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## ECONOMIZING THE TOTALITARIAN TEMPTATION: A RISK-AVERSE LIBERAL REALISM FOR POLITICAL ECONOMY AND COMPETITION POLICY IN A POST-NEOLIBERAL SOCIETY

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## **ECONOMIZING THE TOTALITARIAN TEMPTATION: A RISK-AVERSE LIBERAL REALISM FOR POLITICAL ECONOMY AND COMPETITION POLICY IN A POST- NEOLIBERAL SOCIETY**

**Joseph V. Coniglio\***

*An increasing number of Americans believe that a new renaissance in antitrust enforcement may be just what is needed, across numerous industries, to fix a political economy many feel to be characterized by increasing wealth inequality, lack of opportunity, and which is “rigged” in favor of incumbents and elites. To save capitalism, policymakers must finally show the courage to use antitrust law to take on concentrated corporate power, particularly in high-technology industries, or else risk the devolution of the liberal, capitalist, and democratic order into totalitarianism.*

*This article takes a contrary view. Yes, there may be serious problems with the “neoliberal” order that reached its height at the end of the Cold War. But competition policy is not one of them. Not only does a consumer welfare standard remain the best paradigm for antitrust enforcement when considered against alternatives, but it can find justification in the unprecedented gains in economic growth and technological progress that have occurred during the neoliberal period. Indeed, a consumer welfare standard may be one of the high points not only of neoliberal political economy, but of a broader neoliberal project that attempts to view all of society—rather than just the market—as governable through the logic of wealth maximization.*

*This is not to say, however, that there are no problems with neoliberalism—even if its competition policy is sound. Some of the most serious concerns, like increasing wealth inequality, may be far more the result of programs in other areas of the American political economy, such as monetary policy. Indeed, the greatest indictment of neoliberalism may not be as a theory of political economy at all, but as a theory of society that would reduce all its organs to economic forces and explanations. While a purely economic approach to antitrust is sound, a purely economic theory of society writ large is probably not.*

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“But the age of chivalry is gone. That of sophisters,  
economists, and calculators has succeeded...”

– EDMUND BURKE, REFLECTIONS ON THE  
REVOLUTION IN FRANCE (1790)

## I. INTRODUCTION

The past few years have witnessed a renewed and vibrant public interest in the proper goals for competition policy in a democratic society.<sup>1</sup> Encompassing a range of commentators from all corners of the greater antitrust community, this debate has centered upon four questions. First, has market concentration meaningfully increased over the past forty years? Second, if so, are these increases in concentration primarily a result of poor policy choices, or superior firms enjoying competitive advantage from efficiencies enabled by innovations in areas like information technology? Third, if poor policy choices were made, is it antitrust or other rule regimes that bear substantial responsi-

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1. See, e.g., Alex Webb, *Big Tech Gets Put on Guard by Antitrust Police*, WASH. POST (Jan. 27, 2020), [https://www.washingtonpost.com/business/big-tech-gets-put-on-guard-by-antitrust-police/2020/01/27/c210f84c-40f7-11ea-99c7-1dfd4241a2fe\\_story.html](https://www.washingtonpost.com/business/big-tech-gets-put-on-guard-by-antitrust-police/2020/01/27/c210f84c-40f7-11ea-99c7-1dfd4241a2fe_story.html); Cecilia Kang, *House Opens Tech Antitrust Inquiry With Look at Threat to News Media*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/technology/antitrust-hearing.html>; John D. McKinnon, *FTC’s New Task Force Could Be Trouble for Big Tech*, WALL ST. J. (Feb 28, 2019), <https://www.wsj.com/articles/ftcs-new-task-force-could-be-trouble-for-big-tech-11551357000>.

bility? Fourth, if antitrust bears some blame, should a consumer welfare standard<sup>2</sup> be abandoned wholesale, such as through a return to the political structuralism of the 1960s,<sup>3</sup> or are more incremental changes, such as the development of more specific presumptions,<sup>4</sup> sufficient to set antitrust on the right course for the 21<sup>st</sup> century?

Beyond this more esoteric debate amongst the antitrust cognoscenti, criticisms of the broader theory of political economy known as “neoliberalism”<sup>5</sup> continue their crescendo since the 2008 financial crisis. These criticisms are now noticeably bipartisan. On the left, commentators continue to associate neoliberal policies with both growing economic inequality and real income stagnation for the middle and working classes.<sup>6</sup> On the right, commentators are increasingly critical of neoliberalism’s tendency to see economics only in terms of wealth maximization, which they argue has had deleterious effects on the family and other traditional institutions.<sup>7</sup> Indeed, criticisms of a consumer welfare standard—itsself an exemplar of the neoliberal outlook—are also becoming bipartisan, both with respect to its alleged undue tolerance

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2. For purposes of this article, “consumer welfare standard” refers more broadly to encompass both the total and consumer surplus interpretations by generally denoting some measure of neoclassical welfare within a partial equilibrium analysis—either of the market as a whole, as with total surplus, or of a part, as with consumer surplus—and is therefore preceded by the indefinite article. This article does not take a position on the ongoing debate as to which measure is proper. Compare Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 *FORDHAM L. REV.* 2471 (2013) with Alan J. Meese, *Debunking the Purchase Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 *N.Y.U. L. REV.* 659 (2010).

3. See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710, 718 (2017). To be clear, by “political structuralism” I do not mean to invoke the Harvard School, which saw market structure as a way to gauge economic performance, understood in terms of total surplus, rather than as an end in itself to protect small competitors. See Meese, *supra* note 2.

4. See, e.g., Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards*, *GEO. UNIV. L. CTR.* (2017), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3025&context=facpub>.

5. This article’s focus will be on neoliberalism in the specific context of competition policy, rather than as a theory of political economy or, more generally still, a comprehensive theory of society. However, both latter forms of neoliberalism will also be discussed.

6. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013).

7. Similar points were made in a noted monologue by popular conservative pundit Tucker Carlson. See Tucker Carlson, *Monologue*, *FOX NEWS* (Jan. 3, 2019), <https://www.foxnews.com/opinion/tucker-carlson-mitt-romney-supports-the-status-quo-but-for-everyone-else-its-infuriating>.

for monopoly,<sup>8</sup> as well as its exclusion of political content from anti-trust enforcement.<sup>9</sup>

The bipartisan nature of this dissatisfaction the neoliberal *status quo* provides an occasion to address the current antitrust debate within a larger reflection about alternatives to neoliberalism.<sup>10</sup> Like all systems of political economy, neoliberalism can be understood in terms of a particular set of principles and institutions. First, neoliberalism sees in economics, and specifically neoclassical wealth-maximization, the core basis for market governance.<sup>11</sup> As a second principle, like most if not all liberal theories, neoliberalism does not generally permit the state to intervene in market outcomes to accomplish political ends.<sup>12</sup> Finally, but unlike other liberal conceptions of political economy, neoliberalism tolerates substantial economic inequalities—either between individuals or corporations—in as much as they are consistent with economic efficiency or growth.<sup>13</sup>

The core institutions of neoliberal political economy—and here we are now speaking concretely about the United States, but without any necessary loss of generality—similarly deviate from other liberal paradigms by including institutions reflective of prior “revolutionary” challenges, both from below and above.<sup>14</sup> On the one hand, liberal cap-

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8. For a critique from the right, see Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, THE AM. CONSERVATIVE (Sept. 19, 2017).

9. For a critique from the left, see TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

10. The commentators on neoliberalism are myriad and, as one would expect, present divergent perspectives in describing it. For ease of a coherent exegesis, this article draws primarily from Michel Foucault’s famous lectures on Biopolitics. See MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS 248 (Senellart et al. eds., Burchell trans., 2008) (1979). Through this Foucauldian lens, by “neoliberalism” I am referring specifically to what Foucault termed “American neoliberalism.” See *id.* at 215-19. “European neoliberalism” or what I refer to as “ordoliberalism” will be discussed separately.

11. See *id.* at 247 (“The general form of the market [for neoliberalism] becomes an instrument, a tool of discrimination in the debate within the administration.... It is sort of a permanent economic tribunal confronting government.”).

12. *Id.* at 218 (describing the “permanent ground of liberal debate” as the permissibility of interventionist policies with political aims, and identifying neoliberalism as a reaction against this “non-liberalism”).

13. See Philip Mirowski, *Defining Neoliberalism*, in THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 438 (Rob Van Horn & Philip Mirowski eds., 2009).

14. See generally BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY (1966). Moore identifies fascism as a “revolution from above” and communism as a “peasant revolution,” or what we will call a “revolution from below,” and contrasts both with liberal capitalist democracy. Broadly speaking, whereas communism is a revolution from “below” by virtue of the *fourth* estate or intellectual-led working class displacing the rule of *third* estate or commercial class, fascism is a revolution from “above” by virtue of the bourgeois order being overturned by a class purporting to embody the values of a landed aristocracy or *second* estate. To be sure, some have argued that the discourse of

istal democracy can risk a “revolution from below,” whereby intellectual elites play upon the anxieties of the working class to the end of implementing socialist policies of widespread nationalization.<sup>15</sup> On the other hand, liberal capitalist democracy can also risk a “revolution from above,” whereby a class of wealthy elites is able to form an alliance with industry to thwart democratic rule by the bourgeois classes—while even at times enlisting their support—and establish tight state control of the economy consistent with the newly constituted state’s political ends.<sup>16</sup>

Understood in such a way, perhaps the greatest achievement of American neoliberalism—no doubt supported, if not enabled, by the United States’ exceptional geopolitical successes in the twentieth century—has been its ability to accommodate revolutionary pressures that have elsewhere undermined liberal political economies within an evolved liberal paradigm. Specifically, the existence of large welfare and administrative states reflects neoliberalism’s assimilation of the New Deal’s quasi or incomplete revolution from below as a way to safeguard the interests of the working classes against the excesses of unfettered capitalism.<sup>17</sup> By contrast, neoliberal political economy also

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estates reflects an “old notion that society is divided into classes that pursue their class interests rather than the modern notion that society simply consists of individuals who pursue their self-interest” and that “[t]his is certainly not an accurate picture of society today....” Eric A. Posner, *The Constitution of the Roman Republic: A Political Economy Perspective* 30 (John M. Olin L. & Econ. Working Paper, No. 540, Nov. 2010). Such a critique would seem to be belied by the current and bipartisan uproar against what are characterized as unaccountable elite classes that act in their own interests and not those of the people, and suggests that even in “revolutionary” systems such as liberal capitalist democracy and—without question—communism, it is not invariably the existence of an elite which changes, but rather its composition. *See, e.g.*, ROBERT MICHELS, *POLITICAL PARTIES* (1911) (discussing the theory of the iron law of oligarchy). *Cf.* MOORE, *supra* note 14, at 503 (noting that not only was the Russian peasantry willing to keep the Tsar—rather than have him and his entire family assassinated—but that their main goal for increased “village autonomy” remained underachieved, as its “last open expression occurred in the slogan ‘Soviets without Communists’ of the Kronstadt rebellion in 1921, whose suppression by the Bolsheviks revealed the ‘secret’ of the Russian revolution...”).

15. *See* MOORE, at 480-81 (recognizing the role of discontented intellectuals without ties to the existing order harnessing popular discontent in bringing about a communist revolution); *see also* JOSEPH SCHUMPETER, *CAPITALISM SOCIALISM AND DEMOCRACY* 145-55 (1944) (discussing the “sociology of the intellectual”).

16. *Id.* at xvi (recognizing as a “dominant feature” in German national socialism “a coalition between the older landed élites and the rising commercial and industrial ones, directed against the lower classes in town and countryside (but able at times to attract significant lower-class support on some issues).”).

17. This line of thinking reflects sentiments that President Franklin Roosevelt was a “traitor to his class.” *See generally* H.W. BRANDS, *TRAITOR TO HIS CLASS: THE PRIVILEGED LIFE AND RADICAL PRESIDENCY OF FRANKLIN DELANO ROOSEVELT* (2000). While the administrative state that arose with the New Deal is treated in this article as part of this quasi-revolution from below, it could also be viewed as part of a quasi-revolution

includes both large corporate concerns and a plutocratic class, which jointly represent the incorporation of a quasi or incomplete revolution from above that in the United States took the form of a reaction against the New Deal.<sup>18</sup>

Although the outlooks represented by these revolutionary forces are absent from the consumer welfare debate—antitrust law, of course, presumes the liberal and market principles that these revolutionary paradigms reject—criticisms of the broader neoliberal project, of which antitrust is an essential part, that emphasize the need for more state intervention in the economy—whether in the name of “order” from above or, much more frequently, “equality” from below—are growing bolder as faith in the neoliberal project falters. This faltering puts the onus on neoliberal policymakers to defend, or design an alternative to, the potentially waning neoliberal consensus—or else risk reliving the consequences of totalitarian systems that the twentieth century made painfully clear, and for which neoliberalism was designed as an alternative.

