

“COMPETITION POLICY IN ITS BROADEST SENSE”: CAN ANTITRUST ENFORCEMENT BE A TOOL TO COMBAT SYSTEMIC RACISM?

By Rosa M. Morales¹

The debate among academics, lawyers, politicians, and others about the proper role of antitrust policy in addressing wealth inequality—and by extension, racial inequality—in the United States has intensified. Some critics blame conservative judicial interpretations and applications of antitrust law for increasing concentrations of corporate power, which they argue has contributed to growing wealth inequality, and in turn, racial economic inequality. As such, they posit, modern antitrust enforcement—or lack thereof—has aided and perpetuated systemic racism.

In the past year, a growing chorus has called for antitrust laws to be deployed as a tool to combat systemic racism. Proponents argue that an anti-racist approach to enforcement is consistent with the original purposes of the U.S. antitrust laws, which they claim was to rein in corporate concentrations of power and ensure equal access to markets.² Indeed, finding ways to prevent antitrust enforcement from perpetuating structural inequality will bring U.S. competition policy closer to its stated policy goals of restoring balance and fairness in the marketplace, and promote racial equity.³

Among the chief proponents of anti-racist antitrust enforcement is Federal Trade Commission (“FTC”) Commissioner Rebecca Kelly Slaughter, who in September 2020 ignited a conversation about whether and how antitrust enforcement can and should be anti-racist.⁴ Slaughter’s statements echo the Biden/Harris Administration’s prescription for a “whole-of-government” approach for eradicating systemic racism, including through competition policy and enforcement.⁵ Her comments also come at the cusp of what may

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2 See, e.g., Hal Singer, *Antitrust Can Address Racial Inequities*, THE AM. PROSPECT (Feb. 10, 2021), <https://prospect.org/economy/antitrust-can-address-racial-inequities>; Brendan Kennedy, *Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don’t Have To*, N.Y. STATE BAR NEWS (Jan. 27, 2021), <https://nysba.org/yes-america-antitrust-laws-do-perpetuate-structural-racism-but-they-dont-have-to>; Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, THE APPEAL (Sept. 16, 2020), <https://theappeal.org/how-antitrust-perpetuates-structural-racism>.

3 For example, Federal Trade Commission attorney Synda Mark explained that the goals of antitrust (“ensuring appropriate balance within markets”) and those of racial equity (“balancing that which is unbalanced”) are ultimately similar. See *Equity and Antitrust – A Framework for the Future?*, AM. BAR ASS’N, ANTITRUST L. SECTION (Jan. 11, 2021), https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/january-2021/011121-equityandat.

4 See @RKSlaughterFTC, TWITTER (Sept. 9, 2020, 11:28 AM), <https://twitter.com/RKSlaughterFTC/status/1303762111433265153> (“But I don’t think there has been nearly enough discussion about whether our #antitrust laws can play a role in racial equity. I think the answer is YES! #Antitrust can and should be #antiracist. 5/14”).

5 On July 9, 2021, President Joe Biden signed a sweeping executive order titled the “Executive Order on Promoting Competition in the American Economy” seeking to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

be a significant realignment in U.S. antitrust and competition policy triggered by unusual bipartisan support for reining in market power in and beyond “Big Tech.”⁶

This Article explores the relationship between antitrust policy and racial inequality in the United States, ways in which antitrust law may be used to address systemic racism, foreign regimes that embed racial or social equity principles in their competition policies, and the future of anti-racist enforcement in upcoming reforms in U.S. antitrust policy.

I. THE ANTITRUST AND RACIAL INEQUALITY CONNECTION

According to commentators, the federal antitrust laws—the Sherman Antitrust Act,⁷ the Federal Trade Commission Act,⁸ and the Clayton Antitrust Act⁹—were originally designed to curb increasing concentrations of economic and social power held by “trusts”—famously, American Tobacco and Standard Oil.¹⁰ The drafters, some argue, “understood that concentration of economic power concentrates political power, posing a threat to democracy akin to monarchy or dictatorship.”¹¹ Their aims were therefore to promote economic justice, equal opportunity, and democratic ideals by preventing undue concentrations of economic power and facilitating equal access to markets.¹² But some have observed that the antitrust laws’ egalitarian origins have eluded communities of color because of America’s highly

6 Karl Herchenroeder, *Slaughter Pushes Progressive FTC Agenda, Hints at Bipartisanship*, COMMS. DAILY, Feb. 17, 2021, <https://communicationsdaily.com/article/2021/02/17/slaughter-pushes-progressive-ftc-agenda-hints-at-bipartisanship-2102160076>.

7 26 Stat. 209, 15 U.S.C. §§ 1-7.

8 15 U.S.C. § 45 (2006).

9 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

10 See, e.g., Singer, *supra* note 2; Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARVARD L. & POL’Y REV. 235 (2017).

11 Khan & Vaheesan, *supra* note 10, at 265-66 (citing D. M. Mickey, *Trusts*, 22 AM. L. REV. 538, 549 (1888), and David K. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1220 (1988)).

