of industries with significant impacts on communities of color—from the telecommunications and technology sectors to food, supermarkets, entertainment and other industries—courts have been indifferent to their impact on those communities. For example, the courts have approved bank mergers without conditioning that approval on those firms continuing to serve racially minoritized communities even as their post-merger branch closures have disproportionately impacted such communities.[176] Thus, courts have failed

172. 15 U.S.C. § 16(e)–(f).

173. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in 1 WILLIAM KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMERICORUM 177 (Nicolas Charbit, Elise Ramundo, Anna Chetova & Abigail Slater eds., 2012); A. Douglas Melamed, Commentary, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 14 (1995); Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 9 (1995); *see also* Hiba Hafiz, *Rethinking Breakups*, 71 DUKE L.J. 1491 (2022) [hereinafter Hafiz, *Rethinking Breakups*]; Hiba Hafiz, *Interagency Merger Review*, *supra* note 34.

174. The author reviewed all published decisions citing the Tunney Act (15 U.S.C. § 16) since its 1974 passage until the present, narrowing the search results first with the term "Tunney" (yielding 158 cases), and then with each of the following search terms: "race," "racial," "minority-owned," "minority communities," "Black," "African-American," "Hispanic," "Latin*," "Asian," and "Asian-American."

175. *See generally* Hafiz, *Rethinking Breakups*, *supra* note 173, at 1508–09.

176. Leslie, *Banking Deserts*, *supra* note 11.

to live up to the Tunney Act's oversight potential in the agency's merger enforcement.[177]

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The antitrust laws are famously broad. Traditional accounts have suggested that their breadth facilitates their adaptiveness to changing market realities, but judicial doctrine defining competition rules regarding the parameters of fair play just as much *establish* market realities as they reimagine and evolve with them.[178] In so establishing those realities, courts have entirely ignored the extent of their complicity with private actors' racial exclusions, seeking to fashion facially neutral mechanisms to establish guardrails to protect consumers from certain competitive strategies while, in fact, those mechanisms have created obstacles to and reinforced racial inequality and the remedial potential of antitrust law to alleviate that inequality.

B. "Color-Blind" Antitrust Enforcement

In enforcing the antitrust laws, federal antitrust agencies have historically been either blind to, failed to challenge, or affirmatively perpetuated exclusions and anticompetitive harms on people of color.

In a number of respects, the DOJ and FTC have either been blind to race in their enforcement or have failed to challenge racial exclusions, anticompetitive conduct, and agreements that disproportionately impact communities of color. Specifically, the agencies' methods of reviewing mergers, merger enforcement priorities, and discretionary enforcement decisions have either ignored the racial dimension of market competition effects and market ordering or have exacerbated racial subordination.

First, the agencies' Horizontal Merger Guidelines that govern their merger reviews suffer the same race-blindness as judicial doctrine when it comes to market definition, which in turn skews agencies' assessment of how racially minoritized rivals, consumers, and workers may be impacted by corporate consolidation.[179] The agencies deploy an iterative process when simulating a proposed merger's effects, beginning with the "hypothetical monopolist" test: if it would be unprofitable for a hypothetical monopolist of a group of products within a geographic market to raise its price by a "small but significant and non-transitory amount" (SSNIP)

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177. U.S. DEP'T OF JUST., BANK MERGER COMPETITIVE REVIEW – INTRODUCTION AND OVERVIEW (1995), https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995 [https://perma.cc/TJ9J-48LM]; Kress, *supra* note 49, at 66 ("[A]ntitrust enforcers do not currently consider reductions in branch access as part of a bank merger evaluation . . . .").

178. *See, e.g.*, Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021).

179. *See infra* Section II.A; HMG, *supra* note 79, § 12.

because buyers would substitute to other products or locations, then the agencies expand the candidate market to a larger group of products and/or locations.[180] But while the Guidelines explicitly contemplate that firms may exercise market power in "price discrimination" markets against subgroups of consumers, the agencies have yet to file an enforcement action challenging a merger on the basis of its effects in racially-specific price- or wage-discrimination markets.[181] In other words, the agencies have ignored firms' ability to target racially minoritized consumers and workers for price increases or wage decreases post-merger. With regard to product (or service) markets, there is no evidence in the public record of agency disaggregation of information about buyer substitution patterns based on race. And their geographic market analysis ignores market realities regarding commuting, public transportation access, and the impacts of redlining (and other forms of racial exclusion from property ownership and housing) on market penetration by neighborhood.[182] This form of analysis renders invisible the anticompetitive effects and procompetitive benefits of a merger on racial minorities and their communities.[183]

The limitations of this analysis also inform antitrust agencies' priorities regarding which proposed mergers and acquisitions to enforce against, leading these agencies to ignore or fail to challenge mergers in markets in which corporate consolidation has significantly impacted racially minoritized individuals, firms, and communities of color. An important and recently studied example concerns supermarket mergers and food deserts,[184] but the impacts of mergers on racial minorities in many other contexts can dramatically affect choice, access to technology and information, the pricing of essential goods and services, and more. For example, ignoring the racial impacts of hospital mergers limits the agencies from evaluating how such mergers can worsen health outcomes in minoritized communities.[185]

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180. HMG, *supra* note 79, § 4.1.1.

181. *See supra* notes 79–80 and accompanying text.

182. *See, e.g.*, Baker, *supra* note 74, at 145–51. For redlining and racial exclusions, see ROTHSTEIN, *supra* note 6; see also DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

183. For their analysis of anticompetitive effects and procompetitive benefits of mergers, *see* HMG, *supra* note 79, §§ 6, 7, 10.

184. Leslie, *Food Deserts*, *supra* note 11, at 1721–22, 1745–47.

185. On corporate concentration in health care industry, see, for example, *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets: Hearing Before the Subcomm. on Regul. Reform, Com. & Antitrust L. of the H. Comm. On the Judiciary*, 116th Cong. 17 (2019) (statement of Fiona M. Scott Morton, Theodore Nierenberg Professor of Economics, School of Management, Yale University); Martin Gaynor, Farzad Mostashari & Paul Ginsburg, *Health Care's Crushing Lack of Competition*, FORBES (June 28, 2017, 12:14 PM), https://forbes.com/sites/realspin/2017/06/28/health-cares-crushing-lack-of-competition/?sh=4f195e3b14ff https://perma.cc/UD74-LN2U]; Martin Gaynor, Kate Ho & Robert J. Town, *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LIT. 235, 262 (2015).

