NOT A SIMPLE STORY OF BIG BUSINESS CAPTURE: AN ESSAY ON THE POLITICAL ECONOMY OF ANTITRUST

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INTRODUCTION

According to the view of the political economy of antitrust defended by Filippo Lancieri, Eric A. Posner, and Luigi Zingales in this issue of the *Antitrust Law Journal*, U.S. antitrust institutions have been captured by big business.[1] This political economy theory, referred to below as the "big business capture theory" or the "capture theory," is facially appealing because it rationalizes the distributional effect of the changes in antitrust law since the mid-20th century toward less-interventionist rules and enforcement efforts. Those changes have likely benefited big business substantially more than they benefited any other comparably broad interest group.[2] But as will be discussed, the big business capture theory accounts for the influence of only one interest group and does not address how and why that group's influence has waxed and waned over time.

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[1] Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, *supra* this issue, 85 ANTITRUST L.J. 441 (2023).

[2] That is because the changes in antitrust law systematically altered the error-cost balance of antitrust rules, giving less weight to the concern for deterring anticompetitive conduct and greater weight to the concern for avoiding a chilling of procompetitive conduct.

The big business capture theory suggests four consequential lessons for antitrust policy, each of which is questioned or qualified below.[3] First, it focuses attention on distribution to the exclusion of economic growth. It views antitrust primarily as a political contest among interest groups to appropriate rents, not as an economic regulatory field concerned to a great extent with economic growth and economic efficiency (albeit with material distributional consequences).

Second, if antitrust is a political arena, the capture theory suggests it is an undemocratic one. If antitrust is captured by business interests, particularly through their influence on courts, the least democratic branch of government, then the democratic legitimacy of antitrust law, rules, and enforcement policy is called into question.

Third, if antitrust is captured by business interests, antitrust rules and decisions cannot be justified as largely the product of value-neutral and academically oriented economic analysis and arguments. Rather, in business capture theory, the economic analysis and arguments accepted by policymakers are an intellectual superstructure largely exploited, and often developed, to serve business interests. The implication: if economics does not provide a good guide for judges and enforcers, then it should be downplayed or ignored by antitrust institutions.

Fourth, if the levers of antitrust enforcement are controlled by big business and manipulated to benefit their interests, as the capture theory supposes, then enforcement creates a critical threat to democracy. If the economic power of big business controls the policy arena that we look to for protection of the public interest against special interests, big business can exploit its political power to undermine all of our democratic institutions. The big business capture theory suggests that, after decades in which the antitrust laws were weakened in the service of business interests, our democracy is at serious risk of being supplanted by an oligarchic system in which concentrated economic power and political power are self-reinforcing.[4] This capture theory thus implies that the critical political threat to democracy today is from a big-business-led oligarchy, not from authoritarianism.

This essay explains why the big business capture theory is incomplete, and it challenges the antitrust policy lessons that the theory suggests. Part I surveys reasons for caution in accepting the capture theory. Part II describes

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[3] I do not mean to imply that Lancieri et al., referenced above for a recent defense of this theory, necessarily endorse all four implications I have drawn from treating the theory as an ideal type. As I read their article, they explicitly endorse the second implication. *See generally* Lancieri et al., *supra* note 1.

[4] *See* Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705, 705, 734–35 & 735 n.140 (2022) (discussing definitions of political systems).

an alternative "settlement" political economy theory involving an informal or tacit political settlement by which political competition among interest groups led to an antitrust policy that pursues inclusive economic growth.

While these two political economy theories differ, they each provide a way to criticize the conservative (Chicago School-oriented) approach that has framed antitrust law and policy since the 1980s. The criticism suggested by the big business capture theory is that the conservative approach results from business capture and has, by strengthening big business, entrenched that capture or facilitated its extension. The criticism suggested by the settlement theory is that the conservative approach is undermining inclusive growth.

Part II defends the settlement theory by explaining why it is attractive on both normative and positive grounds. Part III discusses lessons for antitrust policy of the alternative approach. The final Part provides a brief conclusion.

I. REASONS FOR CAUTION IN ACCEPTING THE BIG BUSINESS CAPTURE THEORY

As the big business capture theory recognizes, antitrust rules and enforcement changed considerably beginning in the late 1970s to favor big business in a distributional sense. Yet for decades before that, antitrust rules and enforcement had moved in the opposite direction.

In general, looking at federal enforcement, judicial decisions, and congressional action, U.S. antitrust institutions were friendly to big business interests during the early 1930s. Around the nadir of the Great Depression, both Congress and the Supreme Court gave industry a license to cartelize, and federal enforcers effectively paused their activity.[5]

Antitrust institutions grew markedly less hospitable to big business interests from the late 1930s through the 1960s.[6] The Antitrust Division of the Department of Justice ramped up enforcement during Thurman Arnold's tenure (1938–1943).[7] In 1950, Congress enacted major legislation to strengthen

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[5] *See* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 500 & n.65 (2006).

[6] *See* Baker, *supra* note 4, at 712–20. The antitrust approach of the 1940s through the 1960s was not a continuation of a countervailing power framework that shaped economic policy in the 1930s, contrary to what Mark Glick and Darren Bush contend. *See* Mark Glick & Darren Bush, *The Chicago School, The Post Chicago School, and The New Brandeisian Schools of Antitrust: Who is Right in Light of Modern Economics?*, GEO. MASON L. REV. (forthcoming) (working paper at 21–23), ssrn.com/abstract=4417509. Economic policy beginning in the 1940s was instead "an accommodation with modern capitalism," Baker, *supra* note 4, at 717 & n.54 (quoting historian Alan Brinkley) (citation omitted), that reoriented American political economy toward achieving inclusive economic growth. *Id.* at 717–20.