12 Khan & Vaheesan, *supra* note 10, at 265-66; Singer, *supra* note 2. Hal Singer argues that, while the face of economic and social power has changed since the passage of the Act, the “same questions over who wields power in America” persist today: “dominant platforms or the citizens whose economic well-being antitrust laws were meant to protect.” Singer, *supra* note 2.

racialized economic structure, which is characterized by predominantly white (and male) corporate ownership and control that largely persists today.¹³

For example, America’s racially skewed economy has resulted in a lack of access to capital for entrepreneurs of color—effectively acting as an entry barrier to markets that has stunted Black and Brown wealth and exacerbated racial inequality.¹⁴ Indeed, a recent Silicon Valley Bank study has shown that, in 2019, Black entrepreneurs received only one percent of the \$130 billion spent by venture capitalists in the United States.¹⁵ Another analysis of a 2014 Census Bureau survey revealed that 28 percent of Black entrepreneurs had reported hurt profits from lack of access to capital in contrast to just 10 percent of their white counterparts.¹⁶ And when Black entrepreneurs have accessed capital, their funding levels on average are much lower than those of their white counterparts, at \$35,000 and \$107,000, respectively, which further limits their ability to robustly compete and grow.¹⁷

Observers have also blamed increasing corporate consolidation for exacerbating the inability of entrepreneurs of color to enter and compete in markets dominated by entrenched or powerful businesses.¹⁸ They argue that increased market concentration has pushed out small businesses or denied them entry altogether, which thereby has “contribut[ed] to the economic and structural obstacles Black business owners

13 Vaheesan, *supra* note 2. Darrick Hamilton and Madeline Neighly have noted that:

The rise of corporate concentration, market power, financialization, and shareholder primacy has proven extremely lucrative for those already at the top of the economic hierarchy at the same time as it has increased stratification and has negatively affected those who lack wealth and power. Because of the hidden rules of race, black and brown communities have long been locked out of the mechanisms necessary to accumulate wealth and, thus, hold much less wealth and power than whites in our society. As such, the rise of corporate power has further entrenched the wealth and power of those at the top of our economic hierarchy and has had a detrimental impact on those at the bottom. By privileging the already wealthy and those who already own property or capital—America’s upper-middle class, which is overwhelmingly white—this economy has disadvantaged everyone else—disproportionately black and brown Americans.

DARRICK HAMILTON & MADELINE NEIGHLY, ROOSEVELT INST., *THE RACIAL RULES OF CORPORATE POWER: HOW EXTRACTIVE CORPORATE POWER HARMS BLACK AND BROWN COMMUNITIES AND HOW RACE-CONSCIOUS SOLUTIONS CAN CREATE AN INCLUSIVE ECONOMY* 9 (2019) (internal citations omitted).

14 Reed Albergotti, *Black Tech Entrepreneurs Lack Legal Protections Against Discrimination in Venture Capital*, WASH. POST, July 22, 2020, <https://www.washingtonpost.com/technology/2020/07/22/black-entrepreneurs-venture-capital>.

15 *Id.*

16 *Id.*

17 Tyler Goodwin, *Analysis: Using Antitrust Law as a Means for Racial Equity*, THE PLUG, June 22, 2021, <https://tpinsights.com/2021/06/22/analysis-using-antitrust-law-as-a-means-for-racial-equity> (citing a recent report by McKinsey’s Institute for Economic Mobility explaining the disproportionate hardships Black entrepreneurs face when starting businesses).

18 HAMILTON & NEIGHLY, *supra* note 13, at 20–21. Indeed, Hal Singer observes: “Although the identities of the trusts have changed, we are still grappling with the same questions over who wields power in America: dominant platforms or the citizens whose economic well-being antitrust laws were meant to protect.” Singer, *supra* note 2.

experience.”¹⁹ Market concentration, thus, further perpetuates and exacerbates racialized wealth inequality.

In addition, conservative judicial interpretations and applications of facially neutral antitrust laws and policies dating back to the 1960s and 1970s have been blamed for facilitating and exacerbating these racialized economic effects.²⁰ Specifically, critics blame conservative federal judges and enforcers for refocusing antitrust law to the “consumer welfare standard.” According to critics, this efficiency-focused lens has elevated consumers above “all other economic agents” and prevented the unwinding of monopolists or cartels unless the alleged anticompetitive conduct has harmed consumers, typically in the form of higher prices.²¹ But the standard permits antitrust law to address harm to racial minorities only as consumers, while “ignor[ing] that consumers can also be producers, whether workers, small-business owners, or entrepreneurs.”²² Critics have argued that the consumer welfare standard’s limitations therefore restricts the degree to which antitrust law can be used “as a tool to combat inequality” or systemic racism.²³

II. USING EXISTING ANTITRUST TOOLS TO BRING DOWN SYSTEMIC RACISM

The year 2020 was marked by a racial reckoning in the United States. The killings of George Floyd, Breonna Taylor, and others at the hands of police sparked nationwide outrage. Compounding these tragedies was the disparate impact suffered by communities of color, particularly African Americans, from the global pandemic. Many reacted by marching the streets demanding an end to racial injustice on a systemic level.

19 Goodwin, *supra* note 17.

20 JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 44–45 (2012) (arguing that the Chicago School economic theories of competition and antitrust, which apply the “consumer welfare standard,” have played a role in creating monopolistic conditions that have exacerbated wealth inequality); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 *GEO. L.J. ONLINE* 1, 11 (2015) (claiming that “[t]he adoption of more permissive antitrust rules during the past quarter century has . . . likely increased the prevalence of market power” and, consequently, wealth inequality); Barry C. Lynn, *Killing the Competition: How the New Monopolies Are Destroying Open Markets*, *HARPER’S MAG.*, Feb. 2012, at 27, 32 (same).