This article engages in this type of reflection by considering various modern alternatives to neoliberal competition policy, before critiquing each of them from the perspective of “anti-totalitarian liberal realism” that the paper defines. This article next attempts to provide a political justification for neoliberal competition policy by responding to Schumpeter’s famous reflections on corporatism in *Capitalism, Socialism, and Democracy*. The penultimate section attempts to identify areas of the neoliberal project other than competition policy where critiques may be both more needed and more promising. A brief conclusion follows.

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from above by a patrician *noblesse de robe* seeking to rein in the excesses of capitalism for the good of the social order. Cf. SCHUMPETER, *supra* note 15, at 155 (noting the pre-capitalist origin of European bureaucracy). As the United States lacks this prior history, such a characterization would likely seem odd to American ears.

18. See generally Kim Phillips-Fein, *Business Conservatives and the Mont Pelerin Society*, in *THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 280-301 (Rob Van Horn and Philip Mirowski eds., 2009) (describing the relationship between anti-New Deal sentiment and the Mont Pelerin Society); see also FOUCAULT, *supra* note 10, at 216; SCHUMPETER, *supra* note 15, at 424 (writing that, with respect to many New Deal policies, that “there is a mountain in Switzerland on which congresses of economists have been held which express disapproval of all or most of these things.”). Here again, the predominance of the corporate form in late capitalism could also be interpreted as part of a quasi revolution from below—that is, a collectivist challenge to the rugged individualism of the capitalist entrepreneur as the archetype of the third estate and a precursor for a further revolution from below in the form of socialism, in part by creating an intellectual class that would ultimately become hostile to capitalism. See SCHUMPETER, *supra* note 15, at 424.

## II. MODERN THEORIES OF COMPETITION POLICY

Theories of modern competition policy may fall into one of two broad categories that differ with respect to the extent and types of government intervention into market processes they condone. The first broad category comprises liberal theories that do not generally allow the state to shape market outcomes to satisfy political ends. These liberal theories can in turn be distinguished, first, according to whether state intervention is nonetheless justifiable on other non-economic grounds; and second, whether state intervention is technocratic or formalistic in character. The second broad category comprises illiberal theories of political economy that generally permit state interventions into market outcomes for political purposes. These illiberal theories can be in turn differentiated, first, according to whether the predominant mechanism of state control involves ownership of the means of production, or merely regulation; and second, whether the state has broad control over the economy, or whether the scope of its intervention is generally limited to a subset of politically important sectors.

### A. Liberal Theories

Liberal theories of competition policy can be differentiated both according to whether they envision markets as serving non-economic purposes,<sup>19</sup> as well as whether the nature of the state's intervention is technocratic or formalistic. The role of antitrust enforcement in a given liberal theory will, of course, vary according to the contemplated relation between the market and the state. Should the current neoliberal paradigm continue to waver, realizing another variety of liberal political economy will depend upon the incentives and abilities of the powers that be who are in support of it.

Consistent with our broader definition of neoliberal political economy, neoliberal competition policy limits state interventions to those that satisfy some criterion of economic welfare maximization.<sup>20</sup>

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19. To be clear, I do not mean to exclude from liberal theories legislation aimed to protect, for example, health, safety or morals, which is consistent with even very *laissez faire* liberalism. See HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970* 243-62 (2015) (discussing how even during the substantive due process period in American law state legislation was upheld if it worked to protect health, safety, or morals). Rather, I mean to distinguish between theories of competition policy that see the purpose of markets as limited to economic goods—even if the state may intervene if a social good is harmed—and theories that see the purpose of markets as serving non-economic purposes.

20. This article thus sees the Chicago School as an exemplar of neoliberal competition policy for defining economic order, and therefore the principle of market regulation, using the tools of neoclassical economics, and specifically price theory. See *Mirowski, supra* note 13, at 435; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV.



In this way, as reflected more broadly in the law and economics tradition, neoliberal economic policy makes neoclassical welfare economics the organizing principle of general market regulation rule regimes, such as antitrust.<sup>21</sup> In neoliberal competition policy, technocrats administer these welfare-maximizing policies through higher order economic frameworks, like decision theoretic error-cost analyses.<sup>22</sup> These technocrats apply this economic logic to particular cases through legal regimes and administrative bodies, and are thus consistent with an active role for the state.<sup>23</sup> The goal of neoliberal competition policy is limited to proscribing conduct<sup>24</sup> that reduces a measure of economic performance or welfare (whether ultimately understood as consumer surplus or total surplus).<sup>25</sup>

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925, 932 (1979). To be sure, both the respective total surplus and consumer surplus standards of the Harvard School and Post-Chicago Schools also employ welfare maximizing competition policy frameworks. See Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER REV. 336 (2010). Rather than constitute populism, these approaches thus share the technocratic and welfare maximizing disposition of the Chicago School, and therefore are all treated as encompassed by “neoliberal competition policy” as this article uses the term. See generally Timothy J. Muris & Jonathan Nuechterlein, *Chicago and Its Discontents* (Geo. Mason L. & Econ. Research Paper, No. 19-15, 2019); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1.

21. For the seminal antitrust statement, see ROBERT H. BORK, *THE ANTITRUST PARADOX* 7, 405 (1973).

22. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (1973); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999).

23. *Mirowski*, *supra* note 13, at 436.

24. For a statement in the case law, see, e.g., *Verizon Communs. Inc., v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004). This is to say that neoliberal competition policy is not typically understood to include exploitative offenses, such as excessive pricing—which, rather than rejected on formalist grounds, involves a technocratic judgement aimed to protect dynamic efficiency. See, e.g., Dennis W. Carlton and Ken Heyer, *Extraction vs. Extension: The Basis For Formulating Antitrust Policy Towards Single-Firm Conduct*, 4 COMPETITION POL’Y INT’L 285 (2008).

25. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 107-15 (1978). The author readily acknowledges at the outset both the historical ambiguity of the term “consumer welfare standard” as denoting either total surplus or consumer surplus. See Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse*, 79 ANTITRUST L.J. 881, 899-900 (2014). But see Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014). As noted above, both interpretations constitute “neoliberal competition policy” for purposes of this paper. Of course, the consumer surplus interpretation of the post-Chicago school may be said to deviate from neoliberal policy in as much as it inherently takes into account concerns of distributive justice—namely, privileging the surplus of consumers over producers. This is true, but only in the sense of whose economic welfare counts, not that economic welfare is not what counts. Indeed, prominent post-Chicago scholars have expressly highlighted the difficulties involved in using antitrust to address distributional problems such as wealth inequality. See Jonathan Baker and Steve

While neoliberal competition policy, as well as neoliberal political economy more generally, may be under increasing scrutiny, it is possible that continued advances in technology will present a basis for sustaining the neoliberal order without a need for substantial modifications to either its governing principles or core institutions.<sup>26</sup> That is, on this hyper-neoliberal view, continued technological progress may enable the existing neoliberal system to accommodate renewed revolutionary forces through gains in productivity that, if distributed properly, could increase the wealth of the middle class in a way that prevents revolution. Similarly, continued democratization of the means of communication might counter the rise of totalitarianism, which has historically relied upon the centralized control of information.<sup>27</sup> On this hyper-neoliberal view, the crisis in neoliberalism is not real, but only apparent.

For our purposes, “classical liberalism” refers to an earlier conception of liberal political economy that in America specifically can be linked with *laissez faire* theories of substantive due process during the Gilded Age.<sup>28</sup> Like neoliberalism, classical liberalism need not envision the market as serving any broader social purpose; rather, its goal is economic, specifically the promotion of value-enhancing exchanges.<sup>29</sup> Classical liberalism differs from neoliberalism, however, in that an efficient and ordered market is not seen as a technocratic creation of the state, but as separate and self-sustaining, if not also a “natural” phe-

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Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 5 (2015) (noting how interpersonal utility comparisons are beyond standard economic models); cf. Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

26. In describing this view, I am thinking about what has been termed by its critics the “Californian Ideology,” namely, “a profound faith in the emancipatory potential of new information technologies” where everyone is both “hip and rich.” See Richard Barbarook & Andy Cameron, *The Californian Ideology*, IMAGINARY FUTURES, <http://www.imaginaryfutures.net/2007/04/17/the-californian-ideology-2/>.

27. In the words of President Ronald Reagan, “Technology will make it increasingly difficult for the state to control the information its people receive .... The Goliath of totalitarianism will be brought down by the David of the Microchip.” Ronald Reagan, Speech at London’s Guildhall (June 14, 1989).

28. See Herbert Hovenkamp, *Progressive Legal Thought*, 72 WASH. & LEE L. REV. 653-55 (2015).

29. FOUCAULT, *supra* note 10, at 118 (noting that, for classical liberalism, “[t]he most that was asked of the state was that it supervise the smooth running of the market, that is to say, that it ensure respect for the freedom of those involved in the exchange.”); Mirowski, *supra* note 13, at 434. By characterizing classical liberalism in this way, this article does not mean to exclude from this view that idea that “[t]he rules of law, particularly the rules of private law, make possible and implement economic planning.” See, e.g., ERNST-JOACHIM MESTMÄCKER, A LEGAL THEORY WITHOUT LAW 23 (2007). Rather, the idea is that the purpose of market activity, and therefore the legal systems that are instrumental to it, are understood in the economic terms of value-enhancing exchange or efficiency, and not any larger social good.

nomenon.<sup>30</sup> As such, unlike neoliberalism, both an extensive administrative state geared toward correcting market failure, as well as a welfare state to reduce absolute poverty, are out of place in classical liberalism.<sup>31</sup> However, plutocratic and corporate power have, at least in the United States during the Gilded Age, ultimately dominated this liberal and *laissez faire* instance of political economy.<sup>32</sup>

Although competition policy is not inconsistent with classical liberalism, it takes a more formalistic and common law-like character rooted in property and contract principles to promote freedom of exchange, rather than a technocratic means of bringing about a utilitarian understanding of competition.<sup>33</sup> In the United States, the paradigmatic antitrust formalism has been a focus on intent, and is typified by *United States v. Standard Oil*, which made anticompetitive intent the defining

30. FOUCAULT, *supra* note 10, at 61-62, 247. This point is consistently overlooked by critics of neoliberal competition policy, who contend that it presumes the existence of “natural” or “inevitable” market forces that correct inefficiencies and underlie its *laissez faire* orientation. See, e.g., Lina M. Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9(3) JECLAP 131, 132 (2018). But this is not correct. See Joseph V. Coniglio, *Why The ‘New Brandeis Movement’ Gets Antitrust Wrong*, LAW360 (Apr. 24, 2018). While a mischaracterization, it is an understandable one: it reflects a failure to recognize, among other things, a higher order difference between the philosophical priors of classical liberals who, like other early moderns, posited objectively true universal laws of nature (of which economics was a part), and the respective pragmatism and antirealism of neoliberal thinkers like Posner and Friedman, who deny their existence. See generally RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); MILTON FRIEDMAN, RECONSIDERING LOGICAL POSITIVISM (1999). It is also understandable in light of both the recognized tendency of neoliberals to characterize the market in naturalistic terms, as well as the lack of a unified view amongst thinkers associated with neoliberalism on very this point. See Mirowski, *supra* note 13, at 435. The incorporation of a subjective theory of value, beginning with marginalism, is a further and related distinguishing feature between neoliberalism and at least some classical liberal theories that posited an objective theory of value. See HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970 28, 92 (2015) (placing with Jevons the shift to a subjective theory of value and noting the criticism marginalism originally faced for this orientation). Indeed, the shift to a subjective value contributed toward the rejection of the view of the market as a natural order. See Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063, 1075 (2017).

31. FOUCAULT, *supra* note 10, at 247 (writing that “in classical liberalism the government was called on to respect the form of the market and *laissez-faire*” whereas in neoliberalism “*laissez-faire* is turned into a *do-not-laissez-faire* government, in the name of a law of the market which will enable its activities to be measured and assessed . . .”).

