

Prosocial Antitrust

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Antitrust law is at the center of today's public debate. It has even emerged as a rare unifying force, with bipartisan promises to combat the concentration of economic power. Meanwhile, the business community is grappling with mounting systematic risks arising from climate change, income inequality, and the COVID-19 pandemic. Unexpectedly, the largest asset managers in the world find themselves on the front lines of these battles. Due to the rise of index investing, these "universal owners" manage portfolios that are so large and diversified, their holdings mirror the entire economy. Their diversification protects them against idiosyncratic risk, but greatly exposes them to systematic risks.

The universal owners are keenly aware of their exposure to these risks. They are turning to their portfolio companies and increasing demands on directors and managers to "serve a social purpose" and reduce their negative externalities. Public-regarding pronouncements from CEOs of Wall Street's biggest firms ring hollow to many shareholder primacy loyalists. But the skeptics downplay the economic logic underlying this paradigm shift—diversified shareholders do not want companies to externalize their negative impacts onto the rest of the investors' portfolios.

Many companies are rising to the challenge and making bold commitments. Some are recognizing that, to overcome pervasive social and environmental challenges, they must collaborate with their competitors. This Article reveals that current antitrust law is a barrier to this collaboration and offers a policy proposal for aligning antitrust law with the demands upon the prosocial corporation. The COVID-19 pandemic has reminded us that we are all interconnected. Climate change will continue to deepen that understanding. The problems we face are difficult, but they are not insurmountable. To solve them, however, antitrust law must empower more collaboration.

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INTRODUCTION

But let us not make a fetish of competition! . . . While recognizing its value and making strenuous efforts to [e]nsure it a fair field for its operation, let us not ignore the fact that cooperation also has its legitimate place.

— Henry R. Seager¹

Antitrust law and corporate purpose are on a collision course. Stakeholders, including employees, communities, nonprofits, regulators, and academics are calling on corporations “to provide profitable solutions to people or the planet’s problems.”² Increasingly vociferous demands from investors for companies to “serve a social purpose”³ have brought this concerted pressure to a tipping point.⁴ Companies are realizing that meaningful responses often require collaboration with competitors. This places them squarely in the sights of antitrust law.

This Article is the first to reveal that this collision-in-progress arises out of, but is overlooked by, three pivotal debates in corporate law: corporate purpose, universal ownership, and antitrust. This insight comes at a crucial inflection point for antitrust and corporate law, as both loom large on the agenda of the Biden-Harris Administration and Congress.⁵ The case studies in this Article demonstrate that, for companies, the fear of prompting antitrust enforcement is halting progress on environmental and social crises at a time when the private sector’s engagement is critical.⁶ For instance, the specter of antitrust enforcement is preventing the food industry from combatting the global pollution crisis through industry-wide standards that would mandate the use of food-grade recycled plastics.⁷ The same is true for the clothing industry’s initiatives to develop mandatory, industry-wide standards to address

1. 51 CONG. REC. 13,218 (1914), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1914-pt13-v51/pdf/GPO-CRECB-1914-pt13-v51-12.pdf> (quoting a speech by Prof. Henry R. Seager at the Second Annual Meeting of the Chamber of Commerce of the U.S. on Feb. 12, 1914).

2. Oxford Univ., *Purpose Unlocks Profit: An Oxford Professor Discusses a Blueprint for the Reform of Capitalism*, MEDIUM (Jan. 15, 2020), <https://medium.com/oxford-university/purpose-unlocks-profit-8f78cfdd0e3a> (quoting Colin Mayer: “The purpose of business is to solve problems profitably, and not to profit from causing or exploiting problems.”).

3. Letter from Larry Fink, Chairman and CEO, BlackRock to CEOs, BlackRock (2018), <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter>.

4. See *infra* Part I.

5. See Diane Bartz & Nandita Bose, *Exclusive: Biden Administration Considers Creating White House Antitrust Czar*, REUTERS (Jan. 19, 2021, 2:45 PM), <https://www.reuters.com/article/us-usa-biden-antitrust-exclusive/exclusive-biden-administration-considers-creating-white-house-antitrust-czar-sources-idUSKBN29O2PT>; see also Andy Puzder, *Biden’s Assault on ‘Shareholder Capitalism’*, WALL ST. J. (Aug. 17, 2020, 6:59 PM), <https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153> (noting that President Biden has referred to shareholder capitalism as “untrue and a farce”).

6. See *infra* Part IV.

7. See FOODDRINKEUROPE, FOODDRINKEUROPE’S CONTRIBUTION ON “COMPETITION POLICY SUPPORTING THE GREEN DEAL” (2020), https://www.fooddrinkEurope.eu/wp-content/uploads/2021/02/FoodDrinkEurope_contribution_Green_deal_and_competition_policy.pdf (discussing the first mover disadvantage).

forced labor.⁸ Unilateral and voluntary initiatives have proven deficient in meaningfully addressing social and environmental harms.⁹ Yet the corporate purpose and antitrust debates are not acknowledging these practical realities.

Much to the dismay of shareholder primacy loyalists, the contemporary business community increasingly regards stakeholder governance as a *sine qua non*.¹⁰ Notable players in the business and investment community, like the Business Roundtable and World Economic Forum, have sworn allegiance to “stakeholder capitalism,”¹¹ and acknowledged their responsibility to address mounting societal challenges. Their advocacy has recently focused on the pandemic, climate change, income inequality, and racial injustice. While many in the corporate purpose and antitrust debates continue to dub these challenges “social issues,” today’s investors are more inclined to view them as “systematic risks” that impact the entire economy.¹²

Why are investors more focused on systematic risks today? Due to the rise of index investing, capital has become increasingly concentrated in a few large asset managers.¹³ To put this in perspective, just three asset managers collectively hold more than twenty percent of the S&P 500 and roughly eighty percent of all indexed funds.¹⁴ These “universal owners” manage portfolios so large, they have become “economy-mirroring.”¹⁵ Their business model relies on indexing, which impedes their ability to exit a given company or industry.¹⁶ This insulates universal owners from idiosyncratic risk, but leaves them susceptible to systematic risk.¹⁷ Intriguingly, a handful of corporate governance scholars are beginning to explore the implications of this phenomenon on corporate managers and directors. Some argue that it justifies a different, “portfolio-wide”

8. See *infra* Part III.

9. See *infra* Part III.

10. See Andrew Ross Sorkin, *Has Business Left Milton Friedman Behind?*, N.Y. TIMES (Sept. 13, 2020), <https://www.nytimes.com/2020/09/11/business/dealbook/milton-friedman-anniversary-sorkin-essay.html>; see also Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/>.

11. See *infra* Part I.B.

12. Systematic risk and systemic risk are often conflated. Systemic risk affects a wide range of economic, political, social institutions, whereas systematic risk impacts financial markets and portfolios. See generally JAMES P. HAWLEY & ANDREW T. WILLIAMS, *THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC* 21 (2000); see also John C. Coffee, *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* 9 (Eur. Corp. Governance Inst. L., Working Paper No. 541, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197 [hereinafter Coffee, *The Future of Disclosure*] (“institutional investors are more concerned with ‘systematic risk’ than are individual investors.”).

13. See *infra* Part I.C.2.

14. See *infra* Part I.C.2.

15. See Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 6 (2020).

16. See *id.* at 33–34.

17. See *id.* at 35.

fiduciary duty for directors and officers.¹⁸ Others point to new implications for risk oversight and disclosure.¹⁹ And legal scholars, again reflecting antitrust law's pervasive focus on protecting the competitive process, worry that horizontally owned companies in the same industry will engage in anti-competitive behavior.²⁰ Still others question whether the concentrated ownership is itself an antitrust violation.²¹ But the virtues of collaboration are largely absent from this discussion.

Within antitrust law, a debate with familiar fault lines is underway. The consumer welfare standard—a product of Robert Bork and the Chicago School²²—has for decades sought to promote more output at lower prices through the competitive process.²³ The “progressive,” or Neo-Brandeis, movement assails the consumer welfare standard as overly narrow and seeks to return antitrust law to its roots by reducing concentrations of corporate power. Neo-Brandeisians argue that achieving this will not only increase competition, but also expand liberty and bolster democracy.²⁴ The momentum behind the Neo-Brandeis movement is palpable. On July 13, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.”²⁵ In it he warned that “excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.”²⁶ The Executive Order is animated by a

18. See John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 54–70 (2014) (arguing for a different fiduciary duty for directors to maximize portfolio values, as opposed to firm-specific shareholder value). *But see* Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. (forthcoming 2023).

19. See Coffee, *The Future of Disclosure*, *supra* note 12, at 13.

20. See Condon, *supra* note 15, at 10–11; *see also* Mark Roe, *Corporate Purpose and Corporate Competition* (Eur. Corp. Governance Inst., Working Paper No. 601, 2021) (arguing that “corporate purpose pressure” is easier to respond for companies in monopolistic markets because responding to the pressure takes resources and detracts from shareholder profits).

21. See, e.g., Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1316–17 (2016) (concluding that institutional investors’ horizontal holdings violate current antitrust law). *But see* Lynn LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 54 U.C. DAVIS L. REV. (forthcoming 2021) (arguing that the antitrust argument “is not a serious threat” to horizontal shareholders who impose similar “CSR obligations” on a large number of companies); *see also* Menesh Patel, *Common Ownership, Institutional Investors, and Antitrust*, 82 ANTITRUST L.J. 279, 325 (2018) (arguing that an empirical analysis of common ownership finding that “the extent to which common ownership creates competitive harm” is highly context-specific and “depends on numerous factors”).

22. See *infra* Part II.B.

23. See Joshua D. Wright, Jonathan Klick, Jan M. Rybnicek & Elyse Dorsey, *The Dubious Rise and Inevitable Fall of Hipster Antitrust*, CLS BLUE SKY BLOG (Oct. 15, 2018), <https://clsbluesky.law.columbia.edu/2018/10/15/the-dubious-rise-and-inevitable-fall-of-hipster-antitrust>; *see also* John Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 564 (2022) (challenging the conventional wisdom that output is interchangeable with consumer welfare).

24. See *infra* Part II.C.

25. Exec. Order No. 14036, 86 Fed. Reg. 36,987, 36,987 (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

26. See *id.*

“big-is-bad” rhetoric and focuses on low prices for consumers and more bargaining power for workers.²⁷

The traditionalists, for their part, continue to warn against deviating from the consumer welfare standard. They argue that the Neo-Brandeis movement will chill the competitive process by diverting antitrust law’s focus from economic principles toward “social problems.”²⁸ Despite their opposing theories, the benefits of competitor collaboration are almost entirely absent from both sides of this debate.

This is not surprising when one considers that antitrust law has always had a fraught relationship with the idea of collaboration among competitors. A leading law review article sums up this antipathy: “The Sherman Act has had one principal success: cartels and their smoke-filled rooms, where competitors agree to waste economic resources for their own industry’s benefit, are unambiguously and uncontroversially illegal in the United States”²⁹ This sentiment is consistent with the economic theory underlying antitrust law. While an emerging school of economics is studying the value of “coopetition,” or cooperation among competitors, antitrust law remains animated by a neoliberal economic theory treasuring competition.³⁰ Antitrust cases and enforcement decisions, therefore, tend to cabin prosocial collaboration as “noneconomic” activity—and thus outside the realm of antitrust scrutiny altogether—or as a sham to cover up collusion.³¹ Ironically, progressive antitrust scholars also juxtapose prosocial and economic goals, arguing that “antitrust law, with its singular purpose of bolstering market competition and consumer choice, sometimes conflicts with private efforts to achieve ideological or social objectives that require subverting market forces.”³²

This Article introduces a new perspective on these debates and makes three primary contributions. First, it connects the antitrust, corporate purpose, and universal owner debates—a perspective that is absent from the literature. Examining these debates side by side uncovers a shared tendency to draw false

27. While outside the scope of this Article, there is an important and growing interest in the impact that a focus on consumer welfare has had on workers, who have increasingly unequal bargaining power. *See, e.g.,* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); *see also* Hiba Hafiz, *Labor Antitrust’s Paradox*, 87 U. CHI. L. REV. 381, 382–83 (2020) (describing “labor antitrust” as “uniquely positioned” and superior to labor law in remedying wage suppression).

28. Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294 (2019).

29. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1095 (2014).

30. *See generally* Yadong Luo, *A Coopetition Perspective of Global Competition*, 42 J. WORLD BUS. 129 (2007); Philipp Goedeking, *Competition, Cooperation, Co-Opetition, and Antitrust: Balancing Economies of Scale and Competitive Market Structures*, in NETWORKS IN AVIATION 105–11 (2010).

31. *See infra* Part III.A. I am using the term “prosocial collaboration” to refer to collaboration that addresses environmental or social risks. While I concede that prosocial collaboration is not *always* financially material or motivated by profit, I argue that increasingly prosocial collaboration between competitors is an economic imperative today.

32. Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1213 (2016).

distinctions between social or environmental goals and economic ones. Today, however, an increasing number of social and environmental issues are leading to systematic financial risks.³³ While both corporate law and antitrust traditionally point to regulation to address these risks, regulation is not able to do so with sufficient speed or specificity. Rather, universal owners are responding by self-managing the systematic risks impacting their portfolios.³⁴ This alters directors' and managers' incentives by pressuring them to minimize externalities that impact universal owners' entire portfolios.³⁵ Such market forces have elevated the role of collaboration in corporate strategy and decision-making. Companies are realizing that conserving scarce resources, committing to bold climate initiatives, addressing human rights abuses, and fighting systemic racism are economic imperatives that demand collaboration, particularly among competitors.³⁶

Second, this Article points out that antitrust law, as currently envisioned, cannot accommodate this rising tide of prosocial collaboration. The U.S. debate is not attuned to antitrust law's chilling effect on prosocial collaboration. Antitrust may even be growing more intransigent to collaboration among competitors where large multinational companies are concerned. Antitrust scholars and practitioners may counter that antitrust leaves "plenty of room" for competitor collaboration, as reflected in the Competitor Collaboration Guidelines,³⁷ jointly published by the Department of Justice (DOJ) and the Federal Trade Commission (FTC).³⁸ By reviewing case studies of competitor collaboration in practice, however, this Article reveals that antitrust law's narrow focus on consumer welfare impedes prosocial collaboration.³⁹ A recent

33. Of course, not all social and environmental issues are financially material, but an increasing number are. For an analysis of the subset of financial issues that are relevant to financial performance, see SASB, <https://www.sasb.org> (last visited July 31, 2022).

34. See *infra* Part I.C.2. I would like to thank Barak Orbach for illuminating how the argument in this Article diverges from traditional claims about "ruinous competition," which describes losses that arise out of excessive competition or excessive risk taking. A recent example of ruinous competition is the 2007 to 2008 financial crisis. What this Article argues is that today we face systemic risks that did not exist in the past. These systemic risks demand collaboration among competitors. While collaboration should not be exempted from antitrust scrutiny, we need to acknowledge that today's market realities necessitate this collaboration, and to develop a pragmatic approach towards allowing for them.

35. See *infra* Part I.C.2.

36. See *infra* Part I.C.2.

37. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 1–2 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

38. See Michael Bloom, *Doing Good Well*, FTC (Oct. 20, 2015, 3:38 PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/10/doing-good-well> [<https://web.archive.org/web/20210116091344/https://www.ftc.gov/news-events/blogs/competition-matters/2015/10/doing-good-well>].

39. See *infra* Part IV.

illustration of this is the antitrust scrutiny that “net zero” commitments are receiving by state attorneys general in the United States.⁴⁰

Unlike their American counterparts, European competition authorities are not only cognizant of this potential conflict, but are actively debating whether competition policy is thwarting the private sector’s ability to meet the goals of the European Union’s Green Deal.⁴¹ The European Commission’s recent call for contributions on this topic reflects this exigency: “We’ll be looking for ideas, not just from competition experts, but from everyone with a stake in this issue We need to work—and listen—fast.”⁴² Industry leaders throughout Europe have recently responded that collaboration with competitors would enable them to achieve the following: (1) create sufficient demand for sustainable and ethically produced products; (2) achieve necessary scale to bring sustainable products to market; (3) have meaningful impact; (4) ensure the long-term sustainability of common pool resources; and (5) comply with regulatory requirements.⁴³ U.S. companies are facing the same challenges, but under an arguably more stringent antitrust regime for prosocial collaboration.⁴⁴

Finally, this Article offers a policy proposal for aligning antitrust law with the goals of the prosocial corporation.⁴⁵ The policy proposal introduces a new standard, the universal consumer standard, which would permit competitor collaboration aimed at mitigating systematic risk. Unlike the current consumer welfare standard, the universal consumer standard accounts for harms on future consumers.⁴⁶ This proposal comes at a crucial time. The Biden Administration has not only rebuked shareholder primacy, but has also emphasized that climate change, income inequality, and racial injustice are risks that must be addressed

40. Mark Brnovich, *ESG May Be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022, 4:40 PM), <https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807>.