21 Singer, *supra* note 2; Vaheesan, *supra* note 2.

22 Singer, *supra* note 2.

23 *Id.* Recently, opponents on both sides of the aisle have argued that courts should abandon the consumer welfare standard in favor of one that considers the broader public interest, including those of workers, entrepreneurs, and small businesses. A House antitrust subcommittee report issued last year, for example, urged Congress to reassert the original democratic and equitable goals of the antitrust laws by clarifying that antitrust are designed to protect workers, entrepreneurs, small businesses, as well as consumers. JERROLD NADLER & DAVID N. CICILLINE, *SUBCOMM. ON ANTITRUST, COM. & ADMIN LAW, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS* 392 (2020).

In September 2020, FTC Commissioner Rebecca Slaughter joined the cries for systemic reform through a series of tweets²⁴ challenging antitrust enforcers to “get creative and bold” to combat structural inequality at this “moment of national racial reckoning.”²⁵ Slaughter gave two core justifications for why antitrust enforcement should and can be “anti-racist” to “right the wrongs of systemic racism.”

First, Slaughter challenged the notion that antitrust policies should be a “value-free zone,” considering that no other area of the law is value-neutral.²⁶ For instance, when prosecutors target white-collar crime, as opposed to violent crime, these prosecutorial decisions necessarily reflect specific values.²⁷ Similarly, when the FTC chooses to focus on curbing predatory lending or discrimination in auto financing, areas known to disproportionately affect African-American communities, these decisions, too, reflect certain values.²⁸

Nor is the idea of “race blind” enforcement possible or workable, she argued.²⁹ To the contrary, antitrust enforcement—or the lack thereof—in economic and market structures that are “historically and presently inequitable” inevitably affects structural “equity or inequity,” rendering “race blind” enforcement merely “aspirational.”³⁰ According to Slaughter, purportedly “race blind” enforcement can merely reinforce these unequal economic systems and perpetuate racial inequality.³¹ She therefore advocates for “open-eyed” enforcement of the antitrust laws that would consider the skewed ways that minorities have been affected by antitrust enforcement without regard to the inherent values at play.³² According to Slaughter, reinventing antitrust to fight systemic racism

24 See @RKSlaughterFTC, TWITTER (Sept. 9, 2020, 11:28 AM), <https://twitter.com/RKSlaughterFTC/status/130376211433265153> (“But I don’t think there has been nearly enough discussion about whether our #antitrust laws can play a role in racial equity. I think the answer is YES! #Antitrust can and should be #antiracist. 5/14”); @RKSlaughterFTC, TWITTER (Sept. 9, 2020, 11:28 AM), <https://twitter.com/RKSlaughterFTC/status/1303762113001926656> (“#Antitrust is about ensuring fair #opportunity for all competitors to the benefit of #consumers. As long as Black-owned businesses & Black consumers are systematically underrepresented and disadvantaged, we know our markets are not fair. We need to fix these inequities. 6/14”).

25 Kirk Victor, *Slaughter’s Tweets on Antitrust and Race Spark Backlash*, FTCWATCH, Sept. 21, 2020, <https://twitter.com/RKSlaughterFTC/status/1303762113001926656>.

26 Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *Antitrust at a Precipice: Remarks of Commissioner Rebecca Kelly Slaughter at the GCR Interactive: Women in Antitrust at 4* (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf [hereinafter *Antitrust at a Precipice*].

27 *Id.* at 3.

28 *Id.* at 3–4.

29 *Id.* at 4.

30 *Id.* See also Max Fillion, *US FTC’s Slaughter Seeks to Examine Impact of Antitrust Enforcement on Systemic Racism*, MLEX MARKET INSIGHT (Sept. 15, 2020), <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-ftcs-slaughter-seeks-to-examine-impact-of-antitrust-enforcement-on-systemic-racism>.

31 *Antitrust at a Precipice*, *supra* note 26 at 4.

32 Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sept. 26, 2020), <https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html>.

would be unnecessary, as existing antitrust tools can be used creatively to mete out structural inequality.³³

One tool is demographic data gathering. Data can be used for merger review and conduct challenges to assess disproportionate effects, *e.g.*, of price hikes, on communities of color.³⁴ Indeed, others have noted that “data collection that is more sensitized to the[] antiracism issues” can be used to help enforcers identify “the full range of implications of conduct and company mergers” to avoid further “marginalizing already marginalized groups” through enforcement.³⁵

For example, studies have shown that there are different tolerance levels that are highly racialized for lower-quality products and price discrimination in neighborhoods where those practices occur.³⁶ Traditional price analyses, however, do not consider that the impact of a price increase on high-income consumers is lower than the impact on lower-income consumers.³⁷ Predatory pricing is another instance where data could be useful to determine whether there is an outsized impact on, for example, the ability of minority-owned businesses to compete with below-market prices or other exclusionary conduct by dominant firms.³⁸ Data could thus account for such disparate effects within the existing antitrust framework.

Slaughter has also suggested reprioritizing enforcement to target conduct and transactions with lopsided outcomes for consumers and businesses in communities of color.³⁹ In healthcare, for example, people of color tend to suffer poorer health outcomes, lower quality of care, higher costs, and fewer options than their white counterparts.⁴⁰

33 *Id.* Slaughter does not believe existing antitrust tools are sufficient to eradicate systemic racism. In her November 17, 2020 remarks, Slaughter recognized the need for “Congressional intervention [as] an essential input to reinvigorating antitrust law” in light of “bad case law” and “periods” of lax enforcement in the past forty years. Antitrust at a Precipice, *supra* note 26, at 5-7. Slaughter believes “permissive” jurisprudence has “incentivize[d] companies to take a chance” “at engaging in anticompetitive or monopolistic conduct or proposing mergers that are so clearly anticompetitive.” *Id.* at 6.

