

In Pursuit of Antiracist Antitrust Enforcement

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ABSTRACT

“The consumer welfare standard has a certain attraction to a certain kind of person who is hoping for a kind of certainty. And I can see in the seventies, in particular, it was a strong desire, but it really hasn’t delivered that. And the phrase, I just think it’s so tainted.

The worst thing about it is this case-by-case idea that you’re going to try to calculate this in every case when we know that so many things that matter are immeasurable.”¹

This Article asks whether there is a moral imperative for antitrust enforcement to be antiracist—and, if so, why. While antitrust law traditionally centers on economic efficiency and the consumer welfare standard, emerging scholarship highlights the racialized impacts of market structures, enforcement choices, and doctrinal assumptions. Situating antiracism alongside antitrust doctrine raises foundational questions: What values does antitrust serve? Can antitrust enforcement meaningfully address systemic racial inequities? And how should enforcers navigate the tension between the quantifiable demands of economic analysis and the qualitative realities of structural racism? This Article offers a preliminary exploration of these questions, examining the potential for an antiracist approach to complement—or challenge—the consumer welfare framework that has dominated antitrust for nearly half a century.

¹Tim Wu, *Should We Stop Using the Phrase “Consumer Welfare Standard”?*, Stigler Ctr. for the Study of the Economy and the State (2023), <https://www.youtube.com/watch?v=2ETc701LunA>.

TABLE OF CONTENTS

INTRODUCTION		3
I	DEFINING ANTITRUST AND ANTIRACISM	4
A	<i>What is Antitrust?</i>	4
B	<i>What is an Antiracist?</i>	4
II	THE CONSUMER WELFARE STANDARD PART I	6
A	<i>Beneficiaries of Antiracist Antitrust Enforcement</i>	6
B	<i>Recalibrating the Consumer Welfare Standard?</i>	7
C	<i>Who is the Consumer?</i>	8
III	THE NEXUS OF ANTITRUST AND ANTIRACISM	10
IV	SLAVERY AND ANTICOMPETITIVE BEHAVIOR	14
A	<i>A Monopoly of Labor</i>	15
B	<i>Statutory Enforcement of Slavery</i>	16
V	JIM CROW LAWS AND ANTICOMPETITIVE BEHAVIOR	17
A	<i>Jim Crow Laws: Racial Discrimination as a Form of Cartel Behavior</i>	18
B	<i>Sharecropping During the Jim Crow Era</i>	19
VI	REDLINING AND ANTICOMPETITIVE BEHAVIOR	20
A	<i>Jones v. Alfred H. Mayer Co.</i>	21
B	<i>Redlining and Sherman Act Violations</i>	22
C	<i>United States v. Trustmark</i>	23
VII	ANTIRACISM: ANTITRUST AS A PARTIAL CURE FOR SYSTEMIC RACISM	24
A	<i>UFC</i>	25
VIII	THE CONSUMER WELFARE STANDARD PART 2	26
A	<i>The FTC’s “Woke Social Agenda”</i>	26
B	<i>Neo-Brandeisian v. Chicago School Ideologies</i>	27
1	<i>The Adequacy of the Consumer Welfare Standard</i>	28
IX	SUMMARY AND CONCLUSION	28
A	<i>The Substantive Impact of Commissioner Slaughter’s 2020 Antiracist Antitrust Comments</i>	28
B	<i>Re-Alignment of Thought</i>	29
C	<i>The Case Against Neutrality</i>	29
D	<i>The Problem with a “Value-Neutral” Consumer Welfare Standard</i>	30

INTRODUCTION

Is there a moral imperative for antitrust enforcement to be antiracist? And if so, then why? When reading about antitrust, there are certain concepts that unsurprisingly make regular appearances: monopolies, merger control, elasticity, relevant product market, the Sherman Act, the Clayton Act, vertical markets, the FTC, unfair trade practices, etc. As often as these concepts are mentioned, one could certainly fill up their antitrust bingo card.

Curiously, amidst the discussion surrounding antitrust, there is one concept that appears to be conspicuously omitted despite being a frequent topic of discussion within other economic theories: racism. Perhaps, on a very surface level, one would think that antitrust and racism make strange bedfellows. However, delving deeper reveals that the nexus between these two concepts holds significance within the historical context of American antitrust law, affecting cases ongoing today.

It is baffling when law school antitrust programs omit the examination of the intersection between racism and antitrust law; or conversely, the influence of antitrust law on racism. This topic has been conspicuously absent from coursework, discussions, and lectures. This is not a total indictment of law schools; rather, it highlights the dearth of comprehensive research, scholarly publications, and field experts with nuanced understanding of both of these complex subjects.

When researching antitrust and racism, there is not a complete void of material, but generally, when racism is mentioned with respect to antitrust law, it is often paired as a double-act: “Antitrust and Antiracism.” There is also a distinct possibility that *antitrust* and *antiracism* simply have better SEO, drawing those articles to the top of search engines. Examples of these articles include:

- *Antitrust Can Be Antiracist*²
- *Racist Antitrust, Antiracist Antitrust*³
- *Antiracism and Antitrust*⁴
- *The Antitrust and Antiracism Nexus*⁵
- *Antitrust as Antiracism Panel*⁶

²Minhas, S., *Antitrust Can Be Antiracist*, The Regulatory Review (2022), <https://www.theregreview.org/2022/05/25/minhas-antitrust-can-be-antiracist/> (last visited Dec. 5, 2023).

³John M. Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384 (2021), <https://ssrn.com/abstract=3962410> (last visited Dec. 5, 2023).

⁴W. Kabui, *Antiracism and Antitrust with Eric Cramer*, HB Litigation Conferences Podcast (2023), <https://litigationconferences.com/legal-podcast-antiracism-antitrust-employment-law/> (last visited Dec. 5, 2023).

⁵Hoffman Lent & Schwartz, *The Antitrust and Antiracism Nexus* (2021), <https://www.skadden.com/-/media/files/publications/2021/06/the-antitrust-and-antiracism-nexus.pdf> (last visited Dec. 5, 2023).

⁶*Antitrust as Antiracism Panel*, Rutgers Institute for Information Policy and Law (Jan. 20, 2022), <https://www.youtube.com/watch?v=bbITPsvpv-s> (last visited Dec. 5, 2023).

- *FTC Must Be “Actively Anti-Racist” in Antitrust Enforcement*⁷
- *Centering Anti-Racism in the Antimonopoly Fight*⁸

The list goes on. The titles of these articles suggest that, with respect to antitrust, racism can only be viewed through the specter of antiracism—which is not true. In reality, the interplay between racism and antitrust is a multifaceted and intricate subject. This paper provides a cursory exploration of one small element of this overarching topic: the moral imperative for antitrust enforcement to be antiracist.

I. DEFINING ANTITRUST AND ANTIRACISM

A. *What is Antitrust?*

In the context of a comprehensive global antitrust program, the definition of antitrust remains uncontroversial and well-established. At the federal level, antitrust laws proscribe monopolistic practices, unfair methods of competition, price-fixing, and mergers that engender anticompetitive conduct, ultimately to the detriment of consumers.⁹

Antitrust, as a regulatory tool, is grounded in the premise that competitive markets possess inherent self-regulatory mechanisms and that consumers benefit from robust and, at times, uncompromising market competition.¹⁰

B. *What is an Antiracist?*

What delineates antiracism and antiracist behavior is not as straightforward or as mutually agreed upon as antitrust. Definitions of racism and antiracism are often viewed through the lens of one’s own personal experience of race rather than neutral data-driven information. According to the Oxford English Dictionary, an antiracist is defined as “an opponent of racism.” While this definition is accurate, in the scope of politics, it is not precise enough. Under this definition, the majority of rational individuals would categorize themselves as antiracist. However, the specific criteria of what qualifies someone as an antiracist could be more extensive and precise.

In defining “antiracist,” left-leaning scholars often place antiracist thinking squarely within the context of critical race theory (“CRT”) in analyzing how racism in the United States has historically shaped policies, structures, institutions, and laws that have propagated racial and social inequality.¹¹

⁷Vasant, K., *FTC Must Be “Actively Anti-Racist” in Antitrust Enforcement, Slaughter Says*, MLex/FTCWatch (2022), <https://www.mlexwatch.com/articles/16975/print?section=ftcwatch> (last visited Dec. 5, 2023).

⁸J.D. Fiacco, *Centering Racial Justice in the Antimonopoly Fight*, Institute for Local Self-Reliance Podcast (2022), <https://ilsr.org/liberation-in-a-generation-episode128/> (last visited Dec. 5, 2023).

⁹Ritchie, J.N. & Jones, N., *The Antitrust Laws*, Fed. Trade Comm’n (2022), <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Nov. 28, 2023).