32. See PETER F. DRUCKER, POST-CAPITALIST SOCIETY 4-5 (1993) (noting how, since the turn of the last century, “no one has matched in power and visibility the likes of Morgan, Rockefeller, Carnegie or Ford in the United States. . .”); WU, *supra* note 9, at 24-28.

33. FOUCAULT, *supra* note 10, at 118-19. For a discussion of the relation between different formalistic and technocratic theories of antitrust enforcement, see Joseph V. Coniglio, *Antitrust and Economic Liberty: A Policy Shift from the Trump Administration?*, COMPETITION POL’Y INT’L N. AM. COLUMN (Jan. 2018) (highlighting the difference between theories of economic liberty rooted in the common law and the utilitarian-technocratic approach of the Chicago School).

element of both concerted restraints of trade and unilateral monopolization.<sup>34</sup> As an alternative to neoliberalism, a return to classical liberalism may find support among right libertarians who seek to dismantle both the administrative and welfare states without pursuing aggressive programs to curb the power of the plutocratic class or concentrated corporate interests.

European ordoliberalism presents a third distinct variety of liberal competition policy that, unlike classical liberalism,<sup>35</sup> sees competition law as a means to address perceived social ills with *laissez faire* capitalism<sup>36</sup> to protect individual autonomy understood in the positive sense of participation and self-determination in economic life.<sup>37</sup> As reflected

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34. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) (looking to the common law to interpret Sections 1 and 2 of the Sherman Act and framing the unreasonableness of Standard Oil's behavior in terms of an "intent and purpose to exclude"). See Keith N. Hylton, *The Law and Economics of Monopolization*, in *ANTITRUST L. AND ECON.* 87 (Keith Hylton, ed. 2010) (noting how the specific intent approach dominated monopolization jurisprudence until *Alcoa*). Cf. Richard Epstein, *An Unapologetic Defense of the Classical Liberal Constitution*, 128 *HARV. L. REV.* 145, 155 n.45 (2015) (citing the Standard Oil case as an example of antitrust enforcement consistent with classical liberal principles).

35. To be sure, and as we will suggest, there are strong similarities between classical liberal thinkers like Smith and ordoliberals like Eucken in seeing the law as a "guardian of a system of individual rights, contracts and competition." See, e.g., MESTMÄCKER, *supra* note 29, at 24. However, unlike classical liberalism, ordoliberalism recognizes an enhanced role for state intervention to account for what it perceives as deleterious social effects from capitalism, see FOUCAULT, *supra* note 10, 106 (describing how ordoliberals sought to define "the economic rationality that will make it possible to nullify the social irrationality of capitalism."), in a way that is in tension with the classical liberal conception of the market as a natural or "spontaneous" order. *Id.* at 120 (noting that for the ordoliberals competitive order "will only appear and produce its effects under certain conditions which have to be carefully and artificially constructed."). Hayek's liberalism is particularly interesting as in this context: he would not fit well in the neoliberal category due to his anti-technocratic bent, see, e.g., Friedrich A. Hayek, *The Use of Knowledge in Society*, in *INDIVIDUALISM AND ECONOMIC ORDER* 80 (1948), and his emphasis on the rule of law as inherently constraining state intervention. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 331 (R. Homowy ed., 1960). The question of whether Hayek is closer to this article's understanding of ordoliberalism or classical liberalism is complex, but it would appear that his view of spontaneous market order, see Friedrich A. Hayek, *The Use of Knowledge in Society*, in *INDIVIDUALISM AND ECONOMIC ORDER* (1948), and his disdain for "constructivist rationalism," Friedrich A. Hayek, *Kinds of Rationalism*, 15 *ECON. STUD. QUARTERLY* (1965), would incline him against ordoliberalism's phenomenological project of creating competition. See FOUCAULT, *supra* note 10, at 120; Nils Goldschmidt & Hermann Rauchenschwandtner, *The Philosophy of the Social Market Economy: Michel Foucault's Analysis of Ordoliberalism*, 11-15, No. 07/4 *FREIBURG DISCUSSION PAPERS ON CONST. ECON.*, <https://ideas.repec.org/p/zbw/aluord/074.html>.

36. FOUCAULT, *supra* note 10, at 119-20, 242-3; see also Ralf Ptak, *Neoliberalism in Germany*, in *THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 102 (noting "the dedicated effort to resolve what German ordoliberals conceived as the social question.").

37. See, e.g., Manuel Wörsdörfer, *On the Economic Ethics of Walter Eucken*, in *60 YEARS OF SOCIAL MARKET ECONOMY: FORMATION, DEVELOPMENT AND PERSPECTIVES OF A PEACEMAKING FORMULA* 25-27 (Konrad Adenauer Stiftung ed., 2013).

in the work of founding ordoliberal political economist Walter Eucken, ordoliberalism is concerned that *laissez faire* capitalism can result in spiritual and moral alienation<sup>38</sup> that undermines the foundations for the broader social order of which the market economy is a part by reducing man to a state analogous to that envisioned by Weber's "Iron Cage."<sup>39</sup> In the ordoliberal view, the prevention of these negative social consequences is not a task for technocrats,<sup>40</sup> but one to be solved by the rule of law.<sup>41</sup> As originally conceived, ordoliberalism may be therefore in tension with not only concentrated corporate power, but also a large administrative bureaucracy. However, it may not necessarily be in tension with a large welfare state.<sup>42</sup>

As a way to prevent firm abuses that increase market power and limit individual autonomy, competition law functions as a "disempowering" force and plays a central role in ordoliberal political economy.<sup>43</sup> While it has evolved over time, the essence of ordoliberal competition

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38. *Id.* at 32-34 (discussing how higher-order moral and theological concerns played a role in shaping early ordoliberal thought); FOUCAULT, *supra* note 10, at 242 ("[Ordoliberal society] involves acting so that the individual, to use the classical and fashionable terminology of the time, is not alienated from his work environment, from the time of his life, from his household, his family, and from the natural environment ... The enterprise society imagined by ordoliberals is therefore a society for the market and a society against the market, a society oriented towards the market and a society that compensates for the effects of the market in the realm of values and existence.").

39. MAX WEBER, *THE PROTESTANT WORK ETHIC AND THE SPIRIT OF CAPITALISM* 61, 123 (Parsons trans., Routledge Classics, 1930) (1905).

40. By distancing ordoliberalism from a technocratic theory of liberalism, I do not mean to overlook either its phenomenological underpinnings, see Rainer Klump & Manuel Wörsdörfer, *On the Affiliation of Phenomenology and Ordoliberalism: Links between Edmund Husserl, Rudolf and Walter Eucken*, 18 *EURO. J. OF HIST. OF ECON. THOUGHT* 551, 556-67 (2011), or the importance of the state creating the conditions for competition. FOUCAULT, *supra* note 10, at 120. The distinction is that, whereas in neoliberalism the law serves the technocratic purpose of determining wealth-maximizing outcomes, in ordoliberalism the rule of law has an inherently constraining effect on government intervention, see, e.g., DAVID GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 247-8 (1998), grounded in its Kantian and non-utilitarian privileging of individual liberty. Put differently, on a neoliberal view, even if it is in practice more *laissez faire*, such a result is by contrast derived from a technocratic calculus that may be subject to change *a posteriori*—i.e., assumptions of market self-correction regarding excessive pricing and dynamic efficiency—rather than a more *a priori* conception of individual liberty, such as Eucken's conception of autonomy. See Wörsdörfer, *supra* note 37, at 25-26; David Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 *AM. J. COMPETITION L.* 25, 39 (1994).

41. See Wörsdörfer, *supra* note 37, at 23; GERBER, *supra* note 40, at 245-48.

42. See Viktor Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*, No. 04/11 *FREIBURG DISCUSSION PAPERS ON ECON. ORDER* at 2, [https://www.econstor.eu/bitstream/10419/4343/1/04\\_11bw.pdf](https://www.econstor.eu/bitstream/10419/4343/1/04_11bw.pdf) (discussing the ordoliberals' tolerance of social insurance policies).

43. Wörsdörfer, *supra* note 37, at 27 (describing Eucken's notion of competition law as disempowering market power that reduces individual liberty).

policy can be reduced to the prohibition of conduct that impermissibly concentrates market structures beyond what is consistent with effective competition<sup>44</sup> to protect individual liberty.<sup>45</sup> That is, although not a policy of no fault monopoly—some bad conduct or abuse is required<sup>46</sup>—ordoliberalism sees harms to markets in terms of their effects on market structure or, its demand side variant, consumer choice.<sup>47</sup> As a broader theory of political economy, ordoliberalism may be an attractive alternative to neoliberalism for social conservatives<sup>48</sup> seeking to preserve liberal economic order but find neoliberalism’s hedonistic out-

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44. See, e.g., Case 6-72, *Europemballage Corporation and Continental Can Co. v. Comm’n*, [1973] ECR 215 ¶ 26; see also Sigfrido M. Ramirez Perez & Sebastian van de Scheur, *The Evolution of the Law on Articles 85 and 86 EEC*, in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW* 19 (Kiran Klaus Patel & Heike Schweitzer eds., 2013) (defining the ordoliberal goal of competition policy as “the protection of effective and undistorted competition”); Peter Behrens, *The ordoliberal concept of ‘Abuse’ of a Dominant Position and its Impact on Article 102 TFEU*, EUROPA-KOLLEG HAMBURG, INSTITUTION FOR EUROPEAN INTEGRATION, No. 7/15, at 16 (2015) (“Hence, from an ordoliberal point of view, a restraint of competition may be found wherever (1) the number of freely competing producers is artificially reduced in ways that do not result from the normal process of competition itself, and (2) where this reduces the scope of alternatives among which consumers may freely [choose].”). For examples of arguably ordoliberal policy in European case law, see, e.g., Case C-280/08 P, *Deutsche Telekom v. Comm’n*, [2010] ECRI-9555 ¶ 170; Case T-219/99, *British Airways v. Comm’n*, [2003] ECR II-5917, ¶ 264 (“Article [102 TFEU] does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates on protecting the market structure from artificial distortions...”); Cases 6/73 and 7/73, *Institutio Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission* [1974] ECR 223, ¶¶ 31-33.

45. Cf. Heike Schweitzer & Kiran Klaus Patel, *EU Competition Law in Historical Context*, in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW* 222-23 (Patel and Schweitzer eds., 2013) (linking the structural approach of the European Court of Justice, as embodied in *Continental Can*, with a “rights-based approach”).

46. To be sure, a no fault monopoly offense has been associated with early ordoliberal thought. See GERBER, *supra* note 40, at 251-52 (describing early ordoliberals hostility to monopoly); Wörsdörfer, *supra* note 37, at 27. However, as it developed, ordoliberalism embraced more nuanced theories of competitive order, such as the “as-if” principle and the distinction between performance and impediment competition, see, e.g., David Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. L. 25, 52-53 (1994), including the notion of proscribing conduct that artificially harms “workable” or effective competition, as attributed to it here. Indeed this development is consistent with Foucault’s understanding of the ordoliberal view as one where “pure competition is never attained” and “must and can only be an objective, an objective thus presupposing an indefinitely active policy.” FOUCAULT, *supra* note 10, at 120.

47. See Peter Behrens, *The Consumer Choice Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law*, EUROPA-KOLLEG HAMBURG, INST. FOR EUROPEAN INTEGRATION 25 (Discussion Paper No. 1/14, 2014), <https://www.econstor.eu/bitstream/10419/95925/1/780714202.pdf>.

48. See, e.g., Yuval Levin, *Edmund Burke’s Economics of Flourishing*, in *ECONOMIC FREEDOM AND HUMAN FLOURISHING* 94-95 (Michael R. Strain, Stan A. Veuger eds., 2016) (noting both how Burke was “a friend of markets to the extent that they support and uphold the complex social order that enables human flourishing” and that markets can produce the very “social dislocation, insecurity, and breakdown” that endanger moral community).

look deleterious to traditional institutions such as religion and the family.<sup>49</sup>

Another possible liberal successor to neoliberalism can be understood as a family of theories bearing resemblance to what has been termed “libertarian paternalism.”<sup>50</sup> Although an exegesis of this view lacks the historical context of other liberal theories, this approach appears to share an affinity with ordoliberalism in viewing markets within a broader social context—specifically, the conditions for rational choice.<sup>51</sup> However, whereas ordoliberalism understands this broader context in spiritual or moral terms, the inquiry of libertarian paternalism has the worldly focus on the individual preferences behind market behavior.<sup>52</sup> For libertarian paternalism, we can therefore say that state intervention is justifiable in the sense of helping to shape preferences to reduce bias and achieve better overall social outcomes.<sup>53</sup> For this reason, unlike ordoliberalism, libertarian paternalism appears to be consistent with heavily technocratic governance conducted by a powerful administrative state.