34 Antitrust at a Precipice, *supra* note 26 at 4.

35 Brendan Kennedy, *Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don't Have To*, N.Y. STATE BAR ASS'N, Jan. 27, 2021, <https://nysba.org/yes-america-antitrust-laws-do-perpetuate-structural-racism-but-they-dont-have-to>.

36 Maria Stoyadinova, *Towards Inclusive Competition Analyses: The Questions We Overlook*, COMPETITION POL'Y INT'L, Apr. 26, 2021, <https://www.competitionpolicyinternational.com/towards-inclusive-competition-analyses-the-questions-we-overlook> (citing Darrick Hamilton, Equity and Antitrust ABA Panel).

37 *Id.*

38 *Id.* (citing Nell Abernathy, Roosevelt Inst., *The Effects of Market Power on Women and People of Color*, Presentation to the Congressional Antitrust Caucus (Feb. 16, 2018), <https://rooseveltinstitute.org/2018/03/07/the-effects-of-market-power-on-women-and-people-of-color>, and Feiner, *supra* note 32).

39 Antitrust at a Precipice, *supra* note 26 at 3-4.

40 According to Jamila Taylor, African American families spend a disproportionate share of their household income on healthcare and out-of-pocket costs compared to the average American family, unduly burdening such families and making it difficult for them to access quality care. Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, THE CENTURY FOUND., Dec. 19, 2019, <https://tcf.org/content/report/racism-inequality-health-care-african-americans>.

Recent studies reveal that healthcare industry consolidation is the “driving force behind the sky-high cost of medical care and pharmaceutical drugs,” consequently inflating health insurance premiums employers and individuals pay, which “disproportionately burden[s] people of color and create[s] a barrier to accessing quality care.”⁴¹

Refocusing enforcement on markets and anticompetitive practices that have disproportionately harmed consumers of color could “help reduce racial inequity” more broadly and promote inclusion.⁴² In this way, Slaughter believes the FTC’s “enforcement tools [will] ensure that markets are competitive and inuring to the benefit of historically underrepresented and economically disadvantaged consumers rather than incumbents.”⁴³

Finally, Slaughter argues that the FTC could use its rulemaking authority to end problematic practices, such as non-compete clauses in employee contracts in industries “disproportionately populated by workers of color.”⁴⁴ She argues that rulemaking may be an effective tool to address anticompetitive practices that are “difficult to litigate on a case-by-case basis” in light of the “challenging [antitrust] jurisprudence.”⁴⁵

Slaughter’s enforcement recommendations were met with backlash, with some critics decrying her anti-racist prescription as inconsistent with the purposes of the antitrust laws.⁴⁶ Indeed, one countered that the FTC’s jurisdiction cannot be invoked unless “the challenged conduct harms competition and the competitive process,” and it would not suffice for the FTC to articulate a “goal of making markets fairer or less discriminatory.”⁴⁷ Others responded that antitrust enforcers are not well-suited to achieve anti-racist objectives, and that other programs and statutes are specifically designed to address discrimination.⁴⁸

41 Dani Kritter, *Antitrust as Antiracist*, CAL. L. REV. ONLINE, Mar. 2021, <https://www.californialawreview.org/antitrust-as-antiracist> (citing Open Markets Institute and Rand Corporation studies showing the link between hospital consolidation and higher insurance premiums). Kritter also noted that Black families spend a greater percentage of their household income on insurance premiums and out-of-pocket healthcare costs than other American families, and that, of the more than 30 million uninsured Americans, half are persons of color, putting into “sharp focus” that “racial and ethnic minority groups are more likely to contract the [COVID-19] virus, get severely ill, and die from the” virus. *Id.*

42 Antitrust at a Precipice, *supra* note 26 at 4.

43 *Id.*

44 Fillion, *supra* note 30.

45 *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2021) (prepared statement of Rebecca Kelly Slaughter, Acting Chairwoman of Fed. Trade Comm’n), available at https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf.

46 Victor, *supra* note 25.

47 *Id.*

48 *Id.* In the past, enforcers also have reacted skeptically to calls for prioritizing social considerations in antitrust enforcement. Former Assistant Attorney General Makan Delrahim acknowledged racial justice as commendable, but rejected competition law as the appropriate mechanism to address it. Similarly, former FTC Commissioner Maureen Ohlhausen did not believe antitrust to be well-suited to address socio-economic problems like wealth inequality. See Karen Hoffman Lent & Kenneth Schwartz, *Examining the Biden Administration’s Antitrust Priorities*, N.Y. L.J. (Feb. 9, 2021), available at <https://tinyurl.com/ysem8tk4>.

But Slaughter’s approach finds precedent in South Africa and beyond. Indeed, recent legislative and executive developments suggest U.S. antitrust law and policy could be redefined and expanded to consider disparate effects on communities of color in antitrust enforcement and policy.

