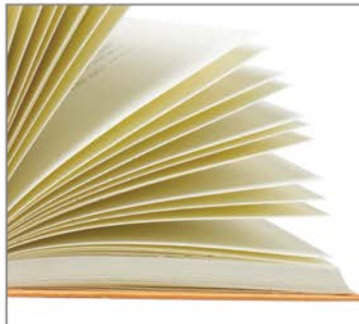

Antitrust Literature Watch

focusing on North American litigation

CRA Charles River Associates

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In this inaugural edition of the **Antitrust Literature Watch**, we feature recent papers by attorneys, economists, and academics that are focused on issues pertinent to North American antitrust litigation. The abstracts included below are as written by the author(s) and are unedited. Author affiliations and titles are reflected in the abstracts and papers. Included in this edition are:

- papers on **class actions** that discuss risks, incentives, and recent trends in class certification and antitrust class action litigation.
- articles addressing **collusion** in a blockchain environment, the potential for artificial intelligence (AI) technologies to facilitate coordination and the associated role of information signals and reduced demand uncertainty, and methods for detecting bid-rigging cartels with descriptive statistics and machine learning.
- studies of **antitrust policy** that ask what we can learn from firms' markups over costs, "bigness," and "hipster antitrust," and address the objectives of antitrust, including the Chicago School's views on competition, the consumer welfare standard, and the application of economics in recent Supreme Court cases.
- examinations of the tools, challenges, and policy for addressing **monopsony** in labor markets, with applications to buyer power in digital markets, anti-poaching agreements, non-competition covenants, healthcare and prescription drugs.
- **tech: platforms** and **multi-sided markets** studies of intra-platform exclusion in software markets and tech monopolies and innovation.

Class Actions

2018 Antitrust Annual Report: Class Action Filings in Federal Court

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386424

Little empirical work has been done to analyze the filing and resolution of private antitrust class action lawsuits. This Report takes an important step toward rectifying that situation. It relies on data that is newly accessible in part through artificial intelligence. Some of the issues it addresses relate only to 2018 and others relate to the years 2013 through 2018. Topics include the number of antitrust class action complaints that are filed each year, the amount of time they took on average to reach a settlement, the mean and median recoveries, the attorney's fees and costs awarded, and the total settlement amounts in each year and overall. The report also analyzes the law firms that represented plaintiffs and defendants in antitrust class action settlements, describing particular cases as well some cumulative results, and also tabulates cumulative totals for claims administrators involved in the settlement process. The plan is to continue providing similar information on an annual basis. The hope is that this data will prove of interest to the academy and the public and private sectors, and that the data will provide a firmer empirical basis than would otherwise be possible for private decisions and for public policy discussions and actions related to enforcement of the antitrust laws through private class actions.

Asymmetric Stakes in Antitrust Litigation

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https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3268&context=facpub

Private antitrust litigation often involves a dominant firm being accused of exclusionary conduct by a smaller rival or entrant. Importantly, the firms in such cases generally have asymmetric stakes: the defendant typically has a much larger financial interest on the line. We explore the broad policy implications of this fact using a novel model of litigation with endogenous effort. Asymmetric stakes lead dominant defendants to invest systematically more resources into litigation, causing the plaintiff's success probability to fall below the efficient level -- a distortion that carries over to ex ante settlements. We explain that enhanced damages may reduce the problem, but cannot eliminate it. We also show that, in most areas of private law, asymmetric stakes do not distort litigation outcomes in this way; the distortion arises in antitrust only because it proscribes certain ex post settlements, and this constraint influences incentives at the litigation stage. Finally, we consider how courts could correct the distortion created by asymmetric stakes by altering plaintiffs' evidentiary burden.

Employment Class Actions and the Gig Economy in the US and UK, and Implications for Canada

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548317

Around the world, traditional forms of business and employment are being disrupted by new global corporations based on internet apps and platforms. These often provide precarious "Gig Economy" work. In some cases, these are the only option for people who no longer have access to traditional paid employment. Often this is because the traditional local employers have been driven out of business by the new competition.

A number of approaches are being taken to help prevent the erosion of employment standards in this environment. One factor that has had some measure of success in behavior modification is the class

action on behalf of misclassified workers. Ultimately, the best solution may be legislative reforms that broaden the definition of employee. An intermediate category, such as the “dependent contractor” definition recognized in Canadian law, may provide a guide to how this should be approached.