41. See *infra* Part IV. See generally *Competition Policy Contributing to the European Green Deal*, EUR. COMM’N, https://ec.europa.eu/competition-policy/green-gazette/conference-2021_en (last visited July 31, 2022); see also ALEXANDRA BADEA, MARIN BANKOV, GRAÇA DA COSTA, JOSÉ ELÍAS CABRERA, SENTA MARENZ, KEVIN O’CONNOR, EKATERINA ROUSSEVA, JOHANNES THEISS, ANDREA USAI, SOFIA VASILEIOU, ALEXANDER WINTERSTEIN & MARC ZEDLER, *COMPETITION POLICY BRIEF: COMPETITION POLICY IN SUPPORT OF EUROPE’S GREEN AMBITION (2021)* (identifying perspectives following the 2020 engagement).

42. See EUR. COMM’N, *supra* note 41.

43. See *infra* Part IV.C.

44. See generally Anu Bradford, Adam S. Chilton, Katerina Linos & Alex Weaver, *The Global Dominance of European Competition Law over American Antitrust Law* (July 2, 2019) (unpublished manuscript) (on file with Columbia Law School Faculty Scholarship Repository); see also, e.g., Niamh Dunne, *Public Interest and EU Competition Law*, 65 ANTITRUST BULL. 256, 265–81 (2020) (discussing European court cases finding that competition law does not apply to certain restrictive practices between competitors if they serve a legitimate public purpose).

45. See *infra* Part V.B. This Article uses the term “prosocial corporation” to describe companies that are embracing a more stakeholder-oriented view of corporate purpose and accounting for their environmental and social impacts.

46. See *infra* Part V.

to “build back better.”⁴⁷ The administration’s policy agenda for corporate governance is cognizant of the role that companies must play to mitigate these risks. On March 21, 2022, the Securities and Exchange Commission released its proposal requiring that companies disclose information relating to climate change in their annual financial disclosures.⁴⁸ And it did not take long for the Department of Labor to reverse its Trump-era admonition to trustees to disregard environmental and social issues as “non-financial.”⁴⁹ Though the rallying cry against “Big Tech” is becoming a rare unifying force in an otherwise polarized Congress,⁵⁰ reforming antitrust law to enable companies to mitigate environmental and social risks remains largely unexplored.

Collaboration among competitors raises weighty concerns that are both practical and normative. Companies, especially multinationals, are hardly sympathetic proponents of a prosocial agenda, and any leeway for collaboration will have to be closely monitored. Also, antitrust should not be the only, or even primary, tool for addressing systematic risk. Other vehicles like environmental regulation, labor law, tax policy, and corporate law offer more promise.⁵¹ Nonetheless, courts, enforcement agencies, lawmakers, practitioners, and academics must acknowledge antitrust’s crucial role in mitigating economy-wide risks. Such a call to action may inspire a broader policy debate that encompasses merger review, state aid, and other core tenets of competition policy. This Article focuses more narrowly on how antitrust policy can begin supporting collaboration between competitors with the collective goal of addressing systematic risk.

This Article proceeds in five Parts. Part I demonstrates how the rise of the prosocial corporation is linked to an increased focus on systematic risk, encouraging companies to collaborate with their competitors. Part II traces the theoretical roots of the antitrust movement to contextualize why the antitrust debate has never focused on the virtues of prosocial collaboration among

47. See Lisa Woll & Aron Cramer, *Joe Biden Can Be the President for a Sustainable Private Sector*, GREENBIZ (Feb. 15, 2021), <https://www.greenbiz.com/article/joe-biden-can-be-president-sustainable-private-sector>.

48. Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>.

49. See *The Biden Administration: A New Start for U.S. Corporate Governance?*, INT’L CORP. GOVERNANCE NETWORK (Dec. 2020), <https://www.icgn.org/biden-administration-new-start-us-corporate-governance>; see also Andy Puzder, Opinion, *Biden’s Assault on ‘Shareholder Capitalism’*, WALL ST. J. (Aug. 17, 2020, 6:59 PM), <https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153>.

50. See Andrew Ross Sorkin, Jason Karaian, Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *The Case(s) Against Big Tech: Partisan Infighting May Take Pressure Off the Tech Giants.*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/20/business/dealbook/big-tech-antitrust.html>; see also Nandita Bose, *Biden Eyes Ex-Obama Staff to Tackle Big Tech and Other Antitrust Issues*, REUTERS (Jan. 16, 2021, 8:52 PM), <https://www.reuters.com/article/us-usa-biden-antitrust/biden-eyes-ex-obama-staff-to-tackle-big-tech-and-other-antitrust-issues-idINKBN29L0PV>.

51. See Sarah Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140–41, 149 (2019) (discussing how “[t]he law governing the corporation throughout its life cycle—corporate law, securities regulation, antitrust law, and bankruptcy law—should be understood as a fundamental part of environmental law.”).

competitors. Part III explores antitrust statutes and case law, revealing an underlying and increasingly frayed distinction between economic and noneconomic motivations and outcomes. Part IV presents case studies that bring to light how antitrust law thwarts the ability of companies to address systematic economic risks. Finally, Part V introduces the universal consumer standard and a policy proposal to harmonize antitrust law with the prosocial corporation.

I. THE RISE OF THE PROSOCIAL CORPORATION

The prosocial corporation's recent ascendance is both disappointing and befuddling to shareholder primacy loyalists.⁵² Many predicted that the COVID-19 pandemic would at last call the bluff on socially minded investors and executives.⁵³ To their surprise, the business and investment community has doubled down on the prosocial corporation.⁵⁴ This Part argues that many of these blind spots arise from the fact that the corporate purpose debate is being waged from the individual firm and investor perspective. While that point of view is doctrinally consistent with corporate law and directors' and investors' fiduciary duties (although this, too, is disputed), it is out of step with market realities.⁵⁵ Shareholders today are so diversified that their portfolios are "economy-mirroring."⁵⁶ This diversification is leading investors to manage systematic risks by putting pressure on their portfolio companies to reduce negative externalities—a role which both corporate and antitrust law traditionally ascribe to regulation.⁵⁷

Many scholars on both sides of the antitrust and corporate purpose debates do not fully appreciate that investor fidelity to prosocial activities is economically rational. Notwithstanding this tendency in academic discussion,

52. See Lucian Bebchuk & Roberto Tallarita, *Was the Business Roundtable Statement Mostly for Show? – (2) Evidence from Corporate Governance Guidelines*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 18, 2020), <https://corpgov.law.harvard.edu/2020/08/18/was-the-business-roundtable-statement-mostly-for-show-2-evidence-from-corporate-governance-guidelines>.

53. See *id.*

54. See Georg Kell, *Covid-19 Is Accelerating ESG Investing and Corporate Sustainability Practices*, FORBES (May 19, 2020, 11:10 AM), <https://www.forbes.com/sites/georgkell/2020/05/19/covid-19-is-accelerating-esg-investing-and-corporate-sustainability-practices/?sh=2f05c19a26bb>.

55. See Coffee, *The Future of Disclosure*, *supra* note 12, at 2 ("The era in which retail investors 'owned' companies or moved the trading markets 'deader than disco.'").

56. For an argument that ESG investing is prohibited by the sole interest rule, see Max M. Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 381–82, 406 (2020). For a critique of this view, see HAWLEY & WILLIAMS, *supra* note 12, at 23 (arguing that the economy-mirroring portfolio of an institutional investor already bears the costs of externalities, and that its "returns would be directly enhanced by a proper treatment of the externality in the first place"). See generally Frederick Alexander, *An Honorable Harvest: Universal Owners Must Take Responsibility for Their Portfolios*, 32 J. APPLIED CORP. FIN. 24, 28 (2020).

57. See Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose* 30 (Eur. Corp. Governance Inst. L., Working Paper No. 515/2020), <https://ssrn.com/abstract=3589951> (arguing that regulation is the best way to reduce negative externalities); see also Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APP. CORP. FIN. 8, 16 (2001) (advocating that regulating externalities "is the legitimate domain of the government in its rule-setting function").

investors are acutely aware that accounting for environmental and social harms mitigates systematic risks. As this Part reveals, this awareness is driving the business and investment community to embrace the prosocial corporation more than ever.

A. THE ACADEMIC DEBATE

In 2000, a well known article declared the end of history for corporate law with a pronouncement that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”⁵⁸ Fast-forward to the present, and corporate purpose has reemerged as “the hot topic in corporate governance.”⁵⁹ On one side, stakeholder governance theorists blame shareholder primacy for exacerbating societal ills.⁶⁰ These scholars argue that the corporation’s purpose is not to create profits at the expense of society, but to solve society’s problems profitably.⁶¹ In contrast, shareholder primacy theorists have doubled down on their fidelity to profit maximization as the only viable north star, arguing that it leads to societal benefit through wealth generation and offers a proven way to hold directors accountable to shareholders.⁶² These traditionalists concede that businesses cause grave externalities but point to regulation as the remedy.⁶³ Some claim, in a more conciliatory tone, that stakeholder and shareholder interests converge in the long term.⁶⁴ Many stakeholder governance purists and shareholder primacy loyalists disagree with this rosy view, correctly pointing out that stakeholder and shareholder interests often diverge in practice.⁶⁵ Because this debate assumes

58. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001).

59. Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309 (2021).

60. See, e.g., Cynthia A. Williams & Peer Zumbansen, *Conclusion: Evaluation, Policy Proposals and Research Agenda*, in *THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR, AND FINANCE CAPITALISM* 477, 477 (Cynthia A. Williams & Peer Zumbansen eds., 2011) (arguing that shareholder primacy has increased “inequality, systemic fragility and financial risk.”).

61. See generally COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD* (2018) (arguing that shareholder profits are a corporate output and not a corporate purpose).

62. See Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100–01 (2020) (“[S]takeholderism would make corporate leaders less accountable and more insulated from investor oversight . . . [which would] undermin[e] economic performance and thereby damag[e] both shareholders and stakeholders.”).

63. See Rock, *supra* note 57 (“[W]e should not fool ourselves into thinking that tinkering with corporate objective can begin to substitute for regulation to control climate change, assure decent wages and working hours, and decent health care . . .”); see also Hansmann & Kraakman, *supra* note 58, at 442 (“the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies . . . lie outside of corporate law.”).

64. See generally R. EDWARD FREEMAN, KIRSTEN E. MARTIN & BIDHAN L. PARMAR, *THE POWER OF AND: RESPONSIBLE BUSINESS WITHOUT TRADE-OFFS* (2020); see also Mozaffar Khan, George Serafeim & Aaron Yoon, *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697 (2016).

65. See Ann Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, THE FINREG BLOG (Oct. 19, 2019), <https://sites.law.duke.edu/thefinregblog/2019/10/10/not-everything-is-about-investors-the-case-for-mandatory-stakeholder-disclosure> (“Investors are mainly interested in . . . a

the perspective of the individual firm and investor, it tends to discount the economic value of environmental and social initiatives, particularly when those initiatives have a negligible impact on the individual company's stock performance. As Parts I.B and I.C explore, the investment community is employing a different calculation and is viewing the prosocial corporation as a proxy for sound risk oversight.

B. THE BUSINESS AND INVESTMENT COMMUNITY

In contrast to the stormy academic debate, the business and investment community appears to be sailing swiftly towards a prosocial and stakeholder-oriented view of corporate purpose.⁶⁶ In 2018, BlackRock CEO Larry Fink made headlines when he announced that BlackRock's portfolio companies must "serve a social purpose."⁶⁷ In August 2019, the Business Roundtable—an association of prominent CEOs—had swapped its commitment to shareholder profit maximization with an embrace of "all stakeholders."⁶⁸ By late January 2020, the World Economic Forum at Davos unveiled "the Davos Manifesto" and declared its allegiance to "stakeholder capitalism."⁶⁹ More recently, the Biden Administration has promised to "put an end to the era of shareholder capitalism."⁷⁰ Lawmakers are eagerly anticipating their chance to finally embed a stakeholder-oriented view into corporate law.⁷¹ From Wall Street to Main Street to the Beltway, the prosocial corporation reigns triumphant.⁷²

company's financial condition or results of operations, but the general public also wants to know about matters relevant to corporate social performance, including political spending, diversity efforts, and legal compliance, even when these matters do not impact the corporate bottom line.").

66. See, e.g., Andrew Ross Sorkin, *BlackRock Chief Pushes a Big New Climate Goal for the Corporate World*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/business/dealbook/larry-fink-letter-blackrock-climate.html>.

67. See Fink, *supra* note 3.

68. Press Release, Bus. Round Table, Statement on the Purpose of a Corporation (Aug. 19, 2019), <https://opportunity.businessroundtable.org/ourcommitment>; David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html>. But see Peter S. Goodman, *Stakeholder Capitalism Gets a Report Card. It's Not Good.*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/business/business-roundtable-stakeholder-capitalism.html>.

69. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

70. Andy Puzder, Opinion, *Biden's Assault on 'Shareholder Capitalism'*, WALL ST. J. (Aug. 17, 2020, 6:59 PM), <https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153>; Allison Schragger, *The "Stakeholder" Fallacy*, CITY J. (July 16, 2020), <https://www.city-journal.org/biden-stakeholder-fallacy>.

71. Accountable Capitalism Act, S. 3348, 115th Cong. (2018) (sponsored by Senator Elizabeth Warren).

72. More recently though, there has been an "ESG Backlash" from conservative lawmakers and CEOs that has dampened some of this enthusiasm. See, e.g., Lisa Pham, *ESG Backlash Has Fund Clients Demanding Proof It Works*, BLOOMBERG (May 31, 2022, 6:41 AM), <https://www.bloomberg.com/news/articles/2022-05-31/esg-fund-clients-demand-proof-strategy-works-amid-backlash#xj4y7vzkg>.

This is not the first time that the business community has championed a compassionate approach to capitalism.⁷³ As far back as 1932, Professor Adolf Berle, one of corporate law's leading luminaries, described corporations as "quasi-public" institutions that "serve not alone the owners or the control [group] but all society."⁷⁴ But certainly by the 1980s, Milton Friedman—symbol and scapegoat of shareholder primacy—had won the day.⁷⁵ Friedman's focus on profit maximization fit squarely with the Reagan Administration's libertarian economic policies and Wall Street's focus on short-term profit maximization.⁷⁶ Although Friedman's articulation of corporate purpose took center stage, it did not deliver a fatal blow to the prosocial corporation.

Several initiatives emerged in the 1980s, largely in response to corporate scandals.⁷⁷ R. Edward Freeman's 1984 book, *Strategic Management: A Stakeholder Approach*,⁷⁸ represented a landmark in the development of stakeholder theory. The rise of globalization and increasingly complex supply chains prompted the Business and Human Rights Movement of the late 1990s, which in turn led to the creation of the United Nations Guiding Principles for Business and Human Rights⁷⁹ and the U.N. Global Compact.⁸⁰ These efforts sought to address human rights abuses through a set of voluntary frameworks

73. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684–85 (Mich. 1919); see also Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that managers should only work for shareholders' financial benefit); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148–50 (1932) (arguing that corporations had social and profit-making functions). For a history of the evolution of the corporate social responsibility and sustainable investment movements, see Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine* (Eur. Corp. Governance Inst. L. Working Paper No. 564/2021), <https://ssrn.com/abstract=3775846>.

74. BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 356 (1932); see also, e.g., Roberta Ramano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 924 (1984) ("An essential difference between Berle and contemporary corporate law reformers is that he had a normative theory of the corporation and its place in the polity, whereas many advocates of reform are uninterested or unwilling to articulate the vision of the good society that informs their policy package.").

75. See Brian R. Cheffins, *Stop Blaming Milton Friedman!* (Eur. Corp. Governance Inst. L., Working Paper No. 523/2020), <https://ssrn.com/abstract=3552950>.

76. See *Greed Is Good. Except When It's Bad.*, N.Y. TIMES: DEALBOOK NEWSL. (Sept. 13, 2020), <https://www.nytimes.com/2020/09/13/business/dealbook/milton-friedman-essay-anniversary.html> ("Milton Friedman's 'The Social Responsibility of Business Is to Increase Its Profits' laid out arguably the most consequential economic idea of the latter half of the 20th century . . . [and] was a call to arms for free market capitalism that influenced a generation of executives and political leaders, most notably Ronald Reagan . . ."); see also Kimberly Amadeo, *Greed Is Good or Is It? Quote and Meaning*, THOUGHTCO. (Aug. 21, 2020), <https://www.thoughtco.com/greed-is-good-or-is-it-quote-and-meaning-3306247> ("President Ronald Reagan's policies matched the 'greed is good' mood of 1980s America.").

77. See, e.g., Steven Toms, *Financial Scandals: A Historical Overview*, 49 ACCT. & BUS. RES. 477, 489–91 (2019) ("Following [the] scandals of the late 1980s, there were moves to improve accounting standards and corporate governance.").