III. LESSONS FROM SOUTH AFRICA AND BEYOND

A. South Africa

South Africa uses competition policy to redress systemic racism and promote openness and inclusivity of its market economy to right the racial wrongs of the country’s past. Post-apartheid, South Africa adopted a new Constitution that contains a Bill of Rights prioritizing equality above all other enumerated rights, including dignity.⁴⁹ The nation’s Deputy Justice Dikgang Moseneke observed that the “achievement of equality” is the “bedrock” of the country’s “constitutional architecture” and “commits [South African] society to ‘improve the quality of life of all citizens and free the potential of each person.’”⁵⁰ Equality is, thus, embedded as an imperative value consideration in all South African law, including competition law and policy.⁵¹

South Africa’s Competition Act of 1998 explicitly acknowledged that Black South Africans were previously completely excluded “by positive law” from participating in the formal economy.⁵² To redress its racist history, two of the statute’s “Purposes” include: “(e) to ensure that small and medium-sized businesses have an equitable opportunity to participate in the economy;” and “(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”⁵³ The Act thus sets “inclusiveness” as a guiding principle, which in antitrust law translates into a “vigilant” commitment to “lowering barriers, opening markets, and trusting in the not-yet-imagined contributions of outsiders to increase innovation.”⁵⁴ Guided by this principle, South African competition policy has created a “space” where “efficiency and equity meet.”⁵⁵

In 2017, President Zuma recognized that the Act’s promise of economic transformation had been unmet and urged amendment of the statute to reinforce its equality and inclusion mandate.⁵⁶ According to Zuma, this mandate could be achieved by, *inter alia*, empowering competition authorities to conduct market inquiries into whether the policy had resulted

49 Eleanor Fox, *South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land Where Markets Were Brutally Skewed*, CPI ANTITRUST CHRON., Dec. 9, 2019, at 2.

50 *Id.* at 2 (quoting *Minister of Finance v. Van Heerden* (CCT 63/03) [2004] ZACC 3, 2004 (6) SA 121 (CC), paras 22–23 (S. Afr.)).

51 *Id.*

52 *Id.*

53 *Id.* (quoting South Africa’s Competition Act of 1998).

54 *Id.* at 5.

55 *Id.*

56 *Id.* (citing President Jacob Zuma, 2017 State of the Nation Address).

in new players entering in the economy, Black South African participation opportunities, and more dynamic, competitive, and inclusive markets.⁵⁷

Zuma’s recommendations were adopted and the Act amended to arm enforcers with remedies targeting structural obstacles, focusing on “[m]arkets plagued by over-concentration and *untransformed ownership*” that acted as “primary structural impediments to market entry and ownership by Black South Africans” and other historically disadvantaged persons.⁵⁸ The reforms largely addressed: (1) abuses by dominant firms; (2) exemptions for anti-competitive agreements and practices; (3) mergers; (4) market inquiries/investigations into distortions in competition, which included assessments of harmful effects on small and medium businesses and historically disadvantaged persons (“HDPs”); and (5) granting greater institutional powers to the Minister and Executive.⁵⁹

As a consequence, the amendments would prevent dominant firms from imposing excessive prices and shifted the burden of proof to defendants to prove that prices were reasonable after a showing by plaintiffs that the price was excessive.⁶⁰ Competition authorities also must consider equality and inclusion goals in clearing mergers and taking other enforcement action.⁶¹ Even a competitive merger may only be approved on the condition that the parties agree to offer shares in the deal or partnerships in a joint venture, or significant worker retraining and entrepreneurial capacity-building, to historically disadvantaged persons.⁶²

A prime example is the 2011 *Walmart/Massmart* case. There, the large supermarket merger threatened the survival of small South African suppliers, who feared displacement by Walmart’s global supply chain. A South African court ordered that Walmart invest 200 million Rands (U.S. \$13 million) on top of Massmart’s 40 million Rands (U.S. \$2.6 million) on capacity training for small suppliers so that they, too, could enter the global supply market. The program generated jobs and local procurement for Black South Africans and other historically disadvantaged groups.⁶³

More recently, in June 2021, the South African Competition Commission blocked the proposed acquisition of Burger King South Africa by a private equity fund, ECP Africa, because the merger would have led to a significant reduction in the shares of HDPs—from over 68 percent to zero percent.⁶⁴ The Commission denied the transaction on “substantial public interest grounds,” as the merged entity would result in “no ownership by HDPs

57 *Id.*

58 *Id.* (quoting Background Note issued by the Minister of Economic Development, May 25, 2017) (emphasis in original).

59 *Id.* at 3.

60 *Id.* at 7.

61 *Id.*

62 *Id.*

63 *Id.*

64 *South African Competition Commission Blocks Burger King Acquisition*, COMPETITION POL’Y INT’L (June 1, 2021), <https://www.competitionpolicyinternational.com/south-african-competition-commission-blocks-burger-king-acquisition>.

and workers.”⁶⁵ The authority reasoned that the merger would have a “substantial negative effect on the promotion of greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons in firms in the market as contemplated in section 12A(3)(e) of the Competition Act.”⁶⁶ Enforcement, in this instance, gave to equity.

B. EU and Canada

Beyond South Africa, the European Union, at least in principle, similarly embeds equity goals into its competition policy. For example, Article 8 of Treaty on the Functioning of the European Union (“TFEU”) provides: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”⁶⁷ And Article 10 of the TFEU requires that, “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”⁶⁸ Indeed, all EU institutions must therefore consider the overarching anti-discrimination and pro-equality principles when making policy in all areas, including in competition policy.

The Canadian Competition Bureau (“CCB”) has also begun considering equity principles in its competition policy and enforcement. In 2018, the CCB embarked on an analysis of the relationship between gender and other identify factors (such as race, sexual orientation, and other factors) and competition.⁶⁹ The agency partnered with the Organisation for Economic Co-operation and Development to spearhead research projects to provide data, research, and evidence for gender-inclusive competition across enforcement, regulation, and policy.⁷⁰ The agency’s objective is to reduce gender-based and other forms of inequality at the systemic level through government policy, including competition.⁷¹ Specifically, the CCB would “consider gender and other identify factors during case prioritization, product market definition, and when developing remedies.”⁷² It would also factor in its enforcement policy whether there are disparate effects on women or other identity group flowing from the alleged anticompetitive conduct.⁷³

The above examples may serve as models, particularly South Africa’s competition regime, for anti-racist competition policies in developed countries like the United States.