¹⁰U.S. Chamber of Commerce Staff, *America’s Antitrust Laws: Myth vs. Facts* (2021), <https://www.uschamber.com/regulations/americas-antitrust-laws-myth-vs-facts> (last visited Nov. 28, 2023).

¹¹Rafia Jaleel, “Critical Race Theory and the Assault on Antiracist Thinking,” *Am. Ass’n of Univ. Professors* (2021), <https://www.aaup.org/article/critical-race-theory-and-assault-antiracist-thinking> (last visited Nov. 28, 2023).

Though CRT has been a flashpoint for conservatives, for purposes of this research paper, it is defined as “an academic approach that examines American institutions and laws through the lens of race and racism.”¹²

In contrast, right-leaning scholars maintain a skeptical stance toward the term “antiracist” and initiatives aligned with antiracism. They cast doubt upon the legitimacy of CRT, often characterizing it as a broad catch-all phrase encompassing any form of race-related instruction within educational institutions.¹³

Furthermore, proponents of conservative viewpoints often repudiate the concept of institutional racism, which posits that American policies, structures, institutions, and laws are inherently imbued with systemic racism and oppression.¹⁴

Conservative author Joseph Pearce explains:

It is no doubt true, of course, that racism still exists in individuals in police departments and other institutions, but it does so in spite of the systemic antiracism which does exist and not because of the systemic racism which doesn't. The real problem is that those who cry loudest about systemic racism are not referring to real concrete systems, but about the whole “system” of civilization as defined by Marxist ideological dogma.¹⁵

From this, two main points emerge:

1. Right-leaning scholars, generally, will not see the need for antiracist initiatives because their perception of antiracist behavior is tied to the left's “quixotic” fight against structural racism, a concept to which few conservatives give any credence. Thus, an imperative for antiracist antitrust enforcement is likely to foster criticism, skepticism, and disdain.
2. Divergent perspectives on antiracism between conservatives and liberals constitute a pivotal factor influencing one's stance in defining “antiracism,” identifying as antiracist, and believing in a moral obligation for antitrust enforcement to adopt antiracist principles.

Given these contrasting perspectives and the necessity of establishing a precise framework for addressing the thesis question, this research paper adopts a definition of antiracism drawn from the work of Ibram X. Kendi, the author of *How to Be an Antiracist*. In explaining the difference between antiracism and non-racism, Kendi writes:

¹²Barbara Sprunt, “Understanding the Republican Opposition to Critical Race Theory,” NPR (June 20, 2021), <https://www.npr.org/2021/06/20/1008449181/understanding-the-republican-opposition-to-critical-race-theory> (last visited Nov. 28, 2023).

¹³David Smith, “How Did Republicans Turn Critical Race Theory into a Winning Electoral Issue?”, *The Guardian* (Nov. 3, 2021), <https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue> (last visited Nov. 29, 2023).

¹⁴“Reject Critical Race Theory,” Heritage Action for America, <https://heritageaction.com/toolkit/rejectcrt> (last visited Nov. 28, 2023).

¹⁵Joseph Pearce, “What Is ‘Systemic Racism’?”, *The Imaginative Conservative* (July 7, 2020), <https://theimaginativeconservative.org/2020/07/what-systemic-racism-joseph-pearce.html> (last visited Nov. 29, 2023).

What’s the problem with being not racist? It is a claim that signifies neutrality. “I am not a racist, but neither am I aggressively against racism.” But there is no neutrality in the racism struggle. The opposite of racist isn’t not racist. It is antiracist. What is the difference? One either endorses the idea of racial hierarchy as a racist, or racial equality as an antiracist. One either believes problems are rooted in groups of people, as a racist, or locates the roots of problems in power and policies as an antiracist. One either allows racial inequities to persevere as a racist or confronts racial inequities as an antiracist. There is no in-between safe space of ‘not racist.’ The claim of ‘not racist’ neutrality is a mask for racism.

16

From this definition, we glean that an antiracist is one who endorses racial equality, locates the roots of problems in power and policies, and confronts racial inequalities. When coupled with antitrust enforcement, we have an individual or perhaps a movement that uses the teeth of existing antitrust laws to promote racial equality by identifying problematic power structures and challenging the legality of those structures to achieve an equitable outcome. But an equitable outcome for whom?

II. THE CONSUMER WELFARE STANDARD PART I

A. *Beneficiaries of Antiracist Antitrust Enforcement*

The Treasury Department believes that racial equality benefits all Americans. They offer that an “underappreciated” aspect of the Bidenomic focus on equality is the “impact [policies] have on all working-class Americans regardless of race. All Americans—including rural, white, and other communities.”¹⁷ Yet, this inclusive language may veer towards political spin rather than substantive reality.

More pointedly, who are the true beneficiaries when using antitrust as a tool for promoting racial equality? Is it individuals, specific racial communities, or corporations? The authors of the research paper, “Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism,” suggest that although African Americans would benefit from using antitrust to combat the power structures, this would also benefit disenfranchised whites.¹⁸

The authors address dismantling structural racism through the specter of labor and employment law; and using antitrust as the tool for the dismantling. They theorize employment is viewed as a zero-sum game played by those with capital (Corporations / Employers) and those without (Laborers and employees). The authors imply

¹⁶I.X. Kendi & Hari Sreenivasan, *Ibram X. Kendi on “How to Be an Antiracist”* (PBS Amanpour & Co., 2020), <https://www.youtube.com/watch?v=CRtkZemTpM8> (last visited Nov. 29, 2023).

¹⁷Wally Adeyemo, *Racial Equity Benefits All Americans*, U.S. Dep’t of the Treasury (2023), <https://home.treasury.gov/news/featured-stories/racial-equity-benefits-all-americans> (last visited Dec. 2, 2023).

¹⁸Joshua Paul 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”)* (Univ. of San Francisco L. Res. Paper No. 2021-01, 2021), <https://ssrn.com/abstract=3816202>.

that those with the capital are white employers and those without are Black laborers. The scholars acknowledge the faults within that premise, recognizing that other non-minorities and whites, too, are included in the category of laborers. The authors emphasize that one of the issues of dismantling systemic racism is that within the perceived zero-sum game, disenfranchised whites perceive it as a threat.¹⁹

They give the example:

“If the pie has a fixed size, and people of color get more of it, white people would seem inevitably to get less. Cutting up a pie is what game theorists call a zero-sum game. But reducing systemic racism could increase the pie available to all disempowered peoples. If so, the interests of disempowered people of color can align with the interests of disempowered white people. That can suggest a less divisive metaphor—a rising tide lifts all boats.”

20

Ultimately, these authors propose that the allocation of workers’ pay and issues of discrimination have typically been addressed by employment law, whereas workers may have a better overall outcome if antitrust law is used to increase the total compensation allocated by firms.

B. Recalibrating the Consumer Welfare Standard?

So, where does that leave consumers and the consumer welfare standard? A significant hurdle facing the antitrust antiracism movement is that antitrust legislation does not specifically address race; rather, it looks to promote the consumer welfare standard. The omission of race is seen by some as a fundamental issue:

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

21

The authors of the “Race-ing Antitrust” research paper suggest antitrust law should differentiate consumers in its analysis, accounting for those disproportionately harmed by anticompetitive actions through a community welfare standard. They highlight how such conduct has been used to oppress minorities or has inadvertently harmed them. Drawing on CRT principles, the article critically analyses the neutral approach of antitrust as being detrimental to communities of color. They proffer that antitrust law, which has historically focused on market structures, should proactively

¹⁹Davis et al., *supra* note 18.

²⁰Davis et al., *supra* note 18; see also <https://ssrn.com/abstract=3816202>.

²¹Capers, B. & Day, G. (2023) “Race-ing antitrust,” *Michigan Law Review* 121.4, 523, doi:10.36644/mlr.121.4.race-ing.

evaluate if market practices are equitable to all consumers, not just in terms of efficiency but also in addressing racial misallocation of resources. Moreover, the authors contend that antitrust law can effectively combat systemic racism.²²

The FTC and Justice Department have enjoyed “substantial success”²³ in antitrust enforcement, in part because the underlying antitrust principles have traditionally been seen as bipartisan and uncontroversial, gaining support from both conservative and liberal policymakers. Historically, antitrust enforcement has avoided the political limelight and the contentious debates that envelop topics such as abortion, affirmative action, gun control, race, and climate change, which has helped it maintain a relatively uncontroversial presence in the political landscape.

The enforcement of antitrust advances the consumer welfare standard, “a normative economic theory to segregate legitimate economic competition goals from ‘value judgments.’”²⁴ To promote antiracist practices in antitrust policy, the Antitrust Enforcer must reconcile economic competition objectives with moral considerations. Herein lies a point of contention: mathematicians, economists, and pragmatists like numbers and definitiveness. Keeping the consumer welfare standard as a value-neutral prospect allows for easier quantitative assessments of consumer welfare within product markets. Moral judgments, in contrast, defy such. Morality is fluid, and some moral-relativist scholars allege that there are no absolutes. How does an economist make a calculation for something that is not absolute? For that reason, economists typically eschew moral considerations, focusing instead on the mechanics of trade-offs, incentives, and interplays, deferring ethical evaluations to the political realm and cultural ethos. Nevertheless, ethical considerations are not so easily divorced from economic realities.

