SYMPOSIUM

EDITORS' NOTE: "NO QUESTION OF MORE PRESSING IMPORTANCE"?

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In the fall of 1911, *The New York Times* published a series of comments by "Eminent Men of Affairs" discussing "The Problem of the Trusts."[1] The series launched in the wake of the Supreme Court's *Standard Oil* decision in May of that year, in which the Court broke Standard Oil into 34 independent companies but also appended "unreasonable" to the Sherman Act's previously categorical prohibition on combinations in restraint of trade.[2] *The Times* motivated the series by declaring that "[t]here is no question of more pressing importance in the United States today than that of the relations which shall subsist between the Government and the people on the one hand and combinations of the capital on the other."[3] Only three years prior to the passage of the Clayton Act, three discussion points were posed to these men of affairs in *The Times* series:

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[1] *See, e.g.*, *The Problem of the Trusts: Discussed by Richard Olney, in the First of a Series of Articles by Eminent Men of Affairs—He Believes Big Business Is Here to Stay, But Is Not Reconciled to Its Management by the Supreme Court—Congress Must Act*, N.Y. TIMES, Oct. 28, 1911, at 4 (prefacing editorial written by Olney) [hereinafter Olney].

[2] Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

[3] Olney, *supra* note 1.

1. "The effect of the operation of the Sherman anti-trust law as construed by the United States Supreme Court in the Standard Oil and Tobacco Trust cases.
2. Whether it is possible to restore the old-time competition or whether the country must legalize capitalistic and industrial co-operation.
3. If co-operation is necessary under existing conditions, to what extent shall the Government exercise regulation and supervision?"

Much undoubtedly has changed in the past 108 years. The United States has more than doubled its body of antitrust law, gained a far broader base of enforcement and judicial precedent, become increasingly federal (and global) in its approach to antitrust, and added a regulatory agency. We also, *finally*, factor in the views of serious women of affairs. But many features and modifications of the public discourse about antitrust remain the same.

When FTC Chairman Joseph Simons announced the Commission would host Hearings on Competition and Consumer Protection in the 21st Century, he said that the purpose of the multi-month series would be "to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy."[4] These same motivations are common threads through the 1911 commentary in *The Times*:

- **Broad-based changes in the economy:** Williams Jennings Bryan, Democratic politician and Secretary of State under Woodrow Wilson, advocated for a Democratic party platform prohibiting corporate control of more than 50 percent "of the total product" and government ownership, as "necessary whenever competition is impossible."[5] He cited increasing economy-wide concentration as the basis:

  > When the Sherman anti-trust act was passed the trust development was comparatively limited. Since then, consolidation and combination have gone on until now . . . nearly every great staple of industry is controlled as to prices and terms of sale. . . . The only reason for combination is to prevent competition, and the only reason for preventing competition is to secure larger profits.[6]

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[4] Joseph J. Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks of Chairman Simons Announcing the Competition and Consumer Protection Hearings (June 20, 2018).

[5] *The Problem of the Trusts: Discussed by William Jennings Bryan in the Eighth of a Series of Articles by Eminent Men of Affairs—Former Presidential Candidate Proposes License Plan to Break Up Trusts and Indorses Democratic Scheme to Limit Business of Inter-State Corporations*, N.Y. TIMES, Nov. 11, 1911, at 9 (prefacing editorial written by Bryan).

[6] *Id.*

- **Evolving business practices:** Samuel Gompers, in favor of a labor union exemption from the Sherman Act, wrote:

> Modern business cannot be conducted upon the old notions. Development industry does not admit of it. Development in transportation does not admit of it. The development and transmission of information does not admit of it. . . . While realizing the necessity for a freer hand in industry and commerce, untrammeled by government cramping . . . I am quite convinced that it is far more important for industry, commerce, labor, and the representatives of free institutions that the activities of wage earners, the wealth producers, in the opportunities for the protection and promotion of their rights and interest have predominating importance.[7]

- **New technologies**: George W. Perkins, ex-vice president of the New York Life Insurance Company and a former partner in the Banking House of J.P. Morgan advocated for limited regulation of the modern corporation (rather than its destruction):

> This is no longer an age of independent and competitive individualism; it is an age of co-operative individualism; and by the latter I mean the concentration of individualistic efforts. . . . What has brought about this changed condition? It is the great agents of modern life—steam and electricity. They have created intercommunication—enabled minds to exchange instantaneous thought. They have displaced the ox team, with its small radius of operation, with the fast railroad and the steamship, which gird the word: the slow mail by the lighting-like wireless or telephone. They have annihilated distance.[8]