65 *Id.*

66 *Id.*

67 Consolidated Version of the Treaty on the Functioning of the European Union art. 8, May 9, 2008, 2008 O.J. (C115) 47.

68 *Id.*

69 Nadia Vassos & Ellen Creighton, *The Competition Bureau’s Journey Towards Inclusive Competition*, COMPETITION POL’Y INT’L (Apr. 26, 2021), <https://www.competitionpolicyinternational.com/the-competition-bureaus-journey-towards-inclusive-competition>.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

IV. IS THE FUTURE OF U.S. ANTITRUST LAW AND POLICY ANTI-RACIST?

The United States is at the cusp of what could be significant reforms to the nation's antitrust and competition laws. In 2021, the Biden/Harris Administration has issued various executive orders and appointed progressives to key agency posts with the express goal of eradicating wealth inequality and structural racism, including through competition policy. And major antitrust reforms have been making their way through the U.S. House of Representatives and the Senate with rare bipartisan support to scale back market power and competitive conduct both political parties believe have given certain firms, specifically in Big Tech, too much power, resulting in less competition.

According to some commentators, these reforms, if passed, combined with executive cooperation, may have the potential to mitigate some of the racialized competitive effects Slaughter and other critics argue have resulted from the last forty years of modern antitrust jurisprudence and enforcement.

A. Biden's Executive Orders

President Biden has made eradicating systemic racism a central pillar of his administration. On his first day in office, Biden issued "Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" ("Racial Equity EO"), which explicitly recognized that "[e]ntrenched disparities in our laws and public policies" have "exacerbated inequities," including "systemic racism."⁷⁴ The Racial Equity EO sought to advance racial equity and support for underserved communities, and directed a "whole-of-government equity" approach that would require "embedding fairness" in the "policies and programs" across all federal agencies.⁷⁵ By doing so, President Biden has made racial equity a value consideration for all federal policy, akin to equality as an imperative value consideration in all South African law post-apartheid.

Notably, the Racial Equity EO establishes an Equitable Data Working Group, co-chaired by the Chief Statistician of the United States and the United States Chief Technology Officer whose members include several of the President's top economic advisors.⁷⁶ Observers view this data gathering initiative as positive news for minority-owned business owners and underserved communities, which studies show suffered disproportionately during the first wave of the pandemic, as 41 percent of Black-owned businesses closed compared to 22 percent of all businesses.⁷⁷ Indeed, as Slaughter has argued in her call for anti-racist antitrust enforcement, data collected and analyzed by this Working Group could assist the federal government in better understanding communities

74 Exec. Order No. 13985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

75 *Id.*

76 *Id.*

77 Rhett Buttle, *Three Things President Biden's Executive Order On Racial Equity Means For Small Business*, FORBES, Feb. 15, 2021, <https://www.forbes.com/sites/rhettbuttle/2021/02/15/three-things-president-bidens-executive-order-on-racial-equity-means-for-small-business>.

of color and craft policy solutions, including competition policy, that may yield more equitable outcomes for all communities and small businesses.⁷⁸

Biden renewed his “whole-of-government effort” on July 9, 2021 when he signed the sweeping “Executive Order on Promoting Competition in the American Economy” (the “Competition EO”), which directed and encouraged several federal agencies to advance 72 competition principles in various economic sectors.⁷⁹ The Competition EO directly addressed perceived harms by prioritizing measures to “address overconcentration, monopolization, and unfair competition in the American economy” that have allowed “racial . . . inequality” to “widen[],” among other things.⁸⁰ The order directed its prescriptions at key economic sectors, including: “labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.”⁸¹ Commentators have identified some of these sectors as areas where lax antitrust enforcement, or lack thereof, has produced disparate impacts on communities and consumers of color, which have exacerbated and perpetuated structural in systemic racism.⁸² Focusing on these areas would therefore aid in addressing structural racial inequities in the economy through policy and enforcement.

Because Biden’s executive orders are directives and not self-executing, however, the Department of Justice’s Antitrust Division, FTC, and other federal agencies will need to determine whether and how to implement the President’s recommendations in enforcement policy.

B. Federal Antitrust Enforcers

The President’s interim appointment of Slaughter as Acting FTC Chairwoman may have signaled early on that the Biden/Harris Administration intended to activate a racial equity agenda at the structural level. Indeed, in her first speech as Acting Chairwoman, Slaughter declared that she intended to follow an “[a]ggressive” approach to enforcement, “including bold and innovative use of FTC’s existing authority” to address all types of anticompetitive harm, including racial inequality.⁸³

78 *Id.*

79 Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

80 *Id.* at 36,987, 36,990.

81 *Id.* at 36,988.

82 *E.g.*, Nicol Turner Lee & Caitlin Chin, *The Debate on Antitrust Reform Should Incorporate Racial Equity*, BROOKINGS, July 8, 2021, <https://www.brookings.edu/blog/techtank/2021/07/08/the-debate-on-antitrust-reform-should-incorporate-racial-equity> (finding that the “lack of competition in the online search industry not only eliminates consumers’ options to choose a different, less-biased search engine,” effectively “put[ing] companies in a power powerful position to exacerbate historical racial inequalities”); Taylor, *supra* note 40 (describing the disparate burden of increasing healthcare costs on African American families).

83 *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2021) (prepared statement of Rebecca Kelly Slaughter, Acting Chairwoman of Fed. Trade Comm’n), available at https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf.