An antiracist perspective involves using antitrust laws to dismantle the power structures that perpetuate racial inequality. It means scrutinizing and challenging the legality of practices that result in inequitable outcomes, thereby actively promoting racial equality through legal mechanisms. Should the FTC and Justice Department make this a goal of antitrust enforcement along (or instead of) the consumer welfare standard? Is there a moral imperative for antiracist antitrust enforcement?

C. *Who is the Consumer?*

“[A]ntitrust enforcers should intervene strategically to address the decline of Black businesses as a direct result of #anticompetitive M&A activity and anticompetitive conduct.”²⁵ tweeted FTC Commissioner Rebecca Slaughter. Addressing the

²²Id.

²³Abbott, A. (2022) Policy Spotlight: *Is Weak Antitrust Enforcement Harming American Competition?*, Mercatus Center. <https://www.mercatus.org/research/policy-briefs/policy-spotlight-weak-antitrust-enforcement-harming-american-competition> (last visited Dec. 2, 2023).

²⁴Glick, M. A. & Bush, D. (2023) “The Chicago School, the Post-Chicago School, and the New Brandeisian Schools of Antitrust,” *SSRN Electronic Journal* (preprint), doi:10.2139/ssrn.4417509.

²⁵Slaughter, R. K. (2020a) “Antitrust enforcers should intervene strategically to address the decline of Black businesses as a direct result of #anticompetitive M&A activity and anticompetitive conduct,” Twitter (Nov. 14, 2020), <https://twitter.com/RKSlaughterFTC/status/1303762120149004289?s=20> (last visited Dec. 2, 2023).

decline of Black businesses is a noble and perhaps necessary goal, especially when viewed from a historical perspective of Jim Crow laws, the Tulsa Race Riots, and segregation, but it does raise questions about its compatibility with the prevailing consumer welfare standard. Some contend that antitrust laws are not the appropriate tool for addressing these social issues. Others argue that antitrust enforcement hasn't gone far enough. Why not also use antitrust for abortion, gun control, or climate change? Responding to Slaughter's series of tweets, a critic retorted, "You say '#Antitrust can and should be #proclimate,' right?"²⁶

In discussions around antiracist antitrust enforcement, critiques have surfaced against Robert Bork's seminal work, *The Antitrust Paradox*, arguing against Bork's assertion that antitrust law's singular goal ought to be the maximization of consumer welfare, achieved primarily by enhancing economic efficiency. Antiracist antitrust proponents challenge the narrowness of this objective and advocate for a more expansive understanding of antitrust goals that include addressing systemic racial inequities.²⁷

The authors of "Race-ing Antitrust" highlight that Bork's concept of consumer welfare, paralleling the Supreme Court's more limited view, implicitly relies on an idealized, racially homogeneous consumer model, mirroring the "reasonable man" construct in criminal and tort law. They challenge that this approach historically envisioned consumers predominantly as white, while labor was often conceptualized as Black, brown, or otherwise non-white. This racialized dichotomy between consumers and labor was reinforced through television and magazine advertising, which at the time was dominated by white faces, significantly influencing the antitrust law's application.²⁸

The authors go on to theorize that the predominance of viewing consumers as white led to a skewed application of the consumer welfare standard in antitrust cases. This perspective facilitated a simplistic judicial analysis focusing on the perceived benefits or detriments to a monolithic group of white consumers, often overlooking the varied implications for consumers across different racial and socioeconomic backgrounds. Such a racially and class-biased approach calls into question the purported race neutrality of antitrust law's focus on consumer welfare.²⁹

"Because the conception of consumers as white was so prevalent, the real impact of the consumer welfare approach to antitrust law was predictable. Simply put, it was easy for those in power to view consumers as white and labor as non-white. For example, confronted with the concentration of markets such as banks or hospitals or grocery stores, it was easy for courts to simply focus on whether consumers writ large—again, prefigured as white—would benefit or be harmed, and ignore that consumers may be

²⁶L. Bergkamp, "You say '#antitrust can and should be #antiracist.' but what about the #climate #crisis? #antitrust can and should be #proclimate, right?" Twitter (2022), <https://twitter.com/lucasbergkamp/status/1525755317275054081?s=20> (last visited Dec. 2, 2023).

²⁷Khan, L. M. (2017) "Amazon's Antitrust Paradox," <https://scholarship.law.columbia.edu/faculty-scholarship/2808> (last visited Dec. 2, 2023).

²⁸Capers, B. & Day, G. (2023) "Race-ing antitrust," *Michigan Law Review* 121.4, 523, doi:10.36644/mlr.121.4.race-ing.

²⁹Id.

situated differently along lines of race and class. All of this should complicate the notional race neutrality of antitrust’s emphasis on ‘consumer welfare.’”

30


III. THE NEXUS OF ANTITRUST AND ANTIRACISM


Antitrust law is generally regarded as a framework for tackling breaches of free market principles rather than promoting equality principles.³¹ Nonetheless, these two domains exhibit an interconnectedness. Structural racism fundamentally revolves around power dynamics and their exploitation. Similarly, antitrust law is fundamentally rooted in the regulation of power within market structures. Antitrust law is a tantalizing sword offering the possibility of combating racism in ways not possible with current anti-discrimination legislation.


2020 was a year where the news cycle was dominated by the COVID-19 pandemic, social unrest, and global protests over the police killing of George Floyd and the presidential election campaigns. Against that backdrop, FTC Commissioner Rebecca Slaughter acknowledged antitrust’s role in the changing political landscape in a series of tweets.

³⁰Id.


³¹Josh Paul 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”)* (Univ. of San Francisco L. Research Paper No. 2021-01, 2021), <https://ssrn.com/abstract=3816202>.








	<p>I've spent the summer mostly offline w/ my newborn, but I've still been immersed in & moved by the momentous challenges our country has been confronting. So, as I come back online, I want to share some thoughts & questions about the @FTC 's role & how we can be #antiracist. 1/14</p>
<p>2:28 PM · Sep 9, 2020</p>	

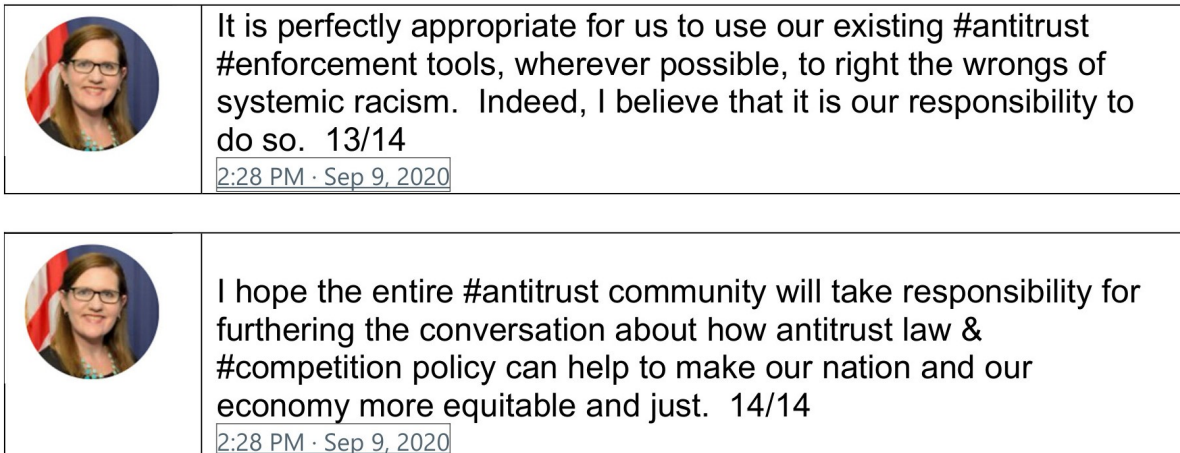
	<p>I've advocated for stronger #enforcement of our #ConsumerProtection laws to address racial inequities affecting Black communities— some examples include predatory lending and sales practices; 2/14</p>
<p>2:28 PM · Sep 9, 2020</p>	

	<p>#Discrimination in auto financing; 3/14 https://ftc.gov/public-statements/2020/05/statement-commissioner-rebecca-kelly-slaughter-matter-liberty-chevrolet...</p>
<p>2:28 PM · Sep 9, 2020</p>	

	<p>And #AI. We can & must do more w/ our consumer protection tools to prioritize addressing inequity. 4/14</p>
	