If competition law is going to play the referee in the ways firms compete, then we should expect some evolution over time, as the ways that companies sell and consumers buy evolve. This is as true today as it was during antitrust law's earliest days. As we have seen over the past century, great leaps forward in technology precipitate periods of reckoning. The Sherman and Clayton

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[7] *The Problem of the Trusts: Discussed by Samuel Gompers in the Seventh of a Series of Articles by Eminent Men of Affairs—President of American Federation of Labor Discusses Difference Between Trusts and Unions, and the Right of a Freeman to Sell His Labor*, N.Y. TIMES, Nov. 9, 1911 (prefacing editorial written by Gompers); *see also* Loewe v. Lawlor, 208 U.S. 274, 304 (1908) (Union members could be liable under Sherman Act when organizing boycott of non-union made products.). A partial exemption for labor came with the passage of the Clayton Act in 1914. 15 U.S.C. § 17.

[8] *The Problem of the Trusts: Discussed by George W. Perkins in the Second of a Series of Articles by Eminent Men of Affairs—Financier Sees Danger to Business in Prosecution of Big Corporations, But Favors Regulation and Sees a Remedy in Publicity*, N.Y. TIMES, Oct. 30, 1911, at 6 (prefacing editorial written by Perkins).

Acts were drafted, implemented, and initially interpreted in the wake of the Second Industrial Revolution. The Chicago School and antitrust's *Microsoft* era bookend the Third.[9]

Nearly two decades ago, the *Antitrust Law Journal* published a precursor symposium to this one, on "Antitrust at the Millennium."[10] In that symposium, Robert Pitofsky wrote, "Of late, we hear increasing concern that the century-old Sherman Act cannot keep up with the more dynamic and fast moving developments of the 21st century," in the introduction to an article advocating for the application of antitrust's core principles to technology and intellectual property.[11] In the same symposium, Richard Posner contended, "There is indeed a problem with the application of antitrust law to the new economy, but that it is not a doctrinal problem; antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy. The real problem lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly."[12]

Taking inspiration from both Pitofsky and Posner, we offer this symposium to ask (again) whether the core antitrust principles and/or our tools for enforcement are what they need to be to grapple with an economy in the midst of the Fourth Industrial Revolution. The articles in this symposium examine how technology may be challenging the boundaries of antitrust law. Christian Catalini and Catherine Tucker, for instance, discuss the ways in which blockchain complicates antitrust enforcement as a decentralized system that

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[9] According to the Founder and Executive Chairman of the World Economic Forum, "The First Industrial Revolution used water and steam power to mechanize production. The Second used electric power to create mass production. The Third used electronics and information technology to automate production. Now a Fourth Industrial Revolution is building on the Third, the digital revolution that has been occurring since the middle of the last century. It is characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres." *See* Klaus Schwab, *The Fourth Industrial Revolution: What It Means, How to Respond*, WORLD ECON. F. (Jan. 14. 2016), www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond.

[10] Symposium, *Antitrust at the Millennium (Part I)*, 68 ANTITRUST L.J. 1 (2000).

[11] Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913, 913 (2000).

[12] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001); *see also* Lawrence H. Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 356 (2001) ("The economic system of competition for that temporary monopoly power through the production of a distinctive product that possibly can become the basis of a standard or the basis of a network is very different than the traditional model that builds out from a large number of agricultural producers producing wheat. It is an economy that is likely to be more volatile. It is an economy in which the price mechanism will not always stabilize outcomes and equalize market shares. It is an economy where things will tend to tip much more towards extremes. It is a very different economy than the one we live with.").

itself is capable of achieving market power while no one actor within the system has the power to control the system (if you can even figure out who those actors are in the first place).[13]

When we first conceived of this symposium, there was a moderate hum of criticism about the scope and ambitions of antitrust law. In a December 2017 *Harvard Business Review* article about the U.S. antitrust movement, for example, Maurice Stucke and Ariel Ezrachi discussed the decline of enforcement under the Chicago School era and lamented that should this trend "continue with a 'light-if-any-touch' antitrust review of mergers and a blind eye to abuse, concentration will likely increase, our well-being will decrease further, and power and profits will continue to fall into fewer hands."[14]