The Issue Class Revolution

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In 2013, four Supreme Court Justices dissented from the decision in Comcast v. Behrend establishing heightened requirements for the certification of damages class actions. In a seemingly off-handed footnote, these dissenters observed that district courts could avoid the individualized inquiries that increasingly doom damages classes, by certifying a class under Rule 23 (c)(4) on “liability” issues only, and “leaving individual damages calculations to subsequent proceedings.” The dissenters were on to something big. In fact, the issue class and follow-on damages model has broad potential to restore the efficacy of aggregate litigation across a number of substantive areas, after decades of judicial hostility. This article offers a bold and original vision for the issue class procedure, promising scale efficiency while sidestepping the doctrinal land mines that dot the class action landscape. It is a vision rooted in sober pragmatism and an account of the economic incentives confronting entrepreneurial law firms as they consider investing in aggregate litigation under Rule 23(c)(4).

The New, Improved Class Action Rule: The December 2018 Amendments to Rule 23

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471949

Rule 23 of the Federal Rules of Civil Procedure, which governs federal class action practice, was amended in December 2018. Although the amendments do not address some of the more pressing issues that have arisen in class action practice of late – ascertainability; cy pres remedies; issues class actions; and pick-off strategies – the amendments are nevertheless important and helpful.

The Article identifies, contextualizes, and analyzes six of the more important changes made in the amended Rule: (A) front-loading of the settlement process by requiring preliminary approval before notice is provided to the class; (B) clarification that preliminary approvals are not appealable; (C) procedural and substantive standards for assessing the fairness of class action settlements; (D) combined notice of preliminary approval and class certification; (E) electronic means of providing class action notice; and (F) modest changes to rein in professional objectors.

The Class Action Law of the Ninth Circuit

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The Ninth Circuit, the largest of the federal courts of appeal, plays a leading role in the ongoing development of class action jurisprudence. Size and diversity distinguish this far-flung court and account for much of its strengths. Together with the immigration and criminal cases that fill its dockets, a steady stream of class actions, many arising under California law, regularly occupy the 46 judges (28 of whom are active and receive litigants’ en banc petitions). Ninth Circuit judges are known for their collegial — and comparatively informal — approach, both internally and externally, to deciding cases. Oral arguments are videotaped and viewable on the court’s website. Somewhat paradoxically, the large number of judges bolsters and lends consistency to the court’s jurisprudence. Once a panel opinion has issued, it is disseminated to all other judges, who may offer comments via email if they believe a point of

law is flawed or incomplete. Thus, instead of granting en banc review, the court often has simply amended a decision to prevent a misalignment in its case law. Further, despite being reversed in the Roberts Court's signature class action case, Wal-Mart Stores, Inc. v. Dukes, as well as in recent other Supreme Court decisions addressing minor points of class action procedure, the Ninth Circuit's reputation as a "cowboy" court is mostly undeserved. For example, the court polices class action settlements with increasing vigilance.

This extended essay provides an overview of class action basics in the circuit — from pleading a case (including defining the class) through certification, settlement, and final disposition. We aim to set out the basic law surrounding the class action prerequisites, in addition to highlighting circuit-specific nuances relating to the Rule 23 analysis that may be relevant when practicing in the Ninth Circuit. We also highlight a flurry of significant recent developments in the court's class action jurisprudence that have already influenced how cases are pleaded, prosecuted, and defended. These developments include:

- Sitting en banc in In re Hyundai & Kia Fuel Economy Litigation, the court reinstated a false advertisement settlement and provided important guidance on the analysis that applies when litigants propose a nationwide class action settlement of state-law claims.
- The court held in Sali v. Corona Regional Medical Center that evidence need not be admissible to inform the analysis of the Rule 23 requirements.
- In ABS Entertainment, Inc. v. CBS Corporation, the court quashed the Central District of California's local rule mandating that a class certification motion be filed within 90 days after case inception, deeming the strict time limit at odds with Rule 23(c)(1)(A)'s flexible "as soon as practicable" standard and with the need to perform a "rigorous analysis" at certification.
- In Davidson v. Kimberly-Clark Corporation, the court clarified that a consumer plaintiff who sues for false advertising may have standing to seek an injunction "even though the consumer now knows or suspects that the advertising was false at the time of the original purchase[.]"
- The court indicated in Torres v. Mercer Canyons Inc. that a class may properly contain uninjured members but that concerns arise if "large numbers" of putative class members were "never exposed" to the allegedly unlawful conduct.
- In Briseno v. ConAgra Foods, Inc., the court rejected the notion that, to obtain certification, a plaintiff must establish a reliable and administratively feasible way to identify putative class members; ascertainability analysis instead focuses on the class definition.
- On remand from the U.S. Supreme Court, the court held in Robins v. Spokeo, Inc. that an alleged violation of the Fair Credit Reporting Act is sufficiently concrete to give rise to an Article III injury in fact where the plaintiff alleges a "material risk of harm" to "concrete interests (as opposed to purely procedural rights)."