78. R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984).

79. U.N. HUMAN RIGHTS OFFICE HIGH COMM'R, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* 1 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

80. U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org> (last visited July 31, 2022).

and prompted companies to collaborate through trade associations and industry initiatives.⁸¹ But until recently, these efforts have only had a marginal impact.⁸²

C. WHY NOW? COMMON OWNERS AND EXTERNALITIES

1. *The Individual Company's Perspective on Negative Externalities*

This Article argues that the recent ascendance of the prosocial corporation has coincided with two parallel developments, both of which reflect a recalibration of negative externalities. First coined by the economist Arthur Pigou,⁸³ an externality represents a cost (“negative externality”) or benefit (“positive externality”) caused by the production of a product or service that is not incurred or received by that producer or service provider.⁸⁴ Fossil fuels provide a paradigmatic example of an industry that has externalized its negative externalities.⁸⁵ Simply put, the cost of gasoline does not reflect the “true cost” of the environmental damage borne by society. Policymakers and academics have long debated about how to minimize negative externalities to a socially optimal level.⁸⁶ Should we penalize bad behavior or reward good behavior? And should these penalties or rewards be administered *ex ante*, through preventative regulation or corrective taxes, such as a carbon tax, or *ex post*, through regulations exacting penalties or tort law?⁸⁷ Of course, private ordering plays a role. Negative externalities often impact a company’s “social license to operate,” which consumers, employees, and even investors can rescind in response to egregious corporate conduct. Environmental catastrophes, such as Exxon

81. HIGH MEADOWS INST., THE ROLE OF INDUSTRY ASSOCIATIONS AND CIVIL PARTNERSHIPS IN CORPORATE RESPONSIBILITY 19 (2020), http://www.highmeadowsinstitute.org/wp-content/uploads/2020/10/The-Role-of-Industry-Associations-and-Civil-Partnerships-in-Corporate-Responsibility_2020.pdf.

82. See Lund & Pollman, *supra* note 73, at 34.

83. ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932).

84. See JONATHAN GRUBER, PUBLIC FINANCE & PUBLIC POLICY 122–52 (3d ed. 2011); see also Leo E. Strine Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007, 1033–34 (“[E]xternalities’ can be put in these more human terms: dirtier water and air, workers suffering death or harm at an unsafe workplace . . . or consumers who are defrauded or injured.”).

85. Ben Machol & Sarah Rizk, *Economic Value of U.S. Fossil Fuel Electricity Health Impacts*, 52 ENV’T INT’L 75, 80 (2013) (“Fossil fuel energy has several externalities not accounted for in the retail price . . .”).

86. See generally Donald Wittman, *Prior Regulation vs. Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193 (1977) (analyzing tradeoffs in regulating *ex ante* and punishing *ex post*); Andrew Johnston, Kenneth Amaeshi, Emmanuel Adegbite & Onyeka K. Osuji, *Corporate Social Responsibility as Obligated Internalisation of Social Costs*, 170 J. BUS. ETHICS 39 (2021); see also, e.g., Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 54–88 (1996).

87. See Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715, 1718 (2015) (questioning the assumption that information is superior *ex post*); see also Cass R. Sunstein, *Internalities, Externalities, and Fuel Economy* 3 (Harv. Env’t Econ. Program, Discussion Paper No. 20-84, 2020), https://heep.hks.harvard.edu/files/heep/files/dp_84_sunstein.pdf (discussing consumers’ failure to consider the impacts on their future welfare).

Valdez's 1989 oil spill, and human rights crises, like Nike's forced labor practices, tarnish brands and inflict financial losses.⁸⁸

Until recently, however, companies have mostly been incentivized to take on *more* risk and externalize their negative impacts. Admittedly, environmental activists and NGOs have enjoyed some rare victories.⁸⁹ However, the stock prices of companies engulfed in crisis often recover remarkably quickly.⁹⁰ In a world of seemingly unlimited natural resources and cheap labor, the cost-benefit analysis for corporate executives and directors was simple. Economically rational actors became locked in a race to externalize their negative impacts. Antitrust policy also encouraged companies to profiteer from negative externalities by cementing consumer price as a normative goal.⁹¹ Yet environmental economists have demonstrated that the low prices that antitrust law applauds depend upon imposing negative externalities on the environment, local communities, and future generations.⁹² In sum, "the most glaring misstep in current antitrust thinking is ignoring externalities."⁹³

Today, however, there is an emerging consensus that we must swiftly prepare for the negative social and financial impacts of climate change. This is no longer a progressive argument. The Pentagon, for instance, has identified climate change as a national security concern,⁹⁴ and insurance companies are building climate risk into their underwriting processes.⁹⁵ Likewise in finance literature, there is an emerging critique of the neoclassical growth paradigm, which ignores physical limitations or "planetary boundaries."⁹⁶ An increasing

88. See generally Hillary A. Sale, *The Corporate Purpose of Social License* (June 13, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403706.

89. See, e.g., Reuters Staff, *U.S. Court Dismisses Energy Transfer Partners Lawsuit Against Greenpeace*, REUTERS (Feb. 14, 2019, 5:13 PM), <https://www.reuters.com/article/us-energy-transfer-lawsuit-greenpeace/u-s-court-dismisses-energy-transfer-partners-lawsuit-against-greenpeace-idUSKCN1Q403T>.

90. Notable examples include Facebook, Chipotle, Samsung, Tyco, and Exxon. See, e.g., Anthony Mirhaydari, *Facebook Stock Recovers All \$134B Lost After Cambridge Analytica Data Scandal*, CBS NEWS (Feb. 10, 2019, 7:56 PM), <https://www.cbsnews.com/news/facebook-stock-price-recovers-all-134-billion-lost-in-after-cambridge-analytica-datascandal>.

91. See *supra* Part I.A–B.

92. See, e.g., PAUL HAWKEN, AMORY LOVINS & HUNTER LOVINS, *NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION* 64 (2d ed. 2000).

93. See Jeffrey L. Harrison, *Other Markets, Other Costs: Modernizing Antitrust*, 27 U. FLA. J.L. & PUB. POL'Y 373, 385 (2016) (arguing that the goals of antitrust law—consumer surplus, allocative efficiency, and productive efficiency—all fail to account for the true cost of externalities and resultant impacts on consumers).

94. See DEP'T OF DEFENSE, *REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT OF DEFENSE* 2 (2019), <https://media.defense.gov/2019/Jan/29/2002084200/-1/-1/1/climate-change-report-2019.pdf>.

95. See Swenja Surminski, *Climate Change and the Insurance Industry: Managing Risk in a Risky Time*, GEO. J. INT'L. AFFAIRS (June 9, 2020), <https://gjia.georgetown.edu/2020/06/09/climate-change-and-the-insurance-industry-managing-risk-in-a-risky-time>; Press Release, AXA, AXA Accelerates its Commitment to Fight Climate Change (Dec. 12, 2017), <https://www.axa.com/en/press/press-releases/axa-accelerates-its-commitment-to-fight-climate-change> (the CEO of AXA, a French insurance firm, comments that "[a] +4°C world is not insurable.").

96. See generally Gail Whiteman, Brian Walker & Paolo Perego, *Planetary Boundaries: Ecological Foundations for Corporate Sustainability*, 50 J. MGMT. STUD. 307 (2013) (arguing that, to address climate

number of businesses are recognizing that systemic risks, from climate change to economic inequality, are threatening their long-term sustainability.⁹⁷ Some of this prosocial activity is a response to pressure from millennials and Generation Z, who are increasingly using their leverage as consumers, employees, and investors to address environmental and social harms.⁹⁸ Notwithstanding this progress, individual companies may still lack adequate incentives to refrain from externalizing their costs. With forced labor and natural resources in ample supply, many businesses can continue to profit from exploiting people and the planet. But the rise of concentrated ownership has changed that calculus.

2. *The Diversified Investor's Perspective on Negative Externalities*

Modern portfolio theory is “the analytical framework utilized by investment managers.”⁹⁹ It posits that investors must account for both risks and returns, with the penultimate goal of maximizing risk-adjusted returns.¹⁰⁰ By design, diversification immunizes investors from idiosyncratic risks—by putting their eggs in multiple baskets, investors protect themselves from a crisis at a particular company or a downturn in a particular industry. Modern portfolio theory is also the rationale underlying the rise in index investing. Through highly diversified indexes, an increasingly smaller number of investors and asset managers have opted to passively place their eggs in expanding baskets spanning the entire market. Many chided John Bogle, the “father of index investing,” for bringing this innovation to The Vanguard Group in 1976.¹⁰¹ Today, however,

change, which is a systematic risk to the economy, companies may need to collaborate to reduce output, placing the values of antitrust at odds with the business community's efforts to achieve long-term sustainability).

97. See Stavros Gadinis & Amelia Miazad, *Corporate Law & Social Risk*, 73 VAND. L. REV. 1401, 1406 (2020) (discussing governance reforms that companies have made to address ESG concerns, including tying executive compensation to ESG metrics and changing the composition of the board); see also Konstantinos Stylianou, *Can Common Business Practices Ever Be Anticompetitive? Redefining Monopolization*, 57 AM. BUS. L.J. 169, 169, 172 (2020) (arguing that antitrust law is focused economic values of a bygone era, such as efficiency gains, whereas businesses today are increasingly focused on long-term sustainability, and that accordingly “antitrust law becomes detached from the very subjects it purports to regulate.”).

98. Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1295–99 (2020) (demonstrating that millennials are more likely to incorporate social issues as investors, employees, and consumers).

99. SATYAJIT BOSE, GUO DONG & ANNE SIMPSON, THE FINANCIAL ECOSYSTEM: THE ROLE OF FINANCE IN ACHIEVING SUSTAINABILITY 226–28 (2019) (discussing Harry Markowitz's portfolio selection theory and arguing that “Markowitz's key insight was to show that the covariance between securities in the portfolio would make it impossible to diversify away all the risk”). Modern portfolio theory has been criticized for relying solely on the variance of portfolio return to measure risk. See *id.* at 230 (“Unfortunately, modern portfolio theory has yet to be modified to incorporate a broader range of risk measures and metrics of co-movement.”).

100. See Mark Rubinstein, *Markowitz's "Portfolio Selection": A Fifty-Year Retrospective*, 57 J. FIN. 1041, 1042, 1044 (2002). See generally Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77, 77 (1952) (defining modern portfolio theory). For a more contemporary treatment and critique, see generally JAMES P. HAWLEY & JON LUKOMNIK, *BEYOND MODERN PORTFOLIO THEORY: INVESTING THAT MATTERS* (1st ed. 2021).

101. John C. Bogle, *Bogle Sounds a Warning on Index Funds*, WALL ST. J. (Nov. 29, 2018, 10:15 AM), <https://www.wsj.com/articles/bogle-sounds-a-warning-on-index-funds-1543504551>.

index funds have grown into a ten trillion dollar industry.¹⁰² In light of this meteoric rise, “[a]n identifiable shareholder with discrete and discernible interests in a specific company is no longer the model that fits the majority of American investors.”¹⁰³ Today’s investors are more appropriately described as “universal owners”¹⁰⁴ who own shares in companies that are dispersed across sectors, industries, or even the entire market.¹⁰⁵

The wealth of universal owners is highly concentrated in a small number of institutional investors. More specifically, “the Big Three” asset managers—BlackRock, Inc., State Street Global Advisors, and Vanguard Group—collectively hold shares comprising roughly 20% of the S&P 500¹⁰⁶ and about 80% of all indexed funds.¹⁰⁷ As a group, these “Titans of Wall Street”¹⁰⁸ are the largest shareholder in 40% of all U.S. listed companies and 90% of all companies in the S&P 500.¹⁰⁹ And their power has been steadily increasing: in 2009, BlackRock, Vanguard, and State Street owned 7% of Apple Inc.’s shares, but today they own 18%.¹¹⁰ In addition to large asset managers, assets managed by employee pension funds, such as The California Public Employees’

102. See generally Neil Irwin, *How to Win at the Stock Market by Being Lazy*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/02/04/upshot/stock-market-winning-strategy.html> (describing the “extraordinary payoffs of being a passive stock market investor”); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 723 (2019) (concluding that “the Big Three will likely continue to grow into a ‘Giant Three,’ and that the Giant Three will likely come to dominate voting in public companies”).

103. Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1310 (2012).

104. See, e.g., HAWLEY & WILLIAMS, *supra* note 12, at 2; see also Tucker, *supra* note 103, at 1310, 1317.

105. See Condon, *supra* note 15, at 12–13. Universal owners and their incentives are analogous to the incentives of communities that manage shared resources or “commons.” There is rich literature on collaborative governance of these common resources. Most notably, of course, Elinor Ostrom, who was the first woman to receive the Nobel Prize for Economics, showed that private solutions to common resource problems can be more effective than regulatory interventions. See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); see also Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg, *Governing Knowledge Commons*, in *GOVERNING KNOWLEDGE COMMONS* 1 (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg eds., 2014) (applying Ostrom’s analysis of the commons beyond environmental public goods to intellectual and cultural ones). For an application of the commons analysis to corporate law, see generally Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEENS L.J. 339 (2012).

106. See, e.g., Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 299, 313 (2017); see also Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 100–01 (2017); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May–June 2019), <https://hbr.org/2019/05/the-investor-revolution>.

107. See Dawn Lim, *Index Funds Are the New Kings of Wall Street*, WALL ST. J. (Sept. 18, 2019, 5:30 AM), <https://www.wsj.com/articles/index-funds-are-the-new-kings-of-wall-street-11568799004>.

108. Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 19–20 (2019).

109. See Bebchuk & Hirst, *supra* note 102, at 721 (predicting that this will eventually rise to 40% in 20 years). For example, six shareholders now control 24% of ExxonMobil and 26% of Chevron and have used such power to pressure for “climate change” emissions restrictions. See Condon, *supra* note 15, at 10–11.

110. David McLaughlin & Annie Massa, *The Hidden Dangers of the Great Index Fund Takeover*, BLOOMBERG (Jan. 9, 2020, 10:40 AM), <https://www.bloomberg.com/news/features/2020-01-09/the-hidden-dangers-of-the-great-index-fund-takeover>.

Retirement System (CalPERS), have grown considerably.¹¹¹ Unlike institutional investors, where portfolio-wide voting strategy may raise “intra-beneficiary conflict,” pension funds do not provide an option to select between asset classes, meaning that all beneficiaries are equally diversified.¹¹² To scale their impact even more, universal owners have recently started forming large investor alliances, such as Climate Action 100+, a group of public and private asset managers that pledged to influence companies to reduce carbon emissions.¹¹³

Once the ambit of NGOs and policymakers, universal owners have emerged as vociferous advocates for social and environmental initiatives.¹¹⁴ Conservatives have dismissed these asset managers’ efforts as “socialist,” while progressives claim they are merely veiled attempts to avoid regulation.¹¹⁵ But, as explored elsewhere, there is a basic economic rationale unifying these prosocial institutional investors.¹¹⁶ Universal owners are not only exposed to systematic risk—the flipside of diversifying away from idiosyncratic risk—but also must grapple with the reality that the business model underpinning index investing also impedes exit.¹¹⁷ Systematic risk, also described as “unhedgeable risk,” affects financial assets across any given portfolio or the entire market, as opposed to picking “winners and losers.”¹¹⁸ Moreover, universal owners make investments on behalf of beneficiaries with very long-term investment horizons that can span generations.¹¹⁹

111. See Condon, *supra* note 15, at 13.

112. See *id.* at 57–58.

113. CLIMATE ACTION 100+, <https://www.climateaction100.org/> (last visited July 31, 2022).

114. See Gadinis & Miazad, *supra* note 97, at 1405–07; see also Coffee, *The Future of Disclosure*, *supra* note 12, at 5–6.

115. See generally Mark R. Kramer, *The Backlash to Larry Fink’s Letter Shows How Far Business Has to Go on Social Responsibility*, HARV. BUS. REV. (Jan. 31, 2019), <https://hbr.org/2019/01/the-backlash-to-larry-finks-letter-shows-how-far-business-has-to-go-on-social-responsibility>; Editorial Board, *Larry Fink’s Latest Sermon*, WALL ST. J. (Jan. 17, 2020, 6:56 PM), <https://www.wsj.com/articles/larry-finks-latest-sermon-11579305418>; Rupert Darwall, *BlackRock’s Choice: Investment Fiduciary or Political Activist?*, THE HILL (May 2, 2020, 8:00 AM), <https://thehill.com/opinion/energy-environment/495673-blackrocks-choice-investment-fiduciary-or-political-activist>.

116. See Gadinis & Miazad, *supra* note 97, at 1406–08.

117. See *id.*

118. See, e.g., HAWLEY & WILLIAMS, *supra* note 12, at 21 (explaining the difference between systemic risk, which affects a wide range of economic, political, social institutions, and systematic risk, which impacts financial markets); see also Markus Pelger, *Understanding Systematic Risk: A High Frequency Approach*, 75 J. FIN. 2179, 2198–2215 (2020). Climate change, for instance, has been viewed as a systematic risk. See, e.g., SCOTT KELLY, JACLYN ZHIYI YEO, ANDREW COBURN, JENNIFER COPIC, DOUG CRAWFORD-BROWN, AIDEEN FOLEY, EUGENE NEDUV, DANNY RALPH & FARZAD SAIDI, UNHEDGEABLE RISK: HOW CLIMATE CHANGE SENTIMENT IMPACTS INVESTMENT 8 (2015), <https://www.jbs.cam.ac.uk/wp-content/uploads/2020/08/crs-unhedgeable-risk.pdf>. Some scholars have analyzed both the magnitude of climate change as a leading systematic risk and investors’ concerns about it. See, e.g., Stefano Battison, Antoine Mandel, Irene Monasterolo, Franziska Schütze & Gabriele Visentin, *A Climate Stress-Test of the Financial System*, 7 NATURE CLIMATE CHANGE 283, 288 (2017); Steven L. Schwarcz, *Systematic Regulation of Systemic Risk*, 2019 WIS. L. REV. 1 (2019).

