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# Paper Trail: Recent Papers on Antitrust and Structural Racism

***Editor's Note:*** *Two recent papers study how antitrust doctrine—past and present—contributes to structural economic racism, and how it could be changed to generate a fairer competitive landscape through "antiracist" policies. Is an "antiracist antitrust" feasible?*

*Reviewed by Matthew E. Moloshok*

**Bennet Capers & Gregory Day, Race-ing Antitrust, 121 Mich. L. Rev. 523 (2023); Hiba Hafiz, Antitrust and Race, 100 Wash. U. L. Rev. 1471 (2023)**

Antitrust scholars pay attention to social movements. Occupy Wall Street prompted articles addressing how and whether antitrust law should be used to address income and wealth inequality. Black Lives Matter prompted opinion pieces calling for "antiracist" antitrust policies and enforcement; Federal Trade Commission (FTC) Commissioner Rebecca Kelly Slaughter notably sent a series of tweets calling for exploration of how the FTC could use "the tools we have" to help build an equitable and antiracist economy, followed by an address on the subject.[1]

What would "antiracist" antitrust entail? Two recent articles offer expansive proposals: Bennet Capers and Gregory Day's *Race-ing Antitrust*[2] and Hiba Hafiz's *Antitrust and Race*.[3] Both papers argue that racism is a distinct harm to markets and market participants, which more general "total welfare" approaches do not adequately address. In particular, they assert that using "color blind" antitrust standards leads courts and agencies to exacerbate harms that disproportionally impact non-white workers, consumers, investors, and communities.

Based on these principles, Professors Capers and Day provocatively propose deploying "critical race theory" to shape both antitrust standards and remedies, while Professor Hafiz, recognizing the "precarity" of race-conscious remedies, offers a somewhat more mainstream but nonetheless sweeping list of reforms. This Paper Trail can barely scratch the surface on the authors' extensive thoughts.

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In *Race-ing Antitrust*, Capers and Day advocate an all-out application of critical race theory (CRT) to re-imagine antitrust doctrines and enforcement.[4] They posit that racial discrimination in itself is a form of market failure because it prevents free market competition for jobs, capital, and business opportunities. Social discrimination and legislative enactments put non-whites in a separate caste; concerted action of labor unions, homeowners' associations, and bankers, among

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[1] Rebecca Kelly Slaughter (@RKSlaughterFTC), Twitter (now known as "X") (Sept. 9, 2020, 2:28 PM), https://twitter.com/rkslaughterftc/status/1303762111433265153; Rebecca Kelly Slaughter, Antitrust at a Precipice: Remarks at the GCR Interactive: Women in Antitrust (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

[2] 121 Mich. L. Rev. 523 (2023) (hereinafter "Capers & Day").

[3] 100 Wash. U. L. Rev. 1471 (2023) (hereinafter "Hafiz").

[4] Capers & Day, 121 Mich. L. Rev. at 529-30.

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others, have closed and distorted markets for work, home ownership, and access to capital and banking services. Failing to confront these racism-influenced structures preserves the "misallocation of resources along lines of race rather than their most productive uses."[5] Yet the prevalent antitrust approaches used by courts operate as if those barriers do not exist. Capers and Day have particular antipathy to the "consumer welfare standard" for evaluating competitive harms precisely because that standard treats consumers as a homogeneous mass, uniformly impacted by market conduct, when prior discrimination shaped markets in ways that minorities may suffer disproportionate harm.

For example, use of the consumer welfare standard has resulted in a free pass for most noncompete and no-poach agreements between employers and employees, even in industries such as franchised food outlets, where the impacted jobs are disproportionately held by minority workers, and predictably depress wages, and prevent job switching or starting one's own business.[6] As it happens, while Capers and Day were writing their article, the FTC issued a proposed rule that would ban most noncompete clauses between employers and employees (although not between franchisors and franchisees).[7] One step forward, perhaps, although it still leaves the consumer welfare standard applicable to other vertical restraints.