Politics, Identity, and Class Certification on the US Courts of Appeals

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This article draws on novel data and presents the results of the first empirical analysis of how potentially salient characteristics of Court of Appeals judges influence class certification under Rule 23. We find that the ideological composition of the panel (measured by the party of the appointing president) has a very strong association with certification outcomes, with all-Democratic panels having dramatically higher rates of certification than all-Republican panels—early triple in about the past twenty years. We

also find that the presence of one African American on a panel, and the presence of two females (but not one), is associated with pro-certification outcomes.

Our results show that, contrary to conventional wisdom in scholarship on diversity on the Courts of Appeal, the impact of diversity extends beyond conceptions of “women’s issues” or “minority issues.” The consequences of gender and racial diversity on the bench, through application and elaboration of certification law, radiate widely across the legal landscape, influencing implementation of consumer, securities, labor and employment, antitrust, insurance, product liability, environmental, and many other areas of law. In considering possible explanations for our findings on the pro-certification preferences of female and African American judges, we note that class action doctrine, as trans-substantive procedural law, traverses many policy areas. As strategic actors, it would be rational for judges to take into consideration how class certification doctrine in a case that does not implicate issues on which they have strong preferences might affect certification in cases that do. Alternatively, or in addition, our results may be the first evidence that trans-substantive procedural law affecting access to justice is itself a policy domain in which female and African American judges have distinctive preferences. In either case, the results highlight the importance of exploring the effects of diversity on trans-substantive procedural law more generally.

Our findings on gender panel effects in particular are novel in the literature on panel effects and the literature on gender and judging. Past work focusing on substantive anti-discrimination law found that one woman can influence the votes of males in the majority (mirroring what we find with respect to African American judges in class certification decisions). These results allowed for optimism that the panel structure—which threatens to dilute the influence of underrepresented groups on the bench because they are infrequently in the panel majority—actually facilitates minority influence, whether through deliberation, cue taking, bargaining, or some other mechanism.

Our gender results are quite different and normatively troubling. We observe that women have substantially more pro-certification preferences based on outcomes when they are in the majority. However, panels with one female are not more likely to yield pro-certification outcomes. Female majority panels occur at sharply lower rates than women’s percentage of judgeships, and thus certification doctrine underrepresents their preferences relative to their share of judgeships and overrepresents those of male judges.

Insurance Structure and Class-Action Settlements

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This paper examines an aspect of Security Class Action dynamics that has not been previously analyzed using game theory: the effects of fragmentation of interests across the insured defendant and potentially multiple-insurers who are all subject to losses under the class action. Incentive conflicts within the defense coalition not only affects the settlements reached but can result in different level of settlements in cases which are of similar merit (operationalized as facing the same loss function should the case go to trial). Our paper provides an explanation for such outcomes even if the legal system is not subject to any obvious form of inefficiency.

Posner and Class Actions

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The hallmark of Judge Posner’s class action decisions is rigorous review to ensure that aggregate litigation serves the best interests of class members and does not unduly pressure defendants to settle. Although he championed class actions, especially as a way to provide efficient justice in cases involving

numerous small claims, Posner also recognized that, because of the agency problems that pervade class litigation, ordinary adversary procedures were not sufficient to protect class members. As a result, the judge had to act as a fiduciary for the class, especially when approving settlements and fee awards. In addition, the colossal liabilities potentially imposed by a class action meant that a defendant might settle even if the case had little merit, so judicial scrutiny—in particular interlocutory appellate review of certification decisions—was necessary to protect defendants. The influence of Posner's opinions can be seen in the FRCP, especially the drafting of Rule 26(f), which, following Posner's opinion in Rhone-Poulenc, allowed interlocutory review of certification decisions. Citation analysis also confirms Posner's influence on the analysis of class actions, especially outside the Seventh Circuit and in academia.