[7] *See* Baker, *supra* note 4, at 715–16 (describing Thurman Arnold's enforcement approach).

merger enforcement.[8] The courts steadily tightened antitrust rules beginning in the 1940s. That tightening lasted at least through the 1960s, when the Supreme Court toughened rules governing horizontal and vertical merger enforcement and held that vertical non-price agreements were illegal per se.[9]

For this reason, any political economy theory explaining the big business friendliness of antitrust law and enforcement cannot describe the 1940s through the 1960s.[10] It must instead describe what changed during the 1970s to cause the pro-business transformation of antitrust law by the courts and enforcement agencies concentrated between 1977 and 1993.[11]

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[8] Celler-Kefauver Antimerger Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18).

[9] *See* Baker, *supra* note 4, at 712 (citing, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962), and United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

[10] Lancieri et al., *supra* note 1, does not purport to do so; that article seeks only to explain changes in antitrust since the mid-20th century. It recognizes that the Court mostly expanded antitrust enforcement before 1975 and acknowledges that the structural era of antitrust went too far. *Id.* at 491, 517. Moreover, it is hard to describe the enactment of the Sherman Act, in 1890, or the Clayton Act, in 1914, as the product of capture by big business. The political impetus for antitrust during the late 19th and early 20th centuries came, importantly, from politically mobilized farmers. *See* ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917 (1999); Donald J. Boudreaux et al., *Antitrust Before the Sherman Act*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 255 (Fred S. McChesney & William F. Shugart II eds., 1995); *cf.* Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 75 (1985) (describing the Sherman Act as favoring the interests of farmers and small business, as well as diverting public attention away from pending tariff legislation that benefited all manufacturers, large and small). A recent study of the 1914 enactment of the Clayton Act (which strengthened antitrust) and the 1918 enactment of the Webb-Pomerene Act (which created an antitrust exemption for certain exporters) finds that senators representing states with less inequality and those from states with direct election (rather than selection by the state legislature) were more likely to support stronger antitrust. *See* Michael O. Allen, Kenneth Scheve & David Stasavage, Democracy, Inequality, and Antitrust (Feb. 3, 2023) (working paper), ssrn.com/abstract=4358176. If greater within-state inequality and legislative selection of senators are viewed as related to greater big business influence on senatorial votes, this study shows that big business opposed stronger antitrust, not that the Clayton Act advanced the interests of big business.

[11] Lancieri et al. assign a monopoly-friendly score to each Supreme Court justice based on that justice's position on the Court's antitrust decisions over his or her tenure. Lancieri et al., *supra* note 1, at 490–91. The average score of the top five monopoly-friendly justices first exceeded 50% after 1970. This indicates that beginning with the Burger Court (particularly with the appointments of Justices Powell and Rehnquist), a majority of the Court was comprised of justices who turned out to favor business interests in antitrust decisions over the course of their careers. This data suggest that any business capture of the Court on antitrust occurred no earlier than the beginning of the 1970s. But it could have occurred later to the extent that some justices on the bench during the 1970s changed their views toward greater monopoly-friendliness over their Court tenures. Lancieri et al. also identify a substantial shift in the composition of the Court in a pro-business, pro-monopoly direction around 1990; this can be understood as entrenching the 1980s perspective on antitrust. *Id.* at 490–97.

With that background, there are multiple reasons to question the political economy theory of big business capture of antitrust institutions.[12] None of the reasons are inconsistent with recognizing that big business benefited systematically and substantially from the way the rules changed during the second half of the 20th century.

The first reason is this capture theory's exclusive focus on a single interest group: big business. Other interest groups that influenced public policy in the 1940s through the 1960s—including broad groups like workers, farmers, consumers, and small businesses—did not disappear during the 1970s, though they lost some political power. When multiple interest groups are effectively organized, they can be expected to bargain to create and divide rents.[13] Yet that possibility, and its implications for antitrust policy, is ignored by the capture theory. More generally, the common view that antitrust has swung back and forth over the past 130 years between more populist and more business-friendly orientations suggests that policy outcomes reflect changes in the relative influence of competing interest groups.[14]

Second, and relatedly, the big business capture theory assumes that big business solved its collective action problem sufficiently to organize to influence antitrust policy, while implicitly supposing that other large and diffuse interest

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[12] In addition to the reasons discussed in the text, the capture theory is not accompanied by a fully formed account of the channels by which big business interests influenced antitrust institutions, particularly during the 1970s. Big business interests likely spend substantially more on lobbying than other large and diffuse interest groups like consumers, farmers, workers, and small businesses. But much business lobbying focuses on industry-specific or firm-specific issues. There is no direct evidence connecting corporate lobbying with antitrust enforcement outcomes, and the indirect evidence does not have a clear interpretation. *Compare* JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 62–64 (2019) (indicating that U.S. antitrust enforcement since the mid-20th century has been almost entirely insulated from direct political influence and reviewing evidence about corporate lobbying), *and* Nolan McCarty & Sepehr Shahshahani, *Testing Political Antitrust*, 98 N.Y.U. L. REV. (forthcoming 2023) (providing evidence questioning whether economic concentration translates into political concentration through lobbying), *with* Lancieri et al., *supra* note 1, at 508 (reviewing evidence indicating that mergers increase lobbying expenditures by the businesses involved, before and after consummation). Similarly, the evidence about the consequences of the "revolving door" (employment transitions between the private sector and government agencies) for regulatory outcomes generally (not looking at antitrust outcomes specifically) is limited and does not point strongly in a single direction. For brief surveys, see BAKER, *supra*, at 63 & 239 n.56; Lancieri et al., *supra* note 1, at 508–13.