In June 2021, however, President Biden picked known progressive and fierce critic of the conservative antitrust jurisprudence of the past 40 years, Lina Khan, in a surprise nomination as FTC Chairperson. Like her current colleague Slaughter has as FTC Commissioner and later as the agency’s Acting Chairwoman, Khan had previously advocated “using antitrust laws aggressively to challenge aggregations of economic and political power,”⁸⁴ and argued for reinvigorating antitrust enforcement to mitigate economic inequality specifically.⁸⁵ But while not directly addressing the connection between antitrust enforcement and racial equity others have observed, Khan has long supported reorienting antitrust law “away from the efficiency focus,” *i.e.*, the consumer welfare standard, to “revers[e] the dramatic rise in economic inequality” produced by increasing “market power”—which, as others have argued, disproportionately affects communities of color.⁸⁶

Although some have hailed Khan’s appointment as “transformative” and marking “the beginning of the end for a 40-year failed [antitrust] regime,”⁸⁷ the FTC is an independent agency that requires a majority vote by a five-member commission, including two Republicans, Noah Phillips and Christine Wilson, who may limit Khan’s ability to advance a progressive, pro-equity agenda. And critically, both federal antitrust agencies will likely continue to be constrained by decades of antitrust laws created by a relatively conservative federal judiciary that will ultimately determine the legality of the challenged conduct or transactions. As a consequence, supporting legislation may ultimately be required before agencies can take actions or adopt policies that may more directly or explicitly consider racial equity in enforcement.

C. U.S. Congressional Proposals

Earlier this year, Senator Amy Klobuchar (D-MN)—who chairs the Senate’s Subcommittee on Competition Policy, Antitrust and Consumer Rights—opined that increasing market power and concentration, and decades of court rulings and lax regulation by agency enforcers, have been key contributors to the monopoly problem, particularly in “Big Tech.”⁸⁸

In February 2021, Klobuchar unveiled sweeping new legislation, the Competition and Antitrust Law Enforcement Reform Act (“COLERA”), which is premised on the assumptions that the “presence of market power [] in the United States [is growing and is resulting in] increase[d] economic inequality, with particularly damaging effects on

84 Sindhu Sundar, *Biden’s Likely FTC Nom Shows Continued Antitrust Focus*, YAHOO! (Mar. 10, 2021), <https://www.yahoo.com/now/biden-likely-ftc-nom-shows-223425563.html> (quoting Stanford Law School professor Doug Melamed).

85 Khan & Vaheesan, *supra* note 10.

86 *Id.*

87 Asher Schecter, *What Does Lina Khan’s FTC Nomination Mean For the Future of Antitrust?*, PROMARKET (Mar. 10, 2021), <https://promarket.org/2021/03/10/biden-lina-khan-ftc-antitrust-enforcement-new-brandeis> (quoting Fordham law professor Zephyr Teachout, a prominent fellow proponent of transforming antitrust law and policy).

88 Kelly Anne Smith & Benjamin Curry, *Sen. Klobuchar’s Antitrust Reform Targets Big Tech*, FORBES ADVISOR (Mar. 15, 2021), <https://www.forbes.com/advisor/investing/big-tech-antitrust-reform>.

historically-disadvantaged communities.”⁸⁹ Notably, Klobuchar’s bill aims to “deviate from the consumer welfare standard”⁹⁰ and undo some of the decades of antitrust jurisprudence that many argue has led to a monopolization crisis in the U.S. economy, which, in turn, has exacerbated racial inequality.

Klobuchar’s anti-monopoly bill seeks to address the “major monopoly problem”⁹¹ and “sav[e] capitalism and build[] an economy that works for all Americans”⁹² by, *inter alia*, making it harder for dominant firms to clear mergers and acquisitions and engage in exclusionary conduct that would disadvantage competitors or inhibit their ability to compete in free markets. These legislative measures are reminiscent of federal government policies adopted during the New Deal era, which saw an “expansion of anti-monopoly laws” that ramped up antitrust enforcement in ways that benefitted independent businesses, including Black-owned businesses.⁹³ Indeed, one observer noted that the “new fair trade laws” of the New Deal, like the Robinson-Patman Act of 1936 and Miller-Tydings Act of 1937, combined with “anti-chain store measures passed in twenty-seven states,” in fact served to constrain market concentration and led to a 31-percent increase of Black-owned retail stores and 14.5-percent increase of Black employees hired by them.⁹⁴ In its present configuration, COLERA could similarly have the potential to reverse some of the racialized effects on communities of color that have been attributed to under-enforcement of antitrust laws in the past 40 years. Indeed, according to one observer, “[p]assing [COLERA] and ending the tyranny of the consumer in antitrust cases would further end the stigma of using competition policy to attack racial injustice.”⁹⁵

Other measures in the U.S. House of Representatives similarly seek to address anticompetitive conduct through antitrust reform that some argue could have positive competitive implications for communities of color. In June 2021, for example, the House Judiciary Committee, voted to advance six landmark antitrust bills, which, if passed, would decrease anticompetitive practices in the tech industry, but also, according to some commentators, have the potential to advance racial equity by expanding the parameters of competition that currently disadvantage marginalized communities.⁹⁶

89 Press Release, Sen. Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>. This bill was co-sponsored by Judiciary Subcommittee on Antitrust and Commerce Committee members Richard Blumenthal (D-CT), Cory Booker (D-NJ), Ed Markey (D-MA), and Brian Schatz (D-HI). *Id.*

90 Singer, *supra* note 2.

91 Grace Gedy, *Klobuchar: “Monopolies Hurt Everyone,”* WASHINGTON MONTHLY (May 7, 2021), <https://washingtonmonthly.com/2021/05/07/klobuchar-monopolies-hurt-everyone/>.