Collusion

Collusion by Blockchain and Smart Contracts

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Blockchain may transform transactions the same way the Internet altered the dissemination and nature of information. If that were to be the case, all relationships between companies would change, including prohibited ones such as collusive agreements. For that reason, the stakes are crucial and the absence of academic studies entirely dedicated to this issue must be remedied.

To this end, this article introduces the first taxonomy of collusion on blockchain. The discussion then moves on to explore their functioning, their robustness and their limits through the three fundamental stages of the existence of collusive agreements: their birth, life and death. The article further highlights how companies may use smart contracts and sophisticated algorithms to collude in the blockchain environment, thus contributing to the literature solely focused on algorithms.

Using empirical studies, economic analyses and existing case law, we draw legal conclusions that we extend beyond the sole blockchain technology. Along the way, we propose methods of action for antitrust and competition agencies.

The Fundamental Unimportance of Algorithmic Collusion for Antitrust Law

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https://jolt.law.harvard.edu/digest/the-fundamental-unimportance-of-algorithmic-collusion-for-antitrust-law

Antitrust and competition law is subject to increasing polarization, especially regarding Internet giants. Some scholars argue that the tech giants abuse their dominant positions, while others point to the increase they contribute to consumer welfare. These two camps seem irreconcilable, mainly because they are not discussing the same thing.

There is, however, a broad consensus on antitrust and competition policy in the area of collusion (Section 1 of the Sherman Act in the United States, Article 101 of the TFEU in Europe). Few economists and lawyers would defend the beneficial effects of anti-competitive collusion for consumers. In fact, cartels are regularly described as being "the supreme evil of antitrust," a quasi-moralist assertion on which the academic community seems to have found a point of agreement. On that basis, algorithmic collusion is now the focus of much academic research. This article ambitions to explain, in the absence

of fundamental challenges for antitrust law, why it actually results from a publication bias (I), and why the focus should be put instead on blockchain based-collusion (II).

Reduced Demand Uncertainty and the Sustainability of Collusion: How AI Could Affect Competition

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https://www.ftc.gov/reports/reduced-demand-uncertainty-sustainability-collusion-how-ai-could-affect-competition

We consider how technologies that eliminate sources of demand uncertainty change the character and prevalence of coordinated conduct. Our results show that mechanisms that reduce firms' uncertainty about the true level of demand have ambiguous welfare implications for consumers and firms alike. An exogenous increase in firms' ability to predict demand may make collusion possible where it was previously unsustainable. However, it also may make collusion impracticable where it had heretofore been possible. The underlying intuition for this ambiguity is that greater clarity about the true state of demand raises the payoffs both to colluding and to cheating. The net effect will depend on a given market's location in a multidimensional parameter space. Our findings on the ambiguous welfare implications of AI in market intelligence applications contribute to the emerging literature on how algorithms and other forms of artificial intelligence may affect competition.

Algorithms, Machine Learning, and Collusion

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This paper discusses the question whether self-learning price-setting algorithms are able to coordinate their pricing behaviour to achieve a collusive outcome that maximizes the joint profits of the firms using these algorithms. While the legal literature generally assumes that algorithmic collusion is indeed possible and in fact very easy, the computer science literature on cooperation between algorithms as well as the economics literature on collusion in experimental oligopolies indicate that a coordinated and in particular tacitly collusive behaviour is in general rather difficult to achieve. Many studies have shown that some form of communication is of vital importance for collusion if there are more than two firms in a market. Communication between algorithms is also a topic in artificial intelligence research and some recent contributions indicate that algorithms may learn to communicate, albeit in a rather limited way. This leads to the conclusion that algorithmic collusion is currently much more difficult to achieve than often assumed in the legal literature and is therefore currently not a particularly important competitive concern. In addition, there are also several legal problems associated with algorithmic collusion, for example, questions of liability, of auditing and monitoring algorithms as well as enforcement. The limited resources of competition authorities should rather be devoted to more pressing problems as, for example, the abuse of dominant positions by large online-platforms.