Ignoring the realities of the "digital divide"—from computer ownership to internet access in racially minoritized communities—limits the agencies' analysis of the effects of telecom mergers.[186] And the agencies' failure to attend to minority-owned businesses as well as the interests of diverse content producers and audiences when reviewing media mergers has been the subject of persistent criticism.[187]

While a significant amount of antitrust agency resources are directed toward merger reviews, the agencies' caseload is primarily focused on challenging *per se* unlawful cartel agreements.[188] In challenging cartels, the agencies have total discretion over how to direct their resources, and they have ignored or failed to prioritize cartel exclusions that disproportionately impact minority-owned competitors, suppliers, or distributors. For example, while white-dominant cartels and dominant incumbents excluded minority entrepreneurs, workers, and consumers in housing, agriculture, banking, labor, and other markets, the antitrust agencies did nothing to challenge those cartels to ensure equal access to economic opportunity as an enforcement priority or to ensure uniform compliance with competition policy even though private plaintiffs were challenging these exclusions under antitrust law and losing.[189] For example, since 1964, private plaintiffs filed eight antitrust class actions challenging housing discrimination under the antitrust laws for conduct that, with one exception, the antitrust agencies ignored.[190]

In even darker moments, the agencies actively perpetuated racial oppression, including by targeting attorneys striking for higher pay to

186. *See* Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/9F6Z-T8YH]; James E. Prieger & Wei-Min Hu, *The Broadband Digital Divide and the Nexus of Race, Competition, and Quality*, 37 TELECOMMS. POL'Y 483 (2013); Robert W. Fairlie, *Race and the Digital Divide*, 3 B.E. J. ECON. ANALYSIS & POL'Y 1, 1–40 (2004).

187. *See, e.g.*, Jason A. Smith, *The AT&T/Time Warner Merger and the Threat to Racial Representation*, PAC. STANDARD (June 14, 2017), https://psmag.com/news/the-atttime-warner-merger-and-the-threat-to-racial-representation [https://perma.cc/7KFM-DQXR]; Elizabeth Guider, *African American Group Opposes NBCU Merger*, HOLLYWOOD REP. (July 1, 2010, 9:17 PM), https://www.hollywoodreporter.com/business/business-news/african-american-group-opposes-nbcu-25188/ [https://perma.cc/4USE-CCFT].

188. Joseph C. Gallo, Kenneth Dau-Schmidt, Joseph L. Craycraft & Charles J. Parker, *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 94 (2000).

189. *See* BARADARAN, *supra* note 8; DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014); Darrell A. H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of* Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999 (2008); Chang, *supra* note 11, at 487.

190. *See infra* Appendix A. The exception was *Bratcher v. Akron Area Board of Realtors*, 381 F.2d 723 (6th Cir. 1967), where the DOJ intervened on plaintiffs' behalf to argue its position that the plaintiffs sufficiently alleged a federal antitrust claim against Akron-area Board of Realtors for excluding Black owners and renters from white neighborhoods. The court reversed the trial court's dismissal of the complaint and remanded the action to proceed on the merits. *Id.* at 724.

ensure adequate representation of indigent defendants.[191] Historically, the antitrust agencies actively enforced the antitrust laws to target and enjoin striking workers, including Black and Brown workers and new immigrants, but failed to challenge white unions and merchants that refused to deal with or hire Black workers.[192] And in one of countless examples of failures to correct racist abuse of antitrust law, the federal antitrust agencies neither submitted briefing nor sought to intervene when 17 white merchants in Port Gibson and Claiborne County, Mississippi, successfully sued the NAACP under state antitrust law in Mississippi courts for their civil rights boycott of their businesses.[193] The agencies' complicity with white racist market structuring contributed to the systemic exclusion of racially minoritized populations from access to economic opportunity.

C. Recent Turn to Antiracist Antitrust

The high-profile police murders of Black women and men, the Movement for Black Lives, and unprecedented organizing and protest efforts for racial equality have ignited a momentous public discussion about structural racism from the grassroots to the highest levels of government.[194] That discussion has thankfully extended to an early but as yet underdeveloped attention to antitrust's role in the historical exclusion of racially minoritized communities as well as to proposals for reforms.

The impetus for antiracist antitrust reforms began in late 2020 with public pronouncements by FTC Commissioner Rebecca Slaughter, calling on antitrust enforcers to "address the decline of Black businesses as a direct result of anticompetitive M&A activity and anticompetitive conduct" and

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191. *See* Capers & Day, *supra* note 12, at 543–544; Newman, *supra* note 108, at 388–90; Donald I. Baker, *The* Superior Court Trial Lawyers Case—*A Battle on the Frontier Between Politics and Antitrust*, *in* ANTITRUST STORIES 257 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

192. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930); Capers & Day, *supra* note 12, at 9–11; Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018).

193. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889–94 (1982).

194. The sources are happily too numerous to cite, but for general context, see generally Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 824–47 (2021); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 651–728 (2020); Amna Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. OF BOOKS (June 15, 2020), https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/ [https://perma.cc/9S2L-DV5N]; Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html [https://perma.cc/8YPQ-LHXQ].

proposing strategies for enlisting antitrust "in the fight against racism."[195] Commissioner Slaughter began by calling for more demographic data in investigations to understand where and how communities of color are affected, but went further to call for prioritizing cases "that specifically help reduce racial inequity" and using "the full range of the FTC's tools to stop unfair methods of competition."[196]

The political branches have since taken small steps to consider racial inequality in antitrust enforcement. The Biden Administration has taken an aggressive approach to antitrust reforms, and President Biden issued an Executive Order on Promoting Competition in the American Economy that identifies corporate consolidation and weakened competition as "widening racial, income, and wealth inequality."[197] Congress has also called on the agencies to assess race and diversity effects in their merger reviews for the first time.[198] And, as discussed earlier, even the judiciary has highlighted the racist impacts of anticompetitive conduct: Justice Kavanaugh—for the first time in a Supreme Court opinion—condemned defendant NCAA's scheme to suppress athlete pay as disproportionately impacting African-American and lower-income athletes.[199]