<p>From ftc.gov</p>	
<p>2:28 PM · Sep 9, 2020</p>	

	<p>But I don't think there has been nearly enough discussion about whether our #antitrust laws can play a role in racial equity. I think the answer is YES! #Antitrust can and should be #antiracist. 5/14</p>
<p>2:28 PM · Sep 9, 2020</p>	

	<p>#Antitrust is about ensuring fair #opportunity for all competitors to the benefit of #consumers. As long as Black-owned businesses & Black consumers are systematically underrepresented and disadvantaged, we know our markets are not fair. We need to fix these inequities. 6/14</p> <p>2:28 PM · Sep 9, 2020</p>
	<p>There's precedent for using antitrust to combat racism. E.g., South Africa considers #racialequity in #antitrust analysis to reduce high economic concentration & balance racially skewed business ownership. 7/14</p> <p>2:28 PM · Sep 9, 2020</p>
	<p>Even though we are working with different laws, as #antitrust enforcers in the US we can still use the tools we have to contribute to creating a more equitable and #antiracist economy. 8/14</p> <p>2:28 PM · Sep 9, 2020</p>
	<p>Specifically, we can strategically deploy our existing tools to address mergers and conduct that contribute to the systematic disadvantages facing Black consumers and Black-owned businesses. 9/14</p> <p>2:28 PM · Sep 9, 2020</p>
	<p>First, we must affirmatively look for the competitive effects on #consumers that are economically disadvantaged because of centuries of #racism. 10/14</p> <p>2:28 PM · Sep 9, 2020</p>
	<p>Second, antitrust enforcers should intervene strategically to address the decline of Black businesses as a direct result of #anticompetitive M&A activity and anticompetitive conduct. 11/14</p> <p>2:28 PM · Sep 9, 2020</p>
	<p>Beyond deploying resources to prioritize investigations that address systemic racism, the @FTC should consider whether there are opportunities to use our competition #rulemaking authority to address racist practices. 12/14</p> <p>2:28 PM · Sep 9, 2020</p>



Slaughter reinforced her Twitter remarks in a speech to the GCR Women in Antitrust meeting, arguing that antitrust enforcement should not be divorced from societal values and should be used strategically to promote equity and combat racism within economic and market structures.³² Amongst her ideas, she put forth a bold proposal:

“Antitrust can and should be deployed in the fight against racism. As anticipated, I have received lots of questions and critical feedback. I appreciate and very much welcome that engagement. To me, the objections I have heard start with what I view to be a faulty premise: that antitrust can and should be value-neutral, and therefore social problems like racism do not have a role in antitrust enforcement.”

33

Slaughter questioned why antitrust is singled out as a value-neutral enclave within law enforcement while other areas of law enforcement openly adopt values-based priorities. By way of example, criminal prosecutors make a value judgment when they declare they have an interest in prosecuting white-collar or violent crime. Attorneys general make a value judgment when they declare they are focusing on predatory lending. Even the consumer protection arm of the FTC makes a value judgment when prioritizing discrimination in the auto financing industry, noting that discrimination in auto financing is widely recognized to affect Black communities disproportionately.

Slaughter emphasizes that antitrust enforcement inherently engages with the fundamental structures of economics and markets—markets, she avers, that the United States has a historical and ongoing track record of racial inequity. She continues:

³²Slaughter, R. K. (2020) United States of America Federal Trade Commission, The Federal Trade Commission. Available at: https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf (last visited Nov. 30, 2023).

³³Id.

“The second problem I have with the premise that antitrust should be uniquely value-neutral is that I do not believe antitrust can be value-neutral. The concept of value-neutral antitrust enforcement is at best aspirational, not unlike the idea of ‘race blindness’ as a way to eliminate racial discrimination. Antitrust enforcement necessarily addresses fundamental economic and market structures. In the United States, these economic and market structures are historically and presently inequitable. So, when we make decisions about whether and where to enforce the law or how to deploy our enforcement resources, we are making decisions that will have an effect on structural equity or inequity.”

34

Commissioner Slaughter has rightly underscored the profound and enduring legacy of institutionally endorsed economic inequities, fueled by racial discrimination in the United States. Legal and market mechanisms, historically leveraged against African Americans, have included egregious systems such as slavery, Jim Crow laws, and redlining. These mechanisms, now outlawed, nonetheless have bequeathed a legacy that continues to impede the economic potential of African American communities. The cumulative effect of these practices has not only been morally reprehensible and racist but also antithetical to the rule of law, which espouses fairness and equality.

These historical injustices have disproportionately allocated economic disadvantage to subsequent generations of African Americans, creating a stark economic dichotomy when compared to their white counterparts. This backdrop provides a compelling argument for an antitrust approach that actively incorporates antiracist principles. Such an approach would not merely be a corrective alignment with the fundamental principles of justice under the rule of law but also a necessary redress for the economic disparities engendered by a legacy of discrimination.

IV. SLAVERY AND ANTICOMPETITIVE BEHAVIOR

The beginnings of slavery in what is now the United States can be traced back to anticompetitive behavior in the fifteenth century.³⁵ Then Pope Nicholas V and the Roman Catholic Church gave the country Portugal a monopoly on trade in West Africa and Spain, thus giving the Portuguese the right to colonize the New World.³⁶ The Pope issued a mandate to the Portuguese king, Alfonso V, with the instruction:

“...to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever ... and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms,

³⁴Slaughter, R. K. (2020) United States of America Federal Trade Commission, The Federal Trade Commission. Available at: https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf (last visited Nov. 30, 2023).

³⁵Elliott, M. & Hughes, J., *A Brief History of Slavery That You Did Not Learn in School*, N.Y. Times (2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html> (last visited Dec. 4, 2023).

³⁶Id.

dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit...”

37

Thus began the legal institution of human chattel into the New World, taking foot in America from 1619 until 1865. The first enslaved Africans arrived in Jamestown, Virginia, from a seized Portuguese slave ship in 1619. The institution of slavery gave rise to a free labor market for cash crops such as tobacco, cotton, and sugar. This use of “free” labor effectively made it impossible for businesses to compete unless these businesses were also willing to use slave labor.

Not disregarding the sheer depravity of slavery, the cost to obtain the “free labor” opened a slave-trade market that was also subject to anticompetitive forces. Slaves, by the nature of their enslavement, were not free to choose where they would work, for whom they would work, how long they would work, nor what type of work they would be forced to do. Nor would they receive compensation for the work they did. Theft of labor and unjust enrichment is the basis for the Reparations Movement—dormant for many years—which resurged with new vigor after the 2020 George Floyd killing and subsequent Black Lives Matter protests.

A. *A Monopoly of Labor*

During the 1840s and 1850s, the slavery abolitionist movement faced the hard truth that slavery in the South had taken over the mechanisms of government to forge an oligarchy that subjugated African Americans.³⁸ By the mid-19th century, Abolitionists had co-opted antimonopoly rhetoric, asserting that slavery constituted a de facto unconstitutional monopoly, allowing slaveholders to exclusively control African American labor.³⁹

In his first annual message in 1865, President Andrew Johnson stated that slavery created a labor monopoly that effectively barred the southern states from the benefits of free enterprise:

“Slavery was essentially a monopoly of labor, and as such locked the States where it prevailed against the incoming of free industry. Where labor was the property of the capitalist, the white man was excluded from employment or had but the second-best chance of finding it.”

40

³⁷Joseph Pearce, *What Is “Systemic Racism”?*, The Imaginative Conservative (2020), <https://theimaginativeconservative.org/2020/07/what-systemic-racism-joseph-pearce.html> (last visited Nov. 29, 2023).

³⁸Price, L. (2012), *Monopolies and the Constitution: A History of Crony Capitalism*, Northwestern Univ. Pritzker Sch. of Law. Available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1213\&context=facultyworkingpapers> (last visited Dec. 4, 2023).

³⁹Id.

⁴⁰Id.

B. *Statutory Enforcement of Slavery*

The barbarity of slavery was not solely perpetuated by private industry; it was done with the explicit permission of the government. Though Great Britain and British slave traders were a key force behind the transatlantic slave trade, no legislation was ever passed in England legalizing slavery. This was in contrast to the British Colonies in the New World, which went to great lengths to preserve the institution of slavery by passing laws and codifying it. Such laws include:

- The 1641 Massachusetts law recognizing slavery as a legal institution.⁴¹
- The 1662 Virginia law which stated that the status of the mother determined whether a Black child would be enslaved.⁴²
- The 1705 Virginia Slave Codes declaring all enslaved people to be real estate, permitting the acquittal of slaveholders who killed enslaved persons during punishment, and denying enslaved people the right to bear arms.⁴³
- The 1705 New York law that punished runaway enslaved persons by execution.⁴⁴
- The 1712 New York law forbidding freed Blacks from owning real estate or property.⁴⁵
- The 1793–1850 Fugitive Slave Acts creating a federal bounty-hunter system for re-enslaving escapees.⁴⁶
- The 1857 *Dred Scott* decision holding that enslaved people were not U.S. citizens and that Congress lacked power to prohibit slavery in federal territories.⁴⁷

The catalog presented herein represents but a fraction of the extensive legislative apparatus that, historically, both federal and state jurisdictions—whether maintaining slavery or purporting freedom—enacted to perpetuate the institution of slavery, entrench racial inequality, endorse white supremacy, and undermine the economic advancement of African Americans even in post-emancipation eras. These statutes were far from “value-neutral” and were deliberately designed to sustain an oppressive system.