119. See, e.g., Strine, *supra* note 84, at 1012 (“Short-cuts get found out. And companies that externalize costs to society and other companies do not benefit Worker Investors who pay for those externalities as investors in a portfolio reflecting the entire market, and as human beings who breathe air, consume products, and pay taxes.”).

The term “passive investor” for universal owners is very much a misnomer. Precisely because exiting a portfolio is challenging, universal owners are flexing their power through a combination of private engagement, shareholder proposals, and voting against individual directors.¹²⁰ Universal owners are increasingly deploying these strategies to incentivize companies to be more prosocial. Just consider the shareholder focus on Environmental, Social, and Corporate Governance (ESG) issues during the 2021 proxy season, which range from worker health and safety to climate change.¹²¹

Given their systematic risk exposure and long-term horizons, universal owners view prosocial activity as a proxy for sound risk oversight. The more diversified shareholders are, the more prosocial they tend to be.¹²² Their portfolios are “economy-mirroring”¹²³—for a highly diversified pension fund, “it is virtually inconceivable that something would be in the interest of pensioners that is not in the interest of society.”¹²⁴ Might universal owners be right, then, about prosocial activity’s role in the risk landscape of index investing? Arguably, universal owners are even more aligned with society than lawmakers, who can depend on campaign contributions from special interest groups, and even nonprofits, which depend on donations.

Boards and management are, in turn, responding to this pressure from universal owners. As I have argued elsewhere, “boards are adopting reforms that go to the heart of corporate governance[,]” including tying executive compensation to environmental and social targets and transforming board governance to prioritize ESG issues.¹²⁵ Scholars are beginning to observe this recent phenomenon, and are arguing that universal owners are also less tolerant of companies that externalize costs than traditional investors.¹²⁶ While the

120. For a discussion of engagement on ESG issues, see Gadinis & Miazad, *supra* note 97, at 1407 (arguing that engagement has become a defining feature of corporate governance in our era); see also Andreas G. F. Hoepner, Ioannis Oikonomou, Zacharias Sautner, Laura T. Starks & Xiaoyan Zhou, *ESG Shareholder Engagement and Downside Risk 1* (Eur. Corp. Governance Inst. – Fin. Working Paper No. 671/2020), <https://ssrn.com/abstract=2874252> (finding that engagement on ESG issues by directors, including diversity, reduces downside risk); Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913, 1943 (2021) (discussing shareholder engagement in the context of efforts to increase gender diversity).

121. GLASS LEWIS, 2020 PROXY SEASON REVIEW: SHAREHOLDER PROPOSALS 1–2, 21 (Courteney Keatinge et al. eds., 2020), <https://www.glasslewis.com/wp-content/uploads/2020/09/2020-Proxy-Season-Review-Shareholder-Proposals.pdf>; Marc Treviño, June M. Hu & Joshua L. Levin, *2021 Proxy Season Review: Shareholder Proposals on Environmental Matters*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 11, 2021), <https://corpgov.law.harvard.edu/2021/08/11/2021-proxy-season-review-shareholder-proposals-on-environmental-matters/>.

122. See Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2008, 2019 (2013).

123. See Condon, *supra* note 15, at 6 (arguing that “institutional investors’ climate activism is motivated by their desire to mitigate climate change risks and damages to their economy-mirroring portfolios.”).

124. ROBERT A. G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 167 (5th ed. 2011).

125. See Gadinis & Miazad, *supra* note 97, at 1420 (discussing fossil fuel companies Shell, Total, and Chevron adding emissions targets to executive compensation).

126. Robert G. Hansen & John R. Lott, Jr., *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers*, 31 J. FIN. & QUANTITATIVE ANALYSIS 43, 43 (1996) (“If shareholders own diversified portfolios, and if companies impose externalities on one another, shareholders do not want value

empirical research is scant, recent studies also confirm that firms with common ownership invest in more prosocial or CSR initiatives.¹²⁷ Unlike traditional investors, universal owners do not benefit from an individual company driving up its share price if those gains come at the expense of other companies in their portfolio. For the universal owner, then, the cost-benefit analysis of externalities must be made not at the individual company level, but at the portfolio level. As Professor Madison Condon recently concluded, “diversified investors should rationally be motivated to internalize intra-portfolio negative externalities.”¹²⁸ This increased sensitivity to externalities challenges conventional wisdom about the high-risk tolerance that diversified shareholders typically have. Professors John Armour and Jeffrey Gordon have also argued that, while diversified investors typically want an individual firm to take on more risk compared to a concentrated shareholder, this logic falls apart if that firm is taking on systematic risks.¹²⁹ This Article argues that the diversified investor’s relationship to systematic risk pressures companies to collaborate. But, as Parts II and III explore, both sides of the antitrust debate have historically discounted the economic value of competitor collaboration.

II. THE ANTITRUST LAW PENDULUM

Despite attempts to camouflage antitrust law as purely economic, it has always been steeped in political ideologies.¹³⁰ Even Robert Bork, who severed

maximization to be corporate policy. Instead, shareholders want companies to maximize portfolio values.”). Hansen and Lott, Jr. also discuss structuring executive compensation to align it with the success of the entire portfolio, as opposed to the executive’s own firm. *See id.* at 58.

127. *See* Xin Dai & Yue Qiu, Common Ownership and Social Responsibility 23 (Aug. 6, 2020) (unpublished manuscript), www.ssrn.com/abstract=3668483 (presenting the first empirical study on the relationship between common ownership and a firm’s CSR score).

128. Condon, *supra* note 15, at 1 (discussing why it is rational for diversified shareholders to deviate from the objective of maximizing share price); *see also* Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214, 242 (1999) (remarking that rational investors “will agree on a simple rule: managers should make the choice that will maximize the value of rational investors’ diversified portfolios”); Coffee, *The Future of Disclosure*, *supra* note 12, at 41–42 (“Because of the high level of common ownership among diversified institutional investors, [they] can potentially profit on a portfolio-wide basis by [imposing constraints] that seek to reduce externalities[]”—at least so long as such actions benefit the “winners” in their portfolio more than they impose costs on the “losers.”).

129. *See* Armour & Gordon, *supra* note 18, at 39; *see also* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value* 3 (Eur. Corp. Governance Inst. L., Working Paper No. 521/2017), https://scholar.harvard.edu/files/hart/files/108.00000022-hart-vol2no2-jlfa-0022_002.pdf (explaining that because consumers and private companies account for externalities, public companies they invest in should too). *But see* Tallarita, *supra* note 18, at 3 (providing an “empirical assessment of the limits of portfolio primacy by examining the scope of action, economic incentives, and fiduciary conflicts of index fund managers with respect to climate risk mitigation”).

130. *See, e.g.*, Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (“[T]he political forces that produced the major antitrust statutes—in 1890, 1914, 1936, and 1950—varied widely[.]”); Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> (describing how U.S. antitrust policy and enforcement reflects shifts in economic, political, social, and/or moral values).

antitrust from its “socio-political”¹³¹ origins and fastened it to economic impacts, admits that “[antitrust] is . . . an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency.”¹³² Advocates of the prevailing consumer welfare standard argue that we should celebrate that antitrust law has matured beyond its erratic past and has focused on consumer welfare as competition policy’s north star.¹³³ But the recent rise of the Neo-Brandeis movement and the attention it has garnered from policymakers signals that the pendulum is swinging.¹³⁴ To contextualize antitrust law’s current juncture, this Part will briefly trace antitrust law’s history.¹³⁵

A. THE BIRTH OF ANTITRUST LAW & THE BRANDEIS ERA

While the common law of antitrust goes back much farther, the Sherman Antitrust Act of 1890 is often described as marking the inception of antitrust law.¹³⁶ Enacted by a nearly unanimous Congress, it sought to forestall the “great trusts.”¹³⁷ The legislative history of the Sherman Act reveals its deeply populist sentiments and prevalent view that “big is bad.”¹³⁸ Economists were always dubious of the Sherman Act.¹³⁹ While some dismissed it as an impotent challenge to stronger market forces, others worried that it would thwart the economic efficiencies that only scale could offer.¹⁴⁰ Both groups were relegated

131. Wright et al., *supra* note 28, at 304; *see also* Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 364 (1965); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 7 (1978).

132. *See* Bork & Bowman, *supra* note 131.

133. Wright et al., *supra* note 28, at 293.

134. *See, e.g.*, Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439, 1462 (2019).

135. For a history of antitrust law and policy, *see generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000); *see also* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 47–74 (5th ed. 2016) [hereinafter HOVENKAMP, *FEDERAL ANTITRUST POLICY*]; WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1981).

136. 15 U.S.C. §§ 1–38; *see also* Mark Grady, *Toward a Positive Economic Theory of Antitrust*, 30 ECON. INQUIRY 225, 228 (1992) (explaining that “[a]s a body of common law, antitrust had an ancient history even by 1890, dating from at least the 15th century”).

137. In the 1800s, several trusts controlled entire sections of the economy, including the railroad, oil, steel, and sugar industries. *See, e.g.*, Kovacic & Shapiro, *supra* note 135, at 45; Wright et al., *supra* note 28, at 298.

138. *See, e.g.*, 21 CONG. REC. 2,457 (1890), https://appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf (Senator Sherman: “[I]ndustrial liberty [lies] at the foundation of the equality of all rights and privileges. . . . If we would not submit to an emperor we should not submit to an autocrat of trade”); *see also* Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 406–09 (2014); Joshua D. Wright & Aurélien Portuese, *Antitrust Populism: Towards a Taxonomy*, 21 STAN. J.L. BUS. & FIN. 131, 140 (2020); Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 77 (2018) [hereinafter Hovenkamp, *Progressive Antitrust*] (drawing a distinction between antitrust law’s populist roots and the subsequent era of progressivism).

139. *See* Kovacic & Shapiro, *supra* note 135, at 44 (“Most economists in the late 19th century scorned the Sherman Act”); *see also* Patrice Bougette & Frédéric Marty, *Information Exchange Among Firms: The Coherence of Justice Brandeis’ Regulated Competition Approach* 10 (GREDEG, Working Paper No. 2020–56, 2021), <http://www.gredeg.cnrs.fr/working-papers/GREDEG-WP-2020-56.pdf>.

140. *See* Kovacic & Shapiro, *supra* note 135, at 44.

to the periphery as lawmakers remained incensed with assailing concentrations of power.

The Sherman Act's broad prohibition of "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce"¹⁴¹ gave courts the power to define proscribed activity, and early Supreme Court decisions reflect a mistrust of large entities.¹⁴² These seminal cases focused on protecting "small dealers and worthy men,"¹⁴³ even if upholding that ideal led to higher costs for consumers.¹⁴⁴ Two landmark Supreme Court decisions in 1911, *Standard Oil Co. v. United States* and *United States v. American Tobacco Co.*, compelled the breakup of major conglomerates and cemented this normative orientation against big business.¹⁴⁵

Standard Oil also marked the first expression of the "rule of reason," a multi-factor analysis under which the Sherman Act is deemed to prohibit only "unreasonable restraint of trade."¹⁴⁶ While some behavior, such as price-fixing, remained condemned by bright-line per se rules, the rule of reason analysis allowed judges to assess anticompetitive conduct on a case-by-case basis.¹⁴⁷ *Standard Oil's* introduction of the rule of reason caused trepidation among members of Congress who felt it gave too much deference to courts.¹⁴⁸

At this juncture, it is impossible to overstate the influence of Louis Brandeis, the influential critic of concentrations of business. From his essays, most notably, "The Curse of Bigness," to his congressional testimony, Brandeis argued that antitrust law should prevent corporations from becoming too large.¹⁴⁹ Unlike the contemporary Neo-Brandeis movement,¹⁵⁰ however, Brandeis did not necessarily view antitrust law as a vehicle for wealth

141. 15 U.S.C. § 1.

142. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 666 (1982); see also Kovacic & Shapiro, *supra* note 135, at 44–45.

143. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).

144. See Kovacic & Shapiro, *supra* note 135, at 44.

145. *Standard Oil Co. v. United States*, 221 U.S. 1, 72–74 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 181, 184, 187 (1911).

146. *Standard Oil Co.*, 221 U.S. at 62, 64, 66–68; see also Kovacic & Shapiro, *supra* note 135, at 45–47.

147. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–98 (1927) (holding that a price-fixing agreement among competitors is an unreasonable restraint "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable").

148. See, e.g., Kovacic & Shapiro, *supra* note 135, at 46 ("Congress feared that the Supreme Court's apparent softening of the law, by reading the Sherman Act's ban on 'every' trade restraint to bar only 'unreasonable' restraints, foreshadowed continuing efforts by conservative judges to narrow the statute unduly.")

149. LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934); see also Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSP. 94, 94 (2019).

150. See *infra* Part II.C.

redistribution.¹⁵¹ Rather, he viewed antitrust as a way to restore personal liberty and democratic ideals by combatting concentrations of power.¹⁵²

Persuaded by Brandeis, President Woodrow Wilson asked Congress to strengthen antitrust legislation, leading to two new laws in 1914: the Federal Trade Commission Act,¹⁵³ which established the FTC, and the Clayton Antitrust Act,¹⁵⁴ which expanded antitrust's regulatory scope to include mergers.¹⁵⁵ Congress subsequently amended the Clayton Act by passing the Robinson-Patman Act of 1936, which added prohibitions on price discrimination.¹⁵⁶ From the Sherman Act to the Robinson-Patman Act, antitrust regulation reflected a Brandeisian mistrust of large corporations. Brandeis' mistrust of big business is a timeworn American quandary.¹⁵⁷ Yet Brandeis eschewed this question altogether, unconvinced that larger firms produced efficiencies in the first place.¹⁵⁸ For Brandeis, concentrated power would necessarily lead to collusion, threaten economic liberty, and unravel the very fabric of democracy.¹⁵⁹

B. THE CHICAGO SCHOOL

Fueled by a mistrust of large corporations, the Brandeis Era persisted through the late 1970s.¹⁶⁰ When Milton Friedman was reorienting the normative direction of business toward shareholder primacy in the 1970s, however, Robert Bork was arguing that consumer welfare ought to be competition policy's only goal.¹⁶¹ The Brandeis Era's captivation with concentrations of power was now

151. See, e.g., Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531, 531–39 (2019) (clarifying that the Brandeis Era was not concerned with total social welfare in welfare economic terms, but rather a social critique of power which corrodes democracy).

152. *Hearings Before the Senate Committee on Interstate Commerce*, 62nd Cong. 1167 (1912) (Statement of Louis Brandeis); see, e.g., Bougette & Marty, *supra* note 139, at 18 n.35 (“[S]ize was not a crime, but to Brandeis, it was a proof of criminality.” For Brandeis, “an industrial monopoly cannot be the result of a natural growth without ‘ruthless practices.’”) (quoting GREGORY J. WERDEN, *THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES* 173 (2020)).

153. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

154. Clayton Antitrust Act, 15 U.S.C. §§ 12–27.

155. See Lamoreaux, *supra* note 149, at 95.

156. Robinson-Patman Act, 15 U.S.C. § 13.

157. See generally Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

158. BRANDEIS, *supra* note 149, at 120.

159. See, e.g., *id.*; Orbach & Rebling, *supra* note 157, at 608 (“Brandeis . . . believed absolute corporate size was a public evil . . .”); see also Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 718 (2017).

160. The Supreme Court repeatedly held that antitrust laws should protect “viable, small, locally owned business,” even when “occasional higher costs and prices might result from the maintenance of fragmented industries and markets.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); see, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948) (“Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer’s quantity purchasing ability.”).

161. See BORK, *supra* note 131, at 97; Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471, 2471–75 (2013) (explaining that Bork used the terms “consumer welfare” and “total welfare” somewhat interchangeably); see also Wright et al., *supra* note 28, at 304 n.38 (“The choice of ‘consumer welfare’ or ‘total welfare’ has caused significant debate and terminological confusion in antitrust

matched by the Chicago School's focus on consumer welfare. To support his argument, Bork scrutinized—or distorted, as some argue—the legislative history of the Sherman Act, which he believed “overwhelmingly support[s] the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare.”¹⁶² In 1978, Bork wrote that “[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription.”¹⁶³ In 1979, the Supreme Court incorporated those words into its *Reiter v. Sonotone Corp.*¹⁶⁴ decision, elevating Bork's argument to antitrust gospel for decades to come.¹⁶⁵

The linchpin of Bork's argument was that courts should interpret antitrust laws to advance the welfare of consumers and ignore other “noneconomic” considerations, like monitoring firm size or protecting small businesses or less efficient competitors.¹⁶⁶ Many would argue that Bork transformed antitrust law from an “interventionist, populist, Brandeisian, and vaguely Jeffersonian” regime to “a mild constraint on a relatively small set of practices that pose a threat to allocative efficiency.”¹⁶⁷ Economists lauded Bork for “[reducing] antitrust law to an elegant and precise formula that ostensibly could be applied with consistency, accountability, and scientific rigor.”¹⁶⁸ But the consumer welfare standard had champions on the left, too. Most notably, Ralph Nader supported the focus on lowering prices for consumers after decades of

over the years.”); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836 (2014) (pointing to a leading criticism of Bork: “[W]ith a disingenuous sleight of hand, Bork shifted from consumer welfare to total welfare without changing labels, hence equating antitrust policy with efficiency while continuing to package it in a consumer welfare pill that courts would easily swallow . . .”).