Antitrust scholars have also shifted their attention to the intersection of antitrust and race, initiating the process of reexamining antitrust enforcement, criticizing the limitations of the consumer welfare standard, and conducting industry-specific analyses of the deficiencies of antitrust enforcement, from college sports to food deserts.[200]

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195. @RKSlaughterFTC, TWITTER (Sept. 9, 2020, 1:28 PM), https://twitter.com/RKSlaughterFTC/status/1303762120149004289 [https://perma.cc/KUG4-SLGR]; Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sep. 26, 2020, 10:45 AM), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html [https://perma.cc/WM3Z-PY3H]; Rebecca Slaughter, Comm'r, Fed. Trade Comm'n, Antitrust at a Precipice: Remarks at Global Competition Review Interactive: Women in Antitrust 3 (2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf [https://perma.cc/6YCD-ZU5R] [hereinafter Slaughter, Antitrust at a Precipice].

196. Slaughter, Antitrust at a Precipice, *supra* note 195, at 4–6.

197. Exec. Order No. 14,036, 86 Fed. Reg. 36987, § 1 (July 9, 2021) (hereinafter EO 14,036).

198. *See* Mychael Schnell, *Lawmakers Call for Investigation into Proposed AT&T WarnerMedia, Discovery Merger*, THE HILL (Dec. 7, 2021, 9:07 AM), https://thehill.com/homenews/house/584649-lawmakers-call-for-investigation-into-proposed-att-warnermedia-discovery [https://perma.cc/UH2D-KKJG].

199. NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

200. *See, e.g.*, Capers & Day, *supra* note 12; Leslie, *Food Deserts*, *supra* note 11; Davis et al., *supra* note 23; Newman, *supra* note 108; Dani Kritter, *Antitrust as Antiracist*, CALIF. L. REV.: BLOG (Mar. 2021), https://www.californialawreview.org/antitrust-as-antiracist/ [https://perma.cc/2UDU-XB6W]; Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, APPEAL (Sept. 16, 2020), https://theappeal.org/how-antitrust-perpetuates-structural-racism/ [https://perma.cc/WQ4B-HW4B]. While Eric Posner and Cass Sunstein have recently explored antitrust and inequality, they only briefly discuss the intersection of race with inequality. *See* Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 192, 198–200 (2022).

The current turn to antiracist antitrust has not escaped backlash. Critics of Commissioner Slaughter's pronouncements have argued that the FTC only has jurisdiction to challenge conduct that "harms competition and the competitive process," not to merely make markets "fairer or less discriminatory."[201] While not directly criticizing proposals put forward by Commissioner Slaughter and academic scholars, Professor Herbert Hovenkamp has argued that "[a]ntitrust policy, in contrast to legal policy generally, is not the appropriate tool for pursuing particular goals of social equality," and "[w]hile race and gender equality are essential policy goals, they are best left to the constitutional and statutory institutions intended to address them."[202]

The stage is thus set for a profound discussion of antitrust's goals and values in relation to market governance, fair access to economic opportunity, and racial equality. The following Part seeks to outline a way forward by detailing reforms to current doctrine and enforcement and proposing Congressional reforms to support an antiracist antitrust.

III. ANTIRACIST ANTITRUST REFORMS

Federal antitrust policy and enforcement have structured competition rules that shaped markets of exchange for over a century without squarely accounting for the tremendous obstacles that both public and private actors have placed in the way of equal access and nondiscriminatory market participation and consumption. Based on the limitations and obstacles identified in Part II, this Part offers preliminary suggestions on how to reverse that legacy, beginning with ways antitrust doctrine, methods, and analyses can be restructured without legislative intervention, before proceeding to more substantial legislative reform proposals.

Given the precarity of race-conscious policy under the current Supreme Court's approach to antidiscrimination law and affirmative action,[203] the proposals are designed to be consistent with both an antisubordination and an anticlassification approach to antidiscrimination policy.[204] To avoid potential constitutionality challenges, the proposals are designed to trigger state action when private actors anticompetitively harm competitors,

201. Kirk Victor, *Slaughter's Tweets on Antitrust and Race Spark Backlash*, FTCWATCH (Sept. 21, 2020), https://www.mlexwatch.com/articles/9223/print?section=ftcwatch [https://perma.cc/9LNN-Q7A7] (quoting an email from antitrust lawyer Henry Su critiquing Commissioner Slaughter's position).

202. Hovenkamp, *supra* note 3, at 811.

203. The Supreme Court has heard challenges to affirmative action programs in public and private universities in the 2022–2023 Term. *See* Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, NYTIMES (Nov. 1, 2022), https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html [https://perma.cc/226B-XGWM].

204. For analysis of the Court's antagonism to race-conscious state action, see, for example, Siegel, *supra* note 67, at 1286–1349.

workers, or consumers based on racial classifications, and they allow race-salient justifications only as defenses and in reference to those unlawful classifications.[205]

A. Market Definition and Consumer Subgroups

As discussed, antitrust agency guidance already recommends assessment of whether subgroups of consumers or workers—including racial subgroups—can be targeted through price discrimination when properly defining markets.[206] Both the antitrust agencies and the courts can improve their assessments of the racial impacts of anticompetitive conduct and agreements by more vigorously investigating whether firms are targeting race-specific price-discrimination markets. In other words, agencies and courts could engage in what I call "race-salient" market definition. First and foremost, in assessing market definition, regulators should seek marketing information and demographic data that could help aid their detection of price-discrimination markets, allowing defendants to exercise market power on subgroups of minoritized consumers and workers, whether because of geographic isolation or product or service preferences.[207]

Information necessary to assess the existence of price-discrimination markets could include historical information about redlining that has segregated neighborhoods and now shapes access to substitute goods and services; information about consumer and worker access to public transportation, internet access, and bank credit; and other information that impacts consumer and worker choice.[208] But assessments may also consider how racially minoritized workers or consumers face unique switching costs, search costs, information asymmetries, and lock-in effects if prices for goods or services go up or wages go down.[209] For example, in the context

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205. By "anticompetitive harm based on racial classifications," I understand harm based on intentional classifications (such as race-based marketing strategies) as well as harm racial minorities disparately suffer because they are competitors, workers, or consumers of color.