While libertarian paternalism remains an emerging theory, it is likely that the incorporation of behavioral economics into antitrust law would form a core part of its competition policy.<sup>54</sup> Specifically, on this type of view the strong neoclassical assumptions of rationality held by neoliberalism would be abandoned in favor of more modest assump-

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49. Wörsdörfer, *supra* note 37, at 15 (noting that Eucken “emphasized the need for an ethical-religious reformation” and that Eucken strove not just “for an ordoliberal post-war economic and social system, but also a Christian-based ordoliberal one”).

50. See Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003).

51. *Id.* at 176. Understood in such a way, there may be some historical context for libertarian paternalism as a successor to American institutionalism, which largely failed to articulate an adequate theory of economic behavior within the larger social context it saw relevant to economic decision-making. See Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L. J. 499, 525-26 (2011). Indeed, institutionalist theories have also been linked to proposals that would replace a consumer welfare standard entirely, see Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled*, UNIV. PENN. FAC. SCHOLARSHIP 17-19 (2018), which is consistent with the characterization of libertarian paternalism as a deviation from neoliberal competition policy, notwithstanding a common technocratic orientation.

52. See generally Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (discussing how preferences can be ill-formed through default rules, framing effects, and starting points).

53. *Id.* (describing the libertarian paternalist’s goal to “steer people’s choices in welfare-promoting directions...”).

54. For examples of such an approach, see Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011); Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469 (2011).

tions that, as a general proposition, would increase the bounds of anti-trust intervention.<sup>55</sup> By seeking to correct individual preferences and market biases, libertarian paternalism would seem to support an anti-trust regime that, in effect, goes beyond a conduct requirement and addresses outcomes directly for their failure to meet prior socio-economic goals.<sup>56</sup> A shift to this form of political economy might be favored by those on the center-left who take issue with neoliberalism's underlying assumptions of firm rationality and failure to consider either larger distributional or other socio-economic questions.

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55. See, e.g., see Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1553-67 (2011); see also Maurice Stucke, *Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893 (2010).

56. Libertarian paternalism should thus be distinguished from the post-Chicago School, whose game-theoretic models expand upon, rather than undermine, standard rational choice models. See J. Thomas Rosch, *Managing Irrationality: Some Observations at the Conference on the Regulation of Consumer Financial Products*, FED. TRADE COMM'N 1, 2 (Jan. 6, 2010), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/managing-irrationality-some-observations-behavioral-economics-and-creation-consumer-financial/100106financial-products.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/managing-irrationality-some-observations-behavioral-economics-and-creation-consumer-financial/100106financial-products.pdf); see also Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1537 (2012) (noting that "the assumption of firm rationality underlying price theory and game theory is, in turn, at the core of the Chicago School, Post-Chicago School, and the Harvard School approaches to antitrust"). This is to suggest that while certain assumptions no doubt vary on the Chicago, Harvard, and post-Chicago theories that result in enforcement differentials, they share a common underlying commitment to both firm rationality and adherence to an economic welfare standard which, as distinct from libertarian paternalism and institutionalism, allows them to be (broadly) categorized as "neoliberal" theories of competition policy.



Table 1 summarizes these four liberal theories.

<b><u>Table 1: Liberal Theories of Competition Policy</u></b>	<i>Non-Economic Interventions Permitted</i>	<i>Non-Economic Interventions Not Permitted</i>
<i>Market Rules as Technocratic Administration</i>	<u>Libertarian Paternalism</u> <ul style="list-style-type: none"> <li>• Antitrust prohibits harms to <i>market performance</i> or <i>social welfare</i> (broadly understood)</li> </ul>	<u>Neoliberalism</u> <ul style="list-style-type: none"> <li>• Antitrust prohibits conduct that harms market performance or economic welfare</li> </ul>
<i>Market Rules as Law Enforcement</i>	<u>Ordoliberalism</u> <ul style="list-style-type: none"> <li>• Antitrust prohibits <i>conduct</i> that harms effective market <i>structure</i> or <i>consumer choice</i></li> </ul>	<u>Classical Liberalism</u> <ul style="list-style-type: none"> <li>• Antitrust prohibits <i>conduct</i> without necessarily analyzing economic effects (<i>e.g.</i>, anti-competitive intent)</li> </ul>

### B. Illiberal Theories

As noted prior, in contrast to liberal theories, what we will term “illiberal” theories envision an express role for the state to intervene in market processes for political purposes. Illiberal theories can first be differentiated according to whether the state’s interventions contemplate either regulation, including monitored cartelization,<sup>57</sup> or outright

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57. This is relevant to the case of German fascism. See Daniel A. Crane, *Antitrust and Democracy: A Case Study from German Fascism*, U. MICH. L. SCH. SCHOLARSHIP REPOSITORY 3-4 (Apr. 17, 2018), [https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1266&context=law\\_econ\\_curr](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1266&context=law_econ_curr)

state ownership of the means of production. Illiberal theories can also be distinguished with respect to whether the state's interventions are general or economy wide—i.e., “totalitarian”—or whether they are typically limited to specific sectors of the economy that are deemed to have a particular political importance—i.e., “authoritarian.”<sup>58</sup> Like liberal theories, illiberal theories will also differ according to their roles for competition policy, and the interests within society that favor them as potential successors to neoliberal political economy.

At least four major illiberal theories are identifiable across the modern history of political economy. The first of these can generally be considered “mercantilism” or, as we will term it for purposes of analyzing its instantiation in competition policy, “industrial policy”—that is, state interventions into market outcomes being justified within the context of a larger geopolitical zero sum game.<sup>59</sup> Market interventions based on industrial policy need not be economy wide, and can in principle be limited to those industries that are deemed to have particular national or geopolitical importance. Furthermore, rather than eliminate private ownership of the means of production, mercantilist or industrial policy ends can be achieved through regulation and subsidies,<sup>60</sup> and may be favored by those on the nationalist right. Indeed, China's competition policy, which is rooted in its conception of socialist market economy, may provide an example of how competition law can be merged with national interests within a broader neo-mercantilist paradigm of political economy.<sup>61</sup>

Another authoritarian theory of illiberal competition policy can be termed “progressivism.” Unlike industrial policy, however, progressive paradigms for political economy like the New Deal are typically motivated by domestic political concerns, such as preventing revolu-

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ent (highlighting the role of cartelization in Germany's pre-World War II development); GERBER, *supra* note 40, at 115-64.

58. In using the term “totalitarian,” I do not mean total—or in the case of “authoritarian,” partial—coordination between the various powers that be (e.g., in Germany, the “Quartet”) or “estates” as discussed prior. Instead, as this article's focus is competition policy and political economy, by “totalitarian” and “authoritarian” I employ analogous usages respectively connoting total or partial control of the *market* by the *state*.

59. FOUCAULT, *supra* note 10, at 52-54.

60. A historical example of mercantilist policies in the United States would be Henry Clay's American System, which included selective tariffs, a national bank, and agricultural subsidies. See Senator Henry Clay, The American System, Speech before the Senate, <https://www.senate.gov/artandhistory/history/resources/pdf/AmericanSystem.pdf>.

61. See generally D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J. L. & BUS. 1, 20-26 (2013).

tion from below,<sup>62</sup> rather than a geopolitical grand strategy.<sup>63</sup> Furthermore, whereas industrial policy can in theory limit its interventions to regulatory policies and subsidies, progressivism contemplates nationalization or socialization of certain industries or economic sectors that are of particular and popular political significance.<sup>64</sup> For progressivism, antitrust still can thus play an important role as a tool to break up large concentrations of economic power that offend democratic principles, and even without the commission of any bad conduct—that is, a no fault monopoly offense,<sup>65</sup> as favored by some contemporary progressive commentators.<sup>66</sup>

Finally, there are “totalitarian” theories of political economy that envision general state control over the economy.<sup>67</sup> In the case of socialism, control is implemented through widespread programs of state ownership of the means of production; in the case of fascism, control is effectuated through regulation—including state sanctioned cartelization—while generally leaving the means of production in private hands.<sup>68</sup> As noted above, socialism can be brought about through a

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62. See WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 336 (1963) (“Despite this encroachment of government on traditional business prerogatives, the New Deal could advance impressive claims to be regarded as a ‘savior of capitalism.’”).

63. Nonetheless, “progressive” antitrust policies can be said to have historically involved “protectionism” in the sense of protecting special interests. See Herbert Hovenkamp, *Progressive Antitrust*, 2018 UNIV. ILL. L. REV. 71, 76. For a discussion of the regulatory capture problem for progressive political economy more generally, see Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063 (2017).

64. See, e.g., Paul Starr, *Liberalism After Socialism*, THE AMERICAN PROSPECT (Fall 1991), <https://prospect.org/article/liberalism-after-socialism> (noting how in the 20th century traditional socialism was replaced with “programs that called for limited nationalization and the extension of welfare-state measures.”).

65. An example would be Senator Hart’s Monopolization Reform Act of 1976. See S. 3429, 94th Cong., 2d Sess. § 3, 122 CONG. REC. 13,872 (1976). This characterization of progressivism differs from that in A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 744-45 (2019) where progressive views are distinguished from both a no-fault monopoly paradigm and the New Brandeis movement. For a different view still, see Herbert Hovenkamp, *Progressive Antitrust*, 2018 UNIV. ILL. L. REV. 71, 76.

66. See generally Zephyr Teachout, *Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform* (Fordham Law Legal Studies Research Paper, No. 2384182, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2384182](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384182). Another related progressive antitrust proposal that has been suggested involves *per se* bans on vertical integration for some companies. See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

67. Cf. SCHUMPETER, *supra* note 15, at 421, (defining “(centralist) socialism as that organization of society in which the means of production are controlled, and the decisions on how and what to produce and on who is to get what, re made by public authority instead of by privately- owned and privately-managed firms.”).

68. See *id.* MESTMÄCKER, *supra* note 29, at 29 (noting how both communism and national socialism relied on “central economic planning” and that national socialism demonstrated how “central planning can be implemented without the formal expropriation of the

revolution from below by the working class against a ruling class that lacks the support of a sufficiently strong middle class.<sup>69</sup> Fascism, by contrast, represents an attempt at revolution from above that can be achieved by wealthy landed elites allying with commercial power against the petit bourgeoisie and working classes, even if at times gaining their support on non-economic grounds.<sup>70</sup> Because they both envision general state control of the economy, antitrust is generally not consistent with either socialist or fascist forms of political economy.<sup>71</sup>

Table 2 summarizes these four illiberal theories.

<b><u>Table 2: Illiberal Theories of Political Economy</u></b>	<i>State Control Through Ownership</i>	<i>State Control Through Regulation</i>
<i>General Control of The Economy</i>	<p><u>Socialism</u></p> <ul style="list-style-type: none"> <li>• Antitrust has little or no independent role</li> </ul>	<p><u>Fascism</u></p> <ul style="list-style-type: none"> <li>• Antitrust has little or no independent role</li> </ul>
<i>Partial Control of the Economy</i>	<p><u>Progressivism</u></p> <ul style="list-style-type: none"> <li>• Antitrust may prohibit concentrated market structure <i>per se</i>, even without the commission of any bad conduct</li> </ul>	<p><u>Industrial Policy</u></p> <ul style="list-style-type: none"> <li>• Antitrust is a potential tool to support national champions for geopolitical gain</li> </ul>

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means of production” as the “ ‘ socialization’ of cartels proved them to be efficient organisations for economic planning”). Socialist theories can vary between those that eschew market forms of control entirely and theories that integrate market mechanisms within a socialist economy. See SCHUMPETER, *supra* note 15, at 421-22.

69. See MOORE, *supra* note 14, at 228.

70. *Id.* at 436-38; 448-50.

71. This holds true in the limited American experience with such ideologies. See, e.g., Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2032 (2015) (noting how socialist candidate Eugene Debs proposed abolishing the antitrust laws).