162. See BORK, *supra* note 131, at 71. For a critique of Bork's interpretation of the legislative history, see Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989) (“Not a single statement in the legislative history comes close to stating the conclusions that Bork drew.”). For a defense of Bork's position, see Crane, *supra* note 161, at 840–44 (citing BORK, *supra* note 131, at 41–47).

163. BORK, *supra* note 131, at 66.

164. 442 U.S. 330, 343 (1979).

165. See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 486 U.S. 85, 107 (1984); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 367 (1982) (Powell, J., dissenting); *Jacobs v. Tempur-Pedic Int'l*, 626 F.3d 1327 (11th Cir. 2010). See generally Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, 31 J. CORP. L. 287 (2006) [hereinafter Hovenkamp, *The Antitrust Enterprise*]; William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

166. See Crane, *supra* note 161, at 847 (“The major thesis that Bork sought to advance was that courts should interpret the antitrust laws to protect economic efficiency and to benefit consumers and not to advance other objectives.”).

167. *Id.* at 835.

168. *Id.*; see also Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 223 (2010) (“The Court's initial embrace of the economic approach to antitrust followed directly from the scholarly work of Judge Robert Bork.”). But see HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 135, at 84 (“One of the great myths about American antitrust policy is that courts began to adopt an ‘economic approach’ to antitrust problems in the relatively recent past.”).

inflation.¹⁶⁹ With influential allies spanning the Reagan Administration to the Naderian left, it is no wonder that the consumer welfare standard achieved mainstream acceptance by the 1980s.¹⁷⁰ The Supreme Court soon began to focus on “demonstrable economic effects” and has since increasingly leaned on economic theory to guide its decisions.¹⁷¹ Bork’s reframing of the goal of antitrust thus led to the adoption of the so-called consumer welfare standard.¹⁷²

C. NEO-BRANDEIS ANTITRUST

While the consumer welfare standard is overwhelmingly favored by antitrust enforcement agencies, practitioners, and courts, it is also besieged by a rising antitrust movement which is “refram[ing] decades of antitrust law.”¹⁷³ Under the banner of the Neo-Brandeis movement—sometimes dubbed “Hipster Antitrust” by Chicago School devotees—this view supports somewhat of a back-to-the-future agenda for antitrust law.¹⁷⁴ The crux of the Neo-Brandeisian argument is that the Chicago School’s focus on efficiency, prices, and consumer welfare belies antitrust law’s original focus on market structure, while also ignoring the harms that necessarily ensue from concentration of power.¹⁷⁵ The Neo-Brandeis movement is, at its core, a critique of power in the private sector. Drawing inspiration from Brandeis, its proponents claim that “the structure of our markets . . . can determine how much real liberty individuals experience in

169. See Khan, *supra* note 159, at 742 (“Ralph Nader and other consumer advocates also came to support an antitrust regime centered on lower prices, according with the Chicago School’s view.”).

170. *Id.* at 735 (pointing to the 1984 DOJ-FTC Merger Guidelines as a “de facto approval of vertical deals”); see also Stucke & Ezrachi, *supra* note 130.

171. See, e.g., John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2439 n.48 (2013) (“In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), . . . the Court overruled its per se ban on nonprice vertical restraints and declared that per se rules must be based on ‘demonstrable economic effect.’”).

172. Before turning to the Neo-Brandeis perspective, it is important to note the long-standing debate between the Chicago School and the Harvard School. As Professor Alan Meese has illuminated, there are two competing articulations of consumer welfare: first, Bork’s “total welfare,” which equates consumer welfare with total welfare resulting from allocative efficiencies; and second, a “purchaser welfare” standard, which measures the welfare of purchasers as measured by consumer surplus in a particular market. See generally e.g., Alan J. Meese, *Debunking the Purchases Welfare Account of Section 2 of the Sherman Act: How Harvard Gave Us the Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010) (arguing that “consumer welfare” should be changed to “total welfare” and “purchaser welfare”). Unlike the total welfare standard, the purchaser welfare standard is a price-based standard.

173. The Neo-Brandeisians are focused primarily on “big tech” companies as targets for revamped enforcement. See, e.g., David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>; Jeff Horwitz, *She Argued Facebook Is a Monopoly. To Her Surprise, People Listened.*, WALL ST. J. (Dec. 10, 2019, 3:44 PM), <https://www.wsj.com/articles/yale-law-grads-hipster-antitrust-argument-against-facebook-finds-mainstream-support-11575987274>.

174. See Wright et al., *supra* note 28, at 294 (“The Hipster Antitrust label was introduced as a ‘lighthearted way to capture a worldview of antitrust regulation expansive enough to solve societal woes ranging from economic inequality to climate change, mixed with the kind of vintage 1960s-style “big-is-bad” thinking.’”).

175. See Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPET. L. & PRAC. 131, 131–32 (2018).

their daily lives.”¹⁷⁶ For the Neo-Brandeisians, the stakes could not be higher. This debate amounts to protecting democracy, because they believe “autocratic structures in the commercial sphere . . . threaten[] democracy in our civic sphere.”¹⁷⁷

To address this concentration of economic power, the Neo-Brandeisians have turned most of their ire towards “tech giants” like Amazon, Google, and Meta.¹⁷⁸ Many antitrust practitioners agree that it is challenging to bring a claim against these platforms, due in part to the nature of their products, which do not result in rising consumer costs and, in some cases, are even offered for “free.”¹⁷⁹ According to the Neo-Brandeisian view, however, we must look beyond prices and recognize that concentration of economic power in a handful of companies exacerbates other social ills, such as income inequality and labor abuses. Their proposed remedy is to use antitrust policy as it was originally intended—a redistributive tool to disperse economic power among many smaller firms.

The Neo-Brandeis fervor has caused proponents of the consumer welfare standard—which remains the law—to sound the alarm bells and urge policymakers to keep antitrust rooted in hard fought economic rigor.¹⁸⁰ Many opponents of the Neo-Brandeis movement fault it for seeking to redistribute wealth away from consumers and towards less efficient competitors or labor.¹⁸¹ Some argue that the unpredictability of the Neo-Brandeis approach will chill procompetitive conduct and encourage rent seeking because it makes “antitrust enforcement more susceptible to political whims and influence.”¹⁸² Others disregard the movement entirely as “populist.”¹⁸³

176. *See id.*

177. *See id.*

178. Rana Foroohar, *Lina Khan: ‘This Isn’t Just About Antitrust. It’s About Values’*, FIN. TIMES (Mar. 29, 2019), <https://www.ft.com/content/7945c568-4fe7-11e9-9c76-bf4a0ce37d49>.

179. However, even “free” products come at a price. *See* Horwitz, *supra* note 173. Moreover, the consumer welfare standard does encompass quality and innovation as well, but demonstrating these factors isn’t as straightforward as identifying price increases, making suits difficult, time consuming, and expensive to bring.

180. Glenn G. Lammi & Washington Legal Foundation, *Transformation of Antitrust Law to All-Purpose Cure for Socioeconomic Ills Would Backfire*, FORBES (July 23, 2019, 10:21 AM), <https://www.forbes.com/sites/wlf/2019/07/23/transformation-of-antitrust-law-to-all-purpose-cure-for-socio-economic-ills-would-backfire/?sh=136e80b574a8> (“The Hipster Antitrust movement would replace 50 years of antitrust enforcement based on rigorous analysis of price and other static economic factors with an amorphous, pliable public-interest standard.”).

181. *See* Herbert J. Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 81 (2019) [hereinafter Hovenkamp, *Antitrust’s Consumer Welfare Principle*] (“Overall, the movement is not enthusiastic about the use of economics in antitrust and appears to believe economics should either be subordinated to political theory or abandoned entirely.”); *see also* Ramsi A. Woodcock, *The Antitrust Case for Consumer Primacy in Corporate Governance*, 10 U.C. IRVINE L. REV. 1395, 1398 (2020) (arguing for a duty to minimize profits in corporate law to resolve the issue of corporate purpose in favor of consumers).

182. *See* Lammi & Washington Legal Foundation, *supra* note 180 (“[I]nstead of advancing the public interest, Hipster Antitrust will facilitate anti-consumer rent seeking and political cronyism by a select few entities, individual, and politicians.”).

183. *See* Hovenkamp, *Antitrust’s Consumer Welfare Principle*, *supra* note 181, at 89; ELYSE DORSEY, GEOFFREY A. MANNE, JAN M. RYBNICEK, KRISTIAN STOUT & JOSHUA D. WRIGHT, CONSUMER WELFARE & THE RULE OF LAW: THE CASE AGAINST THE NEW POPULIST ANTITRUST MOVEMENT 25–32 (2019),

Despite these warnings, Neo-Brandeisian ideas loom large in a growing number of policy circles.¹⁸⁴ The movement's future looks bright, particularly because of its impeccable timing. Reminiscent of the arrival of Bork's consumer welfare standard at the epoch of pro-consumer sentiments, the "anti-big tech" penchant is widespread across the political spectrum.¹⁸⁵ Lawmakers are vying to be at the forefront of antitrust reform, from Republican Senators Josh Hawley, Ted Cruz, and Marsha Blackburn, to Democratic Senators Elizabeth Warren, Amy Klobuchar, Cory Booker, and Mark Warner.¹⁸⁶ Even President Joe Biden has his eye on the technology industry.¹⁸⁷ As a result, there are numerous proposals to impose a legal presumption against concentrations of power within antitrust law.¹⁸⁸ And the bias against large corporations expands far beyond the Beltway, with state attorneys general across the political spectrum echoing Capitol Hill's growing voracity for antitrust as a tool to bridle big business.¹⁸⁹ This is not entirely surprising because, as others have pointed out, antitrust has often been leveraged in periods of concern about excessive corporate power.¹⁹⁰

D. THE GAP IN THE CURRENT DEBATE

The Neo-Brandeis movement is decidedly anti-big business, at times almost pining for the small businesses of a bygone era.¹⁹¹ The consumer welfare standard similarly presumes "perfect markets" and rational actors who will always pursue profit. Remarkably, both movements ignore the actual context in which contemporary businesses operate. While Neo-Brandeisians advocate prosocial goals, their tools are primarily redistributive rather than collaborative. In other words, the Neo-Brandeisians are not advocating for large companies to

<https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement>.

184. The influence of Neo-Brandeisian ideas on the antitrust policy and regulatory debate is reflected by the fact that Lina Khan is the Chair of the FTC.

185. Thomas W. Hazlett, *The New Trustbusters Are Coming for Big Tech*, REASON (Sept. 5, 2019), <https://reason.com/2019/09/05/the-new-trustbusters-are-coming-for-big-tech> (discussing how the political left and right are joining forces under the banner of "hipster antitrust").

186. *See id.*

187. *See* Bartz & Bose, *supra* note 5.

188. Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM: TEAM WARREN BLOG (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>. Warren's proposal involves big, structural changes that include breaking up Amazon, Facebook, and Google. *See* Franklin Foer Interview with Senator Elizabeth Warren, *Elizabeth Warren's Theory of Capitalism*, THE ATLANTIC (Aug. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/08/elizabeth-warrens-theory-of-capitalism/568573/>. *But see* Joshua New, *The Hipster Antitrust Movement Could Undermine American AI*, CTR. FOR DATA INNOVATION (May 20, 2019), <https://datainnovation.org/2019/05/the-hipster-antitrust-movement-could-undermine-american-ai> (criticizing Elizabeth Warren's antitrust proposal to break up big tech as chilling AI development in the US).

189. *See* Claire Hansen, *FTC, 48 Attorneys General Sue Facebook for Antitrust Violations*, U.S. NEWS & WORLD REP. (Dec. 9, 2020), <https://www.usnews.com/news/national-news/articles/2020-12-09/ftc-48-attorneys-general-sue-facebook-for-antitrust-violations>.

190. *See generally*, e.g., HOFSTADTER, *WHAT HAPPENED TO THE ANTITRUST MOVEMENT?* (1964).

191. *See generally* E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: A STUDY OF ECONOMICS AS IF PEOPLE MATTERED* (1973).

collaborate with industry peers to mitigate systemic risks, such as climate change. Yet that is precisely the world that the corporate purpose debate is pushing companies toward.

Neo-Brandeisians' skepticism of collaboration between businesses should come as no surprise. Recall that Brandeis' view, which has been described as "Jeffersonian," favored the dispersion of economic and political power.¹⁹² That normative orientation is precisely why Brandeis parted ways with Roosevelt's New Deal policies, which were "guided by a Hamiltonian logic that advocates an equilibrium between big business and big government."¹⁹³ Brandeis was also not a proponent of trade associations, which he likened to "competition-suppressing cartels."¹⁹⁴ Indeed, Brandeis remained staunchly critical of the "associationalist model" of antitrust that was advocated for by President Herbert Hoover and borne out of the collaboration between business and government necessitated by World War I.¹⁹⁵ Proponents of this view, including some leading economists of the time, maintained that business leaders and governments needed to collaborate through trade associations to exchange information and address the inefficiencies that result from competition.¹⁹⁶ But Brandeis firmly rejected the notion that bigness can lead to socially desirable efficiencies. As others have argued, "[f]rom his involvement in Wilson's 1912 campaign team to his dissent in the American Column ruling^[197] . . . and his position against the National Industrial Recovery Act (NIRA) in *Schechter Poultry* in 1935 . . . Brandeis was consistent in his opposition to such a convergence between big business and big government."¹⁹⁸

As this Article explores in Part III, the prevailing Bork school of thought is not enthusiastic about collaboration between competitors either, but for different reasons.

III. ANTITRUST FALSELY ASSUMES THAT COLLABORATION TO ACHIEVE PROSOCIAL GOALS IS NOT PROCOMPETITIVE

As a leading antitrust treatise points out, "[i]t is obviously not the purpose of the antitrust laws to condemn collaborations producing socially desirable

192. See Bougette & Marty, *supra* note 139, at 6–7.

193. See *id.* at 3.

194. See GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 60 (2009).

195. See LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE 'NEW COMPETITION,' 1890–1940, at 194 (2018).

196. See Bougette & Marty, *supra* note 139, at 18–22.

197. *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 412–19 (1921) (Brandeis, J., dissenting).

198. See Bougette & Marty, *supra* note 139, at 1. Also, as William Bratton and Michael Wachter have explained, Adolf Berle disagreed with Brandeis about the ability of antitrust enforcement to address market failures. See William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 110–11 (2008) (explaining that in contrast to Brandeis, Berle thought that "market competition was part of the problem" and, as opposed to antitrust enforcement, it was "better to accept the large economic units and mold them so as to make them useful to the people")

results.”¹⁹⁹ But if collaborations begin to threaten consumer welfare, which has become synonymous with price, output, or efficiency, then antitrust law typically eschews evidence of prosocial intent or impact.²⁰⁰ An illustrative example is the DOJ’s investigation into four automakers that announced they would meet California’s fuel efficiency standards.²⁰¹ Assistant Attorney General Makan Delrahim penned an opinion which began, “[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That’s long-standing antitrust law.”²⁰²

While Delrahim’s position has been scrutinized as partisan and not grounded in antitrust doctrine, it still underscores antitrust’s false dichotomy between economic and non-economic goals.²⁰³ The automakers’ collaboration on fuel efficiency standards is not just noble; it reflects a recognition that their industry is threatened by climate change. For universal owners, addressing climate change is an economic necessity that ensures continued profitability. As this Article explores in Part IV, companies routinely make voluntary prosocial commitments to mitigate systematic financial risks like climate change.

While rare, antitrust law sometimes blesses collaboration, even if it results in price or output impacts. Certain industries or activities, such as farming and labor, enjoy statutory immunities.²⁰⁴ There are also judicially created immunities, such as the *Noerr-Pennington*²⁰⁵ and state action doctrines, that are rooted in the First Amendment and “protect concerted efforts to restrain or monopolize trade by petitioning government officials.”²⁰⁶ If the activity falls outside of these exemptions, then antitrust law requires that collaboration be either noneconomic or not harmful to competition. As this Part argues, antitrust law’s approach to collaboration has always been plagued by a false assumption

199. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 1504, 1528 (4th ed. 2016).

200. See generally Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 AM. BUS. L.J. 97, 127 (2016) [hereinafter Scott, *Antitrust and Socially Responsible Collaboration*] (discussing the chilling effect of antitrust on CSR activities).

201. Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019, 7:31 PM), <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001>.

202. *Id.*

203. Press Release, Sheldon Whitehouse: U.S. Senator for R.I., *Whitehouse Presses Antitrust Head for Answers on Politicized Investigation of California Fuel Economy Agreement*, <https://www.whitehouse.senate.gov/news/release/whitehouse-presses-antitrust-head-for-answers-on-politicized-investigation-of-california-fuel-economy-agreement>; David Shepardson, *U.S. Launches Antitrust Probe into California Automaker Agreement*, REUTERS (Sept. 6, 2019, 7:54 AM), <https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG>.