Capers and Day also point to real estate restrictive covenants as another vertical restraint that harms minorities—as grocery stores have used them to "metaphorically salt[] the fields as they retreat[ed] to the suburbs in order to make sure that no other supermarket can spring up and sell food at that location to local residents."[8] Bank mergers are another example; whatever benefits they offers the mass of consumers (and those are dubious), closing banks in inner city neighborhoods has led to "less credit at higher prices," with check-cashing stores and pay-day lenders proliferating to fill the void, while the "underbanked population has exploded."[9] Or, consider market power exercises in health care—Capers and Day offer the example of insulin, essential to the management of diabetes. Insulin itself is no longer subject to patent, but three manufacturers hold patents over the "pen" delivery systems used to administer the appropriate dosage, and thus hold significant market power. Theoretically, a procompetitive counterweight would be prescription benefit managers (PBMs) engaged by health insurers, who can use their buying power to negotiate prices downward. However, having given price concessions to the PBMs, the pen manufacturers then extract higher prices from uninsured patients, more than half of whom are people of color. This forces the uninsured to forego the drugs, use them less frequently, or use non-pen systems in which they can dilute them. Professor Day earlier proposed, and Capers and Day concur, that the rule of reason should be modified to subject vertical agreements related to such necessities to the

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5 *Id.* at 528.

6 *See also*, Gabriella Monahova & Kate Foreman, *A Review of the Economic Evidence on Noncompete Agreements*, CPI Columns (May 31, 2023), https://www.pymnts.com/cpi_posts/a-review-of-the-economic-evidence-on-noncompete-agreements/, at 7 (review paper, finding "strong evidence that noncompetes decrease worker mobility; limit entrepreneurship (and therefore competition); and disproportionately affect women, less-educated workers, and those who are less able to bargain over their work contracts, such as workers in low-wage occupations.").

7 Federal Trade Comm'n, Non-Compete Clause Rulemaking (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

8 Capers & Day, 121 Mich. L. Rev. at 534-35 (quoting Christopher R. Leslie, *Food Deserts, Racism and Antitrust Law*, 116 Calif. L. Rev. 1717, 1736 (2022) (internal quotation marks omitted)).

9 *Id.* at 535; *see also*, Jeremy C. Kress, *Reviving Bank Antitrust*, 72 Duke L. J. 519 (2022) (asserting that banking mergers have raised prices and caused non-price harms such as reduced access to local branches that antitrust enforcers ought to consider in evaluating bank mergers).

"quick look" standard; that would switch the burden of proof away from the consumers and onto the suppliers and their powerful trading partners.[10]

Capers and Day address prisons as another monopoly that extracts supracompetitive prices from minorities. Prisons hold monopoly power over prisoner purchases and access to information, as well as monopsony power over prisoner labor. Because minorities face incarceration disproportionately to the white population, they disproportionally suffer when the state (or its private contractors) exercises monopoly power.

Capers and Day even go a step further, positing what they call the "whiteness" of antitrust. Under that theory, Robert Bork (the progenitor of the "consumer welfare" standard) and judges and agency personnel applying the consumer welfare standard all grew up in environments in which advertising and media presented "consumers" as white people, which at some level subliminally could suggest that whatever is good for (white) consumers, is good for everyone. Another concerning example is health care, because "even when controlling for factors such as health insurance and poverty," Black patients have received worse healthcare and suffered worse health outcomes compared to white patients.[11] Capers and Day attribute this to implicit bias in medical training and diagnostics they describe as "grounded in white skin."[12] It is not clear, exactly, how Capers and Day believe that antitrust would rectify this, but it is another example of structural disparities tied to "whiteness."

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Neo-Brandesian antitrust raises many of the same concerns and policy recommendations as Capers and Day, but Capers and Day contend that the Neo-Brandesians' approach is insufficient to solve the problem: ignoring racism (or, more passively, simply not mentioning it) leaves racial inequality entrenched. That is, a CRT-based antitrust would identify societal racism—not just market behavior—as a "source of market failure," with consequences "materially similar to a conventional antitrust injury."[13] Hence, Capers and Day assert that "[i]f nothing more, antitrust enforcement actions should disaggregate the term 'consumer' and recognize that consumers are differently positioned, especially along lines of race."[14] Their preferred regime, however, would go beyond that tweak and instead utilize a "*community* welfare standard," which would "constantly 'look to the bottom' and consider the perspective of the most vulnerable," with a view to "eradicating inequality along lines of race, gender, disability and other forms of subordination."[15] That regime would consider the interests of entire communities—consumers, businesses, workers, and neighborhoods.