## III. CRITICAL ASSESSMENT OF ALTERNATIVE THEORIES

Before evaluating each of these specific forms of competition policy, it is worth developing the normative criteria by which such an analysis will be conducted—that is, “risk-averse anti-totalitarian liberal realism.”<sup>72</sup> Although the limits of this article make a full exegesis of these first principles impracticable, a few key premises can be said plainly.<sup>73</sup> The first is that the lessons of the twentieth century teach us that societies should avoid totalitarian forms of political economy so as to not repeat the atrocities that regimes of this kind have committed.<sup>74</sup> Policymakers of goodwill across the political spectrum should be unified in seeking to articulate a paradigm that overcomes these revolutionary forces so as to protect individual liberty, support continued economic growth, and foster technological progress.

The “risk-averse” nature of this anti-totalitarianism also grounds arguments against classical liberalism and progressivism as organizing principles for competition policy. At the institutional level, as noted above, while classical liberalism is historically consistent with the dominance of both concentrated corporate power and a plutocratic class, the ideal of classical liberals would typically include neither welfare nor administrative states. As such, classical liberalism would provide an effective check against socialism and revolution from below, which could seek to make use of both the welfare and administrative states for its ends.<sup>75</sup> However, the wholesale dismantling of both the welfare and administrative states could dangerously increase the risk of

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72. In discussing “liberal realism” in the context of political economy and competition policy, I mean to connote a theory different than those that exist in the fields of political theory or international relations. See, e.g., MATT SLEAT, *LIBERAL REALISM: A REALIST THEORY OF LIBERAL POLITICS* (2013); Joseph S. Nye, Jr., *Toward a Liberal Realist Foreign Policy: A Memo for the Next President*, HARV. MAG. (Mar.-Apr. 2008). As far as the author knows, the theory of this article may or may not be consistent with either view.

73. As the astute reader will have noted, the principle of anti-totalitarianism may be said to follow from the liberal principle, making the former redundant. As will be clear in their exposition, the anti-totalitarian principle operates at the level of political economy and rejects the general coordination between the political and economic estates that occurs in both socialism and fascism which has been defined above. The liberal principle, by contrast, operates at a higher plane, so to speak, in defending the autonomy of the individual against both challenges from both the right—as we will suggest, in the form of ordoliberalism—and left—as we will suggest, in the form of libertarian paternalism. The article’s realist posture is, by contrast, directed against the hyper-neoliberal and mercantilist views.

74. See, e.g., ALEXANDER SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (1973); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

75. Cf. SCHUMPETER, *supra* note 15, at 206 (“[Bureaucracy] is an inevitable complement to modern economic development and it will be more than ever essential in a socialist commonwealth.”); ARENDT, *supra* note 74, at 318 (noting that the “October Revolution’s amazingly easy victory occurred in a country where a despotic and centralized bureaucracy governed...”).

a revolution from above by removing the institutional powers able to counterbalance any alliance between established wealth and concentrated corporate power seeking to use fascism as a way to protect their economic interests but to the grave detriment of the rest of society.<sup>76</sup>

Progressivism, by contrast, sees powerful administrative and welfare states as necessary to protect the interests of the working classes, and is hostile to the existence of both plutocratic and concentrated corporate power. In the United States, the paradigmatic progressive political program was the New Deal. Whereas the first part of the New Deal included a host of regulations empowering the administrative state and placing regulatory obligations on business, the second part of the New Deal included Social Security and tax increases.<sup>77</sup> Even though progressivism might therefore provide an adequate check against the imposition of fascism by an alliance of private power, the elimination of any substantial checks against the abuse of public power risks progressive institutions being utilized by intellectual elites rousing the working classes to bring about, and achieve power in,<sup>78</sup> a socialist political economy.<sup>79</sup>

In addition to this risk aversion to totalitarian political economy, a certain realism about the present historical moment represents another basis for critiquing some of the theories of competition policy discussed above. While Burke's "age of chivalry" may be lost and utopia never to come, humanity lives better than it once did, and that should count for something. This is to say that, in lieu of believing that a liberal and democratic end of history remains the birthright of all mankind, or attempting to turn back globalization, policymakers should be concerned about losing what unprecedented but fragile progress modernity has actually made in improving the lives of many, many millions who were once in poverty both in the West and around the world.

The hyper-neoliberal approach—namely, that increased technological progress will prove a sufficient condition for sustaining the neoliberal order—can be faulted on these realist grounds, as the full im-

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76. See MOORE, *supra* note 14, at xxiii.

77. See RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 334-38 (1948) (distinguishing between an "initial New Deal" where "[f]armers got the AAA. Business got the NRA codes. Labor got wage-and-hour provisions ... The middle classes got the Home Owners' Loan Corporation, securities regulation, and other reforms" and a "second New Deal" that included both a "drastic new 'wealth tax'" and the Social Security Act).

78. SCHUMPETER, *supra* note 15, at 154 (noting that "though intellectuals have not created the labor movement, they have yet worked it up into something that differs substantially from what it would have been without them"). *But cf.* ARENDT, *supra* note 74, at 458 ("The aggressiveness of totalitarianism springs not from its lust for power...but only for ideological reasons: to make the world consistent, to prove that its respective supersense has been right.").

79. SCHUMPETER, *supra* note 15, at 206-07.

plications of the New Economy and on liberal economic order are not yet fully understood. It may be that the golden age of technological progress and economic growth is already gone and therefore of little promise toward continued middle class expansion.<sup>80</sup> It may be that the social consequences of rapid innovation in the Internet economy are in large part increased group polarization and extremism that, in a heterogeneous society, ultimately leads to fragmentation, violence, and the breakdown of liberal economic order.<sup>81</sup> Finally, it may be that even notwithstanding a liberal effect of democratizing access to ideas, goods, and people, a reinvigorated bureaucracy concerned about inequality chills continued technological progress.<sup>82</sup> All of these possibilities, and still many more, make the hyper-neoliberal paradigm too speculative for policymakers to stake the future of liberal economic order on.

An unabashed program of industrial policy, by contrast, suffers from a more subtle form of idealism. On the one hand, the recognition of nation states as self-interested actors in competition with one another within a sovereignty-based framework has long been a dominant view for thinking about international order in “realist” terms.<sup>83</sup> Over the neoliberal period, however, the immersion of the contemporary nation state within a globalized economy of ideas, goods, people and supply chains has resulted in not only unprecedented economic growth and prosperity around the world, but relative peace.<sup>84</sup> A turn toward industrial policy, even in the limited case of antitrust, risks contributing to the undermining of not only economic growth and neutral rules-based legal frameworks—such as antitrust as an apolitical, value neutral, and technocratic enterprise<sup>85</sup>—but also global peace and stability, with po-

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80. See, e.g., ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH* (2016).

81. See, e.g., Cass R. Sunstein, *The Law of Group Polarization*, John M. Olin L. & Econ. Working Paper No. 91, 22-23 (1999).

82. See, e.g., *Open Markets Institute Applauds Sen. Warren’s Call to Break Up Amazon*, OPEN MARKETS INST. (Sept. 14, 2018), <https://openmarketsinstitute.org/releases/open-markets-institute-applauds-sen-warrens-call-break-amazon/>.

83. Here, I am referring to what is commonly understood as the “Westphalian system.”

84. See Joseph S. Nye, *Will the Liberal Order Survive: The History of an Idea*, 96 FOREIGN AFF. 10, 12 (2017) (noting that “the demonstrable success of the [liberal] order in helping secure and stabilize the world over the past seven decades has led to a strong consensus that defending, deepening, and extending this system has been and continues to be the central task of U.S. foreign policy”); see also HENRY KISSINGER, *WORLD ORDER* 368-69 (2014). Of course, there have long been skeptics about the long run viability of the post-World War II liberal order. See, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996). Some believe it may have been destined to fail. See, e.g., John J. Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 INT’L SECURITY 7 (Spring 2019).

85. See D. Daniel Sokol, *Tension Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247, 1265-66 (2015).

tentially destructive consequences for humanity similar to those that obtained prior to the advent of the liberal international order.

The ordoliberal and the libertarian paternalist alternatives involve still more acute but nonetheless cognizable problems which stem from their lack of a thoroughgoing liberalism. Specifying just how market forces result in alienation—let alone in a way that can ground concrete enforcement standards for prohibiting conduct that increases concentration beyond that which is needed for the requisite amount of effective competition—raises thorny higher order philosophical issues that may not admit of any practical consensus.<sup>86</sup> That is, how does one determine whether competition is sufficiently effective to ensure adequate protection for individual autonomy?<sup>87</sup> Furthermore, even if certain moral norms may no doubt have been integral to the development of liberal capitalism,<sup>88</sup> not only does the modern American constitutional order provide no general substantive due process basis for imposing them,<sup>89</sup> but economic substantive due process, which could in theory ground the fundamental economic rights envisioned by the ordoliberal view,<sup>90</sup> remains in the dustbin of American legal history.<sup>91</sup>

Libertarian paternalism faces analogous conceptual problems. Even if it could be shown that the state sanctioning of certain individual economic preferences is consistent with a broader liberal outlook, behavioral economics, when applied to market behavior, faces an inherent difficulty in distinguishing between irrationalities caused by the offending biases and “efficient mistakes” in light of incomplete infor-

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86. See Joseph V. Coniglio, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Aug. 2017).

87. Similar questions arise in the context of the role of “fairness” in progressive views of antitrust, which also is plagued by vagueness issues. See Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 253, 361 (2019). That is, progressive views face a difficulty analogous to ordoliberalism in specifying the degree to which market concentration becomes unsatisfactory from the political perspective of protecting democracy, rather than ordoliberalism's unique social concerns with autonomy.

88. For a general theory of the relation between certain types of social norms and capitalist development, see MAX WEBER, *THE PROTESTANT WORK ETHIC AND THE SPIRIT OF CAPITALISM* 61, 123 (Parsons trans., Routledge Classics, 2001) (1905).

89. For a clear statement of this sort of view in recent case law, see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life.”).

90. Cf. Schweitzer, *supra* note 45, at 222-23 (describing ordoliberalism as a “rights-based approach” and finding that the European Court of Justice has consistently affirmed a “rights-based approach” in its decisions).

91. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).



mation.<sup>92</sup> While correcting the former will improve market performance, correcting the latter may not when transaction and information costs are greater than zero.<sup>93</sup> As such, libertarian paternalism may be unable to provide a theory of behavior with greater predictive power than that of neoliberalism's theory of rational expectations<sup>94</sup> if it cannot identify errors in decision making that result from bias rather than intendedly rational but faulty behavior given incomplete information.<sup>95</sup>

#### IV. POSITIVE ASSESSMENT OF NEOLIBERAL COMPETITION POLICY

To raise issues with other theories of competition policy is not, however, enough to defend neoliberal competition policy and a consumer welfare standard. The pertinent underlying question, then, is whether a consumer welfare standard should remain the lodestar of antitrust enforcement.<sup>96</sup> Upon posing this question, the problem again arises of identifying normative criteria—particularly those that do not themselves beg the question against rival standards. Critiquing, for example, alternatives to neoliberalism's consumer welfare standard on the grounds that they do not apply neoclassical methodologies or fail to satisfy broader hedonic criteria<sup>97</sup> risks not appreciating the genuinely socio-political purposes that commentators critical of the Chicago School have long believed antitrust should embody,<sup>98</sup> and which surely

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92. Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1048-49 (2012) (describing how “efficient mistakes” can occur when correcting incomplete information and economizing on transaction costs becomes cost-prohibitive).

93. *Id.* at 1049.

94. See generally GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

95. Wright, *supra* note 92, at 1040 (“[I]f behavioral economics is to outperform price theory, its superiority must be proven by its greater predicative power, not merely by the assertion that its underlying assumptions are more ‘realistic.’”); see also Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 15 (1953) (“[T]he relevant question to ask about the ‘assumptions’ of a theory is not whether they are descriptively ‘realistic,’ for they never are, but whether they are sufficiently good approximations for the purpose in hand. And this question can be answered only by seeing whether the theory works, which means whether it yields sufficiently accurate predictions.”).

96. See Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 847 (2014) (noting that the Sherman Act's design as a “‘consumer welfare prescription’ attributed to [Judge] Bork in [Reiter v. Sonotone] has subsequently been quoted 29 times in federal antitrust decisions”).

97. See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2409 (2013).

98. See Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1074 (1979) (providing an early critique of the Chicago School along these lines).

played a role in the original intentions of the Sherman Act drafters.<sup>99</sup> Regardless of whether or not the Sherman Act should ultimately be interpreted accordingly,<sup>100</sup> a proper debate on the merits of a consumer welfare standard requires appealing to a neutral framework by which, much like the ideal of antitrust law, the winners and losers can be determined.