204. See, e.g., *Exemptions and Immunities Committee*, AM. BAR ASS’N, COMM., https://www.americanbar.org/groups/antitrust_law/committees/committee-eandi/ (last visited July 31, 2022).

205. ABA ANTITRUST SECTION, MONOGRAPH NO. 19, *THE NOERR-PENNINGTON DOCTRINE* (1993).

206. See David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 298 (1994).

that competitors' joint pursuit of prosocial goals is either completely noneconomic or a sham to cover up collusion and price-fixing.²⁰⁷

A. LEGISLATIVE EXEMPTIONS

To the frustration of practitioners and policymakers, antitrust law has exempted entire industries.²⁰⁸ The Capper-Volstead Act of 1922,²⁰⁹ which allows competing farmers to pool their output and agree on prices,²¹⁰ walks and talks like a price-fixing cartel. So why did lawmakers exempt farmers? Some argue that “the Capper-Volstead Act should be understood as part of a larger populist movement to limit the power of big business.”²¹¹ The desire to justify the exemption by characterizing activity as beyond antitrust law’s purview is so ingrained in the Capper-Volstead Act’s history that some of its drafters even viewed the farming cooperatives “more as ‘social’ than ‘economic organizations.’”²¹² Both proponents and critics of the Act assume trade-offs between economic and noneconomic benefits. But it can also be understood as an attempt by lawmakers to protect the farming industry: “The value of such farm organizations to the producers of agricultural products is beyond estimate. . . . It creates a civic force in large farming communities which protects the farmers.”²¹³

Scholars, policymakers, and antitrust practitioners roundly disfavor industry-wide exemptions, and for good reasons.²¹⁴ For one, they can become “sticky” and difficult to repeal. They also facilitate the emergence of a small group of “industry beneficiaries who benefit greatly from their special privileges, while the consumers who suffer higher prices are harmed individually only in small amounts and therefore are unlikely to exert much effort to repeal existing laws, even if the laws’ macroeconomic harm is great.”²¹⁵

207. See e.g., Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1076 (1979); Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1214 (1977) (evaluating whether noneconomic goals would better inform antitrust policy). For a brief retrospective, see generally Harry First, *Woodstock Antitrust* (N.Y.U. Ctr. for L. Econ. & Org., Working Paper No. 18-24, 2018), <https://www.antitrustinstitute.org/wp-content/uploads/2018/12/Frist-Woodstock-Antitrust.pdf> (dating the era from 1969 to 1979).

208. See AM. BAR ASS’N, *supra* note 204.

209. 7 U.S.C. §§ 291–92 (2012).

210. *Id.*

211. See Michaela Oldfield, *Farmers’ Cooperatives to Regionalize Food Systems: A Critique of Local Food Law Scholarship and Suggestion for Critical Reconsideration of Existing Legal Tools for Changing the U.S. Food System*, 47 ENVTL. L. 225, 239 (2017).

212. For a discussion of the legislative history, see generally James L. Guth, *Farmer Monopolies, Cooperatives, and the Intent of Congress: Origins of the Capper-Volstead Act*, 56 AGRIC. HIST. 67 (1982).

213. 61st Cong. Rec. 1043 (1921) (statement by Rep. Ira Hersey).

214. See generally U.S. DEP’T OF JUST. ANTITRUST DIV., *ROUNDTABLE DISCUSSION SERIES ON COMPETITION & DEREGULATION* (2018), <https://www.justice.gov/atr/page/file/1120641/download>; John Roberti, Kelse Moen & Jana Stecholdt, *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, DEP’T OF JUST., <https://www.justice.gov/atr/page/file/1042806/download>.

215. See U.S. DEP’T OF JUST., *supra* note 214, at 37.

To be clear, this Article does not call for blanket industry exemptions.²¹⁶ Rather, it seeks to illustrate Congress's willingness to restrain trade in the interest of sustaining the long-term sustainability of an economic activity that society depends on. A similar motivation can fuel a restraint on trade to advance efforts to mitigate climate change, as this Article explores in Part V.

B. EXEMPTIONS FOR NONECONOMIC OR POLITICAL ACTIVITY

The Sherman Act applies to “trade” or “commerce,” and courts have long interpreted it to exempt noncommercial activities that promote “social causes.”²¹⁷ Senator Sherman himself allayed lawmakers’ fears that the Sherman Act would creep into so-called noneconomic territory like religion or alcohol. In addition to a general exemption for noncommercial activity, under the *Noerr-Pennington* doctrine,²¹⁸ entities that petition the government may receive full immunity under the First Amendment,²¹⁹ regardless of any anticompetitive intent or effect.²²⁰ This exemption often arises with group boycotts, which are protected if the boycott was motivated by political aims.²²¹ In *State of Missouri v. National Organization for Women*, for instance, the Eighth Circuit held that the National Organization of Women (NOW) did not violate the Sherman Act by refusing to hold conventions in states that had not ratified the Equal Rights Amendment to the U.S. Constitution.²²² The court reasoned that NOW was attempting to advance a social or political, rather than economic, cause.²²³ Similarly, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court allowed the NAACP to boycott white-owned businesses for their refusal to accept racial integration because its purpose “was not to destroy legitimate competition,” but

216. See *infra* Part V.

217. See, e.g., Sally F. Rogers, *Sherman Act Liability for a Religiously Motivated Boycott*, 17 VAL. U. L. REV. 515, 521 (1983) (reviewing the legislative history of the Sherman Act and arguing that “[o]ne can glean an affirmative intent to regulate business competitors, not organizations motivated by social, moral, religious or political concerns.”); *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) (“It is axiomatic that section one of the Sherman Act regulates only transactions that are commercial in nature.”); see also John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 526 (2019) (arguing that antitrust courses should exempt non-commercial activity at the outset of the inquiry and before moving on to “the zero-stage of analysis” where courts decide between the rule of reason and the per se rule).

218. See *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (*Noerr*) (holding that the First Amendment protects entities who petition the government, even if that conduct is anticompetitive).

219. The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

220. See Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 53 (2015) [hereinafter Greene, *Muzzling Antitrust*] (“Political speech, in the form of petitioning the government, constitutes the one context in which even unlawful anticompetitive conduct receives First Amendment-based immunization from the antitrust laws.”).

221. See *Noerr*, 365 U.S. at 136. For a brief history of political boycotts in the United States, see Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 548 (2012).

222. See, e.g., Charles P. Cokerill, *Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts: Missouri v. NOW*, 13 LOY. L.A. L. REV. 85, 86 (1979); Greene, *Muzzling Antitrust*, *supra* note 220, at 55. See generally *Missouri v. Nat’l Org. for Women*, 620 F.2d 1301 (8th Cir. 1980).

223. See Cokerill, *supra* note 222, at 107; see also Greene, *Muzzling Antitrust*, *supra* note 220, at 55. See generally *Nat’l Org. for Women*, 620 F.2d at 1301.

rather, “to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself.”²²⁴ Thus, while group boycotts restrain trade, “the Court has recognized immunity from the Sherman Act when the actor is not a businessman and the purpose is not commercial, irrespective of an anticompetitive effect.”²²⁵

In group boycott cases, applying the *Noerr-Pennington* exemption often hinges on distinguishing whether the purpose is commercial or noncommercial.²²⁶ But this distinction is tenuous. Courts faced with a group boycott sometimes focus on the actor’s nonprofit status to guide them, but antitrust law does not normally draw a distinction between nonprofit and for-profit organizations.²²⁷ To the contrary, courts have recognized that nonprofit colleges or hospitals can and do collude.²²⁸ Group boycotts are also invariably motivated by a mix of economic and political aims.²²⁹ In these common mixed-motive boycotts, courts ask whether the boycott’s purpose is primarily economic or political.²³⁰ Under this test, an economic boycott seeks to improve market power, whereas a political boycott “uses concerted economic pressure to achieve social or political, rather than economic, ends.”²³¹ Courts have held that competitors violate antitrust law if their “primary purpose” of joining a boycott is for economic reasons as opposed to political ones.²³²

224. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888, 914 (1982) (referring to the “chameleon-like” quality of legal doctrine surrounding conspiracies and concerted action and described the actions of the civil rights boycotts as having “elements of criminality and elements of majesty”).

225. See Rogers, *supra* note 217, at 526 (discussing *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975)); see also *United States v. Gen. Motors Corp.*, 384 U.S. 127, 148 (1966) (invoking a boycott per se rule where retailers induced manufacturers not to sell to competing retailers).

226. See Editors, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1156 (1980) (arguing against antitrust immunity for political boycotts). See generally Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037 (2010) [hereinafter Greene, *Antitrust Censorship*]; Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992).

227. See, e.g., Tomas J. Philipson & Richard A. Posner, *Antitrust in the Non-Profit Sector* (Nat’l Bureau of Econ. Res., Working Paper No. 12132, 2006), https://www.nber.org/system/files/working_papers/w12132/w12132.pdf (“[A]ltruistic firms benefit from exploiting market power, just as non-altruistic ones do, even when they would price below cost without regard to competition.”); see also *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986) (“[T]he adoption of the nonprofit form does not change human nature”); Peter James Kolovos, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689, 729 (1996) (arguing for the application of a rule of reason test to nonprofit collaboration). But see Tara Norgard, *How Charitable Is the Sherman Act?*, 83 MINN. L. REV. 1515, 1553 (1999).

228. See Philipson & Posner, *supra* note 227.

229. See, e.g., Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 990 (1982) (using the term “mixed-motive boycotts” to refer to boycotts motivated by both political and economic concerns); see also Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL’Y 801, 843 (2012) (discussing that the intent of competitors is often both collaboration and competition). See generally Kindred, *supra* note 226, at 711 (discussing mixed-motives boycotts).

230. See Stucke, *supra* note 229, at 843.

231. See *id.*

232. See, e.g., Greene, *Antitrust Censorship*, *supra* note 226, at 54 (“[T]he Court’s polar approach cannot accommodate more complex realities in which the boycotters’ mixed motives include economic self-interests as

Assumptions about the purpose of business as a primarily profit-making endeavor necessarily cloud this analysis. In *FTC v. Superior Court Trial Lawyers Ass'n*,²³³ a group of trial lawyers from the District of Columbia agreed to stop representing indigent criminal defendants until legislation was passed to increase the lawyers' compensation. The lawyers argued that they were seeking to improve the quality of representation for indigent defendants.²³⁴ The Supreme Court, however, noted the FTC's finding that the previous compensation scheme provided an adequate supply of defense lawyers and found that the additional millions in fees that would result were "substantial anticompetitive effects resulting from the [trial lawyers'] conduct."²³⁵

Scholars have lamented that it is unworkable for courts to divine when an activity is motivated by a political or social, as opposed to economic, intent.²³⁶ Others argue that this foundational inquiry into motives is necessary because "[a]ntitrust doctrinally recognizes the need for balance by immunizing truly non-welfare motivated, or 'noncommercial,' conduct" at the outset.²³⁷ But what is "welfare motivated" hinges on intent—a notoriously elusive concept.²³⁸ Today, however, the line between "economic" and "noneconomic" activity is not as stark—brand activism, or engaging on social and political issues, is a business imperative.²³⁹

C. PROCOMPETITIVE JUSTIFICATIONS

Once activity is labeled as "commercial," it raises the specter of antitrust scrutiny and courts must decide whether it imposes an "unreasonable restraint on trade."²⁴⁰ There are two rules that courts use: the per se rule and the more

well as noneconomic or political interests."); Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 659 (2001); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1174 (2018) (citing *FTC v. Superior Court Trial Laws. Ass'n*, 493 U.S. 411 (1990)); see also E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 139, 144 (1961) (acknowledging the presence of both political and economic motivations and rejecting the motivating factor test); see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) (using a primary purpose test, arguably); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (using a primary purpose test).

233. See *Superior Court Trial Laws. Ass'n*, 493 U.S. at 411.

234. See *id.* at 419.

235. See *id.* at 420.

236. See, e.g., Paul G. Mahoney, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L.J. 523, 540 (1984) (arguing that "attempts to distinguish between commercially motivated and politically motivated boycotts allow potentially anticompetitive results" and advocating for an economic effects test, rather than a political motive test).

237. See Newman, *supra* note 217, at 530.

238. See Cass & Hylton, *supra* note 232, at 657–58 (2001); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 334 (2001).

239. See Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1546 (2018) ("Many in society and within corporations now expect businesses and executives particularly those at large public companies, to engage with the critical social issues of today. Silence and indifference are becoming less and less the norm."); see also Yashoda Bhagwat, Nooshin L. Warren, Joshua T. Beck & George F. Watson IV, *Corporate Sociopolitical Activism and Firm Value*, 84 J. MKTG 1, 1 (2020).

240. See AREEDA & HOVENKAMP, *supra* note 199, at 262 (discussion of cases exempting noncommercial activity as immune from antitrust liability).

searching rule of reason analysis.²⁴¹ In theory, activities such as price-fixing, group boycotts, and output restraints receive per se treatment.²⁴² In practice, however, most contemporary business activities survive this test.²⁴³ With the rise of economic analyses inspired by Bork in the late 1970s—and first articulated by Justice Brandeis in *Chicago Board of Trade v. United States*—antitrust courts began abandoning per se rules in favor of the rule of reason standard.²⁴⁴

The rule of reason test is a fact-intensive conduct standard that prohibits an activity if its competitive harms outweigh the consumer benefits.²⁴⁵ While Justice Brandeis conceived of the rule of reason standard before an economic theory of “market failure,” he was prescient in recognizing that restraints on trade are sometimes necessary to prevent such failures.²⁴⁶ Courts applying the rule of reason test consider three factors: first, whether the plaintiff has shown a significant anticompetitive effect from the challenged practice (e.g., price increase, output reduction, or market power); second, whether the defendant has offered procompetitive reasons to justify these negative effects; and third, whether the plaintiff has rebutted these procompetitive justifications by showing that the restraint is not reasonably necessary to attain defendant’s objectives (or that less restrictive measures could attain these objectives). Finally, the court balances the anticompetitive effects and procompetitive justifications to reach a conclusion.²⁴⁷

In general, courts applying the rule of reason test “have rejected calls for consideration of the social value or purpose of a collective agreement.”²⁴⁸ Time and again, the Supreme Court has insisted that “good intentions” do not matter.²⁴⁹ In *FTC v. Wallace*, for example, the Court explained that “it is not the prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic measures their conceptions thus informed.”²⁵⁰ And in *NCAA*

241. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 746 (2012).

242. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (“Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.”).

243. See Michael A. Carrier, *The Four Step Rule of Reason*, 33 ANTITRUST 50, 50 (2019).

244. 246 U.S. 231, 238 (1918).

245. See Carrier, *supra* note 243.

246. See Newman, *supra* note 217, at 518 (“Brandeis’ articulation highlights a useful point: left unrestrained in a literal sense, markets may fail to produce optimal results, i.e., cause ‘evil.’ What looks like a harmful restraint of trade may, in fact, be a ‘remedy’ for undesirable results.”).

247. See Carrier, *supra* note 243.

248. See Scott, *Antitrust and Socially Responsible Collaboration*, *supra* note 200, at 122.

249. See, e.g., *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 684–85, 694–95 (1978) (rejecting public safety as a procompetitive justification for a ban on price competition); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 462–64 (1986) (rejecting public health and access to dental care as a procompetitive justification for refusal to provide x-rays to insurers as a way of preventing them from denying coverage for dental treatment).

250. 75 F.2d 733, 737 (8th Cir. 1935).

v. Board of Regents, the Court applied a rule of reason analysis to the NCAA's mandatory price and broadcast agreement, rejecting the procompetitive justification that the agreement benefited society by maintaining the "revered tradition of amateurism in college sports."²⁵¹

The attempt to draw a line between prosocial and procompetitive activity was particularly tenuous in *United States v. Brown University*.²⁵² In that case, nine competing colleges sought to award only need-based financial aid to students. The Third Circuit found that promoting a "social ideal of equality of educational access and opportunity," a noneconomic justification, was actually procompetitive.²⁵³ Upon remand, however, the district court was instructed "to more fully investigate the procompetitive and noneconomic justifications proffered."²⁵⁴

Brown suggests that competitors may be able to collaborate under a rule of reason analysis in areas where Congress has a demonstrated commitment to prosocial goals. But a binary distinction between economic and noneconomic motives is impractical. Need-based financial aid, for example, is motivated by concerns not only for social welfare and equality of opportunity, but also economic mobility.²⁵⁵

D. THE CURRENT MARKET FAILURE TEST IS INCONSISTENT WITH UNIVERSAL OWNERSHIP

While courts routinely dismiss noneconomic, or "non-welfare," justifications, precisely what procompetitive reasons come into play is, as Justice Breyer famously stated, "an absolute mystery."²⁵⁶ As Professor John Newman points out, the "relevant case law reveals multiple competing approaches and seemingly irreconcilable opinions" on what constitutes "beneficial."²⁵⁷ After all, whether a particular activity is beneficial necessarily begs the question: beneficial to what end? Professor Newman traces this confusion to the use of three different tests by courts.