To be sure, Capers and Day's approach differs from "total welfare standard," as articulated by (among others) Christine S. Wilson when she served as a Commissioner of the FTC.[16] Wilson's conception would only have considered the interests of producers as well as consumers. For example, she viewed it as inherently too difficult to measure and balance all potential interests that would need to be balanced. She also believed that goals such as reducing wealth inequality could be

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[10] Gregory Day, *The Necessity in Antitrust Law*, 78 Wash. & Lee L. Rev. 1289 (2021).

[11] Capers & Day, 121 Mich. L. Rev. at 549.

[12] *Id.* at 550 (internal quotations omitted).

[13] *Id.* at 566-67.

[14] *Id.* at 568.

[15] *Id.* at 569-71 (emphasis added).

[16] Christine S. Wilson, Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf, at 12-18.

achieved by "more direct ways," such as transfer payments or tax benefits.[17] In Wilson's view, a "total welfare standard" focusing on consumers and producers could in itself "maximize total surplus," and thereby give policy makers "redistributing that surplus a larger pie with which to work."[18] Capers and Day, however, view all total welfare approaches from the antitrust world skeptically (without specifically commenting on Wilson's proposals). First, under any total welfare approach, a net societal benefit from conduct that adversely impacted only a single minority group would seem to pass antitrust muster. Second, Capers and Day seek to change the market structures that generated the inequality, which would eliminate a need to redistribute incomes or wealth.

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Capers and Day then call for the elimination of state-action immunity and reduction of regulation regulation. The state monopolizes some areas in which minority populations are particularly vulnerable, such as lotteries, and prison services, in which they contend "people of color are primarily harmed," while licensing and state-imposed monopolies can each "erect insurmountable barriers to entry," say for African hair-braiding businesses or other small, community-facing entrepreneurial endeavors.[19] This approach is solidly mainstream; the FTC created an Economic Liberty Task Force to examine ways to reduce regulatory barriers that helped to entrench incumbents and continue to do so.[20] However, a deft hand is required to eliminate unnecessary regulation while still maintaining public safety (say, in building trades) where it is often poor and minority communities which are exposed to the worst abuses in the absence of regulation.

Capers and Day acknowledge their CRT approach is "radical," but do not see any impediments to their approach beyond willingness to engage. Just as the Chicago School was implemented as a judicial creation; courts and legislatures are free to change these things, so Capers and Day believe: "The task, now, is simply to begin."[21]

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While Professor Hafiz in her paper, *Antitrust and Race* ("Hafiz"), agrees with Capers and Day's descriptions of the problem, she acknowledges the "precarity" of race-conscious enforcement and remedies. Her paper offers a range of policy proposals which are not particularly distinct from Neo-Brandesians on the one hand or Capers and Day on the other (apart from removal of the CRT label).

What distinguishes Hafiz's work is her review of some 3,600 reported decisions under the Sherman Act since its enactment, an effort that documents the sordid failure of courts and government to attack concerted discriminatory actions by labor unions, homeowners' associations, and banks as antitrust violations. She found that only 168 of those decisions even referred to the race of perpetrators and victims, and only a handful treated racial discrimination or its effects as salient to the alleged antitrust violation.[22] Hafiz criticizes this "colorblind" approach because it reflects a "failure to identify under a traditional antitrust analysis the ways in which race is salient to how markets actually function, or that race *has* economic salience in marketplaces."[23] In this regard,

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[17] *Id.* at 13.

[18] *Id.* at 14.

[19] Capers & Day, 121 MICH. L. REV. at 573.

[20] *See*, Press Release, Federal Trade Comm'n, FTC Launches New Website Dedicated to Economic Liberty (Mar. 16, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/03/ftc-launches-new-website-dedicated-economic-liberty; FEDERAL TRADE COMM'N, *Economic Liberty*, https://www.ftc.gov/policy/advocacy-research/advocacy/economic-liberty.

[21] Capers & Day, 121 MICH. L. REV. at 575.

[22] Hafiz, 100 WASH. U. L. REV. at 1473.

[23] *Id.* at 1488 (emphasis in original).