206. *See supra* note 88 and accompanying text.

207. *See* Slaughter, Antitrust at a Precipice, *supra* note 195, at 4.

208. The antitrust agencies could benefit from interagency coordination here. For example, U.S. Census data on tract boundaries, FCC data on the digital divide, and labor agency data on commuting distances, race-based wage gaps, and more, could provide significant granularity to data the agencies apply in enforcement actions. *See, e.g.*, Hafiz & Marinescu, *supra* note 66; HELEN C.S. MEIER & BRUCE C. MITCHELL, TRACING THE LEGACY OF REDLINING, NAT'L CMTY. REINV. COAL. (Feb. 2022), https://ncrc.org/redlining-score/#:~:text=%E2%80%94%20Key%20Findings,belonging%20to%20a%20minority%20group [https://perma.cc/8JRS-78CX]; Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. 199, 233 (2021) [hereinafter Hafiz, *Interagency Coordination*]; Judith Dempsey & Patrick Sun, *The Digital Divide in U.S. Mobile Technology and Speeds* 19–24 (FCC Off. Econ. & Analytics, Working Paper No. 51, 2020), https://www.fcc.gov/reports-research/working-papers/digital-divide-us-mobile-technology-and-speeds [https://perma.cc/Y8HC-VH4K].

209. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476–77 (1992) (recognizing lock-in effects in market definition analysis).

of labor market power assessments, not all employers should be viewed as "reasonable substitutes." Where employers are shown to have a history of discrimination or hostile work environment liability, they should not be neutrally identified as "reasonable" substitutes diluting the market power of target employers, because they presumptively have the power to wage-discriminate against workers impacted by anticompetitive conduct. Thus, labor and employment law compliance—and compliance with employment discrimination law specifically—should inform agency and court analyses of workers' outside options when evaluating price- or wage-discrimination markets.

Additionally, when conducting their market definition assessments, and depending on the industry or sector, agencies and courts might consider whether countervailing power by consumers/buyers or workers/sellers may differ by race and either limit or strengthen the targeted firm or firms' power over price or wages.[210] For example, in his discussion of food deserts and white flight, Professor Christopher Leslie explains that, "compared to suburban dwellers, residents of inner cities lack corresponding or offsetting power as buyers" because suburbanites "can use their cars to chase lower prices" but inner-city residents "cannot similarly leverage their collective buying power to shop elsewhere in order to compel or encourage grocery sellers to lower their prices."[211] Thus, where demographic data show that consumer or worker subgroups lack countervailing power to lower prices or lift wages, that should factor into agencies' and courts' market definition determinations and thresholds determining enforcement priorities.

While reviewing more robust data is a crucial first step in reconfiguring race-salient market definition, how that information is analyzed and weighted in any judicial analysis is just as significant. In assessing the impacts of anticompetitive conduct on consumer subgroups, enforcers could use more granular data iteratively in demand (or supply) substitution analyses, evaluating how changes in price or wages impact consumer and worker subgroups in labor, product, and service markets, as well as in geographic markets and submarkets. In performing this analysis, the courts should not assume that workers or consumers have equal access to goods and services, whether through commuting by car, easy access to public transportation,[212] or city- or even neighborhood-specific access to market diversity. Courts should respect agencies' and experts' economic evidence and analysis regarding price-discrimination markets rather than second-guess them based on judicial "intuitions" about substitutability or other

210. *See supra* note 132 and accompanying text.

211. Leslie, *Food Deserts*, *supra* note 11, at 1741–42.

212. *See* Leslie, *Food Deserts*, *supra* note 11, at 1722; Gregory Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 504 (2020).

heuristics that could lead to rejection of otherwise properly proven submarkets.[213]

Nor should agencies and courts flatly assume that firms cannot price- or wage-discriminate on the basis of race.[214] Courts should recognize and not elide heterogeneous preferences among racially minoritized consumers and workers that would reduce their demand for product or service substitutes. Where more granular data reveals low demand elasticity in consumer subgroup choice or low supply elasticity in worker choice, product, service, labor, and geographic price-discrimination submarkets should be cognizable as relevant antitrust markets for market power analyses.

Restructuring market definition analysis in this way is consistent with current law. While courts have not yet recognized price-discrimination markets based on racial demographic realities, they have found cognizable neighborhoods or areas smaller than entire metropolitan areas as relevant geographic markets.[215] And courts already assess disaggregated information when performing their market definition analyses, but only when it is available;[216] they currently lack race-salient demographic data. Finally, antitrust agency guidance already recommends assessment of whether anticompetitive effects vary for different customers in price-discrimination markets when properly defining markets.[217]

B. Assessing Market Power

Proper market definition is not enough—the agencies and the courts must also accurately assess firms' ability to engage in anticompetitive conduct impacting racially minoritized consumers and workers, including firms' ability to profitably raise prices or lower wages without those consumers or workers switching to other products, services, or employment. Race can also be salient in evaluating barriers to entry, which can be a

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213. *See, e.g.*, Leslie, *Food Deserts*, *supra* note 11, at 1746–53 (collecting cases).

214. *See, e.g.*, ANDRE M. PERRY, BROOKINGS INST., HOW RACIAL DISPARITIES IN HOME PRICES REVEAL WIDESPREAD DISCRIMINATION: TESTIMONY SUBMITTED TO THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES 4–7 (2021), https://www.brookings.edu/testimonies/how-racial-disparities-in-home-prices-reveal-widespread-discrimination/ [https://perma.cc/CG2Y-2ETL]; Akshat Pandey & Aylin Caliskan, Geo. Wash. Univ., Disparate Impact of Artificial Intelligence Bias in Ridehailing Economy's Price Discrimination Algorithms, *in* AIES '21: PROCEEDINGS OF THE 2021 AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 822, 828 (2021), http://doi.org/10.1145/3461702.3462561 [https://perma.cc/ENZ6-B94P]; Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 310–11 (1995).