Collusive Algorithms as Mere Tools, Super-tools or Legal Persons

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https://academic.oup.com/jcle/article-abstract/15/2-3/123/5560038?redirectedFrom=fulltext

The widespread use of algorithmic technologies makes rules on tacit collusion, which are already controversial in antitrust law, more complicated. These rules have obvious limitations in effectively regulating algorithmic collusion. Although some scholars and practitioners within antitrust circles in the United States, Europe and beyond have taken notice of this problem, they have failed to a large extent to make clear its specific manifestations, root causes, and effective legal solutions. In this article, the authors make a strong argument that it is no longer appropriate to regard algorithms as mere tools of firms, and that the distinct features of machine learning algorithms as super-tools and as legal persons

may inevitably bring about two new cracks in antitrust law. This article clarifies the root causes why these rules are inapplicable to a large extent to algorithmic collusion particularly in the case of machine learning algorithms, classifies the new legal cracks, and provides sound legal criteria for the courts and competition authorities to assess the legality of algorithmic collusion much more accurately. More importantly, this article proposes an efficacious solution to revive the market pricing mechanism for the purposes of resolving the two new cracks identified in antitrust law.

Harmful Signals: Cartel Prohibition and Oligopoly Theory in the Age of Machine Learning

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The classical legal approach for distinguishing between illicit collusion and legitimate oligopoly conduct is to rely on proxies, such as elements of "practical cooperation", on "plus factors", or on the finding of an anticompetitive intent among rival firms. These criteria ultimately relate to the inner sphere of natural persons and its emanations in communicative acts. Some authors therefore conclude that the cartel prohibition of Article 101 TFEU or Section 1 of the U.S. Sherman Act are unable to capture collusion if it is achieved by autonomously acting computers relying on machine learning capabilities. It is instead suggested here to define collusion as parallel informational signals, which achieve a supracompetitive equilibrium, and to use the consumer welfare standard as a proxy for distinguishing between illicit collusion and legitimate oligopoly conduct. This approach is not tantamount to the idea of prohibiting tacit collusion as such. Rather, it is to check singular elements of communication, i.e. "informational signals", within an existing oligopolistic setting for their propensity to create a consumer harm. This approach can help to close potential regulatory gaps currently associated with the surge of algorithmic pricing.

Detecting Bid-Rigging Cartels with Descriptive Statistics

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https://academic.oup.com/jcle/article-abstract/15/4/427/5730310?redirectedFrom=fulltext

The paper shows that descriptive statistics, used as screens, capture the effect of bid rigging in the distribution of the bids. The bid-rigging cartel studied in this paper negatively affected the variance of the bids as illustrated by the coefficient of variance and the kurtosis statistic. Furthermore, it cleverly manipulated the differences between bids to secure that the designated bidder from the cartel won the contract. Such cover-bidding mechanism produced asymmetry in the distribution of the bids illustrated by the relative distance, the skewness statistic, and the percentage difference between the first and second lowest bids. The descriptive statistics capture the change in the statistical pattern of the distribution of the bids between periods of collusion and competition. Moreover, the bid rotation screen shows that the behavior of firms changed radically between the cartel and post-cartel periods. Finally, the paper discusses policy implications for competition agencies wishing to set up a detection method for screening procurement markets.

Machine Learning with Screens for Detecting Bid-Rigging Cartels

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We combine machine learning techniques with statistical screens computed from the distribution of bids in tenders within the Swiss construction sector to predict collusion through bid-rigging cartels. We assess the out of sample performance of this approach and find it to correctly classify more than 84% of the total of bidding processes as collusive or non-collusive. We also discuss tradeoffs in reducing false positive vs. false negative predictions and find that false negative predictions increase much faster in

reducing false positive predictions. Finally, we discuss policy implications of our method for competition agencies aiming at detecting bid-rigging cartels.

Antitrust Policy

Do Increasing Markups Matter? Lessons from Empirical Industrial Organization

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This article considers the recent literature on firm markups in light of both new and classic work in the field of industrial organization. We detail the shortcomings of papers that rely on discredited approaches from the "structure-conduct-performance" literature. In contrast, papers based on production function estimation have made useful progress in measuring broad trends in markups. However, industries are so heterogeneous that careful industry-specific studies are also required, and sorely needed. Examples of such studies illustrate differing explanations for rising markups, including endogenous increases in fixed costs associated with lower marginal costs. In some industries there is evidence of price increases driven by mergers. To fully understand markups, we must eventually recover the key economic primitives of demand, marginal cost, and fixed and sunk costs. We end by discussing the various aspects of antitrust enforcement that may be of increasing importance regardless of the cause of increased markups.