Some views, on the other hand, face obvious problems. For example, neo-structuralist approaches<sup>101</sup> that consider the existence of a monopoly to be inapposite with a healthy competitive process overlook that not only does the existence of monopoly rents spur entry in existing markets, but the competitive processes characterizing many New Economy markets is one between successive monopolies that leap frog one another by introducing a new and superior product.<sup>102</sup> Furthermore, it hardly bears repeating that these types of socio-political theories fail on their own terms by being unable to articulate a non-arbitrary standard by which enforcers can distinguish harm to competitors from harm to competition—among many other concerns.<sup>103</sup> Put another way, theories that seek to preserve deconcentrated market structures for their own sake lack any limiting principle for determining when conduct that increases market concentration can be understood as unlawful.<sup>104</sup>

A consumer welfare standard, however, can also risk problems in its application, specifically as it concerns measuring conduct that involves noticeable tradeoffs between static and dynamic welfare<sup>105</sup>—

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99. See, e.g., Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 98-106 (1982).

100. For a textualist defense of a consumer welfare standard, see Joseph V. Coniglio, *How the “New Brandeis Movement” Already Overshoots the Mark: Sketching an Alternative Theory for Understanding the Sherman Act as a Consumer Welfare Prescription*, COMPETITION POL’Y INT’L N. AM. COLUMN (Oct. 2017). For a contrary view, see Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013).

101. See, e.g., Lina M. Khan, *The New Brandeis Movement: America’s Antitrust Debate*, 9(3) JECLAP 131, 132 (2018).

102. See, e.g., Coniglio, *supra* note 30.

103. See Muris & Nuechterlein, *supra* note 20, at 8-9.

104. Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, COMPETITION POL’Y INT’L ANTITRUST CHRON. (Oct. 2017).

105. See Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have An Antitrust-Relevant Theory of Competition Now?*, in REGULATING INNOVATION: COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY 240-41 (2011) (discussing how, while perhaps not impossible, the economic tools to measure tradeoffs between static and dynamic competition by examining technical rates of substitution are not yet available); see also Harold Demsetz, *The Intensity and Dimensionality of Competition*, in THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 144 (1995).

which can be particularly acute in the New Economy markets characterized by innovation competition that are often a focus of regulators. That is, although it is clear that consumer welfare is a broad concept that includes harm to innovation,<sup>106</sup> it may be very difficult in practice for competition enforcers to determine the net welfare effects of conduct that, for example, harms product market competition but also results in cognizable dynamic efficiencies.<sup>107</sup> In the current debate, neither economic decision criteria nor the structuralist foil may therefore be the best way to evaluate the merits of a consumer welfare standard.

As another basis for evaluating a consumer welfare standard, one might understand harm to competition in terms of the larger ethic of rivalry and entrepreneurship that presumably underlies all forms of capitalism. Indeed, the putative tension between the sort of monopoly capitalism or “corporatism,” associated with a neoliberal competition policy and entrepreneurship was famously highlighted by no less an economist than the renowned Joseph Schumpeter, and presents a far more fruitful avenue than structuralism to evaluate neoliberal competition policy and a consumer welfare standard.<sup>108</sup> Furthermore, by analyzing corporatism within a larger sociological analysis of capitalism, Schumpeter’s discourse may also provide a higher-order framework for adjudicating the merits of neoliberal competition policy in a way that perhaps best avoids begging the question against rival theories that view antitrust as implicating issues beyond the calculation of economic surplus.

Schumpeter is, of course, no structuralist.<sup>109</sup> In his landmark work *Capitalism, Socialism, and Democracy*, Schumpeter acknowledges a

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106. See *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights of the S. Comm. On the Judiciary*, 115th Cong. 23-24 (2018) (Questions for Joseph Simons, Chairman, Federal Trade Commission), <https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws>.

107. This type of measurement problem is not limited to the American consumer welfare standard. The European Union, for example, has applied a framework that attempts to protect both dynamic consumer welfare and consumer choice. See Case T-286/09, *Intel v. Comm’n*, [2014] ECR II-0000, ¶ 31 (“Intel’s anticompetitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.”). However, there are many examples of business conduct that lower consumer choice while increasing incentives to innovate, and which would involve a similar sort of tradeoff. See Joshua D. Wright and Doug Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2411 (2013). But see Neil Averitt and Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 *ANTITRUST L.J.* 175, 176 (2007). Indeed, it may be that these latter types of tradeoffs pose larger problems of commensurability that do not exist in the case of measuring net welfare effects. See Coniglio, *supra* note 86.

108. See SCHUMPETER, *supra* note 15, at 131-42.

109. Some commentators have attempted to present an alternative “Austrian” critique of corporatism grounded in the work of Friedrich Hayek, and specifically his famous

“very common type of social criticism” which “laments the ‘decline of competition,’” but notes that “[e]conomically neither the case for competition nor the case against concentration of economic control is anything as strong or weak as this argument implies.”<sup>110</sup> Rather:

[s]ince capitalist enterprise, by its very achievements, tends to automatize progress, we conclude that it tends to make itself superfluous—to break to pieces under the pressure of its own success. The perfectly bureaucratized giant industrial unit not only ousts the small or medium-sized firm and ‘expropriates’ its owners, but in the end it also ousts the entrepreneur and expropriates the bourgeoisie as a class . . . .<sup>111</sup>

Neither, however, does Schumpeter appear satisfactory to the neoliberal economist. In fact, he expressly disclaims a defense of corporatism<sup>112</sup> on utilitarian grounds:

[b]ut I am not going to sum up as the reader presumably expects me to. That is to say, I am not going to invite him, before he decides to put his trust in an untried alternative advocated by untried men, to look once more at the impressive economic and the still more impressive cultural achievement of the capitalist order and at the immense promise held out by both. I am not going to argue that that achievement and that promise are in themselves sufficient to support an argument for allowing the capitalist process to work on and, as it might easily be put, to lift poverty from the shoulders of mankind.<sup>113</sup>

Simply put, for Schumpeter “[e]conomically and sociologically, directly and indirectly, the bourgeoisie . . . depends on the entrepreneur and, as a class, lives and will die with him.”<sup>114</sup> The core Schumpeterian justification of capitalism thus sounds in the ethic of entrepreneurialism—a spirit that would seem far removed from the utilitarian calculus that prevails amongst the corporate managers and technocratic intellectuals—that is, Burke’s “sophisters, economists, and calculators”—that preside over the neoliberal corporatist order and, with it,

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knowledge problem. See BARRY LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* 249-50 (2009). For a discussion of why Hayek’s theory of knowledge does not support a structuralist competition policy, see Joseph V. Coniglio, *Hayek as a New Brandeisian? The Need to Distinguish Theory from Practice in Hayekian Competition Policy*, *COMPETITION POL’Y INT’L N. AM. COLUMN* (Oct. 2018).

110. SCHUMPETER, *supra* note 15, at 140.

111. *Id.* at 134.

112. In lieu of a tendency “expropriate” its owners, we may also identify this form of capitalism with the separation of ownership and control, See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932), with profit-maximization the managers’ singular goal.

113. SCHUMPETER, *supra* note 15, at 129.

114. *Id.* at 134.

enforcement of a consumer welfare standard. As the development of capitalism undermines the role of the entrepreneur by replacing him with both automation and depersonalized corporate forms, the “bourgeois fortress thus becomes politically defenseless.”<sup>115</sup> Hence, rather than represent the empowerment of the many against the Old Order, a Schumpeterian observer of capitalism “might well wonder whether in the end such complete emancipation was good for the bourgeois and his world.”<sup>116</sup>

Schumpeter’s apparent privileging of the entrepreneurial ethic as a necessary, rather than merely sufficient, condition for the survival of capitalism can be faulted on at least two grounds. First, since Schumpeter first wrote *Capitalism, Socialism, and Democracy*, the unprecedented post-World War II achievements in economic growth, technological progress and reducing poverty around the world seem to have established the utilitarian justification of neoliberal capitalism as sufficient in its own right—as distinct from the “psycho-sociological superstructure” of entrepreneurship analyzed by Schumpeter.<sup>117</sup> This is to say, simply, that modernity’s great capitalist revolution—with the great possibilities for technological progress perhaps the biggest surprise—may after all have made the many better off, who should therefore have the conviction to defend neoliberal capitalism on these utilitarian grounds.

Put differently, even if Schumpeter may have been able to argue in 1942, amidst the destruction of Europe and the encroaching spectre of communism, that “[a]s regards the economic performance, it does not follow that men are ‘happier’ or even ‘better off’ in the industrial society of today than they were in a medieval manor or village,”<sup>118</sup> the subsequent and unprecedented global economic growth, technological progress, reductions in poverty, and victory over communism in the Cold War made humanity generally better off before capitalism took its revolutionary course.<sup>119</sup> As an economic matter, that would seem to be beyond dispute. Even if, as Schumpeter intimates, capitalism and the modern liberal order may be critiqued from the vantage point of higher questions of “Meaning”—that the “stock exchange is a poor substitute for the holy grail”<sup>120</sup>—post-World War II economic history does nonetheless provide a justification for neoliberal capitalism—albeit perhaps

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115. *Id.* at 143.

116. *Id.* at 135.

117. *Id.* at 121.

118. *Id.* at 129.

119. SCHUMPETER, *supra* note 15, at 134-39.

120. *Id.* at 137. We will return to this indictment of capitalism as a social order writ large later on.

not neoliberal *society*—that would seem to be independent of the entrepreneurial justification Schumpeter seemed to think was essential to its survival.

To be sure, the attribution of this more general success of neoliberal capitalism to neoliberal competition policy specifically does not follow necessarily. It could be that, for example, neoliberal monetary, trade, and fiscal policies were the great contributors to the economic growth of the neoliberal period, and that neoliberal competition policy was not a sufficiently important factor to now claim justification from the successes of the broader neoliberal program—an intellectual free-rider, it would so be alleged. Although this is ultimately an empirical question well beyond the scope of this article, technological change and innovation are generally recognized as the greatest drivers of economic growth.<sup>121</sup> Furthermore, Schumpeter himself is also famous for his recognition that “[t]he firm of the type that is compatible with perfect competition is in many cases inferior in internal, especially, technological, efficiency.”<sup>122</sup>

In replacing the structuralist paradigm which preceded it—where a desire to protect small businesses resulted in mergers amounting to a combined market share of less than 8% being unlawful<sup>123</sup>—a consumer welfare standard therefore provided the legal framework for businesses that compete on the merits to realize the efficiency gains achievable through increased scale that can drive economic growth through technological progress.<sup>124</sup> Indeed, commentators are increasingly highlighting the importance of competition policy in the economic changes brought about by neoliberalism—even if only to emphasize its allegedly negative aspects.<sup>125</sup> However, in recognizing the centrality of neoliberal competition policy to the broader neoliberal political economy, obviously both the good and the bad should be taken into account. Simply put, the unprecedented economic growth of the post-World

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121. See, e.g., Robert Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957); see also Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 15 GEO. MASON L. REV. 1191, 1194 (2008).

122. SCHUMPETER, *supra* note 15, at 106. But see Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF ECONOMIC ACTIVITIES: ECONOMIC AND SOCIAL FACTORS 609 (Richard Nelson ed., 1962).

123. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 272, 304 (1966).

124. See Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1, 4-9 (1973); SCHUMPETER, *supra* note 15, at 81-106. To be sure, the general relationship between market structure and innovation remains complex. For a discussion, see generally Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in INNOVATION POLICY AND THE ECONOMY (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2006).

125. See, e.g., LYNN, *supra* note 109.

War II period should be seen as no more “natural” than the market forces it is incorrectly suggested to have assumed.

Furthermore, even if Schumpeter were correct that entrepreneurship remains the *raison d’être* of capitalism, post-World War II economic history has also presented an empirical basis for at least challenging Schumpeter’s claim that the entrepreneurial spirit must wane as neoliberal capitalism waxes—even before the high-tech revolution kicked into gear.<sup>126</sup> The success of Microsoft, Apple, Google, Amazon, and Facebook, to name the most prominent American cases, all involve the sort of entrepreneurial spirit that Schumpeter might have thought lost in late capitalism. Rather than disappear, the entrepreneurship embodied in these and other companies took a radically disruptive form, with many of the most valuable technology companies owing their prowess to either challenging powerful established players in traditional industries—such as Amazon<sup>127</sup>—or the first movers in their then-emerging New Economy markets—such as Facebook.<sup>128</sup> That is, in the New Economy, corporatism and monopoly appear to be not necessarily any more inconsistent with entrepreneurship than they are with competition.