215. *See* Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 336 (1962); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.20 (1985); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26–27 (1984); Inserra Supermarkets, Inc. v. Stop & Shop Supermarket Co., 240 F. Supp. 3d 299, 307 (D.N.J. 2017); *see also* Leslie, *Food Deserts*, *supra* note 11, at 1764.

216. *See* Baker, *supra* note 74, at 145–46.

217. *See* HMG, *supra* note 79, § 3 ("Targeted Customers and Price Discrimination").

critical factor in analyzing whether a firm has market power. But price and wage effects and barriers to entry are not the only sources of market power. The agencies and courts should thus assess whether firms or merging parties may have more market power in race-salient submarkets due to discriminatory access to credit, lending, and other classification-based challenges that inhibit diverse entry. Market power can also be inferred from the power to exclude rivals, including minoritized rivals.[218] Thus, the agencies and courts should also consider conduct that successfully excludes racially minoritized rivals. Assessing the impact of conduct on diverse entry is critical for evaluating what, if any, impacts that conduct may have on access to goods and services by racially minoritized consumers, workers, and communities.

C. Cartels and Inferring Collusion

Proving a cartel agreement, including a discriminatory cartel, is very difficult under current doctrine.[219] Because tacit collusion doctrine is a matter of judge-made law,[220] courts could reconsider and adapt it to further both competition policy and racial equality, at least where they do not conflict.

First, where plaintiffs allege a cartel's improper or classification-based exclusion on the basis of race, direct evidence of actual marketplace effects should obviate formal market definition requirements or mandatory categorization of the conduct as "price-fixing" or a "group boycott."[221] The *Vietnamese Fishermen's Association v. Knights of Ku Klux Klan* case is illustrative.[222] Plaintiffs, Vietnamese shrimp fishermen in Galveston Bay, Texas, alleged that the Knights of the KKK and resident affiliates directed a series of exclusionary acts at them: boat merchants charged them higher prices; bait shops refused to deal with them; KKK leaders led rallies and recruited attendees to "military camps" to fight them; and KKK members led a shrimp boat of armed men in KKK garb near their boats to fire a cannon, burned boats and crosses, and firebombed them.[223] Plaintiffs alleged that the acts forced them to terminate or curtail their commercial

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218. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (defining monopoly power in Section 2 cases as the "power to control prices or exclude competition"); Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159, 164 (10th Cir. 1986) (same for Section 1 cases).

219. *See supra* Section II.A.

220. For an overview of tacit collusion doctrine, *see* AREEDA & HOVENKAMP, *supra* note 74, ¶¶ 1428–36.

221. Newman, *supra* note 108, at 393–94.

222. 518 F. Supp. 993 (S.D. Tex. 1981).

223. *Id.* at 1001–06; Andrew Chin, *The KKK and Vietnamese Fishermen*, U.N.C. SCH. OF L.: ANDREW CHIN, http://www.unclaw.com/chin/scholarship/fishermen.htm [https://perma.cc/3JFJ-SYC4] (last visited Apr. 18, 2023).

fishing business in the area.[224] Reviewing this evidence, the Texas Southern District Court concluded it sufficient to show a Section 1 violation by "lessening . . . competitive conditions" for the purposes of preliminarily enjoining the conduct without requiring plaintiffs to formally meet market definition requirements or fit the conduct cleanly into a "price-fixing" bucket—eliminating competitors from a substantial portion of the market was enough.[225]

Additionally, to make discriminatory cartel agreements easier for plaintiffs to prove, courts should recognize racial animus as a facilitating practice that supports their inference of an agreement because it stabilizes cartels and eases firms' ability to coordinate and police agreements while also reducing individual members' incentive to cheat. Racial animus functions as a "trust-facilitating device," to use Professor Christopher Leslie's terms, because it can reaffirm group identity, social norms, and social status among like-minded cartel members and is a mechanism "designed to compensate for the distrust among cartel members" that they may betray a collusive agreement.[226] Further, when inferring agreements between cartel members, courts consistently recognize that when members act contrary to their own self-interest—say, by refusing to contract with a supplier in another cartel member's territory—that supports finding an agreement.[227] Evidence of racial animus may help explain why cartel members reduce output or refuse to deal at the expense of their own unilateral self-interest but in a way that only furthers the cartel's interests.

D. Merger Review Analysis and Race

In addition to restructuring market definition and market power analysis, agencies and courts should condemn mergers where their effects may be to substantially lessen competition or tend to create a monopoly in race-salient price discrimination markets.[228] Section 7 of the Clayton Act prohibits mergers that have such effects in "any line of commerce or in any activity affecting commerce in any section of the country," and the current Merger Guidelines adopt a policy of "assess[ing] competition in each relevant market affected by a merger independently and normally will challenge the

224. *Vietnamese Fishermen's Association*, 518 F. Supp. at 1010.

225. *Id.*; *see also* Newman, *supra* note 108, at 388.

226. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 579 (2004) (describing trust-facilitating devices that facilitate cartels).

227. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015); Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc., 203 F.3d 1028, 1037 (8th Cir. 2000).

228. *See also* Karen Hoffman Lent & Kenneth Schwartz, *The Antitrust and Antiracism Nexus*, N.Y.L.J., June 8, 2021 (advocating conditioning mergers on parties' assurance that portions of merger-specific efficiencies be used to ensure "competing black and brown entrepreneurs are not driven out of the market").

merger if it is likely to be anticompetitive in any relevant market," including price-discrimination markets.[229] In addition, the agencies assess efficiencies not strictly in the relevant market only if they are "so inextricably linked with [that market] that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s)."[230]

One objection to prohibiting mergers based on narrower, race-salient price discrimination markets is that it could overlook efficiencies to consumers in broader markets. For example, if two supermarket chains seek to merge, their merger may enable them to exercise market power in minority-majority neighborhoods but may create integration efficiencies leading to reduced prices for a larger population of consumers in other neighborhoods. So the question becomes: why should agencies or courts condemn a merger that creates anticompetitive effects for some consumers but produces significant efficiencies for others? Should we not balance any anticompetitive effects to consumer subgroups against procompetitive benefits to other subgroups or to consumers under a broader market definition? And if we *must* balance, does that not create administrability challenges by asking courts to weigh two competing consumer groups' interests with only their value-based discretion motivating a decision concerning two incommensurable choices?[231]