Under the "market failure" approach, a valid justification is present if—and only if—the challenged restraint alleviates a market failure. Alternatively, the "competitive process" approach attempts to condemn restraints that harm (and bless restraints that benefit) "competition" itself or the so-called "competitive process." Lastly, the "type of effect" approach appears to offer a

251. 468 U.S. 85, 120 (1984).

252. 5 F.3d 658 (3d Cir. 1993).

253. See Nathan Boninger, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 757–58 (2018).

254. See *Brown Univ.*, 5 F.3d at 661, 678.

255. See Newman, *supra* note 217, at 530 (citing 154 Cong. Rec. 22, 817 (2008)) ("This exemption originated because Congress disagreed with a suit brought by the Department of Justice against nine colleges for their efforts to use common criteria to assess each student's financial need.")

256. Transcript of Oral Argument at 24, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (No. 16-1454).

257. See Newman, *supra* note 217, at 502.

shortcut: simply identify the effects of the challenged restraint, then ascertain whether they align with a pre-approved typology of virtuous marketplace effects (e.g., higher output, lower prices, etc.).²⁵⁸

This Article agrees with Professor Newman’s doctrinal, normative, and practical arguments in favor of the market failure test.²⁵⁹ Most contemporary courts also hold that “alleviating a market failure is an acceptable procompetitive justification.”²⁶⁰ But the market failure test is fundamentally at odds with the market reality of increasing universal ownership. In Part V, this Article proposes a new standard, the universal consumer standard, which attempts to harmonize antitrust with universal ownership and empowers it to address systematic risks. Before doing so, it is important to appreciate how the current consumer welfare standard impedes collaboration to address systematic risks, which the next Part explores.

IV. HOW ANTITRUST IMPEDES COMPETITORS FROM COLLABORATING TO MITIGATE SYSTEMATIC RISK

In 2015, Michael Bloom, Assistant Director of Policy and Coordination at the FTC, addressed “how companies can work together to achieve social welfare goals—such as environmental objectives, health and safety objectives, or labor objectives—without running afoul of the antitrust laws.”²⁶¹ He began with a familiar admonition that even “laudable social welfare objectives” violate antitrust law if they restrict output, increase prices, or otherwise harm competition under the more searching rule of reason analysis.²⁶² But he also insisted that antitrust leaves “plenty of room for well-structured joint efforts to advance social welfare goals.”²⁶³ This Part examines case studies of competitor collaboration to argue that, in practice, antitrust law actually prevents companies from addressing systematic risks.

To contextualize how voluntary collaboration among competitors has evolved, this Part begins with a brief overview of global civil regulation and its limitations. It then describes how competition authorities and courts have addressed prosocial collaboration. It reveals that antitrust enforcement reflects the same blind spot for systematic risk that permeates corporate law and antitrust debates. As Part III explored, antitrust traditionalists argue that any proposals to expand the consumer welfare standard reflect a solution in search of a problem, while progressives insist that antitrust courts should not abandon their “political,

258. *See id.* at 504.

259. For a discussion of the prevailing standards, see Christine S. Wilson, Commissioner, Fed. Trade Comm’n, Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium, *Antitrust at the Crossroads?, Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get* (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf. *See generally* Hovenkamp, *The Antitrust Enterprise*, *supra* note 165.

260. *See* Newman, *supra* note 217, at 526.

261. *See* Bloom, *supra* note 38 at 1.

262. *See id.*

263. *See id.*

social, and moral goals in their quest for a single economic goal.”²⁶⁴ The case studies below demonstrate that companies are increasingly collaborating with competitors to address systematic risks because these risks are financially material.²⁶⁵

While U.S. enforcement agencies remain trapped in this either/or paradigm, global antitrust authorities are beginning to see that competition policy sometimes chills the private sector’s efforts to address systematic risk. The European Commission, for instance, is debating whether antitrust policy prevents companies from advancing the goals of the Green Deal.²⁶⁶ Commissioner Vestager has stressed that competition policy cannot replace environmental regulation or tax policy, but nevertheless embraced its critical importance.²⁶⁷ To harmonize antitrust policy with the Green Deal, the European Commission asked industry leaders to “provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to E.U. antitrust risks.”²⁶⁸ With its focus on narrow, short-term impacts on price and output, antitrust law prevents companies from addressing systematic risk through collaborations to reduce plastics, increase biodiversity, and prevent human rights abuses.²⁶⁹ As this Article examines more fully below, specific jurisdictions have gone further, with Austria as the first country to enact a so-called “green” exemption from antitrust for sustainability agreements.²⁷⁰ While E.U. and U.S. competition law diverge in notable respects,²⁷¹ large multinational companies in the United States face similar challenges.

264. See Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 551 (2012).

265. See Jacquelyn MacLennan, Mark Gidley, Kathryn Mims & Kate Kelliher, *Competitor Collaboration: from Combatting COVID-19 to the Climate Crisis*, WHITE & CASE (Sept. 16, 2020), <https://www.whitecase.com/publications/insight/sustainability-competition-law/competitor-collaboration-covid-19>.

266. See Margrethe Vestager, Exec. Vice President, Eur. Comm’n, Speech at an Event Hosted by MEP Stephanie Yon-Courtin: *The Green Deal and Competition Policy* (Sept. 22, 2020), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en. See generally EUR. COMM’N, *supra* note 41.

267. See EUR. COMM’N, *supra* note 41.

268. See *id.* at 4.

269. See *id.*

270. See generally Viktoria H.S.E. Robertson, *The World’s First Green Antitrust Provision Shows That Climate Action Is the Newest Frontier*, PROMARKET (Mar. 10, 2022), <https://www.promarket.org/2022/03/10/the-worlds-first-green-antitrust-provision-shows-that-climate-action-is-the-newest-antitrust-frontier/>.

271. See generally Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, *The Global Dominance of European Competition Law over American Antitrust Law*, 16 J. EMPIRICAL LEGAL STUD. 731 (2019) (unpublished manuscript) (on file with Columbia Law School Faculty Scholarship Repository); Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT’L L. 355 (2004); see also ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 99–130 (2020) (providing a novel account of the EU’s unilateral power to regulate global markets by imposing higher standards).

A. THE RISE OF VOLUNTARY INITIATIVES & THEIR LIMITATIONS

In 1987, the United Nations' Brundtland Commission defined sustainable development as "that [which] meets the needs of the present without compromising the ability of future generations to meet their own needs."²⁷² With less than seven years projected before the impacts of climate change become irreversible, the private sector is under increasing pressure to respond.²⁷³ Governments and companies around the world have undertaken a number of voluntary initiatives to address unsustainable business practices.²⁷⁴ The most ambitious and comprehensive are the U.N. Sustainable Development Goals (SDGs).²⁷⁵ Adopted by all member states in 2015, the SDGs were "explicitly designed to engage the private sector in addressing the world's most pressing challenges."²⁷⁶ Global companies comprise sixty-nine of the top one hundred economies in the world.²⁷⁷ Recognizing that the scale of the problems requires joint efforts with the private sector, SDG Goal #17 emphasizes partnership and collaboration.²⁷⁸

Unfortunately, many studies conclude that after decades of industry-led private governance, voluntary standards have only marginally impacted human rights and the environment.²⁷⁹ Professor David Vogel has observed that these

272. See U.N. DEPT. ECON. & SOC. AFFAIRS: SUSTAINABLE DEVELOPMENT, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 14 n. 27 (1987), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

273. See CLIMATECLOCK, <https://climateclock.world> (last visited July 31, 2022).

274. See generally David Vogel, *Private Global Business Regulation*, 11 ANNU. REV. POL. SCI. 261 (2008) (providing a literature review of voluntary "civil regulations," including codes and soft laws); see also A. CLAIRE CUTLER, VIRGINIA HAUFLE & TONY PORTER, PRIVATE AUTHORITY & INTERNATIONAL AFFAIRS 16 (1st ed. 1999) (providing one of the first comprehensive accounts of global civil regulation and "describing how and why frameworks for governing international economic transactions are created and maintained by the private sector"); HIGH MEADOWS INST., *supra* note 81, at 6 (analyzing over 200 voluntary initiatives: "Over the past three decades, Partnerships and Industry Initiatives that promote social and environmental goals have become commonplace in most industry sectors.").

275. See U.N. Sustainable Development Goals, U.N. DEPT. ECON. & SOC. AFFAIRS: SUSTAINABLE DEV., <https://sdgs.un.org/goals> (last visited July 31, 2022) (stating seventeen sustainable development goals, or SDGs, which are "an urgent call for action by all countries—developed and developing—in a global partnership"); see also G.A. Res. 70/1 (Oct. 15, 2021).

276. G.A. Res. 70/1, *supra* note 275.

277. See *69 of the Richest 100 Entities on the Planet Are Corporations, Not Governments, Figures Show*, GLOB. JUST. NOW (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show>; Jake Johnson, *157 of World's 200 Richest Entities Are Corporations, Not Governments*, INEQUALITY.ORG (Oct. 19, 2018), <https://inequality.org/research/richest-entities-corporations-governments>.

278. G.A. Res. 70/1, *supra* note 275.

279. See Richard Locke, Matthew Amengual & Akshay Mangla, *Virtue Out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains*, 37 POL. SOC'Y 319, 319 (2009) ("Private, voluntary compliance programs, promoted by global corporations and nongovernmental organizations alike, have produced only modest and uneven improvements in working conditions and labor rights in most global supply chains."); see also Genevieve LeBaron & Andreas Ruhmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOB. POL'Y 15, 15 (2017) ("In the case of the Modern Slavery Act, the triumph of voluntary reporting over more stringent public labour standards seems to have undermined the effectiveness of recent governance initiatives to address forced labour in global supply chains.").

“global civil regulations” suffer from the same deficiencies as international treaties, which also rely on voluntary compliance.²⁸⁰ Competition policy has been largely overlooked as one explanation for why soft law initiatives fall short.

B. WHY DO COMPETITORS WANT TO COLLABORATE?

1. To Address Human Rights Abuses and Fair Working Conditions

Seeking to fill a void in international law, the United Nations’ Guiding Principles for Business and Human Rights ask companies to use their “leverage” to prevent abuses.²⁸¹ Companies, in turn, have developed human rights standards through industry collaborations.²⁸² But the Supreme Court has repeatedly emphasized that “private standard-setting associations have traditionally been objects of antitrust scrutiny.”²⁸³ To avoid antitrust scrutiny, any industry-wide standards must be unrestricted and voluntary.²⁸⁴ In other words, participation in standard-setting organizations must be open to all industry participants and impose no mandatory compliance obligations.²⁸⁵ In practice, preventing competitors from boycotting bad actors for failure to adhere to standards renders them ineffectual. Voluntary standards can also foster a “race to the bottom” where less costly initiatives gain more industry support.²⁸⁶

The Worker Rights Consortium (WRC), an international labor rights organization,²⁸⁷ seeks to improve wages and working conditions for garment

280. See David Vogel, *The Private Regulation of Global Corporate Conduct: Strengths and Limitations* (2009) (unpublished manuscript) (on file with UC Berkeley Department of Political Science).

281. For a discussion of the concept of leverage in the U.N. Guiding Principles for Business and Human Rights, see generally SHIFT, USING LEVERAGE IN BUSINESS RELATIONSHIPS TO REDUCE HUMAN RIGHTS RISKS (2013), https://shiftproject.org/wp-content/uploads/2013/11/Shift_leverageUNGPs_2013.pdf.

282. For an analysis of the tension between the concept of leverage and competition policy, see ANTONIO CAPOBIANCO, BARBARA BIJELIC & TYLER GILLARD, COMPETITION LAW AND RESPONSIBLE BUSINESS CONDUCT 6 (2015), <https://mneguidelines.oecd.org/global-forum/2015GFRBC-Competition-Law-RBC.pdf> (“‘Leverage’ can be exerting acting alone or in co-operation with other entities as a strategy to influence other enterprises to be more responsible.”).

283. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556, 570–73 (1982); see also Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325, 348 (2009) (“Trade associations that serve important roles in managing an industry’s operation, whether setting industry rules or controlling access to essential facilities, may run afoul of antitrust prohibitions when deciding to exclude certain members.”).

284. See, e.g., Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. 93, 130 (2017). See generally AM. BAR ASS’N, *ABA Section of Antitrust Law, Handbook on Antitrust Aspects of Standard Setting* (2d ed. 2011) (discussing standard setting and antitrust); see also Letter from Joel I. Klein, Assistant Att’y Gen., to Joseph M. Sullivan, Esq. (May 20, 1997) (<https://www.justice.gov/archive/atr/public/busreview/1126.htm>).

285. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658–60 (1961) (finding that the American Gas Association’s refusal to certify an individual manufacturer’s gas burner and a utility’s refusal to sell gas to a manufacturer constituted an unlawful group boycott, as the standards were influenced by competitors and did not use objective measures); see also Scott, *Antitrust and Socially Responsible Collaboration*, *supra* note 200, at 127 (discussing several industry initiatives).

286. See Scott, *Antitrust and Socially Responsible Collaboration*, *supra* note 200, at 138.

287. See WORKER RIGHTS CONSORTIUM, <https://www.workersrights.org> (last visited July 31, 2022).

factory workers by specifying a code of fair labor practices. The DOJ initially threatened to bring an antitrust enforcement action against it, but the WRC worked for several years to make the necessary concessions.²⁸⁸ The resulting modifications effectively stripped the WRC of its sting by requiring that any action taken against non-compliant suppliers be voluntary and non-collective.²⁸⁹ This resolution reflects a cautious tone and renders any impact necessarily marginal.²⁹⁰ If it implicated a large enough share of the labor market to impact sales price, the outcome would likely be different.²⁹¹

These antitrust limitations continue to hamstring the apparel industry's attempts to create ethical products. The Sustainable Apparel Coalition, "the apparel, footwear, and textile industry's leading alliance for sustainable production," warns that "[u]nder general antitrust laws, the Coalition cannot coordinate or instruct members how to operate with customers or suppliers or competitors."²⁹² And the Better Cotton Initiative, an industry initiative aimed at producing sustainable cotton, prohibits its members from "enter[ing] into any agreement, arrangement, or understanding among themselves to refrain, or to encourage others to refrain, from purchasing any materials, product, equipment, services or other supplies from any supplier or vendor, or from dealing with any supplier or vendor."²⁹³

2. *To Promote Conservation and Ensure the Long-Term Sustainability of Scarce Resources*

The tension between conservation and antitrust law has been recognized by surprisingly few scholars.²⁹⁴ But, as Professor Jonathan Adler sums up, "what conservation demands, antitrust condemns."²⁹⁵ Professor Adler focuses extensively on marine fisheries, which present a classic "Tragedy of the

288. See Letter from Sharis A. Pozen, Acting Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., to Donald I. Baker, Baker & Miller PLLC (Dec. 16, 2011) (quoting BYLAWS OF THE WORKERS RIGHTS CONSORTIUM § 1.2(1) (2010), http://workersrights.org/about/wrc_bylaws.pdf).

289. See Scott, *Antitrust and Socially Responsible Collaboration*, *supra* note 200, at 136.

290. See Daniel A. Crane & Ben Kobren, *Making Antitrust Help, Not Harm Workers Abroad*, THE HILL: CONG. BLOG (Apr. 28, 2015), <https://thehill.com/blogs/congress-blog/labor/240231-making-antitrust-help-not-harm-workers-abroad>.

291. *Id.*

292. See Amina Razvi, *Common Questions About the SAC*, SUSTAINABLE APPAREL COAL. (Sept. 2020), <https://apparelcoalition.org/common-questions-about-the-sac>.

293. See *Antitrust Policy*, BETTER COTTON INITIATIVE (Sept. 2, 2009), https://bettercotton.org/wp-content/uploads/2015/06/BCI_Antitrust_Policy_final_eng_ex.pdf.

294. See Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 8 (2004) (identifying the conflict between the goals of antitrust and a cooperative's efforts to conserve fish through output restraints and the goals of antitrust); see also Scott, *Antitrust and Socially Responsible Collaboration*, *supra* note 200, at 127 (arguing that the threat of antitrust liability "chills" certain forms of environmental collaboration in private industry); Light, *supra* note 51, at 149 ("Small changes in how federal courts interpret antitrust law, such as acknowledging the environmental benefits of industry cooperation, could remove disincentives for meaningful cooperation aimed at addressing cumulative harms that degrade common pool resources.").