Antitrust Law and Its Critics

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Antitrust law is the subject of substantial current controversy, criticism, and proposed reform. The current unease seems to reflect the confluence of four factors: rising populism, on both the left and the right, that decries free markets, globalism, and increasing inequality within the developed countries; the rise of big tech, which seems to expand without limit through scale and scope economies and network effects; a growing body of economic studies that suggest that market concentration and market power have increased in recent years; and increasing concern of libertarians about private, as well as government, power coupled with evidence of increased industry concentration.

On the surface, there appears to be a conversation about the future of antitrust law between three groups; conservatives who argue that antitrust law is basically fine as it is, progressives who argue that antitrust enforcement has been too lax and that antitrust law should be adjusted but within the prevailing consumer welfare paradigm; and populist critics who have more far-reaching reform proposals. In fact, however, there are really two very separate conversations. One, between conservatives and progressives, concerns how antitrust law might best promote economic welfare. The other, pushed largely by the populists, concerns how to replace what is now known as antitrust law with alternatives that will serve other objectives, in addition to economic welfare, such as promoting an equitable distribution of wealth and of economic and political power. The two conversations seldom intersect in any meaningful way.

This paper analyzes the current controversies. It explains what the consumer welfare standard means, why proposals for abandoning or replacing it are unsound, and how the two conversations have not intersected. It ends by describing ways in which the various critics and defenders of antitrust law might fruitfully join in a single conversation that addresses both antitrust and regulatory issues.

Chicago and Its Discontents

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https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6185&context=uclrev

This symposium began with a call for papers "re-assessing the validity of the Chicago School's assumptions about competition and considering whether a more aggressive approach to antitrust enforcement is now warranted." That framing uncritically accepts the premises of antitrust's new populist movement: first, that "the Chicago School" marked an abrupt break from prior academic analysis of antitrust law, and, second, that its adherents shared a common positive agenda fundamentally at odds with robust antitrust enforcement. Both of those premises are false. The Chicago School represented a logical continuation of the antitrust analysis developed over the preceding decades, and its members shared no positive doctrinal agenda. Instead, they shared a commitment only to promoting consumer interests by means of rigorous economics. Of course, that commitment influenced how the economics profession and antitrust policymakers thought, and progressive "post-Chicago" scholarship today shares the same commitment to consumer welfare and economic rigor. Post-Chicago scholarship thus has far more in common with Chicago School scholarship of the 1960s and 1970s than with today's populist movement, which abandons any coherent framework altogether.

Hipster Antitrust: New Bottles, Same Old W(h)ine?

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Although the debate over hipster antitrust is often portrayed as something new, experienced observers recognize it as a replay of an old argument that was resolved by the global consensus that antitrust should focus on consumer welfare rather than on the size of firms, the levels of industry concentration, and other considerations. Moreover, the history of the Federal Trade Commission's Section 5 authority to prevent unfair methods of competition stands as a reminder of the dangers of allowing enforcement policy to be guided by vague and uncertain standards.

The Looming Crisis in Antitrust Economics

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As in so many areas of law and politics in the United States, antitrust's center is at bay. It is besieged by a right flank that wants to limit antitrust even more than it has been limited over the last quarter century. On the left, it faces revisionists who propose significantly greater enforcement.

One thing the two extremes share is denigration of the role of economics in antitrust analysis. On the right, the Supreme Court is increasingly revealing that fundamental economic analysis no longer occupies the central role that it once had. On the left, some proposals by Democratic presidential contenders seem to be uninformed or indifferent about how their proposals will affect important participants in the economy.

The antitrust laws speak of the conduct they prohibit in unquestionably economic terms, such as "restraint of trade," "monopoly," or lessening of "competition." They do not embrace any particular economic ideology, such as the Chicago School or institutionalism. Nor do they require the use of any particular economic model, such as perfect competition or monopolistic competition. This openness gives policy makers a great deal of room, but it is not an invitation to economic nonsense. Antitrust

economics should be a tool for determining how a practice affects competition, which requires an assessment of who is injured by the practice, how, and by how much. Economics should not be a tool for picking a winning interest group and then manipulating the doctrine to get that result.

This paper first examines the way that the Supreme Court's emergent, more conservative majority addresses issues of antitrust economics, focusing on its two most recent decisions at this writing. Then it looks at the sharply contrasting approaches of some of the Democrat presidential candidates for the 2020 election.