These objections are troubling, but I offer a few responses. First, this balancing problem is not unique to race-salient antitrust enforcement: courts and agencies are routinely asked to assess when market and submarket definitions create trade-offs between consumers, as the current Merger Guidelines recognize.[232] Thus, a race-salient antitrust would just incorporate analysis of price-discrimination markets into its analysis of trade-offs and execution of policy objectives. Still, the exact circumstances of the hypothetical are likely rare and industry-specific; in most circumstances and industries, balancing between different subgroups would be unnecessary. After all, the Clayton Act prohibits anticompetitive mergers or acquisitions in "*any* market," however broadly or narrowly defined, so long as it is economically significant, and current law prohibits multi-market balancing.[233] Additionally, to the extent conflicts exist between subgroups or groups of consumers or workers, merger conditions could be designed to

229. 15 U.S.C. § 18; HMG, *supra* note 79, §§ 3, 4.1, 10, at 30 n.14.

230. HMG, *supra* note 79, § 10, at 30 n.14 (alteration in original).

231. For similar arguments on administrability challenges in multi-market balancing, *see, e.g.*, Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting Out-of-Market Benefits*, 90 U. CHI. L. REV. 1 (2023).

232. *See* HMG, *supra* note 79, § 10, at 30 n.14.

233. 15 U.S.C. § 45; Sean Sullivan, *Modular Market Definition*, 55 U.C. DAVIS L. REV. 1091, 1120 (2021). For prohibitions on multi-market balancing, *see supra* note 145 and accompanying text.

resolve inequities between them. For example, mergers could be conditioned on the merged firm's commitment not to shutter stores or access to services in minority neighborhoods.[234] The circumstances are thus rare that such a merger would need to be condemned wholesale because anticompetitive effects may be averted by negotiated divestitures, leasing arrangements, or other conduct-based conditions that would alleviate such effects while still allowing the realization of procompetitive efficiencies in other markets. And while the hypothetical does raise the standard "anxiety-about-balancing" questions, because courts are generalists and engage in balancing in constitutional, administrative, and common law fields like torts, such balancing is not outside the ken of judicial expertise.[235] Further, any balancing would bring out the "difficult tradeoffs" between harmful effects and procompetitive benefits of firm conduct for courts to openly confront in a way that color-blind antitrust has thus far avoided, to the detriment of a broader understanding and accounting of how firm conduct impacts racial equity.

E. Race in Rule of Reason Analysis

Antiracist conduct can be procompetitive. But current doctrine fails to recognize and integrate the *ways* it can be procompetitive in its rule of reason analysis. Ameliorating three key obstacles to an antiracist antitrust could improve that integration.

First, in light of *NSPE* and *Indiana Federation of Dentists*, courts should clarify the circumstances under which ancillary restraints doctrine should apply to racially minoritized firms' coordination to allow introduction of procompetitive defenses under the rule of reason. Viewing horizontal coordination between racially minoritized firms as *per se* unlawful rather than as involving ancillary restraints to procompetitive ventures limits economic self-help options for people of color.[236] Because *per se* (as opposed to rule of reason) treatment of horizontal agreements is a matter of judge-made law, courts are in a position to adapt their review of such agreements in a manner that furthers both competition policy and racial equality. Circumstances where courts might apply ancillary restraints doctrine to such agreements might first include when evidence of market conditions sufficiently supports an inference that the assertion of countervailing power against dominant firms or collusive cartels may reduce market power upstream, lower downstream prices to consumers,

234. Leslie, *Food Deserts*, *supra* note 11, at 1771–72.

235. *See C.* Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 947–52 (2016).

236. *See supra* Section II.A.

increase output and/or innovation, or reduce upstream or downstream firms' ability to engage in anticompetitive price discrimination.[237] Current rule of reason doctrine already requires that courts "take into account . . . 'specific information about the relevant business and' the 'restraint's history, nature, and effect'" as well as firm market power,[238] which could be assessed in light of trading partners' countervailing power.

Additionally, ancillary restraint doctrine should apply where coordinating firms can show that, but for their coordination, they would lack the economies of scale or scope, production or distribution efficiencies, client networks, or other necessary conditions for successful entry or effective competition. Similarly, where behavioral evidence supports an inference that incumbent firms have ignored unmet demand by racially minoritized consumers and workers, and entry to promote market diversity is only possible or most efficient through coordination, racially minoritized firms should be entitled to present that evidence. The Third Circuit has laid the groundwork for applying ancillary restraints doctrine to diversity-based defenses.[239] But courts could more broadly clarify that "non-economic" defenses to anticompetitive conduct can sound in competition goals and should be cognizable when they further such goals.

Second, to fully evaluate the anticompetitive effects and procompetitive benefits of a given restraint in a market, courts should avoid multi-market balancing that immunizes conduct harmful to people of color but potentially beneficial to "aggregate" consumers or workers in other or broader markets.[240] In the rare circumstances where balancing is allowed, courts should assess the net effect on consumer or worker subgroups and ensure that that effect is positive and that no less restrictive alternative is available to alleviate the anticompetitive harm to aggrieved consumer or worker subgroups.[241]

Third, in unilateral refusal to deal cases, courts should reject dicta in *Trinko* imposing a duty to deal only if defendants terminate a prior course of dealing and competitors have no alternative avenue of market access, applying instead a test that evaluates whether granting access would provide a net benefit to consumers and workers. This shift in duty-to-deal doctrine could enable racially marginalized firms to more easily challenge incumbent firms' self-preferencing and overcome barriers to market access

237. For procompetitive benefits of countervailing power, *see supra* notes 18, 132 and accompanying text.

238. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

239. *See* United States v. Brown Univ., 5 F.3d 658, 674–75 (3d Cir. 1993).

240. *See, e.g.*, Naidu et al., *supra* note 20, at 587.

241. *See* Hemphill & Rose, *supra* note 13, at 2108.

through access to facilities and networks necessary for successful competition.