[13] Roger G. Noll, *Economic Perspectives on the Politics of Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1253, 1266 (Richard Schmalensee & Robert D. Willig eds., 1989). The attribution of political (here, regulatory) outcomes to literal capture supposes that only one interest group is effectively organized. *Id.*

[14] On political swings, see, e.g., William H. Page, *The Ideological Origins and Evolution of U.S. Antitrust Law*, *in* 1 A.B.A. SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 1 (2008).

groups have been unable to successfully employ similar methods to solve their own collective action problems.[15]

Third, the capture theory's focus on the interests of big business is challenging to reconcile with the observation that the advocates of pro-business positions in antitrust policy debates commonly frame their positions in public interest terms and generally support the antitrust laws rather than calling for their repeal, even when advocating reduced antitrust intervention.[16] Even if that framing is intended in part to lend legitimacy to rent-seeking goals or to help business interests solve their collective action problem, this observation suggests a recognition that antitrust is more than just a policy area responsive to interest group claims. It is not necessary to suppose that shifts in antitrust law and enforcement are mainly driven by the technocratic ideas of experts to recognize that public interest considerations play a substantial role in policy debates.

Fourth, the big business capture theory cannot readily rationalize the not-insubstantial influence on the antitrust enterprise of developments in economics since the 1970s that called into question non-interventionist perspectives. Those developments often moved the law and enforcement in a direction counter to the distributional interest of big business. They have expanded the reach of antitrust law through their influence on enforcement efforts and judicial decisions.

Examples include, among other things, the analysis of network effects that underlies the *Microsoft* monopolization case; strategic entry deterrence; raising rivals' costs analysis, including its application to vertical foreclosure, exclusive dealing, and vertical mergers; rebuttals of the single monopoly profit theory; new understandings of the potential anticompetitive effects of tying, bundled rebates, most favored nations (MFN) clauses, and platform MFNs; understanding the anticompetitive effect of "pay for delay" settlements between branded drug manufacturers and generic manufacturers, why competition in the sale of new products does not prevent the exercise of market power in aftermarkets, and how imperfect information can create market power; theoretical and empirical analyses demonstrating that predatory pricing is not implausible; and theoretical and empirical support for anticompetitive horizontal merger theories involving unilateral effects or the elimination of a mav-

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[15] Lancieri et al. suggest that "ideas help special interests overcome collective action problems by enabling them to organize themselves around a goal or ideal." Lancieri et al., *supra* note 1, at 517. Ideas can play a role in aggregating interests, promoting collective action, and shaping political programs. Baker, *supra* note 5, at 504. But big business does not have a monopoly on ideas.

[16] For limited exceptions, see Baker, *supra* note 5, at 508 n.95.

erick.[17] These successes are contrary to the implications of the political economy theory of big business capture, and they show that economic analysis does not necessarily or always serve business interests.

Finally, the contemporary authoritarian threat to democracy from Trumpian populism is not directly connected to economic concentration and big business interests.[18] That observation calls into question the implication of capture theory that emphasizes a proximate political threat from a big-business-led oligarchy.

II. AN ALTERNATIVE POLITICAL ECONOMY PERSPECTIVE: A POLITICAL SETTLEMENT

I have elsewhere advanced an alternative view of the political economy of antitrust since the 1940s, which I will here term a political "settlement" theory.[19] That perspective is concerned with a political competition between two broad interest groups: big business interests, on the one hand, and the potential victims of their market power, namely consumers, workers, farmers, and small business, on the other hand.[20]

From a political theory point of view, the primary novelty of the settlement perspective is that it allows for the possibility that these broad interest groups could work together. If so, antitrust policy does not necessarily benefit just the

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[17] These and other developments in economics supporting antitrust intervention since the 1970s are mentioned in Steven Salop's survey of selected post-Chicago contributions. *See* Steven Salop, *The Reasonable Competitive Conduct Standard for Antitrust*, PROMARKET (Apr. 6. 2023), www.promarket.org/2023/04/06/the-reasonable-competitive-conduct-standard-for-antitrust. Similarly, Mark Glick and Darren Bush, who in general defend neo-Brandeisian views, recognize that "[t]he post-Chicago School undermined the majority of the original Chicago School policy prescriptions," referencing some of the same economic developments identified by Salop, and they observe that "post-Chicago economists have had influence with the antitrust agencies, in part because they advocated stronger antitrust enforcement." Glick & Bush, *supra* note 6, at 12–13. On the other hand, other developments in economics since the 1970s not surveyed here work toward justifying not intervening. In addition, the Supreme Court has at times doubled down on non-interventionist Chicago School ideas, often in dicta. *See generally* Jonathan B. Baker, *What About the Supreme Court? The Lurking Threat to US Antitrust Reform*, 11 J. ANTITRUST ENFORCEMENT 154 (2023). In contrast with the view taken here, Lancieri et al., who defend the capture theory, describe post-Chicago economics as a failure on the ground that Chicago ideas have persisted in the courts despite post-Chicago advances in economic and legal theory. Lancieri et al., *supra* note 1, at 517–18.

[18] Baker, *supra* note 4, at 736–40.

[19] Baker, *supra* note 5; *see also* Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010); Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2186 (2013) [hereinafter Baker, *Economics and Politics*]; Baker, *supra* note 4.

[20] Baker, *supra* note 5, at 496–97 (discussing the "division of the polity into two broad interest groups").

group currently in power. It generates economic growth and efficiencies, the benefits of which are shared between the groups.