The Problem of Bigness: From Standard Oil to Google

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https://www.aeaweb.org/articles?id=10.1257/jep.33.3.94&within%5Btitle%5D=on&within%5Babstract%5D=on&within%5Bauthor%5D=on&journal=3&q=antitrust&from=j

This article sets recent expressions of alarm about the monopoly power of technology giants such as Google and Amazon in the long history of Americans' response to big business. I argue that we cannot understand that history unless we realize that Americans have always been concerned about the political and economic dangers of bigness, not just the threat of high prices. The problem policymakers faced after the rise of Standard Oil was how to protect society against those dangers without punishing firms that grew large because they were innovative. The antitrust regime put in place in the early twentieth century managed this balancing act by focusing on large firms' conduct toward competitors and banning practices that were anti-competitive or exclusionary. Maintaining this balance was difficult, however, and it gave way over time—first to a preoccupation with market power during the post–World War II period, and then to a fixation on consumer welfare in the late twentieth century. Refocusing policy on large firms' conduct would do much to address current fears about bigness without penalizing firms whose market power comes from innovation.

Monopsony

Competition Concerns in Labour Markets

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https://one.oecd.org/document/DAF/COMP(2019)2/en/pdf

A recent fall in the labour share of income in some countries has stirred a debate on monopsony and the market power of employers to reduce workers' wages or working conditions below competitive levels. The debate focused attention on the role that competition agencies may have to help ensure efficient labour input markets.

This paper sets out the economic drivers and effects of employer monopsony power in labour markets. It analyses when the exercise of monopsony power by employers may infringe competition law and identifies the cases where competition enforcement can effectively address monopsony power in such markets.

The paper also looks at how monopsony power is exercised in digital markets, examining how the intermediation power of some big platforms may negatively affect wages and working conditions of self-employed platform workers.

The paper finds that, whilst competition law enforcement has been so far limited, it may have an increased role to play in labour input markets, particularly in addressing anticompetitive agreements that

artificially creates monopsony power, abuses of monopsony power and merger transactions leading to increased buyer power on the labour demand side.

The paper looks at some practical and analytical challenges to the application of the traditional tools of competition enforcement analysis in these markets. It then discusses ways to overcome such challenges and proposed adjustments to these tools suggested in the recent literature, as well as competition advocacy solutions to address monopsony power in these markets.

Competition Policy for Labour Markets

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421036

Competition law in many jurisdictions defines its consumer welfare goal in terms of low consumer prices. For example, mergers are challenged when they threaten to cause a price increase from reduced competition in the post-merger market. While the consumer welfare principle is under attack in some circles, it remains the most widely expressed goal of antitrust policy.

We would do better, however, to define consumer welfare in terms of output rather than price. Competition policy should strive to facilitate the highest output in any market that is consistent with sustainable competition. That goal is in most ways the same as a goal of pursuing lower consumer prices; that is, as output goes up prices go down.

In the United States we have traditionally seen anti-labour policies as coming from the political right, through such means as right-to-work laws that drive wages down or other forms of anti-union activity. But today the competition policy advocated on the left has its own share of anti-worker sentiment, particularly in the form of attacks on low prices. Higher prices certainly harm consumers, but they also harm labour by reducing output. Product consumers and labourers have one thing in common: just as consumers benefit from high output because it produces lower prices in product markets, so too labour benefits from high output because it increases the demand for jobs and, in the process, boosts wages.

This paper examines competition policy toward labour, focusing on these themes. In particular we look at anticompetitive mergers in labour markets; anti-poaching agreements; excessive non-competition covenants, particularly those that bind only the employees working in a particular franchise, such as McDonald's; and anticompetitive occupational licensing.

Antitrust Remedies for Labor Market Power

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https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13776&context=journal_articles

Recent research indicates that labor market power has contributed to wage inequality and economic stagnation. Although the antitrust laws prohibit firms from restricting competition in labor markets like in product markets, the government does little to address the labor market problem and private litigation has been rare and mostly unsuccessful. The reason is that the analytic methods for evaluating labor market power in antitrust contexts are primitive, far less sophisticated than the legal rules used to judge product market power. To remedy this asymmetry, we propose methods for judging the effects of mergers on labor markets. We also extend our approach to other forms of anticompetitive practices

undertaken by employers against workers. We highlight some arguments and evidence indicating that market power may be even more important in labor than in product markets.