F. Agency Administration and Congressional Reforms

In addition to doctrinal reforms to antitrust law, the antitrust agencies and Congress can implement measures towards establishing an antiracist antitrust. While the recommendations for antitrust agency action may be implemented without granting those agencies additional authority, more aggressive measures will require legislative reforms.

Antitrust Agency Actions. Under their current authority, the antitrust agencies can administer the antitrust laws in a number of ways that advance racial equality. Specifically, the agencies can collect better demographic data to target anticompetitive conduct that disproportionately impacts people of color, prioritize enforcement in markets that would be most impactful for communities of color, including price discrimination markets, and design consent decrees that solicit feedback from those communities in Tunney Act proceedings for more robust judicial review of the racial impacts of DOJ settlements.

First, as FTC Commissioner Slaughter and others have already recommended, the agencies should gather and analyze more granular demographic data through: civil investigative demands; during the pre-merger notification process, merger investigations, and second requests; and under their authority to conduct independent studies with experts.[242] The agencies should also publicly release this data for study by outside researchers. Further, to conserve resources, the agencies can place the burden on regulated parties to gather and analyze the impacts of proposed mergers in race-salient price discrimination markets.[243] Requesting that parties assess proposed mergers' impacts in submarkets is already standard agency practice, so tailoring requests based on submarkets composed of consumers and workers of color would not impose significant additional burdens, particularly given the sophistication of regulated parties that meet the Hart-Scott-Rodino threshold and their likely collection of demographic data for marketing and market segmentation purposes independently of antitrust agency review. To streamline more granular, race-salient market definition, the agencies should issue guidance to regulated parties and

242. *See* Slaughter, Antitrust at a Precipice, *supra* note 195, at 4; HAMILTON & NEIGHLY, *supra* note 27, at 23; U.S. DEP'T OF JUST., ANTITRUST DIV., ANTITRUST DIVISION MANUAL III-15 (5th ed. 2015), https://www.justice.gov/atr/file/761166/download [https://perma.cc/SHE3-GMPK]; 15 U.S.C. §§ 42, 46, 49, 57b-1; *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/X8JB-5TL8].

243. *See also* HAMILTON & NEIGHLY, *supra* note 27, at 23.

amend Sections 3 and 4 of the Horizontal Merger Guidelines to include a discussion of submarkets and consumer subgroups based on demographic data and race-specific demand or supply substitution analysis.[244]

Additionally, the agencies should draft reports and conduct retrospectives to understand and publicize the racial effects of their antitrust enforcement actions to both inform current investigations and priorities and ensure public accountability.[245] The antitrust agencies should also coordinate with the National Labor Relations Board, Department of Labor, the Equal Employment Opportunity Commission, the Census Bureau, and the federal banking agencies to collect and analyze data, share information, and refer cases pertaining to firms' anticompetitive conduct and mergers that disparately impact workers and consumers of color.[246]

Second, the agencies should prioritize scarce resources to target conduct in markets that would most adversely impact minoritized communities, coordinating with the Justice Department's Civil Rights Division.[247] More granular data collection on the impacts of firm conduct in racially minoritized communities could flag priority areas, but empirical scholarship has already identified increasing market power in sectors that disproportionately impact communities of color, including health care markets with increasing health care costs, labor markets with monopsony power and anticompetitive employer conduct, telecommunications markets with unilateral conduct and agreements that increase the costs of internet access, supermarkets with restrictive covenants that create food deserts, and more.[248]

Third, because most merger enforcement results in negotiated consent decrees, the agencies should use their bargaining leverage in those negotiations to advance racial equality goals.[249] For example, when designing structural remedies—or remedies ordering firm breakups or sale of subdivisions, facilities, or assets—the agencies should consider the

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244. The agencies have announced their intent to revise the Merger Guidelines and solicited public input but have not yet requested input on antiracist reforms. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers [https://perma.cc/4BSE-3LEP].

245. *See, e.g.*, HAMILTON & NEIGHLY, *supra* note 27, at 23–24. For agency authority, see *supra* note 242.

246. For interagency coordination, see Hafiz & Marinescu, *supra* note 66; Hafiz, *Interagency Coordination*, *supra* note 208; Hafiz, *Interagency Merger Review*, *supra* note 34; *see also* HAMILTON & NEIGHLY, *supra* note 27, at 23–24.

247. *See* Posner & Sunstein, *supra* note 200, at 9, 12; Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 4–5 (2015); Kritter, *supra* note 200.

248. *See* Slaughter, Antitrust at a Precipice, *supra* note 195, at 4–5; Posner & Sunstein, *supra* note 200, at 9. For collected empirical studies, *see supra* Part I.

249. *See* Leslie, *Food Deserts*, *supra* note 11, at 1771–73.

impacts of those remedies on racially minoritized communities and ensure against, for example, plant or store closures that reduce the provision of goods and services in those communities.[250] When designing conduct remedies that condition settlement on the parties' agreement to engage in certain conduct, the agencies should ensure the parties' commitment to rejecting contracting practices that have deleterious effects on communities of color, such as mobility restraints in employment contracts or restrictive covenants in leasing that reduce competition and entry in racially minoritized communities.[251] The agencies could also condition mergers on the merged firm's expansion and entry into underserved areas and communities harmed by redlining. And similar to the federal government's authority to condition federal contracts on contracting parties' achievement of diversity goals, the agencies could explore requirements that merging firms affirmatively prioritize diversity in hiring and in contracting practices as a condition for approving a merger. Finally, to aid in judicial review of DOJ consent decrees in Tunney Act proceedings, the agencies should solicit comments and participation from minority-owned firms and communities of color and respond to their comments to develop a more robust record for courts' public interest review.

Congressional Reforms. While a number of antitrust reform proposals are circulating in Congress, none yet explicitly address the adverse impacts of corporate concentration, firm dominance, and anticompetitive conduct on people of color.[252] But Congress could restructure the rules of competition by amending the antitrust laws and requiring that antitrust agencies take a more active role in the struggle to achieve racial equality.