#### V. THE OTHER LIMITS OF ANTITRUST

The implication of the foregoing is that the most pressing task for competition policymakers may not involve a rethinking of first principles. The principles of neoliberal competition policy may have ultimately been proven justified by an unprecedented period of economic growth, technological progress and reductions in poverty, and should presumably remain operative as long as they remain the best framework for bringing about these ends. Neither, as we have suggested, must the capitalist entrepreneur be lost in the process. The totalitarian temptation to submit to general state control of the economy—whether it be in the form of communism from below or fascism from above—

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126. Peter F. Drucker, *Our Entrepreneurial Economy*, HARV. BUS. REV. (Feb. 1984), <https://hbr.org/1984/01/our-entrepreneurial-economy>.

127. See Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, COMPETITION POL’Y INT’L ANTITRUST CHRON. (Oct. 2017) (“[O]ften highly innovative firms are relatively young upstarts facing older money and established technology. For example, one of Amazon.com’s principal targets . . . is Wal-Mart, which is substantially owned by the wealthiest family in the United States.”).

128. Tim Arango, *Hot Social Networking Site Cools as Facebook Grows*, N.Y. TIMES (Jan. 11, 2011), <https://www.nytimes.com/2011/01/12/technology/internet/12myspace.html?mtrref=undefined&gwh=CD53DA28C5DB1E6D45B48317061DDA7F&gwt=pay&assetType=REGIWALL>.

should be resisted so as to preserve and build upon the great prosperity Western Civilization has managed to achieve.

This statement will no doubt be highly unsatisfactory to many critics of neoliberalism who seek more fundamental and revolutionary changes. Surely, they suggest, there must be some principled basis for critiquing the neoliberal *status quo* with which so many are frustrated. Indeed, there very well may be, and none of the arguments in this article should be understood to the contrary. The goal of this article has been limited to a tailored defense of neoliberal principles only as they relate to competition policy, broadly understood. It does not suggest that neoliberal monetary, trade, and fiscal policies are also sound—let alone a neoliberal social order, where all the core institutions within society are organized according to the neoliberal principles of wealth-maximization, empiricism, and the rest.<sup>129</sup>

This is to say that even if neoliberalism is a sound theory as applied to the area of competition policy, neoliberal monetary policy, for example, may be problematic and a just target for contemporary critics. Similarly, claiming that competition policy should be enforced using a consumer welfare standard does not mean that all the organs of law and civil society should be oriented to maximize wealth or consumer welfare, even if this economic inquiry is nonetheless informative.<sup>130</sup> It is well known that several prominent neoliberals have expanded the neoliberal policy apparatus beyond the regulation of market capitalism with which antitrust is concerned to domains typically understood to be beyond a purely utilitarian purview.<sup>131</sup> However, whatever the merits of these broader neoliberal policy programs, the competition policy baby, so to speak, should not be thrown out with the bathwater.

Consider the charge that neoliberal policies have increased wealth inequality in the United States. Some commentators attempt to link this increased inequality with a decline in competition<sup>132</sup> and, by implication, consumer welfare competition policy. Notwithstanding the interest such theories appeared to have garnered from highly distinguished economists and policymakers, such as Nobel Laureate Joe Stiglitz,<sup>133</sup> one might alternatively consider whether increasing wealth

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129. FOUCAULT, *supra* note 10, at 243.

130. See, e.g., MESTMÄCKER, *supra* note 29, at 13.

131. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

132. See, e.g., Simcha Barkai, *Declining Labor and Capital Shares* (London Bus. Sch. Working Paper, 2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

133. See Joseph Stiglitz, *Inequality, Stagnation, and Market Power: The Need for a New Progressive Era* 4 (Roosevelt Inst. Working Paper, Nov. 2017), <http://facultyresearch.london.edu/docs/BarkaiDecliningLaborCapital.pdf> (noting how in-



inequality and the resultant social strife are far more a result of policies in other areas, such as monetary policy.<sup>134</sup> At the same time as Chicago School antitrust policy took root, the American economy began to undergo sustained expansions in the money supply and reductions in interest rates that, at least in theory, disproportionately reward the owners of financial assets, who are more likely to be wealthy.<sup>135</sup>

Indeed, after the financial crisis, monetary policy engaged in a truly unprecedented expansion, with the Federal Reserve lowering interest rates to zero and increasing its balance sheet from approximately \$900 billion before the crisis to \$4.5 trillion after, most of which constituted either troublesome mortgage-backed securities or treasury bonds.<sup>136</sup> The share of wealth of the world's richest people roughly doubled.<sup>137</sup> At the same time, however, one would seem to look in vain for any shift toward an increased *laissez faire* competition policy during the Obama administration. Indeed, antitrust enforcement under the Obama administration arguably increased relative to the George W. Bush administration, even if only at the margins and not in the area of monopolization.<sup>138</sup>

Consider further the alleged relation between large social media platforms and an increasingly deteriorating civil society. Framed as a monopoly problem, some critics here as well see a consumer welfare

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creased inequality may have been caused by “changing the implicit rules of the game—new anti-trust standards that made the creation, abuse, and leveraging of market power easier—and the failure of anti-trust standards to keep up with the changing evolution of the economy.”).

134. Cf. SCHUMPETER, *supra* note 15, at 427 (noting that “one of the most powerful factors for acceleration of social change is inflation.”). One could use the qualifier “neoliberal” to describe monetary policy over the past several decades, but it is not all clear to the author whether monetary policy, particularly since the financial crisis, is at all closer to Friedman than, say, Keynes.

135. See Moritz Kuhn, Moritz Schularick, and Ulrike Steins, *Research: How the Financial Crisis Drastically Increased Wealth Inequality in the U.S.*, HARV. BUS. REV. (Sept. 13, 2018), <https://hbr.org/2018/09/research-how-the-financial-crisis-dramatically-increased-wealth-inequality-in-the-u-s> (describing how “the middle class has a higher share of its wealth in housing, whereas the rich own more stock” and that “[s]tock market booms primarily boost the wealth at the top of the wealth distribution where portfolios are dominated by listed and unlisted business equity, thereby, increasing wealth inequality.”); Charles Wolf, Jr., *Zero Interest, Greater Inequality?*, THE RAND BLOG (Nov. 2, 2015), <https://www.rand.org/blog/2015/11/zero-interest-greater-inequality.html>.

136. See Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet*, [https://www.federalreserve.gov/monetarypolicy/bst\\_recenttrends.htm](https://www.federalreserve.gov/monetarypolicy/bst_recenttrends.htm) (last visited Jan. 17, 2020).

137. Don Resinger, *World's Richest People Have More Than Doubled Their Wealth Since 2008*, FORTUNE (June 19, 2018), <https://fortune.com/2018/06/19/worlds-richest-people-wealth/>.

138. See, e.g., Daniel A. Crane, *Has the Obama Administration Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (2012).

standard as a culprit.<sup>139</sup> And yet, both concentration and consumerism in the American media long predated neoliberalism and the Chicago School. As to media centralization, Edward Bernays long-ago advocated for a media paradigm whereby an “intelligent minority” of elites would use the press to administer democracy through a concerted media apparatus<sup>140</sup>—or, in the words of Walter Lippmann,<sup>141</sup> engage in the “manufacture of consent.”<sup>142</sup> As to consumerism, Bernays also showed how the insights of his renowned uncle, Sigmund Freud, could be used to encourage a mass psychology of consumerism through the media and other public relations tools.<sup>143</sup>

To be sure, the inclination toward so-called anti-monopoly tools, including antitrust, as part of a broader project to restore American democracy should not be surprising. Democracy and capitalism were revolutions from below that worked together and transformed human society.<sup>144</sup> However, as a general matter, monopoly, viewed as breakdown of the atomistic capitalist ideal, is in principle neither a necessary nor sufficient condition for the undermining of democracy: a monopolist may find its political power almost entirely curtailed by rival monopolists with contrary interests; conversely, a firm that lacks market power in the antitrust sense may be, for myriad other reasons, highly politically powerful.<sup>145</sup> Simply put, the relation between monopoly and democracy is far more nuanced than commentators like the neo-Brandeisians appear willing to admit.

Indeed, a commonality that many critics of neoliberalism have with neoliberals in the broader social sense is the general reduction of social and political problems to economic forces. That is, regardless of the particular societal ill, these paradigms are all apt to define the root problems through economic discourses such as class conflict between rich and poor, monopoly versus competition, or a lack of economic

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139. Barry Lynn, *Google and Facebook are strangling the free press to death. Democracy is the loser*, THE GUARDIAN (July 26, 2018), <https://www.theguardian.com/commentisfree/2018/jul/26/google-and-facebook-are-strangling-the-free-press-to-death-democracy-is-the-loser>.

140. EDWARD BERNAYS, PROPAGANDA 127 (1928).

141. We should note that Lippmann was not entirely removed from the neoliberal project, see Dieter Plehwe, *Introduction*, in THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 13 (Rob Van Horn and Philip Mirowski eds., 2009) (noting that Lippmann’s publication of *The Good Society* in 1937 “marked the beginning of a new dawn in the history of neoliberalism”), and was a member of the Mont Pelerin Society.

142. WALTER LIPPMANN, PUBLIC OPINION 248 (1922).

143. See BERNAYS, *supra* note 140, at 75-82.

144. MOORE, *supra* note 14, at 413-32.

145. Coniglio, *supra* note 30.

growth.<sup>146</sup> Indeed, it appears true to say that whereas for the classical Marxist the capitalist exploitation of labor is the root of all evil, for the neoliberal more economic growth is almost always the *summum bonum*.<sup>147</sup> Of course, although neoliberalism is often critiqued along these lines as amounting to a belief in “market fundamentalism,”<sup>148</sup> alternatives like Marxism equally if not more constitute a religious ideology—namely, the dogmatic belief that a materialist and dialectical process of history will liberate the oppressed proletariat and establish rule by an intellectual class purportedly championing the interests of the fourth estate.<sup>149</sup>

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146. See, e.g., Francis Fukuyama, *The End of History?*, 16 THE NAT'L INT. 3, 6-7 (Summer 1989) (“The materialist bias of modern thought is characteristic not only of people on the Left who may be sympathetic to Marxism, but many passionate anti-Marxists as well. Indeed, there is on the Right what one might label the Wall Street Journal school of deterministic materialism that discounts the importance of ideology and culture and sees man as essentially a rational, profit-maximizing individual.”).

147. I use the qualifier “classical” here, as of course later Marxists associated with the Frankfurt School were very much concerned with determining “what new social rationality could be defined and formed in such a way as to nullify economic irrationality” they saw in capitalism and, like the ordoliberal, took as their starting point Weber’s broader conception of capitalism as a *society*. FOUCAULT, *supra* note 10, at 105-06.

148. See, e.g., D. Joseph Stiglitz, *Moving Beyond Market Fundamentalism To A More Balanced Economy*, 80 ANNALS OF PUBLIC AND COOPERATIVE ECON. 345 (2009); Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, THE AM. CONSERVATIVE (Sept. 19, 2017) (asking conservatives to “break from the principles of free market fundamentalism”); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 6 (2015) (describing neoliberalism in terms of an “efficiency-based ‘market fundamentalism’”); Stucke, *supra* note 55, at 905 (seeking a course between “laissez-faire and socialist fundamentalism.”). This idea, of course, is in concept as old as Weber’s identification of capitalism with the Protestant work ethic. See WEBER, *supra* note 88, at 61.