92 Marcy Gordon, *Battling bigness: Congress eyes action against monopolies*, AP NEWS (Mar. 19, 2021), <https://apnews.com/article/publishing-health-coronavirus-pandemic-book-publishing-airlines-383681c569b18262df1d95baf65484a4>.

93 Brian Feldman, *The Decline of Black Business*, WASHINGTON MONTHLY (Mar./Apr./May 2017), <https://washingtonmonthly.com/magazine/marchaprilmay-2017/the-decline-of-black-business/>.

94 *Id.*

95 Singer, *supra* note 2.

96 Lee & Chin, *supra* note 82.

For example, they argue that increased funding for federal antitrust enforcers through the Merger Filing Fee Modernization Act, would facilitate more agency challenges in conduct cases involving anticompetitive behavior that disproportionately directly or indirectly harms marginalized communities.⁹⁷ Another House bill, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, could potentially give users greater flexibility to switch away from platforms with allegedly biased or discriminatory algorithmic outcomes—*i.e.*, because the demographic data gathered on these platforms arguably can reinforce entrenched bias regarding age, gender, sexual orientation, or race through “proxy variables” such as zip code, education, interests, and purchase history.

Due to the perceived potential benefits for marginalized communities, supporters of the pending House bills have called upon Congress to consider racial equity as a competition concern given the ways that the “values” of antitrust and civil rights law “intertwine”—namely, where “[m]arket dominance can effectively put companies in a powerful position to exacerbate historical racial inequalities.”⁹⁸ Notably, they argue, the bills’ co-sponsors expressed a need for antitrust reform to “consider how antitrust affects certain values, including quality, privacy, . . . censored speech”⁹⁹—demonstrating that antitrust laws, as Slaughter has illustrated, indeed are not (and need not be expected to be) value-neutral. But unlike Klobuchar’s COLERA, which explicitly acknowledges addressing economic inequality, particularly of “historically-disadvantaged communities,” as a purpose of the bill, the House bills do not include racial equity as a value consideration for their passage.

While anti-monopoly sentiment and reining in market power are experiencing bipartisan support at the moment, the Senate is split 50-50 between Republicans and Democrats, who enjoy a one-vote margin with Vice President Kamala Harris’s tie-breaking vote. Given the obvious potential for gridlock, any significant antitrust reform, particularly those that “look[] beyond impact of big-company market dominance on consumer prices to its broader effects on industries, employees and communities,”¹⁰⁰ such

97 *Id.* The other House bills include the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, American Innovation and Choice Online Act, Platform Competition and Opportunity Act, and Ending Platform Monopolies Act. *Id.*

98 Lee & Chin, *supra* note 82. See also Feldman, *supra* note 93 (arguing that the “story of how the struggle for civil rights intertwined and intersected historically with the struggle against monopoly provides a lesson for the future”). In fact, the relationship between “anti-monopolism” and racial equity was clear to civil rights activists early on. For example, in 1928, W.E.B. Du Bois wrote: “To ask the individual colored man . . . to sell meat, shoes, candy, books, cigars, clothes or fruit in competition with the chain store, is to ask him to commit slow but almost inevitable economic suicide.” Feldman, *supra* note 93. An article published in 1932 by the Associate Negro Press and the National Negro Business League, in cooperation with the U.S. Department of Commerce, noted that “an embarrassing problem confronts the 70,000 or more Negro-owned individual enterprises in the U.S. today[.] . . . Big Business, which so perceptively handicaps the small industrial business in which category Negro enterprise unquestionably belongs.” *Id.* Indeed, understanding this connection, Black civil rights leaders battling segregation continued to advocate for anti-monopoly laws well into the 1940s. *Id.*

99 *Id.*

100 Mary Gordon, *Battling bigness: Congress eyes action against monopolies*, AP News, Mar. 19, 2021, <https://apnews.com/article/publishing-health-coronavirus-pandemic-book-publishing-airlines-383681c569b18262df1d95baf65484a4>.

as the purported racialized effects on communities of color, will require compromise by Democrats who need at least ten Republicans to support passing new antitrust law.

V. CONCLUSION

The rare alignment across the executive and legislative branches may, indeed, signal a significant shift in antitrust policy and enforcement with potential benefits for communities and consumers of color. But it remains an open question of whether efforts to achieve racial equity will be limited absent significant legislative reforms given the current state of the law and the configuration of the federal judiciary.

Given the polarized political climate and delicate balance in Congress, legislative efforts to undermine the consumer welfare standard, for example, which some partly blame for exacerbating and perpetuating systemic racism, are likely to fail. Indeed, Republican lawmakers have “denounc[ed]” Democrats whom they accuse of “seeking to use antitrust law not to promote competition but to advance social or environmental goals,”¹⁰¹ *e.g.*, racial justice. Accordingly, efforts to combat systemic racism will likely be limited to creative use of the existing antitrust enforcement toolbox with its attendant risk in federal courts.

In the meantime, given the unsettled state of enforcement, companies whose proposed transactions and business practices will be reviewed by the antitrust agencies during the next four years should expect to face questions and information requests that seek to determine how diverse communities—particularly communities of color—have been or will be impacted. Firms should also expect that issues that once were seen as procompetitive efficiencies (*i.e.*, lower production costs through lower labor costs) may be scrutinized more carefully and viewed with greater skepticism, if not deemed potentially harmful.