That possibility arises because, as the settlement perspective supposes, broad and diffuse interest groups can better solve their collective action problems and mobilize politically under conditions of adversity (the absence of political power) than with political success.[21] Under such circumstances, interest groups that recognize that they interact politically in repeated play may reach a self-enforcing political bargain (an informal consensus, not a literal bargain) to adopt competition policy (antitrust) in order to share the efficiency gains from competitive markets (the benefits of economic growth).[22]

In my view, an outcome of this sort was reached in the United States during the 1940s. Around that time, the political system reached an informal or tacit political settlement:[23] an informal consensus to focus economic policy gener-

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[21] *Id.* at 487–89. It further supposes that when a broad and diffuse interest group succeeds politically, it cannot lock in its success permanently, as by creating procedural hurdles that impede the ability of competing broad and diffuse interest groups to organize. *Id.* at 489–90; *see infra* note 43. The idea that adversity helps diffuse interest groups solve collective action problems is consistent with the view taken in positive political theory that general reform arises when unrepresented groups are triggered to organize by the cumulative effects of policies and some groups represented in the dominant coalition think they are not getting a large enough share of the overall rents, Noll, *supra* note 13, at 1268, though that explanation focuses on interactions among more narrow interest groups than the large diffuse groups of interest here.

[22] Each group does better in long-run expectation with competition policy. That outcome avoids regulatory instability from cycles in policy between two regimes that do not allow the economy to obtain as great benefits from economic growth: a regime that redistributes in favor of large firms (laissez-faire, which benefits large firms by permitting them to exercise market power) and a regime that redistributes in favor of consumers, workers, farmers, and small business (deconcentration or economy-wide regulation, which shifts rents away from large firms). For a mathematical example illustrating how competition policy can emerge politically as a self-enforcing bargain between competing interest groups along the lines sketched here, see Baker, *supra* note 5, at 524–30.

[23] In one political science usage, the term "political settlement" describes an agreement that resolves major social conflict, such as a civil war. TIM KELSALL ET AL., POLITICAL SETTLEMENTS AND DEVELOPMENT: THEORY, EVIDENCE, IMPLICATIONS 27 (2022) (defining a political settlement as "an ongoing agreement among a society's most powerful groups over a set of political and economic institutions expected to generate for them a minimally acceptable level of benefits, and which thereby ends or prevents generalized civil war and/or political and economic disorder") (italics removed); *see generally* Jonathan Di John & James Putzel, Governance & Soc. Dev. Res. Ctr., *Political Settlements: Issues Paper*, UNIV. BIRMINGHAM (2009), epapers.bham.ac.uk/645/1/EIRS7.pdf. This essay uses the term to describe the resolution of an important but arguably less fundamental social conflict. Like settlements in the political science literature, the settlement discussed in this essay was an informal or tacit agreement among interest groups that resolved a major social conflict over economic policy, while allowing substantial room for political debate and conflict within its (broad) bounds. *See generally* Baker, *supra* note 5; *see also* Baker, *supra* note 4, at 711–20. In both the political science literature and this essay, the idea of a settlement involves coordination across interest groups and a recognition that each group must solve collective actions problems to do so. As with the settlements in the political science literature, the settlement discussed here has a quasi-constitutional dimension. *See* Baker, *supra* note 4, at

ally on the pursuit of inclusive economic growth, and to do so in part through a policy of fostering competition using the antitrust laws. That outcome was a major achievement of mid-20th century political liberalism, so it could also be termed a liberal consensus.[24]

From this perspective, the 1980s' shift in antitrust policy specifically, which is often described as Chicago school oriented, and the concurrent shift in domestic economic policy generally, which is sometimes described as a turn to neoliberalism, were each the product of a changing political coalition working within the inclusive growth framework: the replacement of a center-left coalition by a center-right coalition.[25] The new coalition was much friendlier to big business, but it did not discard the goal of inclusive economic growth.

The goal of inclusive economic growth should be understood as a general policymaking aspiration, not as a standard for deciding individual antitrust cases or for framing specific antitrust rules. The center-left coalition that controlled antitrust policy from the 1940s through the mid-1970s chose a different approach to implement that goal than the approach employed later during the 20th century. While there is a substantial question as to whether the antitrust policy implemented by the courts today is becoming or has become too business friendly to justify a continued description as furthering inclusive economic growth, that goal has animated domestic economic policy, including antitrust, for eight decades. It places bounds on antitrust rules without closely determining or constraining them. That allows substantial room for argument and debate.[26] It also allows room for big business interests to influence anti-

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718–19; Jonathan B. Baker, *Accommodating Competition: Harmonizing National Economic Commitments*, 60 WM. & MARY L. REV. 1149 (2019).

[24] *See* Baker, *supra* note 4, at 717. The goal of inclusive economic growth animated economic policymaking generally, not just antitrust. *Id.*; *cf.* Ariel Ezrachi, *Sponge*, 5 J. ANTITRUST ENFORCEMENT 49, 59 (2017) (describing a nation's domestic competition policy as reflecting its broad social values and adapting to its social developments while constrained and rationalized by a "membrane" of economic thinking). The reorientation of economic policy toward economic growth began during the New Deal and was completed after the Second World War. That is when the U.S. political system (including the courts) adopted national economic commitments (deeply entrenched norms) to competition and to a social safety net (robust social insurance and regulation to protect those vulnerable to market forces), and it is also when the country harmonized those commitments with each other and with a prior national economic commitment to protect private economic rights (contract and property). As part of the same reorientation toward inclusive economic growth, these commitments were complemented by the embrace of a broad national industrial policy of providing public goods and extensive government support for research and development. Baker, *supra* note 4, at 718–19.

[25] *See* Baker, *supra* note 4, at 723; Baker, *Economics and Politics*, *supra* note 19, at 2188–89.

[26] While the goal inclusive growth is a general policy aspiration, not a standard for deciding cases or framing rules, it is both routine and appropriate for courts and enforcers to consider how antitrust rules foster inclusive growth—that is, their consequences for efficiency, growth, and distribution—when interpreting, formulating, or implementing those rules. Litigants and policy advocates commonly argue about such consequences when advancing their views about the law.

trust enforcement supported by policy arguments favoring less intervention, much as is suggested by the big business capture theory.