The enduring ramifications of such legislative measures—including slavery, Jim Crow, and redlining—continue to affect the economic standing of African Americans

⁴¹Jim Crow Museum (n.d.), *Slavery in America*. Available at: <https://jimcrowmuseum.ferris.edu/timeline/slavery.htm> (last visited Dec. 4, 2023).

⁴²Id.

⁴³Id.

⁴⁴Thirteen/WNET New York (2004), *Slavery and the Making of America: Timeline*. Available at: <https://www.thirteen.org/wnet/slavery/timeline/1731.html> (last visited Dec. 4, 2023).

⁴⁵Id.

⁴⁶History.com Editors (2009), *Fugitive Slave Acts*. Available at: https://www.history.com/topics/black-history/fugitive-slave-acts/#section_2 (last visited Dec. 4, 2023).

⁴⁷National Archives (n.d.), *Dred Scott v. Sandford* (1857). Available at: <https://www.archives.gov/milestone-documents/dred-scott-v-sandford> (last visited Dec. 4, 2023).

adversely. It is unrealistic to anticipate a dramatic shift in the economic fortunes of African Americans when faced with the vast residue of historically racist legislation. Counteracting these historic injustices with ostensibly “value-neutral” or “race-blind” approaches, such as the consumer welfare standard, is unlikely to yield substantive change. A robust antiracist approach necessitates transcending the consumer welfare standard in favor of adopting, or indeed replacing it with, policies imbued with an acute consciousness of social justice and equality.

V. JIM CROW LAWS AND ANTICOMPETITIVE BEHAVIOR

Jim Crow laws were racial segregation and racial disenfranchisement laws that represented a formal, codified system of racial apartheid that dominated the American South from 1865–1968. Jim Crow laws affected most aspects of daily life.⁴⁸ These laws were so pervasive and insidious—with such long-arching effects—that despite ending in 1968 many years before I was born, they still had a residual effect on my upbringing. As written in 2013:

“My father grew up in a working-class family in the Deep South during the time of strict Jim Crow laws. At the start of World War II, they moved up to Wilmington, Delaware, so that my grandfather, a plumber by trade, could get work in the shipyard. Delaware wasn’t as strict as some of the southern states, but it wasn’t as integrated as Philadelphia, for example. The school system was segregated. Apparently, there was only one Black high school in the whole state. All Black students, no matter where they lived in the state, could only go there. Cinemas, the YMCA and even the amount of registered Black plumbers was segregated. My father, who was on his high school basketball team, could only play other Black high schools—and since there was only one in Delaware, this meant that all away games were out of state. Eventually, some parochial schools permitted integrated games, but this wasn’t allowed in public schools for a number of years.”

49

Jim Crow laws enforced a racial hierarchy as they commanded segregation and restricted access to transportation, schools, movie theaters, parks, libraries, swimming pools, drinking fountains, restrooms, and restaurants.⁵⁰ This system was underpinned by the 1896 *Plessy v. Ferguson* United States Supreme Court decision. This landmark decision established the “separate but equal” doctrine that became the standard for all segregation ordinances throughout the country.⁵¹

In Richard McAdams’s research paper, “Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination,” he observed that in the Jim

⁴⁸WGBH Educational Foundation (n.d.), *Freedom Riders: Jim Crow Laws*, PBS. Available at: <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> (last visited Dec. 5, 2023).

⁴⁹Rutledge, A. (2013), *Racial Segregation Was Not So Bad...*, Quora. Available at: <https://fmimqhuchoerpuec.quora.com/Racial-Segregation-wasnt-so-bad> (last visited Dec. 4, 2023).

⁵⁰WGBH Educational Foundation, *supra* note 48.

⁵¹See *infra* note 51.

Crow South, a duality of governance emerged: white legislators enacted statutes that covertly undermined the economic ascendancy of African Americans, yet these same legislators harbored a desire to attribute the economic underperformance of African Americans to their own deficiencies. Consequently, when African American success appeared to challenge the racial and social hierarchy, white vigilantes resorted to self-help and extrajudicial measures to preserve their perceived racial superiority. McAdams posits that a scholarly analysis of the Ku Klux Klan's origins shows that it was founded as a mechanism for lower-status white individuals to reclaim a sense of social dominance. This dynamic illustrates a complex interplay between legislative action and societal attitudes, where racial violence served as an unlawful instrument to maintain the status quo in response to the perceived threat to African American prosperity.⁵²

A. *Jim Crow Laws: Racial Discrimination as a Form of Cartel Behavior*

Scholar Darrell A.H. Miller, in his research paper, “White Cartels, the Civil Rights Act of 1866 and the History of *Jones v. Alfred H. Mayer*,” proposes that racial discrimination is a form of cartel behavior.⁵³ Wherein groups are bound by factors such as kinship, race, culture, or custom and possessing sought-after levers of power formally or informally agree to minimize competition from other groups, Miller alleges. Cartels are typically unstable, as individual members are enticed by personal gain to defect or cheat. Governments historically prolonged the existence of such cartels through coercive legislation, as exemplified by Jim Crow laws enforcing segregation after Reconstruction.⁵⁴

In the absence of coercive legislation, McAdams suggests that racial discrimination endures due to the group-status benefits it provides, such as prestige, which does not align with classical economic theories focused solely on material welfare maximization. McAdams argues that racial discrimination enhances group status for whites, explaining why racial cartels persist despite the allure of personal material gain that might lead individual members to defect. This enduring discrimination is upheld through social norms that promote discrimination even in competitive markets.⁵⁵

“[T]he cartel-like behavior of whites serves to maximize the non-material end of status production (the cartel seeks to monopolize social status) and ... the cartel employs the non-material means of intra-group status rewards and punishments. If this fundamental point is right, then social norms can support discrimination notwithstanding market competition.”

⁵²McAdams, R.H. (1995), *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, Univ. of Chicago. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2650&context=journal_articles (last visited Dec. 4, 2023).

⁵³Miller, D.A.H. (2009), *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.* Available at: <https://scholarship.law.duke.edu/> (last visited Nov. 30, 2023).

⁵⁴Id.

⁵⁵McAdams, R.H. (1995), *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2650&context=journal_articles (last visited Dec. 4, 2023).

56

Similarly, scholar Daria Roithmayr introduces the concept of “market lock-in” to describe how discrimination’s effects persist after formal legal barriers have been removed. She contends that past discriminatory practices in the legal field during the Jim Crow era, including the rise of law schools, bar examinations, and the decline of apprenticeships, created a system that systematically disadvantaged African American candidates. This system, with prohibitive switching costs, continues to impede African Americans’ ability to compete in the marketplace, even when nominally neutral.⁵⁷

B. *Sharecropping During the Jim Crow Era*

After the end of the Civil War, with the enactment of the Thirteenth Amendment, the Southern slave states shifted from a system of slavery to sharecropping. From around 1880 to 1940, sharecropping was a key element in the economy of the South. Sharecropping involved a system of farmers and laborers who rented land from landowners. The downturn of the Southern economy after the war left many Black and white farmers incapable of purchasing the necessary resources to reinstate farming. Former plantation owners who previously enjoyed the free human capital of slavery now faced insolvency. Their financial position meant that they could not afford to pay wages upfront. This led to a tenant-farming system, particularly for cotton and tobacco cultivation.⁵⁸

Tenant farmers typically rented land and housing from landowners, retaining autonomy over the crops and profits generated post-harvest, from which they paid their rent. In contrast, sharecroppers, who often owned nothing, operated under significant debt, borrowing land, housing, and essential farming supplies. They provided labor but lacked decision-making power over the crops and relied on landowners to sell the harvest and deduct their debts from the proceeds. Both tenant farmers and sharecroppers depended on local merchants for credit, aspiring to clear their debts with the harvest revenues.⁵⁹

However, the volatile nature of crop yields and prices thrust many farmers deeper into a tenancy, with the crop-lien system perpetuating a relentless cycle of debt and impoverishment.

Sharecropping, too, was subject to anti-competitive and cartel-like behavior:

“No free-labor alternative could possibly allow the planter to recoup his lost capital or to approach pre-war-level productive output and margin of profit. All of which is not to say that the planter did not try. Indeed, he sought to simulate slavery the best he could. He put laborers in the old slave quarters and forbade liquor and sometimes even visitors. The terms of his contracts might prohibit conversing in the fields or leaving the plantation

⁵⁶Miller, *supra* note 53.