149. See ARNOLD TOYNBEE, A STUDY OF HISTORY, ABRIDGEMENT OF VOLUMES I-VI 399-400 (ed. D.C. Somerwell, 1946) (“Marx has taken the goddess ‘Historical Necessity’ in place of Yahweh for his deity, and the internal proletariat of the Western World in place of Jewry for his chosen people. . .”); see also ARENDT, *supra* note 74, at 329 (noting that even “Marx’s hopeful predictions that the state would wither away and a classless society emerge were no longer radical, no longer Messianic enough” and that “in Russia ‘the revolution was a religion and a philosophy . . .’”); SCHUMPETER, *supra* note 15, at 5 (writing that “Marxism is a religion” in the sense of constituting “a system of ultimate ends that embody the meaning of life and are absolute standards” and “a guide to those ends which implies a plan of salvation and the indication of the evil from which mankind, or a chosen section of mankind, is to be saved.”). I say “more” because while the neoliberal experiment has, as noted above, had important successes for which its devotees can be proud, the realization of Marxism for the masses has in theory and in practice been terror and the Gulag. See, e.g., Alexander Solzhenitsyn, *Communism: A Legacy of Terror*, Speech at the AFL-CIO 30 (July 9, 1975) (“Both the theory and practice of communism are completely inhuman. . .”), available at <https://archive.org/details/SolzhenitsynTheVoiceOfFreedom/page/n9/mode/2up>; Michel Foucault, *Le grande colère des faits*, LE NOUVEL OBSERVATEUR (May 9, 1977) (“In the Gulag, one sees not the consequences of an unhappy mistake, but the effects of the ‘truest’ theory in the political order. Those who sought to save themselves by sticking Marx’s true beard on the false nose of Stalin were not enthused.”), translated in Jürgen Habermas, *The*

The justification for a consumer welfare standard, as well as for neoliberal political economy more generally, should be distinguished from a defense of this sense of neoliberalism as a comprehensive social order which, like its Marxist rival, shares in this totalitarianizing of the economic.<sup>150</sup> Put simply, notwithstanding its fruits, neoliberalism should not become the very sort of utopian and totalitarian ideology that it was designed to replace. The existence of a justification for neoliberal competition policy does not mean that the wealth maximizing logic of the market should be the organizing principle for society writ large<sup>151</sup>—or even law, as a general matter.<sup>152</sup> To paraphrase Schumpeter, it is the higher order question of “Meaning,” upon which the indictment of neoliberalism is likely most sound and most needed—however difficult that may be to articulate.

## VI. CONCLUSION

The United States has been the preeminent embodiment of capitalism and democracy around the world. As it transitioned through what we have understood as the classical liberal, progressive, and neoliberal phases of its political economy, it played a leading role in overcoming the greatest authoritarian and totalitarian forces in modern history: the last of the monarchies of the Old Order in World War I, national socialism in World War II, and communism in the Cold War. But rather than

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*Critique of Reason as an Unmasking of the Human Sciences: Michel Foucault*, in *CRITIQUE AND POWER: RECASTING THE FOUCAULT/HABERMAS DEBATE* 65 n.26 (M. Kelly ed., 2015).

150. See *Mirowski*, *supra* note 13, at 439 (noting the “ultimate destination of the constructivist orientation within neoliberalism” as one where “[a]ny problem, economic or otherwise, has an economic solution...”). FOUCAULT, *supra* note 10, at 243 (noting the “radical” nature of neoliberalism relative to ordoliberalism with respect to the former’s “absolute generalization” of the economic form to all areas of society).

151. As Foucault puts the question, “[c]an the market really have the power of formalization for both the state and society? . . . It is a question of knowing how far the market’s powers of political and social information extend.” See FOUCAULT, *supra* note 10, at 117-18. Schumpeter says no: “no social system can work which is based exclusively on a network of free contracts between (legally) equal contracting parties and which everyone is supposed to be guided by nothing except his own (short-run) utilitarian ends.” SCHUMPETER, *supra* note 15, 423-24. The same, of course, is applicable to Marxism: while recognizing the “Economic Interpretation of History [as] one of the greatest individual achievements of sociology,” *id.* at 10, Schumpeter is clear that “[h]e who places his trust in the Marxian synthesis as a whole in order to understand present situations and problems is apt to be woefully wrong.” *Id.* at 48. See also Franz Bohm, Walter Eucken, & Hans Grossman-Doerth, *The Ordo Manifesto of 1936*, in *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* 258 (D. Crane and H. Hovenkamp eds., 2013) (writing that Marxist analysts “fail to appreciate the huge variety of forces which shape history.”).

152. See, e.g., MESTMÄCKER, *supra* note 29, at 13 (“Wealth maximization is no substitute for the purpose of law in general.”).

herald a liberal and democratic end of history,<sup>153</sup> the current crisis of the neoliberal order is an occasion for policymakers to reflect upon precisely where things may have went wrong.

The stakes are high. But for the United States' unique achievements in republican government, victory in two world wars, and technological and economic progress, Schumpeter may very well have been proven right that the great revolution of capitalist democracy, which preceded over a hundred and fifty years of inter-Western wars, civil strife, and the resultant loss of hundreds of millions of lives, could have been merely a precursor<sup>154</sup> to a far more barbaric and inhumane system of government than what came before it,<sup>155</sup> and which would put to death by the tens of millions the very masses it claimed it would liberate.<sup>156</sup> The United States, with its unrivaled system of free enterprise, commitment to the rule of law, and inheritance of the Western tradition remains the best hope to prevent, in solidarity with its allies, the final triumph of such a totalitarian tragedy.

The competition policy community, which during the neoliberal period accustomed itself to a comfortable and technocratic discourse about which conduct rules will maximize consumer welfare,<sup>157</sup> must adapt its thinking by considering changes to antitrust law within the context of a broader debate that questions not only the consumer welfare consensus, but also the neoliberal principles upon which contemporary antitrust is premised. In this debate, competition policymakers should remain steadfast in their conviction that history has justified a consumer welfare standard as the lodestar of antitrust law<sup>158</sup>—even if

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153. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

154. SCHUMPETER, *supra* note 15, at 162-63 (“The capitalist process not only destroys its own institutional framework but it also creates the conditions for another ... With every peg from under the capitalist structure vanishes an impossibility of the socialist plan.”).

155. See Letter from George Washington to Gouverneur Morris (Oct. 13, 1789), in *THE WRITINGS OF GEORGE WASHINGTON: PT. IV* 40 (2015) (warning that the revolution in France must be careful to “forbear running from one extreme to another” so as to not bring about “a higher toned despotism than the one which existed before.”).

156. See, e.g., Solzhenitsyn, *supra* note 149, at 7-8 (discussing how the communist system in Russia “introduced concentration camps for the first time in the world” where “15 million peasants were sent off to extermination,” as well as “artificially created a famine, causing 6 million persons to die in the Ukraine in 1932 and 1933” while “Europe didn’t even notice it” and that he “could keep on enumerating these [persecutions] endlessly, but I have to stop because I have come to the year 1933”), available at <https://archive.org/details/SolzhenitsynTheVoiceOfFreedom/page/n9/mode/2up>.

157. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008).

158. For a defense of a consumer welfare standard along similar lines, see generally Joseph V. Coniglio, *The Consumer Welfare Debate Comes to the FTC Hearings: Who’s on the Right Side of History?*, COMPETITION POL’Y INT’L N. AM. COLUMN (Nov. 2018).

incremental changes are appropriate in some areas. Simply put, the inability for antitrust law to operate as an economic, social, or political panacea does not mean it isn't working.

Rather, what is good policy for antitrust law may not be good policy for all organs of society, and the fundamental problem with neoliberalism may not so much as involve what has been gained, but what has been lost—that is, so to speak, Burke's "chivalry" or Schumpeter's "holy grail"—within neoliberalism's broader program to generalize the market form across society.<sup>159</sup> Seeking to use antitrust or other market tools as a means to understand, let alone solve, larger social problems fundamentally fails to grasp the deeper forms of which societies have historically been constituted.<sup>160</sup> Even if man is a *homo economicus*—as he always has been<sup>161</sup>—that is certainly not all he is, and his economic nature need not and should not come at the expense of the higher rational faculties that ground moral and political order. These questions, as uncomfortable as they may be, far outstrip the search of the New Brandeisians and others for a golden mean in the Herfindal-Hirschman index that balances the interests of capitalism and democracy in a given market. They are also more important.

The hope lies not, moreover, in a return to either Jeffersonian democracy or New Deal progressivism.<sup>162</sup> Just as the analysis of the problem may be better found on the classical "anthropological"<sup>163</sup> analysis, to avoid the Scylla and Charybdis of tyranny and ochlocracy, a path forward for America and the West lies in its unique and millennia-old tradition of republican government. In particular, if liberal cap-

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159. See FOUCAULT, *supra* note 10, at 243.

160. See TOYNBEE, *supra* note 149, at 60-79; see also ERIC VOEGELIN, ORDER AND HISTORY VOL III, PLATO AND ARISTOTLE 182 (2000). Notwithstanding Voegelin's critical mention of Toynbee, both thinkers appeal to Plato's conception of society as a reflection of principles of action beyond just *homo economicus*, which itself can be seen as a devolution from higher forms of psychical order and represents the privileging of passion over reason. *Id.* at 179 (discussing the oligarchic man). This is, to be sure, anathema to Schumpeter's claim that "the rational attitude presumably forced itself on the human mind primarily from economic necessity" and that "all logic is derived from the pattern of the economic decision or, to use a pet phrase of mine, that the economic pattern is the matrix of logic." SCHUMPETER, *supra* note 15, at 122-23. *But see* Stucke, *supra* note 55.

161. SCHUMPETER, *supra* note 15, at 123 ("Pre-capitalist man is in fact no less 'grabbing' than capitalist man. Peasant serfs for instance or warrior lords assert their self-interest with a brutal energy all their own."); see also FOUCAULT, *supra* note 10, at 270 (distinguishing between the *homo economicus* who "must be let alone" and the neoliberal *homo economicus* who "responds systematically to systematic modifications artificially introduced into the environment"). Here again, the idea of viewing neoliberal rationality in naturalistic or given terms is belied by its understanding of *homo economicus* as distinct from that of the classical liberal view. See Coniglio, *supra* note 30.

162. See generally LYNN, *supra* note 109; MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND POPULISM (2019).

163. VOEGELIN, *supra* note 160.

italist democracy continues to falter,<sup>164</sup> the United States can take the lead in looking back to the cosmopolitan and meritocratic model of republican Rome<sup>165</sup> that inspired Presidents<sup>166</sup> and abolitionists<sup>167</sup>—even if America ultimately chartered a different course.<sup>168</sup> The West’s ability to once again renew its civilization around a rightful heir—lest imposters claim the title—to its great tradition of right order, individual liberty, and progress in the condition of man may hang in the balance.

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164. For Schumpeter’s prediction, see SCHUMPETER, *supra* note 15, at 61 (“Can capitalism survive? No. I don’t think that it can.”).

165. For a good recent discussion of the Roman republic from a modern political economy perspective, see Posner, *supra* note 14. Posner’s critique of the relevance of Roman republicanism to America appears to be based on the view that the downfall of the Roman Republic was brought about by the expansion of population after the Social Wars, a demographic state of affairs he finds analogous to the heterogeneity of contemporary American society. *Id.* at 32. However, at least one notable historian identified the earlier Second Punic War as the major factor behind the downfall of republican Rome. See, e.g., TOYNBEE, *supra* note 149, at 150, 349 (noting how “[t]he devastation of Italy by Hannibal...actually gave [the Romans] a shock from which they never recovered” and the resultant “breakdown of the [Roman] Republic in the second century B.C.”). Indeed, this historical interpretation is consistent with Rome as the beginning of a civic republican tradition in Western political thought that is “compatible with modern pluralistic forms of society.” PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 8 (1997). Furthermore, Posner’s additional suggestion that the success of the Roman Republic was due to a “relatively coherent class of elites,” rather than a meritocratic republicanism, is in tension with his recognition elsewhere of Rome’s “fluid” class structure where “[m]any plebeians joined the ruling class . . .” Posner, *supra* note 14, at 30, 32. Put another way, for every Caesar, there was a Pompey; and while Brutus may have been the “noblest” Roman, there was none greater than Cicero.

166. See, e.g., THOMAS F. MADDEN, *EMPIRES OF TRUST: HOW ROME BUILT—AND AMERICA IS BUILDING—A NEW WORLD* 35 (2009) (“[John] Adams believed that the United States government must emulate the Roman...”). To be sure, the federal government set up by the American founders, which separated the legislative, executive, and judicial powers, represented a different form republicanism than Rome’s system of checks and balances. See Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. L. REV. 527, 535 n.41 (2012); Posner, *supra* note 14, at 21.

167. See, e.g., Robert Gooding-Williams, *Douglass’s Declaration of Independence and Practices of Politics*, in *A POLITICAL COMPANION TO FREDERICK DOUGLASS* 166-67, n.115 (Neil Roberts, ed., 2018) (describing Frederick Douglas’s “Roman, republican thinking” and his invoking of the “Roman concept of political innovation”).

168. See GORDON S. WOOD, *THE CREATION OF THE EARLY AMERICAN REPUBLIC 1776-1789* at 567-592 (1998 ed.) (describing how John Adams’s more classical understanding of the founding was at odds with its actual revolutionary form).