This alternative political economy perspective of the settlement theory is attractive on both normative and positive grounds that distinguish it from the political economy theory of big business capture.[27] Its normative attraction is in explaining why, consistent with interest group competition, economic growth and economic efficiencies matter for antitrust policy (along with the importance of distribution, which is related to inclusivity).[28] That is, the settlement theory explains why it is appropriate for these public interest considerations to play a substantial role in policy debates.[29]

Both aspects of the goal of inclusive growth—economic growth and inclusivity (related to distribution)—are socially valuable. As a result of economic growth,[30] particularly since some time in the 19th century, most people

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[27] Lancieri et al., *supra* note 1, consider and reject a public interest theory by which antitrust is largely a technocratic field that changes mainly by incorporating new developments in economics. *Id.* That theory differs from the settlement perspective discussed here because it does not account for the influence of interest group competition. In addition, the public interest theory does not account for the complexity of the relationship between developments in economics and legal change, though it does recognize (correctly) that antitrust rules and enforcement have responded to new economic learning. *See* Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 69–70 (Antonio Cucinotta, Roberto Pardolesi & Roger Van den Bergh eds., 2002).

[28] If a single interest group such as big business controls economic regulatory policy, it is unlikely to capture and share the gains from efficiency and growth available from fostering competition. That interest group would face a choice between (i) using its position to appropriate rents from other groups rather than fostering competition among firms and (ii) using its position to foster competition while appropriating the social benefits of the resulting gains to the economy from increased efficiency and growth. It is unlikely to prefer to foster competition for two reasons. First, the gains from appropriating rents are likely achieved more quickly, and it would be expected to discount future profits. Second, it is likely impractical to generate greater competition among firms and simultaneously compensate firms for any resulting reduction in profits (along with giving them a share of the additional social gains from greater economic growth). Political actors often face difficulties in making commitments to compensate others in the future or to take future actions that would not be in their interest ex post. *See* Baker, *supra* note 5, at 493.

[29] The settlement theory is a political economy theory, not a public interest theory. To the extent growth and efficiency are understood to be important public interests, however, the two theories share a common feature: a recognition that arguments about the way antitrust rules and enforcement affect efficiency and growth matter to antitrust outcomes. *Cf.* Baker, *supra* note 5, at 492–93 (explaining that interest group bargaining may lead to the development of welfare-enhancing institutions, but noting that this outcome is not the inevitable product of Coasian bargaining among conflicting interest groups or evolutionary selection). In terms of schools of legal thought, the settlement theory is a positive political theory, not a public choice theory. While both theories use economics to study politics, the latter is heavily influenced by libertarian normative commitments. *See* McNollgast, *The Political Economy of Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1659 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[30] While economy-wide growth is neither an unqualified good nor the only good, it is socially valuable. Viewed as a measure of social well-being, it raises both measurement issues and conceptual ones. Per-capita income statistics, a common measure, do not account for the value of

today live in vastly greater comfort and material circumstances than their counterparts in the past—in terms of food, shelter, clothing, health and medical care, ability to travel and communicate, access to information and entertainment, leisure time and options, and more.[31]

Economy-wide growth does not improve everyone's circumstances at the same rate. Individual quality of life depends on the distribution of wealth and income across society as well as on the average level. Greater inequality is harmful in many ways.[32] It can undermine the legitimacy of the social order, and the morale and work effort of those left behind, by eroding the sense that society gives everyone a fair opportunity to succeed and an equal voice in the nation's future. It can also skew public policies to favor the wealthy, violate common moral norms, and slow economic growth.

Both economic growth and inclusivity are important for ensuring political support for antitrust. From the perspective of the settlement political economy theory, antitrust rules should tilt more toward fostering growth than inclusivity the more that other economic policies are successful in limiting inequality, and they should tilt more toward distribution the more that other economic policies are successful in fostering growth.[33]

The settlement political economy perspective is also attractive, and distinguished from the business capture political economy theory, because it offers a historically grounded account of the changes in antitrust enforcement since the mid-20th century that also rationalizes the way antitrust changed during

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non-market economic activities such as household production (e.g., cleaning, cooking, and childcare) or account for negative externalities from economic activities (e.g., environmental harms). In concept, economic growth does not account for non-economic aspects of well-being such as leisure, health and mortality, education, and financial security. For an analysis indicating that variation in per-capita income across countries is nevertheless closely related to variation in welfare, see Geoffrey J. Bannister & Alexandros Mourmouras, *Welfare vs. Income Convergence and Environmental Externalities* (Int'l Monetary Fund Working Paper No. 17/271, 2017), ssrn.com/abstract=3104541 (growth measures also do not account for distribution, but that idea is captured by the inclusivity aspect of the inclusive growth goal).

[31] Indeed, most people in the United States today have access to many valuable things that could not have been bought in 1900 at any price, including, for example, our health and lifespan, smartphones and computers, washing machines, air conditioners, automobiles, and rural electrification. *See generally* MARK KOYAMA & JARED RUBIN, HOW THE WORLD BECAME RICH: THE HISTORICAL ORIGINS OF ECONOMIC GROWTH 1–16 (2022); J. BRADFORD DELONG, SLOUCHING TOWARDS UTOPIA: AN ECONOMIC HISTORY OF THE TWENTIETH CENTURY, 1–26 (2022).

[32] *See generally* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 5–10 (2015).