A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317575

Recent empirical studies have revealed that labor market monopsony is far more common than previously thought, and that there is a strong correlation between wage suppression and labor market concentration. Yet few antitrust cases have been brought by workers against employers who exercise significant market power against them, and hardly any such cases have been successful. In contrast, antitrust cases against monopolists on the product market side are common. We argue that section 2 of the Sherman Act, which prohibits certain forms of monopolization (and has been interpreted to apply to labor market monopsonization as well) is insufficient for addressing monopsonization of labor markets because of structural differences between labor markets and product markets. We propose a new statute that would strengthen the law by giving employees a more robust claim against labor monopsonists who abuse their market power.

The Opportunities and Limitations of Monopsony Power in Healthcare: Evidence from the United States and Canada

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Perhaps more than any other sector of the economy, healthcare depends on government resources. As a result, many healthcare systems rely on the use of government monopsony power to decrease spending. The United States is a notable exception, where prices in large portions of the healthcare sector are set without government involvement. In this paper we examine the economic implications of a greater use of monopsony power in the United States. We present a model of monopsony power and test its predictions using price differences between the United States and Canada – a country that represents an example of a “Medicare for All” style system. Overall, we find that wage differences for medical providers across the two countries are primarily driven by the broader labor market while price difference for prescription drugs are more directly the result of buyer power. We discuss theoretical reasons why a Canadian monopsonist may be more willing to exploit its buyer power over prescription drugs rather than provider wages and why a U.S. monopsonist might not be willing to do the same.

Tech: Platforms and Multi-sided Markets

Intra-Platform Exclusion in Software Markets

Patrick Todd
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564282

A large proportion of our online activity takes place through a handful of platforms. With increased hostility towards the prevalence of vertical integration in tech markets and calls for the breaking up of profitable technology companies such as Amazon, Apple, Google and Microsoft, the time is ripe to devise antitrust rules that sensibly approach the relationship between platform operators and firms that compete within their ecosystems. This article analyzes situations where platform operators design their platforms in such a way that is liable to exclude intra-platform competitors. There are certain intricacies

of exclusion in intra-platform markets that existing theories of harm in antitrust law do not anticipate; thus, applying those theories unyieldingly is liable to cause confusion and result in judicial error. Existing cases reveal that some authorities and courts have been taking a sensible approach to intra-platform exclusion since the early 2000s whereas others, especially in the E.U., have shown a tendency to protect excluded intra-platform firms at the expense of consumer welfare.

Is This Time Different: Schumpeter, the Tech Giants, and Monopoly Fatalism

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501824

Growing numbers of legislators and policy experts charge that tech firms such as Amazon, Google, Facebook, Apple, and Microsoft are "monopolies," with the potential power to harm consumers.

Many economists, lawyers, and politicians say that economic features of these companies' product markets — such as network effects, economies of scale, data collection, tying of complementary goods, or operating online marketplaces — create unfair competition or insurmountable entry barriers for new competitors. They conclude that "forward-looking" antitrust policy is needed to prevent persistent market dominance from undermining consumer welfare.

Economist Joseph Schumpeter warned against such monopoly fatalism. He recognized that the most important long-term competitive pressure comes from new products cannibalizing incumbent businesses through marked product quality improvements. An antitrust policy that second-guesses the future based on the present ignores this unpredictable margin of competition, to the detriment of consumers.

Over the past century, large businesses operating in industries similar to today's tech firms were regularly labeled as unassailable monopolies. Retailers, social networks, mobile phone producers, camera manufacturers, and internet browser and search engine companies have all been thought likely to dominate their sectors perpetually, based on similar economic reasoning to that heard about tech companies today.

Yet historical case studies of the Great Atlantic and Pacific Tea Company, Myspace, Nokia, Kodak, Apple's iTunes, Microsoft's Internet Explorer, and more show that none of these features ensured continued dominance. All these businesses saw their market shares disintegrate in the face of innovative new products and companies, as Schumpeter theorized.

This suggests that we should be extremely skeptical about predictions of entrenched monopoly power for Amazon, Google, Facebook, Apple, and Microsoft today. Basing antitrust policy on overcoming market features that "tip" markets toward one-firm dominance or legislating to prevent highly speculative "future harms" is a fool's errand.

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