⁵⁷Roithmayr, D., *Barriers to Entry: A Market Lock-In Model of Discrimination*, SSRN. Available at: <https://ssrn.com/abstract=278839> (last visited Dec. 4, 2023).

⁵⁸Conrad, D.E. (n.d.), *Tenant Farming and Sharecropping*, Oklahoma Historical Society. Available at: <https://www.okhistory.org/publications/enc/entry.php?entry=TE009> (last visited Dec. 6, 2023).

⁵⁹*Id.*

without permission. Inevitably, he required the freedman to be ‘peaceable, orderly, and pleasant, ... kind and respectful.’ Planters even tried (unsuccessfully) to form cartels with each other, in order to limit concessions made to the freedmen.”

60

In his research paper, “Bound or ‘Free’ Black Labor in Cotton and Sugarcane Farming,” Ralph Shlomowitz evaluates post–Civil War labor dynamics. He posits that the slavery system can be regarded as an egregious, legally sanctioned employer cartel designed to control and exploit labor.⁶¹ Post-emancipation, there was an attempt by plantation owners to recreate a labor structure with similar features, notably restricting freedmen’s rights to select employers, thus maintaining their bargaining power over working conditions. This was attempted through the enactment of “Black Codes” (similar to the later Jim Crow laws) and the formation of employer cartels, supplemented by violence, threats, and intimidation to compel freedmen into a labor system reminiscent of slavery.⁶²

These attempts at recreating a system akin to slavery largely failed to establish the necessary control mechanisms. Legislative efforts were overturned, and the employer cartels collapsed. As a result, freedmen retained the autonomy to choose their employers, prompting plantation owners to engage in a competitive labor market. This competition necessitated compliance with the principles of a free labor market, where labor could not be coerced.

Given this vast expanse of insidious and racist Jim Crow laws, in consideration of the length of time of their institution, their wickedness, and the ongoing generational knock-on effect—along with government-sanctioned actions that actively supported anti-competitive behavior and racial segregation to the detriment of African Americans—it is imperative for antitrust enforcement to move beyond a value-neutral premise and be actively antiracist. There is a moral imperative for antitrust law to be antiracist because doing so redresses past wrongs, makes an attempt to even the playing field, and proactively addresses racial equality.

VI. REDLINING AND ANTICOMPETITIVE BEHAVIOR

In the aftermath of the American Great Depression, under President Roosevelt, banks and financial institutions were reluctant to extend credit due to soaring unemployment and inflation rates. To stimulate lending, the federal government introduced a mechanism known as redlining. This process involved creating maps to guide banks on where lending for mortgages was deemed low or high risk, with risk assessments regrettably correlated with racial demographics. Neighborhoods considered low-risk were marked in green and eligible for mortgages with favorable interest rates, whereas areas predominantly inhabited by non-white families, delineated

⁶⁰Riddle, W.A. (1996), *The Origins of Black Sharecropping*, JSTOR. Available at: <https://www.jstor.org/stable/26475959> (last visited Dec. 6, 2023).

⁶¹Shlomowitz, R. (1984), *Black Labor in Cotton and Sugarcane*, JSTOR. Available at: <https://www.jstor.org/stable/2208473> (last visited Dec. 6, 2023).

⁶²Id.

in red, were labeled high-risk, and residents therein were often ineligible for conventional mortgages. Consequently, non-white families were compelled to resort to alternative, often onerous, credit markets. Moreover, these communities were subjected to racially restrictive covenants.

The enduring impacts of redlining are stark, manifesting in the systemic denial of mortgage opportunities to African American populations, contrasting sharply with those afforded to white communities. Instead, African Americans were often relegated to predatory lending practices. Redlined communities experienced sustained divestment, characterized by a dearth of essential services such as grocery stores and local businesses, and were further disadvantaged by urban planning decisions, such as the construction of federal highways, which frequently fragmented their neighborhoods.

The ramifications of redlining for many African American and minority communities across the United States have been profound, relegating these communities to the margins in terms of resources and opportunities—effects that persist to the present day. As a result, these communities often exhibit lower median incomes and endure greater financial instability, which in turn precipitate adverse long-term health outcomes. For families within these communities, the consequences have extended to the realm of education, where young people face disparities in school resources due to an inequitable tax base compared to communities that escaped redlining. The structural inequality engendered by redlining continues to reverberate, undermining the educational and economic foundations necessary for generational advancement.

“This history is very personal for me. I’m a third-generation Minneapolitan and my grandparents were immigrants from Sweden who came to this country with nothing. They worked incredibly hard jobs, but both sets of my grandparents in 1942 were able to buy houses in South Minneapolis. These houses were in a part of the city that was blanketed by racial covenants. Because of those racial covenants, my parents grew up in neighborhoods that were entirely white, and in many ways they described them as a paradise for children. They had wonderful parks, they had really solid schools that sent them to college, but no one in their neighborhood ever talked about the fact that this neighborhood was only for white people. And I want everyone with this map to imagine themselves in this landscape of privilege and doesn’t.”

63

A. *Jones v. Alfred H. Mayer Co.*

In 1968, in *Jones v. Alfred H. Mayer Co.*, the United States Supreme Court affirmed Congress’s authority to prohibit white homeowners from refusing to sell their houses to Black purchasers.⁶⁴ The Court departed from the conventional civil rights

⁶³*Redlining and Racial Covenants: Jim Crow of the North* (PBS 2019), <https://www.youtube.com/watch?v=ymOaiWla3DU> (last visited Dec. 5, 2023).

⁶⁴*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968).

jurisprudence framework and a previously dormant Reconstruction-era statute, the Civil Rights Act of 1866. What truly stood out in this decision was the Court’s assertion that the right to acquire private property on equal terms as whites could be encumbered not only by state actions but also by individuals involved in placing property on the market.⁶⁵

B. Redlining and Sherman Act Violations

The Sherman Act, codified under 15 U.S.C. §§ 1–7, is the cornerstone of federal antitrust legislation, targeting unreasonable restraints of trade and monopolistic practices.⁶⁶ Passed by Congress in 1890, it was viewed as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”⁶⁷ The Act is enforced by the Department of Justice and is supplemented by the Federal Trade Commission Act and the Clayton Act, both enacted in 1914.⁶⁸

The Sherman Act is composed of two sections, with the first section focusing on agreements and the second section focusing on monopolistic behavior. Together, the sections outlaw “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.”

Section 1 explicitly forbids any agreement or scheme that restricts trade or commerce across state lines. In the landmark 1969 case *United States v. Container Corp. of America*, the Supreme Court found that an unspoken or tacit agreement between corporations is sufficient to establish a conspiracy under Section 1 of the Sherman Act when each party exchanges information with the expectation of reciprocal exchange and such conduct restrains trade.⁶⁹

“A restraint on trade or commerce can be shown by proving the anti-competitive effect of the disputed product.”

70

Redlining’s anticompetitive nature can be evidenced in two ways:

1. through data indicating significantly fewer residential loans in redlined areas compared to others; and
2. through the harsher terms and conditions imposed on loans in these areas.

⁶⁵Id.

⁶⁶Ritchie, J.N. & Jones, N. (2022), *The Antitrust Laws*, Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Dec. 5, 2023).

⁶⁷Id.

⁶⁸Id.

⁶⁹Doehrman, T.C. (1975), *Redlining: Potential Civil Rights and Sherman Act Violations Raised by Lending Policies*, Indiana Law Review. Available at: <https://journals.iupui.edu/index.php/inlawrev/article/view/2172> (last visited Dec. 5, 2023).

⁷⁰Id.

For civil action under Section 1, it can be shown that these practices affected interstate commerce. Thomas C. Doehrmann’s paper identifies three Sherman Act Section 1 issues raised by a “concerted refusal to grant mortgages or rehabilitation loans” in a redlined area:⁷¹

1. **Illegal Price-Fixing** — financial institutions collectively manipulate credit costs in redlined neighborhoods. Such horizontal price-fixing arrangements represent a clear violation of the Sherman Act.⁷²
2. **Group Boycotts** — lenders collectively refuse to provide loans, or do so only under overly stringent conditions, in certain geographic areas.⁷³
3. **Tying Arrangements** — loans in redlined areas may be conditioned on accepting additional, typically unfavorable, requirements.⁷⁴

C. *United States v. Trustmark*

In October 2021, the Department of Justice and Consumer Financial Protection Bureau filed a civil suit against Trustmark National Bank, alleging, inter alia, that the bank engaged in a pattern or practice of unlawful redlining by structuring its business and outreach efforts to avoid the credit needs of majority-Black and Hispanic neighborhoods in its residential mortgage lending. The government did not allege Sherman Act violations but instead alleged multiple violations under the Fair Housing Act and Federal Consumer Financial Law.