[33] *See* Baker, *Economics and Politics*, *supra* note 19, at 2186 (discussing how the welfare standard should be sensitive to changing political risks); *id.* at 2187 (describing social insurance as a side payment to protect political support for competitive markets); BAKER, *supra* note 12, at 192–93 (describing antitrust law's bar to cross-market welfare tradeoffs similarly while suggesting that it should be understood not to prevent firms from conduct when the benefits to competition in one market greatly exceed the harms in another and there is no practical less restrictive alternative).

the 1940s. Unlike the capture theory, moreover, the settlement theory explains why the political debate over antitrust policy faded in salience over time.[34]

The settlement political economy perspective is not inconsistent with recognizing the neoliberal turn in economic regulatory policy during the 1980s.[35] From the settlement perspective, that turn is understood as the product of a shift in the governing coalition from center-left to center-right, which led to a substantial reform of the way inclusive growth was pursued but not to a rejection of that goal.[36] The shift in the governing coalition, in turn, can be understood as reflecting in part the ability of big business to capitalize on adversity—its position outside the prior governing coalition along with the economic problems of the 1970s—to overcome their collective action problems.[37]

It is not possible to discriminate between the two political economy theories by looking at the way antitrust law changed between, say, 1950 and 2015. Each theory provides an explanation for the major transformation during that period: the reworking of antitrust rules associated with judicial adoption of Chicago School views around the 1980s. For the big business capture theory, the shift in rules arose when big business interests secured sufficient influence over antitrust institutions to precipitate the adoption of a new approach. For the settlement theory, the shift in rules was tied to the shift of a governing coalition from center-left to center-right, operating within the bounds of the settlement. Neither theory purports to explain more subtle variation in antitrust law during these sixty-five years before or after the major mid-course shift, nor to explain in detail the specific ways that the courts altered the rules.[38]

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[34] *Infra* note 41 and accompanying text.

[35] On the neoliberal turn, see Baker, *supra* note 4, at 721–22; Glick & Bush, *supra* note 6, at 22–23.

[36] *Supra* note 25. That political shift explains why Chicago School ideas—which the center-right coalition found congenial—had little traction before the 1970s but substantial influence after.

[37] *Cf.* BAKER, *supra* note 12, at 46 (describing policy outcomes as the product of interest-group competition mediated by ideology). While the economic challenges of the 1970s affected all interest groups, it is plausible that groups on the right, which were sympathetic to big business concerns yet outside the then-governing center-left coalition, could more effectively exploit those challenges to solve their collective action problems. Lancieri et al. similarly take the view that the difficult 1970s economy created an environment congenial to the political acceptance of Chicago School ideas that served big business interests. Lancieri et al., *supra* note 1, at 517.

[38] The business capture theory presumably explains changes after the 1980s as reflecting, in a general way, negotiations among the big business interests that have collectively captured antitrust law and policy. It would presumably seek to account for ways that the bargaining leverage and payoffs to various members of the big-business interest group changed as the economy changed, for constraints imposed by government institutions, and for new ideas that have influenced business thinking. The settlement theory would explain changes before and after the major 1980s shift as reflecting, in a general way, negotiations within the governing coalition or poten-

Unlike the political economy theory of big business capture, however, the settlement political economy perspective provides an explanation for the post-2015 ferment among policymakers and commentators seeking to strengthen antitrust law and enforcement. Although market power in the economy has been growing more substantial and widening since the 1980s, this was not recognized broadly in the economics literature or connected with systematical deficiencies in the intellectual arguments for the conservative antitrust program that has shaped antitrust rules and enforcement since the late 1970s until the mid-2010s.[39] Before the mid-2010s, the public had little basis for recognizing that antitrust rules were increasingly unsuccessful in supporting the goal of inclusive growth. Not surprisingly, a recent review of opinion polling evidence found that antitrust retained wide popular support after the 1980s and that the decline in its political salience, famously recognized by historian Richard Hofstadter in the mid-1960s,[40] continued throughout the second half of the 20th century.[41]

The recent change in intellectual climate has given the victims of market power a greater ability to connect economy-wide trends and their own personal situations with lax antitrust enforcement. As people come to recognize that antitrust rules are not supporting either inclusivity or economic growth, it becomes more attractive for political actors to mobilize interest groups comprised of the victims of market power.[42] If such a political mobilization does not succeed and the antitrust laws and enforcement are not strengthened, we may look back from some future vantage and conclude that the mid-20th cen-

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tially a change in the governing coalition (e.g., back to center-left), while accounting for similar additional influences.

[39] See, for example, my two surveys: Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015), and Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH (March 2017), equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today. The parallel neo-Brandeisian political critique of concentration first attracted public attention around the same time, with a 2016 speech by Senator Elizabeth Warren and a 2017 conference at the University of Chicago. Baker, *supra* note 4, at 705 n.1. Analogous ferment in European competition policy similarly began around 2015. Laurent Warlouzet, *Toward a Fourth Paradigm in European Competition Policy? A Historical Perspective (1957–2023)*, *in* THE TRANSFORMATION OF EU COMPETITION LAW: NEXT GENERATION ISSUES 33 (Adina Claici, Assimakis Komninos & Denis Waelbroeck eds., 2023); *see* Or Brook, *In Search of a European Economic Imaginary of Competition: Fifty Years of the Commission's Annual Reports*, 1 EUR. L. OPEN 822 (2022) (describing rhetorical moves during Commissioner Margrethe Vesteger's tenure away from an exclusive focus on economic concepts when discussing the goals of competition policy but not when defending prohibitions).

[40] Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS 188 (First Vintage Books 2008) (1965).

[41] Polling evidence indicates a continuing high support for antitrust. Lancieri et al., *supra* note 1, at 450–56 *see also* Baker, *supra* note 4, at 716 n.50.