In the past year and a half, that hum became a whirr, and the whirr became a roar. As of the date of writing, several U.S. Democratic presidential candidates, including former Vice President Joe Biden, Senator Cory Booker, South Bend Mayor Pete Buttigieg, Representative Tulsi Gabbard, Senator Kamala Harris, Senator Amy Klobuchar, and Senator Elizabeth Warren, have issued positions on competition policy,[15] including a sweeping proposal from Senator Warren aimed specifically at the technology sector.[16] There have been over 200 articles about antitrust on the front page of *The New York Times*, *The Wall Street Journal*, and the *Financial Times*, since January 1, 2018. The FTC completed its 22 days of Hearings on Competition and Consumer Protection in the 21st Century at the writing of this Note.[17] And the roar in the United States pales in comparison to the thunder of hearings, investigations, reports,

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[13] Christian Catalini & Catherine Tucker, *Antitrust and Costless Verification: An Optimistic and a Pessimistic View of Blockchain Technology*, *infra* this issue, 82 ANTITRUST L.J. 861, 869–70 (2019).

[14] Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

[15] *See* John Newman, *What Democratic Contenders Are Missing in the Race to Revive Antitrust*, THE ATLANTIC (Apr. 1, 2019), www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135; Casey Newton, *Democratic Presidential Candidates Agree: Big Tech Is Too Powerful*, THE VERGE (May 17, 2019), www.theverge.com/interface/2019/5/17/18628627/democrats-big-tech-facebook-sanders-buttigieg.

[16] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

[17] In the thirteenth hearing, FTC Commissioner Rebecca Kelly Slaughter encouraged additional attention to "technology-intensive industries," noting that "[r]etrospectives may be particularly useful to inform our understanding of how these industries evolve and how mergers in the early stages of such industries' life cycles effect nascent competition and influence industry structure, growth, and dynamism." Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm., Remarks at the Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives (Apr. 12, 2019).

and enforcement actions arising around the world from Europe to Australia, Japan to India, and many places in between.[18]

We conceived of this symposium over two years ago with high expectations that it would be published against a backdrop of robust and widespread discussion, but the volume of debate about antitrust has vastly exceeded our expectations. Yet the objective of this symposium has always been the same. We aspire to provide an inclusive forum for the examination of the fundamental principles and applications of our competition policy while imposing on that debate a competition policy principle that we believe remains unassailable: theoretical and empirical rigor. While much of the instant debate about antitrust plays out in soundbites and eye catching cover pages, the *Antitrust Law Journal* provides a critical forum for more rigorous development and discussion.

Theoretical and empirical rigor is important for making sound antitrust policy, and particularly critical when technological innovation is driving calls for reevaluation. The challenge may be as simple as separating correlation from causation. Technological innovation also tends to precede growth—a company creates something cool, people buy it, company gets big.[19] Many of the calls we see today relate the undesirable consequences of technology, correlating the source of those ills with "tech giants," and concluding that the fix for the technological ill is regulating the giant. Perhaps. But while remaining agnostic on whether and what mechanism is called for to address the hangover effect of society's rapid embrace of a new technology, it is essential that we think critically before concluding that antitrust is the right tool.

In these pages, Google's Hal Varian tackles the need for empirical rigor head on in his article *Recent Trends in Concentration, Competition, and Entry*.[20] He pairs the comments in the "popular press" that associate tech industry and economy-wide increases in "concentration" with higher prices, higher profits, curtailed entry, with the available econometric evidence and finds "lit-

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[18] *See, e.g.*, JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, EUR. COMM'N, COMPETITION POLICY FOR THE DIGITAL ERA (Apr. 4, 2019), ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; DIGITAL COMPETITION EXPERT PANEL (UK), UNLOCKING DIGITAL COMPETITION (Mar. 2019), www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; AUSTRALIAN COMPETITION AND CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT (July 26, 2019), www.accc.gov.au/publications/digital-platforms-inquiry-final-report; Ministry of Economy, Trade & Industry, Japan Fair Trade Comm'n & Ministry of Internal Affairs and Communications, Fundamental Principles for Improvement of Rules Corresponding to the Rise of Digital Platform Businesses (Dec. 18, 2018), www.jftc.go.jp/en/policy_enforcement/survey/index_files/190220.1.pdf.

[19] *But see* Catalini & Tucker, *supra* note 13, at 865 (noting one feature coinciding with the adoption of blockchain is that it reduces the need for centralized digital platforms and, as a result as the authors argue "blockchain technology should reduce market power in digital platforms.").