Hafiz rejects the notion that antidiscrimination laws are themselves a sufficient corrective; if (say) a hospital in a predominantly Haitian neighborhood terminates a Haitian nurse, the antidiscrimination laws do not get involved in the impact of the termination on patients or the community.

Hafiz properly singles out refusals to deal as a needed area for reform. When antitrust law champions the *Colgate* doctrine—the principle that parties are free to decide who they wish to do business with—it essentially allows race discrimination to flourish. Indeed, Hafiz points to the Second Circuit's 1915 decision in *Great Atlantic & Pacific Tea v. Cream of Wheat* as authorizing a refusal to deal even if it were due to "prejudice."[24] Between the "anything-goes" right to refuse to deal, and societal bias generally, minority enterprises lack an opportunity to get a foot in the door in many markets. Indeed, even a monopolist's refusal to deal cannot be challenged, unless doing so disrupted a prior course of dealing.[25] As minority enterprises are less likely to have a prior course of dealing, the *Colgate* doctrine perpetuates their exclusion.

Hafiz, like Capers and Day, is also a critic of the rule of reason, but she comes at it from a different angle: the way government usually assembles data at the level of metropolitan statistical areas smooths out (and thus prevent detection of) racial disparities and income disparities between particular neighborhoods or towns within the larger area. Consequently, it is hard to show relevant markets or submarkets within the larger area, much less show adverse competitive impacts upon them. Hafiz proposes having government use civil investigative demands, merger approval, and other powers to force companies to produce their internal data showing individual location data, which could show the adverse impacts. Hafiz also criticizes "multi-market balancing, assessing procompetitive justifications in markets outside the market of a challenged anticompetitive restraint in order to immunize agreements and conduct harmful to people of color."[26] What she has in mind here are cases (such as, but not limited to, those involving college athletes) that have allowed collusion harming the workers (the athletes) because it would benefit the down-stream consumers (the spectators/viewers). Hafiz goes on to observe that the DOJ and courts have failed—in even a single case—to use their power under the Tunney Act's "public interest" standard to assess if consent decrees in actions brought by the United States, including those involving mergers, would have adverse impact on minority communities.

So too, in the application of Horizontal Merger Guidelines, Hafiz finds no evidence in the public records that agencies have ever studied the impacts of mergers on racial minorities. She also observes that in the first hundred-plus years of antitrust enforcement, the agencies stood by while "white-dominated cartels and dominant incumbents" refused to deal with minority businesses and discriminated against minority workers and consumers in virtually every industry. And when private parties brought antitrust suits, government agencies treated their complaints as civil rights concerns, rather than antitrust claims. She found only one exception—*Bratcher v. Aron Area Board of Realtors*,[27] where the DOJ intervened to allege that realtors had conspired to exclude Black owners and renters from white neighborhoods.

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[24] 227 F. 46, 49 (2d Cir. 1915).

[25] Hafiz, 100 Wash. U. L. Rev. at 1509 (citing *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 401-05 (2004)).

[26] *Id.* at 1501-02 (citing an earlier paper she authored, Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. Chi. L. Rev. 381, 392-99 (2020)).

[27] 381 F.2d 723 (6th Cir. 1967). The celebrated decision in *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981), which successfully challenged exclusion of Vietnamese commercial fishermen from Galveston Bay, was litigated privately, and itself is a rare example of a court applying antitrust law to racially motivated boycotts. Hafiz, 100 Wash. U. L. Rev. at 1498 n.108.

Hafiz acknowledges concerns that continuing to be color blind might be morally superior because that at least avoids "reproducing race-based distinctions or divisiveness."[28] However, she offers two responses: first, she asserts that acknowledging race-based distinctions serves a kind of truth and reconciliation benefit; second, she states that any practice or structure that limits equal access to market participants, reduces market "diversity," or enables price discrimination against groups of consumers based on race "*is* an antitrust harm."[29]

Acknowledging the constitutional "precarity of race-conscious policy under the current Supreme Court's approach to antidiscrimination law and affirmative action,"[30] Hafiz tries to thread a needle. She would allow courts and agencies to take enforcement action when "private actors anticompetitively harm competitors, workers, or consumers *based on* racial classifications" and she would permit "race-salient justifications only as defenses and in reference to those unlawful classifications."[31] It is hard to unpack these concepts.