[42] For the same reason, the failure of the antitrust rules as reframed during the 1980s to prevent the substantial and widening market power we see today threatens the informal political bargain to pursue inclusive growth. BAKER, *supra* note 12, at 48–52.

tury settlement by which economic policy focused on the pursuit of inclusive economic growth, relying in part on antitrust, ended during the early 21st century, replaced by oligarchy or crony capitalism.[43]

One danger is that a Supreme Court majority in thrall to a Chicagoan perspective on antitrust would stymie the strengthening of antitrust required to address the substantial and widening market power in the U.S. economy, particularly if a gridlocked Congress would not step in.[44] Then market power may grow to the point where both its beneficiaries and its victims reject the idea that economic regulatory policy, including antitrust, supports inclusive growth. That would overturn the settlement, and the politics of economic regulation would become a purely distributional contest. Even if that distributional contest takes place on a level playing field, where it is possible for those out of power to oust the governing coalition through political mobilization, that outcome would result in slower economic growth than what would have been feasible and would also lead to an uglier form of politics, closer to a zero-sum contest. The political system would change for the worse and likely transition to oligarchy if a governing coalition, unwilling or unable to address our market power problem, is able to lock in its political control, as by systematically disenfranchising opposing views, gerrymandering voting districts, and eviscerating constraints on corporate political contributions.[45]

More optimistically, we may look back and conclude that the settlement and the pursuit of economic growth was reinvigorated through initiatives that commenced during the Biden administration, and that antitrust played a major role in achieving that end.[46]

III. DIFFERENT LESSONS FOR ANTITRUST POLICY

The settlement political economy perspective suggests different lessons for antitrust policy than those suggested by the capture theory. First, for the rea-

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[43] *See id.* at 55–56 (defining these political systems and explaining why Trump's election made concerns about them more salient).

[44] *See* Baker, *supra* note 17.

[45] *Cf. supra* note 21 (explaining that the settlement perspective supposes that an interest group in power cannot create procedural hurdles that impede the ability of competing interest groups to organize). The big business capture theory raises a similar concern. *Supra* text accompanying note 4. The central role of anti-oligarchy politics in neo-Brandeisian thinking suggests that at least some neo-Brandeisians believe that such a transition has already occurred.

[46] Beyond the Biden administration's whole-of-government approach to competition policy, *see* Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021), I have in mind industrial policy initiatives involving public investments to promote research and domestic manufacturing in "key industries of the future." *See* President Joe Biden, Remarks by President Biden on Bidenomics (June 28, 2023), www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/28/remarks-by-president-biden-on-bidenomics-chicago-il; *cf. supra* note 24 and accompanying text (describing an industrial policy of providing public goods and extensive government support for research and development as a component of the mid-20th century approach to inclusive growth).

sons indicated above, this settlement theory implies that antitrust policy is concerned with economic growth and efficiency, not just with distribution. Recognizing antitrust's political context does not mean rejecting the pursuit of efficiency and growth, the sources of social gains from competition, in favor of pursuing inclusivity (improving the distribution of economic benefits); it means considering both.

In addition to the normative justification for considering inclusivity when implementing competition policy,[47] there is a more practical reason. The economics literature shows that competition promotes efficiency and economic growth,[48] but competition, alone, will not ensure inclusivity. Market power makes inequality worse, so policies that make the economy more competitive do have distributional effects on average that benefit inclusivity.[49] But even a perfectly competitive market tends to generate allocations of goods and services that favor the wealthy.[50] In an economy where the social safety net has not prevented inequality from widening, therefore, the distributional benefits of reducing market power are not enough: promoting competition without an additional sensitivity to distributional effects would go too far toward pursuing growth without inclusivity.[51]

Second, the dual focus on inclusivity and growth entails an important lesson: economic analysis and economic evidence appropriately play a central role in developing antitrust rules and making enforcement decisions. For antitrust to succeed in supporting inclusive growth, it is necessary to understand both the distributional consequences of antitrust rules and the consequences of those rules for economic growth and efficiency. Economics is essential for understanding business behavior and synthesizing documents and testimony when evaluating litigant claims in individual cases and for understanding whether and how antitrust rules advance inclusive economic growth. Hence, there is no contradiction between recognizing that antitrust operates in a polit-

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[47] *Supra* text accompanying notes 28–33.

[48] *E.g.*, BAKER, *supra* note 12, at 27–28; *id.* at 223 n.109 (collecting sources).

[49] Baker & Salop, *supra* note 32, at 11–13.

[50] More technically, competitive markets maximize a social welfare function that gives more weight to those who value additional income the least, who are generally those with higher lifetime incomes. Takashi Negishi, *Welfare Economics and Existence of an Equilibrium for a Competitive Economy*, 12 METROECONOMICA 92 (1960); *see also* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018); Elizabeth A. Stanton, *Negishi Welfare Weights in Integrated Assessment Models: The Mathematics of Global Inequality*, 107 CLIMATIC CHANGE 417 (2011). Perfect competition does not tend to redistribute endowments toward the less well off because a market participant does not trade if it expects that doing so will make it worse off.

[51] Distributional effects are one reason why antitrust law discourages justifying harm to competition in one market by the benefits the same conduct has for competition in other markets. "The legal prohibition on cross-market welfare trade-offs operates informally as a type of social insurance against the risk of losses from anticompetitive conduct to interest groups vulnerable to injury from the exercise of market power by large firms." BAKER, *supra* note 12, at 192.

ical context—the context in which the goal of inclusive growth was established and the context in which antitrust rules aiming to achieve that goal are developed—and framing arguments about how best to achieve that goal in economic terms.

Not surprisingly, economics plays a central role in antitrust today. The federal enforcement agencies incorporated economic thinking and increased their commitment to doing so throughout the second half of the 20th century.[52] A great deal of antitrust scholarship, including much of mine, translates economic thinking for application to antitrust policy and works out the antitrust implications of developments in economics. Antitrust litigation often comes down to a contest between economic narratives: an explanation by the plaintiff about why defendant's conduct harms competition, and an explanation by the defendant about why it does not or, even better, why it benefits competition. Although most enforcement agency investigations do not lead to litigation, that contest always lurks in the background, shaping investigations.