From 2014 to 2018, Trustmark systematically engaged in redlining within the Memphis, Tennessee–Mississippi–Arkansas Metropolitan Statistical Area. This involved deliberately refusing home loans and related services in predominantly Black and Hispanic neighborhoods. Trustmark placed most of its branches and mortgage loan officers in majority-white areas, resulting in significant underrepresentation of marketing and outreach in minority neighborhoods. Internal policies were insufficient to ensure equitable credit access, leading to markedly lower loan applications and approvals in Black and Hispanic communities compared to other lenders.

The case settled in October 2021 through a Consent Order. Trustmark agreed to:

- invest \$3.85 million through a loan subsidy program to increase access to mortgages in majority-Black and Hispanic neighborhoods in Memphis;
- increase physical presence and outreach in these neighborhoods, including opening a new lending office;
- comply with fair lending requirements; and
- pay a \$5 million civil penalty.

⁷¹Id.

⁷²Id.

⁷³Id.

⁷⁴Id.

Given the extensive history of pervasive and racially discriminatory redlining practices—and considering their duration, severity, intergenerational harms, and the historical complicity of government-sanctioned conduct that perpetuated anticompetitive behavior—it is essential for antitrust enforcement to move beyond a value-neutral stance and adopt an actively antiracist framework. Antiracist antitrust enforcement is necessary to rectify historical injustice, strive toward a level playing field, and proactively support racial equality within economic systems.

VII. ANTIRACISM: ANTITRUST AS A PARTIAL CURE FOR SYSTEMIC RACISM

In “Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism,” the authors theorize that antitrust laws can fill the gaps left by antidiscrimination laws. After reading their paper, my takeaway from their research was that the strategies the authors give for using antitrust law to combat racism:

- do not attack racism directly;
- do not exclusively help African Americans (people of all races benefit); and
- are primarily in the arena of employment law.

The research, though with flaws, is substantial and provides an intriguing playbook for facilitating antitrust law to address racial discrimination. The paper is substantially comprehensive, and a critique of the research paper could be quite a lengthy paper in itself. A few of the paper’s key findings:

- Labor and employment law primarily addresses the differential treatment of workers by individual employers or managers. This is often demonstrated in cases where white people are hired or promoted over equally or better-qualified African Americans.
- Employment laws emphasize individual employment decisions, which limits their effectiveness in combatting systemic racism.
- Antitrust laws can address broader economic systems and market-wide issues, such as illegal wage-fixing or no-poach agreements, affecting various levels of the supply chain.
- The current state of employment discrimination law struggles to address systemic issues, such as labor market designs disadvantaging people of color. In contrast, antitrust law evaluates entire market systems, including how markets are structured and whether firms exploit or distort these structures for their benefit.
- Systemic racism often operates in ways that appear colorblind, making it challenging to address through laws focusing solely on differential treatment.
- Unlike employment discrimination laws, antitrust laws view harm from the perspective of the labor market as a whole, addressing exploitation by management of all workers.

- While not directly targeting racism and limited in addressing market power abuse, antitrust law’s market-efficiency focus and appeal to a broad population make it a significant tool against systemic racism.

Though these theories are intriguing and, in some ways, a refreshing take, I feel reluctant to buy into them wholly.

The paper addresses a number of antitrust cases recently in the news. Specifically, the authors address the UFC case, stating that this case “illustrates the potential advantages of antitrust over employment discrimination law in addressing systemic racism.”

A. UFC

The UFC case, styled as *Cung Le et al. v. Zuffa, LLC d/b/a Ultimate Fighting Championship and UFC*, was an antitrust case over employment discrimination. Mixed Martial Arts (“MMA”) fighters sued the UFC, alleging that the UFC garnered monopsony power through acquiring competitors and implementing a scheme involving long-term exclusionary contracts. As a result, the UFC paid their fighters less than 20% of revenues from events, whereas other American sports teams pay over 50% of their revenue to the athletes.⁷⁵

The authors propose that the UFC litigation serves as a compelling case study in the application of antitrust law to assess the dynamics of an entire market, rather than isolating a single firm or specific action. The core of the plaintiffs’ argument is that the UFC has effectively manipulated the market for professional MMA fighters’ services in North America. This is alleged to have been achieved through several strategies: primarily, the UFC engaged in securing MMA fighters with long-term exclusive contracts and exerted competitive pressure to acquire or eliminate rival MMA companies.

The critical focus here, from an antitrust perspective, is not merely on how a long-term contract impacts the individual fighter bound by it, but the emphasis is on understanding the aggregate impact of these contracts on the broader market structure. It is the cumulative effect of these long-term agreements and the UFC’s strategic maneuvers within the market that were under scrutiny.

Undoubtedly, this was an employment law and antitrust case, but there was no compelling element here in which one of a reasonable mind could say that this case had an impact on improving systemic racism. The authors obliquely addressed this but ultimately provided an incomplete response:

“Despite an oft-reported cultural perception of MMA as a ‘white sport’ with predominantly white fans, athletes, and management, Black and brown fighters in fact constitute a significant portion of the UFC’s roster and of its top fighter ranks in particular. This is true with regards to Black fighters, and even more so when other non-white minorities, such as Latinx fighters, are taken into account. The UFC has crowned over a dozen Black champions and currently boasts four Black champions across a total of eight

⁷⁵Davis, Josh Paul, Cramer, Eric L., Streater, Reginald L. & Suter, Mark R., *Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism* (2021). USF Law Research Paper No. 2021-01.

male weight divisions, including its first three champions from continental Africa.”

76

When analyzing this case, and the research paper, the absence of statistics regarding Black MMA fighters is notable. While the authors do not assert racial discrimination within the context of the lawsuit, external sources indicate that approximately 25% of UFC fighters are Black,⁷⁷ a fact not directly addressed in the lawsuit. This raises questions about the relevance and applicability of the authors using the UFC case as an “illustrative” example in a discussion centered on antiracism within antitrust law.

The UFC litigation, predominantly involving plaintiffs who are white and without allegations of racial discrimination, does not ostensibly appear to be a case addressing the eradication of racist animus. This presents a challenge in aligning the authors’ broader research, which is insightful, with their choice of the UFC case as an example. It suggests a hypothetical scenario where if antitrust methodologies were applied to cases with a stronger racial dimension, antitrust law might emerge as an unexpected hero in addressing issues of racial discrimination, especially where traditional anti-discrimination laws fall short. Critiquing the paper is not to undermine its substantial and thoughtful contributions, but rather to emphasize the necessity of careful selection and presentation of examples when discussing the role of antitrust law in combating racism.

VIII. THE CONSUMER WELFARE STANDARD PART 2

A. *The FTC’s “Woke Social Agenda”*

Tom Herbert, in an article for the right-leaning *Washington Examiner*, wrote, “Republicans should understand that the FTC is run by radical ideologues hellbent on using government power to push a woke social agenda.”⁷⁸

Herbert’s conclusion is harsh and hyperbolic. He, however, is not alone in his thinking. A quick Google search reveals a cacophony of contrarians criticizing the FTC’s “woke social agenda,” yet there is shockingly little pushback. Unfathomably, few voices praise, let alone defend, the FTC’s proposal of antiracist antitrust enforcement as a valid social strategy aimed at eradicating the continued realities of discrimination and social injustice. Herbert is just one of many vocal dissenters. His article itself has apparent misquotes leading to some illogical and hyperbolic conclusions. It is far from perfect. Nonetheless, Herbert is able to home in on something quite central. He identifies the fact that there is a paradigm shift at the FTC, not present during the Trump administration. This apparent realignment of philosophies is what has riled the Chicago School.

⁷⁶Davis et al., *supra* note 74.

⁷⁷Moore, J. (2023) *Best Black UFC Fighters*, Baller Circuit.

⁷⁸Herbert, T., Republicans Should See Through Klobuchar’s Big Government FTC Bill, *Washington Examiner* (2022), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/republicans-should-see-through-klobuchars-big-government-ftc-bill>.

Within the FTC, Lina Khan, Chairperson, supported by Commissioners Rebecca Slaughter and Alvaro Bedoya—who are alleged to support Neo-Brandeisian ideologies—has commanded a majority of 3–2 on the five-person Commission.⁷⁹ Individually, they have all spoken about a shift away from the traditional consumer welfare standard, to the dismay of Republicans and Chicago School scholars alike.⁸⁰

Nothing in the writings or speeches of the trio would indicate that they are “hell-bent” on pushing a “woke social agenda.”

This naturally leads one to think: Is the consumer welfare standard enough?