First, Congress could use legislation to establish a clear social policy favoring the use of antitrust regulation to achieve racial equality. On market definition, a prospective bill could grant explicit authority and resources to the agencies to collect and analyze demographic data and market segmentation analyses from the public and regulated parties and establish consumer subgroups and geographic submarkets as cognizable relevant antitrust markets where appropriate. The bill could clarify that race-salient price-discrimination markets count as "economically significant" for the purposes of market definition.[253] Further, to ease proof of anticompetitive effects in race-salient markets, Congress could reverse *American Express* and allow direct evidence of price and wage effects to show market power

250. *See* Hafiz, *Rethinking Breakups*, *supra* note 173.

251. *Id.*; Leslie, *Food Deserts*, *supra* note 11, at 1772.

252. For the six bills circulating as of this writing, see *Competition and Antitrust*, GOVTRACK.US, https://www.govtrack.us/congress/bills/subjects/competition_and_antitrust/5920 [https://perma.cc/MBH7-MHX3] (last visited Apr. 18, 2023).

253. For "economically significant" relevant market requirement, see Brown Shoe Co., Inc. v United States, 370 U.S. 294, 320 (1962).

over consumer subgroups and in geographic submarkets even absent a market definition requirement.[254]

With respect to cartels and horizontal agreements, the bill could amend current law to condemn tacit collusion without proof of an express agreement if racial animus is shown. And much like the Clayton and Capper-Volstead Acts' exemptions of labor and farm cooperative coordination from antitrust liability, a proposed bill could exempt coordination among people of color that seeks to further market entry and the promotion of diversity in public markets.[255] Precedent for such legislation includes the establishment of a "class exemption" in Australian competition law that allows groups of small economic actors to request exemptions from the Australian competition authority for engaging in conduct that might otherwise breach cartel prohibitions, like forming bargaining groups and negotiating prices or wages with suppliers or consumers, so long as that conduct is in the "public interest."[256] A prospective bill could also prohibit multi-market balancing in merger reviews and rule of reason analyses, clarify when price- and wage-discrimination against people of color can be anticompetitive, and promote diversity as a cognizable procompetitive benefit that enhances choice. To ensure discriminatory anticompetitive conduct and agreements can be more easily challenged, the bill could eliminate the antitrust standing requirement for antitrust actions.[257] And finally, Congress could require the antitrust agencies to issue annual reports assessing the racial impacts of their enforcement and delineating concrete annual goals for achieving racial equality through enforcement.

Beyond antitrust legislation specifically, Congress could support diversity in public markets by easing access to credit and market entry by minority-owned firms and in communities of color. It could allocate more funding for small business loans and streamline access to those loans by people of color through the Small Business Administration (SBA).[258]

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254. *See* Ohio v. American Express, 138 S.Ct. 2274, 2285 (2018); Competition and Antitrust Law Enforcement Reform Act of 2021, § 13, S.225, 117th Cong. (2021) (proposing elimination of market definition requirement except where statute explicitly references "relevant market," "market concentration," or "market share").

255. For proposals to condemn tacit collusion and parallel pricing, see LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING (2013); Posner & Sunstein, *supra* note 200, at 10.

256. *See Competition and Consumer Act 2010* (Austl.) https://www.legislation.gov.au/Details/C2011C00003 [https://perma.cc/7QJD-ZD8U]; Tess Hardy & Shae McCrystal, *Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses*, 42 SYDNEY L. REV. 311 (2020).

257. For criticisms of current antitrust standing, *see* Leslie, *Food Deserts*, *supra* note 11, at 1769–71; Crane, *Antitrust Antitextualism*, *supra* note 178, at 1227–29.

258. To overcome discriminatory lending rampant during the COVID pandemic, the SBA should establish a separate office within their Office of Entrepreneurial Development focused on minority-

Federal loan and contracting dollars could be directed towards protecting and strengthening minority rivals and innovation by minority-owned firms. Congress could also prohibit mobility restrictions in employment contracts to enhance choice and outside options for workers of color, and could reduce their switching costs from low-paying or discriminatory employers by ensuring portability of health, retirement, and other benefits between employers.[259] To ensure that the administrative state more broadly works to achieve racial equality, Congress could amend the Paperwork Reduction Act and Administrative Procedure Act to require the Office of Information and Regulatory Affairs to conduct racial impact analyses of significant agency actions.[260] And finally, Congress could ease racially minoritized individuals' and firms' access to the courts by removing procedural hurdles to successful litigation, including by reversing heightened pleading standards, prohibiting the use of mandatory arbitration and class action waivers for employment and antitrust actions, and amending Rule 23 of the Federal Rules of Civil Procedure to ease class certification requirements.[261] In sum, Congress should consider wide-reaching reforms to level the playing field for racially minoritized entrepreneurs and protect workers and consumers of color from extractive abuses by employers and other buyers and sellers of goods and services.

CONCLUSION

Antitrust regulation is our collective social project for ensuring that markets function for the public good, as a means of accessing economic opportunity, and to protect winners that compete on the merits rather than through exploiting market failures such as racial discrimination. But for its over century-long history, federal regulation of market competition has been blind to and even reinforced market practices that rigged the rules against people of color, contributing to racial inequality. Under their existing authority, antitrust agencies and the courts can begin to reverse this legacy and target structural impediments to equal market access. Attuning antitrust doctrine and enforcement to the ways in which markets have entrenched

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owned businesses that coordinates with its Office of Equal Employment Opportunity & Civil Rights Compliance. *See, e.g.*, Silvia Foster-Frau, *Racial Bias Affected Black-Owned Small Businesses Seeking Pandemic Relief Loans, Study Finds*, WASH. POST (Oct. 15, 2021, 7:16 PM), https://www.washingtonpost.com/national/ppp-bias-black-businesses/2021/10/15/b53e0822-2c4f-11ec-baf4-d7a4e075eb90_story.html [https://perma.cc/CV6P-E4G6].

259. *See, e.g.*, SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 8, 98, 101 (2019).

260. *See* HAMILTON & NEIGHLY, *supra* note 27, at 26.

261. *See, e.g.*, 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/WXZ3-7HES].

incumbents, established conduct rules and administrative priorities that reinforced and even favored racial discrimination, and refusing to ignore the salience of race in how firms and employers compete will be crucial components of a broader project to dismantle systemic racism.