*Hafiz proposes to have agencies use their authority in mergers and in civil investigative demands to drill down into what market participants know about the characteristics and circumstances of the customers and workers in the markets under consideration.*

When does she believe that conduct was impermissibly "based on racial classifications"? At times she defines it broadly, as encompassing not only intentional conduct, such as "race-based marketing strategies" but also conduct that resulted in "disparate impact."[32] Elsewhere she proposes that liability attach only if "firms are *targeting* race-specific price-discrimination markets."[33] She would identify those markets by gathering data to show how the product or geographic market was shaped by "redlining that has segregated neighborhoods and now shapes access to substitute goods and services," such that minority consumer and workers in that market have relative disadvantages in "access to public transportation, internet access, and bank credit," or face "unique switching costs, search costs, information asymmetries, and lock-in effects if prices for goods or services go up or wages go down."[34] Targeting would, however, imply that the market actor had the same information and was acting with intent to exploit the situation.

Meanwhile, Hafiz cautions that courts and agencies should not rely upon intuition as to the dimensions of relevant markets or submarkets, and should never "flatly assume that firms cannot price- or wage-discriminate on the basis of race."[35] Hafiz notes that her approach on data-driven market definition is regularly used (think *FTC v. Staples*)— but so far, it has been done without attention to how historic racism and its consequences gave contour to current markets. In part, this is due to lack of data (which appears to arise from failing to ask for data). Accordingly, Hafiz proposes to have agencies use their authority in mergers and in civil investigative demands to drill down into what market participants know about the characteristics and circumstances of the customers and workers in the markets under consideration.

Hafiz asks the pertinent and "troubling" question—"why should agencies or courts condemn a merger that creates anticompetitive effects for some consumers but produces significant efficiencies for others?"[36] Her answers are thoughtful. First, under current Merger Guidelines, balancing

[28] Hafiz, 100 Wash. U. L. Rev. at 1489.

[29] *Id.* (emphasis in original).

[30] *Id.* at 1518.

[31] *Id.* at 1518-19 (emphasis added).

[32] *Id.* at 1519, n.205.

[33] *Id.* at 1519 (emphasis added).

[34] *Id.* at 1519.

[35] *Id.* at 1521.

[36] *Id.* at 1524.

rights of consumers within a single market is inherent in merger review. Second, she believes balancing would be rare, particularly because "the Clayton Act prohibits anticompetitive mergers or acquisitions in '*any* market,' however broadly or narrowly defined, so long as it is economically significant, and current law prohibits multi-market balancing."[37] Third, balancing provides the opportunity to encourage equitable resolution; for example, conditioning a merger on an agreement not to close down supermarkets in neighborhoods X and Y might not materially alter the merger's efficiencies. In all events, allowing "balancing would bring out the 'difficult tradeoffs' between harmful effects and procompetitive benefits of firm conduct for courts to openly confront in a way that color-blind antitrust has thus far avoided, to the detriment of a broader understanding and accounting of how firm conduct impacts racial equity."[38]

Hafiz concludes with this observation: "Attuning antitrust doctrine and enforcement to the ways in which markets have entrenched incumbents, established conduct rules and administrative priorities that reinforced and even favored racial discrimination, and refusing to ignore the salience of race in how firms and employers compete will be crucial components of a broader project to dismantle systemic racism."[39]

## Can there be an antiracist antitrust?

The antiracist papers of both Capers and Day and of Hafiz are thought-provoking. They strongly make the case for an avenue to redress broad, societal, structural barriers to economic opportunity, and show why antitrust is the logical choice to assure a free and fair marketplace. Many of their proposals can easily fit within current antitrust principles. A group boycott, even if racially motivated, is still a group boycott; courts should not turf claims of that type to antidiscrimination laws. Mergers, or vertical conduct evaluated under the rule of reason that has unreasonable, adverse impact on markets or submarkets definable by the race, sex, or ethnicity of the market participants should be actionable. For example, if data showed that Spanish language speakers have a strong preference for Spanish language broadcasting, or if data showed that Black investors prefer to work with Black investment advisors, each of those would potentially be a distinct market or submarket, which does not depend on assumptions about characteristics of populations, but instead arises from documentable facts on the ground. Indeed, federal agencies themselves have begun to take steps to develop data on equity "barriers" as part of their investigative and enforcement standards.[40] Determining whether to apply a per se rule, a quick look, or a full rule-of-reason analysis is already something courts weigh all the time; to shift that boundary is well within the competence of courts.