[20] Hal R. Varian, *Recent Trends in Concentration, Competition, and Entry*, *infra* this issue, 82 ANTITRUST L.J. 807 (2019).

tle empirical support." As Varian notes: "Evidence on increases in markups has been interpreted as an indicator of increases in market power, but it is more plausible to see this as a technology shift that has led to both decreasing prices and decreasing marginal cost, due to computerization."[21]

In many ways, there has never been a better time to demand a strong empirical grounding for antitrust policy. At the core of our current wave of technological development are explosions of both data and the analytical tools to evaluate data. This puts us in a position not only to ask for empirical support for changes in law and policy, but also to consider ways in which we can improve upon the empirical tools we are using to make those determinations. In their symposium contribution, Denicolò and Polo question the fundamental shift in merger control policy under the "innovation theory of harm" that posits horizontal mergers always reduce innovation, absent specific research synergies, despite its "fragile" economic underpinnings.[22] Instead, the authors argue that regulators and courts "recognize that the effects of a merger on innovation may be negative or positive" and that the "assessment of a prospective merger's impact on innovation should be open-minded and grounded in the facts of the specific case."[23] In *Innovation, Competition, Unilateral Effects, and Merger Policy*, Nicolas Petit then puts forward specific empirical tests that he proposes will help identify cases where intervention by an antitrust regulator in a merger would be inappropriate, on the theory that it would reduce innovation competition.[24]

Inclusiveness has been the second lodestar for this symposium. Despite the vehement-seeming debate among antitrust practitioners, academics, and observers, we have largely trended toward consensus with debate at the margins. The pages of *The New York Times* from 1911, which feature serious existential questions about both corporations and the regulation thereof, remind us that there is much common ground. Nonetheless, today's dialogue features relatively revolutionary ideas. Presidential candidate Senator Warren, for example, recommends legislation that "requires large tech platforms to be designated as 'Platform Utilities' and broken apart from any participant on that platform," and new regulations and fines to enforce these requirements.

Tim Wu, whom *The Nation* credited with "Go[ing] after the titans of the new gilded age,"[25] is among those pushing hardest at the boundaries of mod-

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[21] *Id.* at 833.

[22] Vincenzo Denicolò & Michele Polo, *The Innovation Theory of Harm: An Appraisal*, *infra* this issue, 82 ANTITRUST L.J. 921, 923 (2019).

[23] *Id.* at 951.

[24] Nicolas Petit, *Innovation Competition, Unilateral Effects, and Merger Policy*, *infra* this issue, 82 ANTITRUST L.J. 873, 876–77 (2019).

[25] Christopher Shay, *Tim Wu Goes After the Titans of the New Gilded Age*, THE NATION (Nov. 13, 2018), www.thenation.com/article/tim-wu-interview-curse-bigness/.

ern antitrust law and enforcement. The inclusion of his article, *Blind Spot: The Attention Economy and the Law*, in this symposium is a key component of well-rounded debate. He argues that traditional market definition is missing something in technology mergers, particularly those that involve two-sided markets and zero prices, and identifies several transactions that passed regulatory muster but which he argues should not have been cleared. As a partial solution, he suggests a refinement to expand market definition to include markets defined based on attention, and using changes in attention in response to unwanted "attentional intrusions" (e.g., ads) as a means of identifying close substitutes.[26]

In her article, *Practical Competition Policy Implications of Digital Platforms*, Diane Coyle also argues that digital multi-sided platforms test the boundaries of standard competition policy and intuitions. She contends that there is a need to "address the longstanding shortcoming in competition inquiries" of "often overlooking harder-to-measure benefits, such as quality and variety and ignoring dynamic consumer welfare, in favor of static efficiencies."[27] According to Coyle, new tools "to enhance the competitive process in digital markets should be based on open standards and interoperability, data portability, consumer transparency, and algorithmic pricing."[28]

As has been the case at several other points in history, it seems that antitrust is again of "pressing importance" in our public discourse. We are grateful for the opportunity to contribute this symposium to the conversation at this key moment of self-reflection. We are even more grateful to the symposium authors for the innovative thinking and careful reasoning they brought to their contributions. We look forward to the continued dialog and debate that the pieces in this symposium may stimulate.

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[26] Tim Wu, *Blind Spot: The Attention Economy and the Law*, *infra* this issue, 82 ANTITRUST L.J. 771, 798 (2019)].

[27] Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, *infra* this issue, 82 ANTITRUST L.J. 835, 859 (2019).

[28] *Id.*