Third, the settlement political economy perspective does not imply that economic analysis and arguments have systematically been shaped to serve business interests. Unlike the capture theory, it makes room for other, more plausible possibilities. Academic economics has changed greatly since the 1980s, most importantly through the game theory revolution in microeconomics and the development of new empirical techniques that take advantage of dramatic improvements in computing power and data availability. These developments have in general worked to qualify or undermine the Chicago School economic views that underly many of the 1980s' new antitrust rules—as the success of post-Chicago economic analyses suggests.[53]

The contemporary academic economic literature on antitrust-related topics is often sympathetic to enforcement and by no means systematically skeptical—indicating that that field of industrial organization economics is not skewed to favor big business interests. Any appearance otherwise is more likely due to selection—a tendency of big business interests to hire consulting economists with a compatible view—than to an incentive to manipulate the courts with theories cooked up to please potential big business sources of financial support.[54] Moreover, the antitrust enforcement agencies can draw on their substantial internal economic expertise.[55] For these reasons, the potential

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[52] This trend is evident in the history of the role of economics at the FTC. *See generally* Paul A. Pautler, *A History of the FTC's Bureau of Economics*, 28 RSCH. L. & ECON. 143 (2018).

[53] *Supra* note 17 and accompanying text.

[54] While antitrust disputes often provide data and exposure to business practices that stimulate academic work, economists on both sides of the case are stimulated that way.

[55] Private litigation can differ from government litigation. In private litigation involving a dominant firm accused of anticompetitive exclusionary conduct by a smaller rival, the defendant usually has a larger economic stake in the outcome because it stands to lose market power, while

biases and interests of economic experts are no more a reason for enforcers and courts to downplay or ignore economic analysis in antitrust than they would be to downplay expert testimony in any other area of litigation.[56]

Fourth, the settlement perspective provides an account of the democratic legitimacy of antitrust law, rules, and enforcement policy—both around 1940, when the courts began to strengthen the rules, as well as around 1980 when the courts began to weaken the rules. The first shift was consistent with the outlook of the center-left governing coalition on economic regulatory policy of that era, while the second tracked the outlook of the newly ascendant center-right governing coalition. Because antitrust law operates like a common-law field (though it is formally a matter of statutory interpretation), the democratic legitimacy of its rules derives from the way they reflect the ideological perspective of the governing coalition in the political branches, implemented through the selection and confirmation of judges and justices.[57] While changes in antitrust rules produced by statutory changes would have greater democratic legitimacy, particularly in a legislative environment characterized by heightened political salience of competition policy, these broad judicially-created changes are not illegitimate.[58]

Finally, the settlement political economy perspective does not entail an intellectual commitment to treating the danger of oligarchy as the fundamental or determinative threat to democracy today. The big business capture theory, by contrast, leaves little room for recognizing the imminent threat to democracy from Trumpian populism.

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the successful plaintiff would expect face a more competitive market. *See* Richard J. Gilbert & David M. G. Newbery, *Preemptive Patenting and the Persistence of Monopoly*, 72 AM. ECON. REV. 514 (1982). The differing stakes could lead to a systematic difference in the quality of economic testimony between the parties that favors dominant firms, which a judge would need to account for. *See* Erik Hovenkamp & Steven C. Salop, Asymmetric Stakes in Antitrust Litigation, SCHOLARLY COMMONS (Mar. 29, 2020), scholarship.law.georgetown.edu/facpub/2250.

[56] Judges routinely hear and evaluate competing expert testimony in many areas of law, including scientific, engineering, and medical testimony as well as economic testimony. Judges also routinely evaluate the bias and interests of parties and witnesses.

[57] A governing coalition cannot expect to anticipate all the issues that will arise in the future or expect that it will usually be able to respond with new legislation when that happens. Under such circumstances, it can help ensure that its views are implemented on future issues by selecting and confirming judges based on ideological outlooks.

[58] BAKER, *supra* note 12, at 65. This conclusion assumes that the courts, in deciding antitrust cases, act consistently with the norms governing the judicial role. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2384 (2023) (Kagan, J., dissenting) (arguing that the Court majority exceeded "its proper, limited role" in interpreting a non-antitrust statute). Daniel Crane provides another argument for democratic legitimacy when he concludes that in the past, Congress has repeatedly acquiesced to the cabining-in of antitrust statutes through judicial interpretation. Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1213–14, 1228, 1233, 1237, 1241 (2021).

CONCLUSION

Both the capture theory and the settlement theory provide an explanation for the way antitrust law and enforcement changed during the 1980s toward a more business-friendly approach that turned out to be inadequate to deter growing market power. The stakes in accepting one of these two political economy theories are about how to frame, understand, and implement antitrust policy, including: whether antitrust should be concerned with efficiency and growth (as well as distribution); the proper role of economics; and whether, when seeking to protect democracy, to prioritize attacking economic concentration or confronting direct authoritarian threats. These differences are related to the fault lines between groups of reformers: the business capture theory has an affinity with the neo-Brandeisian (antimonopoly) perspective on antitrust reform, while the settlement political economy theory is more closely aligned with the views of center-left (post-Chicago) reformers.[59]

The two perspectives on political economy often point in the same direction, as many types of reform initiatives would advance the goals of both reform groups.[60] Yet no matter how antitrust reform proceeds, it would be a mistake for antitrust rules and enforcement specifically, and domestic economic policy generally, to give up on the pursuit of inclusive growth.

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[59] On the differences between antitrust reform camps, see Baker, *supra* note 4.
[60] *See id.*