Once one moves beyond those types of steps, however, there are significant barriers to developing an "antiracist antitrust" for reasons having nothing to do with antitrust law. The Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*

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[37] *Id.* at 1524 (citing *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963) and *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 609–11 (1972)) (emphasis in original).

[38] *Id.* at 1525.

[39] *Id.* at 1531-32.

[40] For example, in its most recent Equity Action Plan, the FTC proposes "to develop a toolkit for assessing whether certain communities are disproportionately suffering losses as a result of unfair or deceptive practices in the use of emerging technologies." Federal Trade Comm'n, Federal Trade Commission (FTC) Equity Action Plan (Apr. 14, 2022) at 5, https://www.ftc.gov/system/files/ftc_gov/pdf/FTCEquityActionPlanForRelease41422.pdf.

*College*[41] is just the latest reminder that government, including courts and agencies, cannot take affirmative action to rectify historic societal discrimination, unless attributable to the immediate parties before them. Meanwhile, the Supreme Court's recently-expanded "major questions" doctrine arguably could bar agencies from using their powers of defining "unfair" methods of competition to redress disparate market opportunities, even if those are the result of longstanding, intentionally discriminatory conduct by the dominant (historically white) society.[42]

Congress could potentially overcome both issues by legislation. It could solve the "major questions" problem by specifically investing agencies with sufficiently clear mandates to consider racism as a form of unfair practice. Congress (in contrast to courts) could adopt some version of "antiracist antitrust" as an appropriate step to eliminate modern "badges of slavery"; if Congress did so, and showed a rational basis to do so, that could insulate such measures from challenge under the equal protection guarantee of the Fourteenth Amendment.[43] As of this writing, however, Congressional action is vanishingly unlikely. A poll in 2023 found that Black Lives Matter lost popularity in the electorate between 2020 and 2023[44] and even the spate of papers on antiracist antitrust appears to have slowed. Aversion to CRT is a rallying cry for many on the right. Congress is deeply divided. Still, just as it took about one hundred years from the Emancipation Proclamation to secure the Civil Rights Act of 1964 and to begin enforcing the Reconstruction Era civil rights statutes, antiracist antitrust concepts eventually may also find acceptance. It is something of a moral imperative, and certainly implicit in antitrust law, that people who want to participate in markets will have fair opportunities to do so, and, as a corollary, that members of historically discriminated against groups may stand on their own and fairly compete in those markets. Congress can and should allow antitrust to embrace the challenge. ●

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[41] 143 S. Ct. 2141 (2023).

[42] *See e.g., Chamber of Commerce of United States v. Consumer Fin. Prot. Bureau*, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398 (E.D. Tex. Sep. 8, 2023) (applying the "major questions" doctrine, holding CFPB could not construe "unfairness" to include discrimination, where Congress had not specifically referred to discrimination or disparate impact in its creation and had not defined "protected classes or defenses"). *See also*, Dissenting Statement of Commissioner Noah Joshua Phillips Regarding Federal Trade Commission vs. Passport Automotive Group, Inc. et al., FTC File No. 2023199 (Oct. 14, 2022) (assertion of Count III claim of "unfairness" in charging higher rates to Black and Latino customers unnecessary because it is directly prohibited by the Equal Credit Opportunity Act, and "unfairness" does not embrace discrimination claims).

[43] *See* Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. Rich. L. Rev. 1291 (2022) (discussing Congress's "badges of slavery" authority and proposing a broad interpretation).

[44] Juliana Menasce Horowitz, Kiley Hurst, and Dana Braga, *Support for the Black Lives Matter Movement Has Dropped Considerably From Its Peak in 2020*, PewResearch, (June 14, 2023), https://www.pewresearch.org/social-trends/2023/06/14/support-for-the-black-lives-matter-movement-has-dropped-considerably-from-its-peak-in-2020/ (from approximately 66% to 51%, noting, however, wide disparities among demographic groups and differing reasons for the self-reported reductions in enthusiasm).