B. *Neo-Brandeisian v. Chicago School Ideologies*

The consumer welfare standard is deeply rooted in the philosophies of Louis Brandeis, a prominent twentieth-century legal scholar and Supreme Court Justice.⁸¹ He articulated concerns about the dangers of excessive economic power, particularly in corporations, fearing its potential to corrupt the political landscape and erode democratic principles. Brandeis championed the role of government in maintaining market competitiveness and preventing the rise of dominant entities, a perspective that influenced public policy for an extended period, particularly in antitrust laws up to the 1970s.⁸²

The latter half of the twentieth century witnessed a paradigmatic shift with the appointment of Milton Friedman at the University of Chicago’s Department of Economics. Friedman, a staunch advocate of free-market economics, propelled the Chicago School of Economic Thought, originally founded in the 1930s by Frank Hyneman Knight.⁸³ His approach emphasized consumer price as the primary measure of economic efficiency and extended economic analysis across various forms of human behavior.⁸⁴

In a related development, Bork, educated under the Chicago Law School, emerged as a significant critic of monopoly and antitrust legislation. He was a proponent of the efficiency argument, positing that consumer economic welfare should be the sole criterion for legal judgments under the Sherman Act, as expounded in *The Antitrust Paradox*.⁸⁵

⁷⁹Hebert, T., *supra* note 77.

⁸⁰Maier, G., Economics: Antitrust—How the FTC Became the Board of Irresponsible People (2022), <https://drivebycuriosity.blogspot.com/2022/09/economics-antitrust-how-ftc-became.html> (last visited Dec. 18, 2023).

⁸¹Sauer, C., Republicans Owe It to Limited Government and Free Markets to Stop Lina Khan, *RealClearMarkets* (2023), https://www.realclearmarkets.com/articles/2023/01/23/republicans_owe_it_to_limited_government_and_free_markets_to_stop_lina_khan_877104.html.

⁸²Ganti, A., What Is the Chicago School of Economics? *Investopedia* (2023), https://www.investopedia.com/terms/c/chicago_school.asp.

⁸³Henderson, D.R., Frank Hyneman Knight, *Econlib* (2023), <https://www.econlib.org/library/Enc/bios/Knight.html>.

⁸⁴Ganti, *supra* note 81.

⁸⁵Crane, D., The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy (2014), U. Mich. L. Sch., <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2549&context=articles>.

1. *The Adequacy of the Consumer Welfare Standard*

The debate around the adequacy of the consumer welfare standard in antitrust law is ongoing.⁸⁶ Critics point out its limitations, such as its narrow focus on immediate price effects to the exclusion of broader considerations like long-term innovation impacts, and its neglect of buyer power and monopsony issues. These arguments are further compounded by the stance of financial economists, who assert that corporate responsibilities are limited to maximizing shareholder value, often prioritizing short-term stock price increases.

1. Antitrust Hipsters

The contemporary discourse also includes critiques from what are sometimes dismissively labeled as “antitrust hipsters.”⁸⁷ These “hipsters” go beyond the normal “big is bad” monopolist arguments. They challenge the constraints of traditional economic approaches to welfare, arguing for a more expansive interpretation. They place the debate against the backdrop of a broader societal struggle for equity, where antitrust law’s perceived indifference to issues beyond the white male majority is increasingly questioned.

Economist Laura Beltran comments:

“[H]ipsters’ are only rejecting unjustifiable restrictions imposed by an antiquated economic approach to welfare, or at least an untenable interpretation of that approach. In a political environment where women and persons of color are fighting for their rights, why has antitrust decided to turn a blind eye to favor the white male majority?”⁸⁸

IX. SUMMARY AND CONCLUSION

A. *The Substantive Impact of Commissioner Slaughter’s 2020 Antiracist Antitrust Comments*

While comments from Commissioner Slaughter on antiracist antitrust are appreciated, there is room to question their substantive impact. Her outlined approach via social media, including affirmatively seeking the competitive effects on economically disadvantaged consumers and intervening in the decline of Black businesses due to anticompetitive practices, raises the question of actual implementation by the FTC. Since her 2020 comments on the FTC’s active stance against racism, there has been a noticeable absence of follow-up statements or actions explicitly addressing antiracism. Her last FTC statement regarding racism was a January 2021 panel event, “Does Antitrust Perpetuate Structural Racism?”⁸⁹ As we approach 2024, it does not

⁸⁶Bennett Capers, G.D., *Race and the Consumer Welfare Standard*, *ProMarket* (2023), <https://www.promarket.org/2023/04/13/race-and-the-consumer-welfare-standard/>.

⁸⁷Beltran, L., *How the Consumer Welfare Standard Propagates Gender and Racial Inequalities*, *ProMarket* (2023), <https://www.promarket.org/2023/01/09/how-the-consumer-welfare-standard-propagates-gender-and-racial-inequalities/>.

⁸⁸*Id.*

⁸⁹Ritchie, J.N. & Jones, N. (2021), Acting Chairwoman Slaughter Panelist at the New York Bar Association January 2021 Virtual Meeting.

leave one confident that there is more to come. Perhaps Slaughter was one of the many to get caught up in the 2020 post–George Floyd “zeitgeist of social justice.”⁹⁰

B. Re-Alignment of Thought

In the introduction of this paper, I raised a fundamental question: Does a moral imperative exist for an antiracist approach to antitrust law? Initially, my stance on this issue was not definitive. As a student who values justice and equality, and whose intellectual alignment was previously more in line with the post–Chicago School, the notion of antiracist antitrust was elusive and untenable. Gradually, the idea became conceptually intriguing in a way that fostered natural curiosity, which ultimately carried me over to the Neo-Brandeisian side.

The true depth of this issue became apparent through extensive research into the history and legal framework that has systematically disadvantaged African Americans. The overwhelming evidence from the study of racist statutes, the underlying justifications for slavery, Jim Crow laws, and redlining revealed an inescapable conclusion: these were not mere policy choices but deeply ingrained racist ideologies.

This journey through historical legal texts illuminated the stark reality of how laws have historically worked against African Americans. This realization led me to the conviction that in pursuit of genuine equality, it is time for the law to take proactive legal steps to support African American communities. If this objective can be achieved through antitrust measures, or through the Federal Trade Commission adopting an antiracist agenda, then such efforts must be endorsed.

C. The Case Against Neutrality

Neo-Brandeisians have long questioned the “value-neutral” premise of the consumer welfare standard. The landscape of American legal history is replete with laws at federal, state, and local levels that have perpetuated slavery, Jim Crow, redlining, and systematic racial discrimination. These laws were far from value-neutral; they were explicitly discriminatory.

The cessation of de jure discrimination did not mark the end of all forms of discrimination. The enduring economic impact of four centuries of government-sanctioned discrimination cannot be undone simply by neutral policies such as the consumer welfare standard. As Elie Wiesel famously stated: “We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented.”⁹¹

Thus, a neutral stance—and a value-neutral policy—only perpetuates the status quo. Thinking back to Ibram X. Kendi’s quotation from *How to Be an Antiracist*, when considering the moral imperative to make antitrust antiracist, perhaps Kendi’s quote can be co-opted for antitrust and modified as such.

⁹⁰Capodilupo, R. (2023), #AntiracistAntitrust: The Impending Social Agenda of the Federal Trade Commission.

⁹¹Elie Wiesel, Quote, Goodreads, <https://www.goodreads.com/quotes/18490-we-must-always-take-sides-neutrality-helps-the-oppressor-never> (last visited Dec. 5, 2023).

D. The Problem with a “Value-Neutral” Consumer Welfare Standard

What’s the problem with pursuing “value-neutral” consumer welfare standards? It is a pursuit that signifies neutrality.

“I am not a racist but neither am I aggressively against racism.”

92

But there is no value-neutrality within the racism struggle. The opposite of “racist” is not “not racist.” It is *antiracist*.⁹³

In antitrust enforcement, what is the difference?

- One either endorses the idea that the codification and ratification of racist laws regarding slavery, Jim Crow, and redlining benefitted and continue to perpetuate a racial hierarchy—
- Or one works toward equality in identifying and eliminating the latent and on-going effects of racially discriminatory laws.
- One either believes that the lack of enforcement and historic dismissal of anti-competitive behavior within the realm of slavery, Jim Crow, and redlining perpetuated human suffering and was morally justified—
- Or one believes there was no justification for historic wholesale neglect of enforcement against anticompetitive behavior that prolonged slavery, Jim Crow, and redlining; and that corrective measures within antitrust must be taken.
- One either allows racial inequities to persevere⁹⁴ under the guise of a “value-neutral” consumer welfare standard—
- Or one actively pursues antiracist antitrust in attacking the systematic disadvantages facing communities of color.

There is no in-between safe space for antitrust to be “value-neutral” and “not racist.” The claim of a “not racist,” “value-neutral” consumer welfare standard is merely a façade used by racists.⁹⁵

⁹²Kendi, I.X. & Sreenivasan, H. (2020), *Ibram X. Kendi on “How to Be an Antiracist”*, PBS Amanpour & Company.

⁹³Id.

⁹⁴Id.

⁹⁵Id.