295. See Adler, *supra* note 294, at 24.

Commons” scenario.²⁹⁶ Cooperative fisheries have historically faced antitrust scrutiny for their efforts to prevent overharvesting by self-regulating output.²⁹⁷ In *Manaka v. Monterey Sardine Industries*, the court squarely rejected that output restrictions could provide a procompetitive justification as necessary to the sustainability of the sardine population:

Such an association as that of the boat owners is not freed from the restrictive provisions of the antitrust act, because they profess in the interest of conservation of important food fish to regulate the price and the manner of taking such fish “unauthorized by legislation and uncontrolled by proper authority.”²⁹⁸

By 1952, the Monterey sardine fishery population had collapsed to the detriment of consumers.²⁹⁹ As Professor Adler has argued, this could have been prevented if the court had considered conservation as a procompetitive justification under the rule of reason standard, rather than dogmatically applying the per se rule to an output restriction.³⁰⁰

Overharvesting threatened the viability of several fish species in the 1990s.³⁰¹ Fish-harvesting cooperatives responded by working with the DOJ to form the cooperative Pacific Whiting Conservation Cooperative (PWCC).³⁰² The DOJ blessed this agreement after concluding that it “seems unlikely to reduce output or increase price under any likely scenario.”³⁰³ Notwithstanding the agreement’s positive impacts, antitrust still prevents these collectives from agreeing to a total catch limit below the level the government has already set.³⁰⁴

The conflict between antitrust and conservation is also playing out globally. The Amazon Soybean Moratorium, a commitment by Brazilian firms to refrain from purchasing soybeans from certain parts of the rainforest, has been lauded as “one of the great conservation successes of the twenty-first century,” resulting in an 84% decrease in deforestation.³⁰⁵ Brazilian farmers have recently complained to the local competition agency, Conselho Administrativo de Defesa

296. *See id.*

297. *See id.* at 25, 39 (arguing that while there is now a federal antitrust exemption for fishing cooperatives, the Fisherman’s Collective Marketing Act (FCMA), 15 U.S.C. § 521, it is too narrow, because it only exempts specified activities if an “otherwise legal cooperative marketing association could not engage in otherwise prohibited boycotts or concerted refusals to deal with noncooperating dealers”).

298. 41 F. Supp. 531, 534 (N.D. Cal. 1941) (citation omitted).

299. Unfortunately, similar stories played out in Mississippi, California, and Massachusetts. *See Adler, supra* note 294, at 26–33.

300. *See id.* at 33.

301. *See* Andrew Jacobs, *China’s Appetite Pushes Fisheries to the Brink*, N.Y. TIMES, Apr. 30, 2017, at A1 (“Overfishing is depleting oceans across the globe, with 90 percent of the world’s fisheries fully exploited or facing collapse.”).

302. *See* Letter from Joel I. Klein, Assistant Att’y Gen. to Joseph M. Sullivan, Esq. (May 20, 1997), <https://www.justice.gov/archive/atr/public/busreview/1126.htm>.

303. *See id.*

304. *See id.*; *see also* Scott, *Antitrust and Socially Responsible Collaboration*, *supra* note 200, at 128.

305. *See generally* Robert Heilmayr, Lisa L. Rausch, Jacob Munger & Holly K. Gibbs, *Brazil’s Amazon Soy Moratorium Reduced Deforestation*, 1 NATURE FOOD 801 (2020).

Econômica (CADE), that this agreement restrains trade by restricting output in violation of competition policy.³⁰⁶ A similar story played out in Indonesia when, in 2016, the Indonesian competition authority threatened to fine palm-oil traders who had decided not to buy palm oil from farmers who engaged in illegal deforestation.³⁰⁷

3. To Control Pollution

In 2019, the DOJ investigated automakers who sought to meet California's fuel efficiency standards despite federal rollbacks. As discussed above, the investigation was widely decried as partisan.³⁰⁸ The DOJ dismissed the probe after antitrust scholars and practitioners reached consensus that it would present "significant hurdles."³⁰⁹ Although compliance with California's standards would increase costs, there was no indication those costs would be passed along to consumers.³¹⁰ Any coordination among competitors on price, however, would be a textbook example of collusion in violation of antitrust law. In 1969, automakers learned this the hard way when they coordinated to avoid a first mover disadvantage associated with introducing emissions reduction technology in their vehicles.³¹¹

Although the DOJ dismissed this probe,³¹² given our increasingly divided political environment, the risk of partisan antitrust looms large. Just consider the scrutiny that investor boycotts of fossil fuel companies are receiving.³¹³ The financial sector has recently "started moving in parallel to cut off liquidity and

306. See Nicole Kar, *Competition Rules Stymie Co-Operation on Climate Goals*, FIN. TIMES (Jan. 30, 2020), <https://www.ft.com/content/b3e0da9c-3eba-11ea-b84f-a62c46f39bc2>. See generally Heilmayr et al., *supra* note 305.

307. Jonathan Vit, *Under Gov't Pressure, Palm Oil Giants Disband Green Pledge*, MONGABAY (July 1, 2016), <https://news.mongabay.com/2016/07/under-government-pressure-palm-oil-giants-disband-green-pledge/>; see also Herbert Hovenkamp, *Are Agreements to Address Climate Change Anticompetitive?*, REGUL. REV. (Sept. 11, 2019), <https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive> [hereinafter Hovenkamp, *Agreements to Address Climate Change*].

308. See generally Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 ECOLOGY L.Q. 219 (2020); Dailey C. Koga, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 WASH. L. REV. 1989 (2020); see also Dailey C. Koga, Comment, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 WASH. L. REV. 1989, 1990 (2020); Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html>.

309. See Hovenkamp, *Agreements to Address Climate Change*, *supra* note 307.

310. See *id.*

311. See *United States v. Auto. Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969). For a discussion of this case, see Light, *supra* note 51, at 172–74; see also David Andrews, *Antitrust Law Meets the Environmental Crisis—An Argument for Accommodation*, 1 ECOLOGY L.Q. 840, 859–60 (1971).

312. See David McLaughlin & Jennifer A Dlouhy, *U.S. Closes Antitrust Probe of Carmakers over Emissions Pact*, BLOOMBERG (Feb. 7, 2020), <https://www.bloomberg.com/news/articles/2020-02-07/u-s-closes-antitrust-probe-of-automakers-over-emissions-deal>.

313. See C. Boyden Gray, *Banks' Energy Boycott Is an Antitrust Problem*, WALL ST. J., July 14, 2020, at A19. See generally Inara Scott, *The Trouble with Boycotts: Can Fossil Fuel Divest Campaigns Be Prohibited?*, 57 AM. BUS. L. J. 537 (2020) [hereinafter Scott, *The Trouble with Boycotts*].

capital to America's energy sector."³¹⁴ This effort involves large banks from Citibank to Goldman Sachs, as well as investor alliances like Climate Action 100+. Critics warn that it reflects an effort to "collude on a boycott of a critical segment of the U.S. economy" in violation of antitrust law.³¹⁵ It is important to remember that just like corporations, investor coalitions also risk antitrust scrutiny for prosocial collaboration. Proponents of these investor initiatives argue that, given the prominence of climate change in the public debate, these "environmental goals" should be protected as political speech under the First Amendment.³¹⁶ Net-zero alliances are facing the same ire from Republican attorneys general.³¹⁷ But many large asset managers and financial regulators recognize that climate change is a systematic and financially material risk.³¹⁸

C. RECENT EXAMPLES FROM THE EUROPEAN UNION

The COVID-19 pandemic has forced global competition enforcers to acknowledge the tension between competition policy and prosocial collaboration.³¹⁹ From vaccine development and distribution to the delivery of personal protective equipment (PPE), the pandemic has also caused companies to collaborate with competitors.³²⁰ In many cases, these conflicts can easily be resolved under existing law, either because the prosocial collaboration is in fact procompetitive or because it is being done at the behest of the government to address an emergency situation.³²¹ These cases merely require that competition authorities provide clarification through guidance or expedited comfort letters.³²² Some jurisdictions have recently gone even further and provided a

314. See Gray, *supra* note 313.

315. See *id.*

316. See Scott, *The Trouble with Boycotts*, *supra* note 313, at 564.

317. Alastair Marsh, *Net-Zero Insurers Uncover New Climate Adversary in Antitrust Law*, BLOOMBERG (Jan. 19, 2022, 1:40 AM), <https://www.bloomberg.com/news/articles/2022-01-19/net-zero-insurance-coal-exit-plans-impeded-by-antitrust-laws>.

318. See, e.g., VEENA RAMANI, ADDRESSING CLIMATE AS A SYSTEMIC RISK: A CALL TO ACTION FOR FINANCIAL REGULATORS 44 (2020), <https://www.ceres.org/sites/default/files/reports/2020-06/Financial%20Regulators%20FULL%20FINAL.pdf>.

319. See Barak Orbach, *Antitrust in the Shadow of Market Disruptions*, 34 ANTITRUST ABA J. 32, 32 (2020) (analyzing "the relationship between competition policy and large-scale market disruptions" which includes pandemics); MacLennan et al., *supra* note 265.

320. See *Biopharma Leaders to Unite to Stand with Science*, BUS. WIRE (Sept. 8, 2020, 6:30 AM), <https://www.businesswire.com/news/home/20200908005282/en> (stating that biopharma CEOs have pledged to defer competition on vaccine); see also Barak Orbach, *On the Covid-19 Vaccine Corporate Pledge*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2020), <https://corpgov.law.harvard.edu/2020/09/10/on-the-covid-19-vaccine-corporate-pledge> (discussing antitrust concerns raised by pledge).

321. See *Reducing Antitrust Risk of Collaborations During the COVID-19 Pandemic*, HOGAN LOVELLS (Apr. 23, 2020), https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/2020-pdfs/2020_04_23_acer_alert_reducing_antitrust_risk_of_collaborations_during_the_covid_19_pandemic.pdf?la=en; Orbach, *supra* note 319, at 32 (analyzing "the relationship between competition policy and large-scale market disruptions" which includes pandemics); MacLennan et al., *supra* note 265.

322. See Frances Murphy, Izzet Sinan, Christina Renner & Joanna Christoforou, *COVID-19: The Return of the 'Comfort Letter'*, MORGAN LEWIS (May 1, 2020), <https://www.morganlewis.com/pubs/2020/05/covid-19-the-return-of-the-comfort-letter-cv19-1f>.

temporary “safe harbor” or blanket exemption for certain industries or activities, from transportation to manufacturing PPE.³²³ While these efforts can provide a stop-gap to allow markets to navigate COVID-19, they have also triggered debate as to whether competition policy is adaptable enough to address other risks like climate change.

This conversation around competition policy is nascent in the United States.³²⁴ But in the European Union, there is a sense of urgency to address competition policy’s potentially chilling effect on the private sector’s efforts to meet ambitious Green Deal milestones.³²⁵ The European Commission’s recent call for contributions reflects this exigency: “We’ll be looking for ideas, not just from competition experts, but from everyone with a stake in this issue. . . . We need to work—and listen—fast.”³²⁶ Law firms, seeing an uptick in clients pursuing sustainability goals, are weighing in.³²⁷ The global law firm Linklaters recently commissioned a survey of over two-hundred sustainability leaders in the United Kingdom, Europe, and the United States to assess whether competition policy was chilling prosocial collaboration.³²⁸ Ninety-three percent wanted to work with peers to achieve sustainability goals, but fifty-seven percent of sustainability leaders had forgone specific sustainability projects because the antitrust risk was too high.³²⁹ Survey respondents reiterated that collaboration with industry peers advances their sustainability goals by allowing them to pool resources and share expertise, develop new industry norms, and scale their impact. By observing specific scenarios, the conflicts that companies face become obvious.

1. To Create Sufficient Demand for Sustainable Products

This Article is not the first to bemoan the dearth of behavioral economics in competition policy.³³⁰ While the consumer welfare

323. See Mark R. Butscha, Jr., Michael W. Jahnke, & Thomas F. Zych, *FTC and DOJ Announce Expedited Procedure to Provide Antitrust Guidance to Businesses Responding to COVID-19 Pandemic*, THOMPSON HINE (Apr. 2, 2020), <https://www.thomsonhine.com/publications/ftc-and-doj-announce-expedited-procedure-to-provide-antitrust-guidance-to-businesses-responding-to-covid-19-pandemic>.

324. See LINKLATERS, *COMPETITION LAW NEEDS TO COOPERATE: COMPANIES WANT CLARITY TO ENABLE CLIMATE CHANGE INITIATIVES TO BE PURSUED* (2020), <https://www.linklaters.com/en-us/insights/publications/2020/april/competition-law-needs-to-cooperate-companies-want-clarity-to-enable-climate-change> (“Beyond Europe, neither the environmental commitment nor the timeline for competition authorities to engage (or not) is as clear.”).

325. See Vestager, *supra* note 266.

326. See *id.*

327. See *id.*

328. See LINKLATERS, *supra* note 324.

329. See *id.*

330. See generally Stephen Martin, *Chapter 15: Behavioral Antitrust*, in HANDBOOK OF BEHAVIORAL INDUSTRIAL ORGANIZATION 404–54 (Victor J. Tremblay, Elizabeth Schroeder & Carol Horton Tremblay eds., 2018), <https://www.elgaronline.com/view/edcoll/9781784718978/9781784718978.00022.xml>; see also Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 ANTITRUST L.J. 105, 120 (2012); Brent A. Kaplan, Brett W. Gelino & Derek D. Reed, *A Behavioral Economic Approach to Green Consumerism: Demand for Reusable Shopping Bags*, 27 BEHAV. & SOC. ISSUES 20, 27 (2017).

standard dominates antitrust enforcement globally, consumer preferences are notoriously difficult to pin down. Ambivalent consumer behavior towards sustainable products is belied by an ostensible preference for such products in surveys. Behavioral economics attributes this discrepancy to various factors, including hyperbolic discounting.³³¹ According to this theory, when consumers have a choice of two products, they will tend to decide quickly but fail to account for the long-term impact of their decisions.³³²

An example from Unilever illustrates this phenomenon. Unilever invested in R&D to create a sustainably sourced deodorant, allowing it to offer consumers the same amount of product at the same cost, but with less packaging.³³³ Less packaging reduced production costs, shipping costs, and the overall amount of waste or recycling material.³³⁴ Unilever was the first to market and make the product's technology publicly available, thereby encouraging its competitors to make more sustainable products. Despite Unilever's efforts at marketing and consumer education, consumers chose to buy the product in the larger package, assuming that they were getting more value for their dollar.³³⁵ The product launch failed.³³⁶

Moreover, as Unilever learned the hard way, coordinating with competitors to offer a more sustainably packaged product is a per se antitrust violation. In the infamous "detergent cartel" case, the European Commission fined Unilever, Henkel, and Procter and Gamble over 315 million euros for violating antitrust laws.³³⁷ The companies defended their conduct on sustainability grounds.³³⁸ They wanted to wean consumers off of detergent which came in large packaging and required hot water to ones that would reduce energy use and come in smaller packaging.³³⁹ Concerned that consumers would not pay the same price for a product sold in smaller quantities, the companies agreed not to raise their prices and to launch their products at the same time.³⁴⁰ Coordinating with competitors on price and product launches is precisely the sort of behavior that antitrust law seeks to prevent. The European Commission argued that the detergent companies (1) agreed to indirectly increase prices (by keeping prices the same when products were compacted), (2) agreed to exclude certain types of promotions (considered a form of price-fixing) during different phases of the

331. Ariel Rubenstein, "Economics and Psychology"? *The Case of Hyperbolic Discounting*, 44 INT'L ECON. REV. 1207, 1208 (2003).

332. *Id.* at 1209.

333. FOODDRINKEUROPE, *supra* note 7, at 2 n.1; UNILEVER, SUSTAINABILITY COOPERATIONS BETWEEN COMPETITORS & ART. 101 TFEU 1, 4, https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf.

334. FOODDRINKEUROPE, *supra* note 7, at 2 n.1; UNILEVER, *supra* note 333, at 4.

335. FOODDRINKEUROPE, *supra* note 7, at 2 n.1.

336. *Id.*

337. See Elina Laurinen, *The Consumer Detergents Cartel*, COMPETITION POL'Y NEWSL., Jan.–Apr. 2011, at 3.

338. *Id.*; UNILEVER, *supra* note 333, at 4.

339. *Id.*; FOODDRINKEUROPE, *supra* note 7, at 2 n. 1.

340. FOODDRINKEUROPE, *supra* note 7, at 1–2.

environmental initiative, (3) agreed to increase prices at a specific time and market in order of market leadership, and (4) exchanged sensitive pricing and trading conditions information, fostering more types of price collusion.³⁴¹

Unilever's failed launch exposed the limitations of unilateral action. While economists have long focused on the benefits of a first mover advantage, sustainable brands often face a first mover disadvantage, leading to failed product launches.³⁴² For instance, reminiscent of Unilever's example, the German retailer Lidl recently walked away from its commitment to selling only Fairtrade bananas in its 3,200 stores.³⁴³ Applying a similar logic, the first mover disadvantage might also hamper the ability of airlines to replace old aircraft with more environmentally sustainable plane.³⁴⁴ This transition will reduce emissions but invariably lead to higher ticket prices, potentially incentivizing companies to attempt to wait it out.

Understandably, consumer rights advocates and competition authorities are unmoved by these examples and offer many rebuttals. They claim competition law is meant to protect consumers.³⁴⁵ If consumers do not want the products, then why should we permit private actors to impose paternalistic limitations on consumer choice, particularly when higher prices disproportionately impact poorer consumers? Importantly, these private actors and the competition authorities are not accountable in any way to these consumers. If we want to limit consumer choice, legislation enacted through the democratic process is the appropriate process. This Article does not seek to discount these important critiques. But, as is explored more fully in Part IV, we should not jettison the benefits of prosocial collaboration so quickly.

2. *To Produce Sufficient Quantities of Sustainable Goods at Scale*

The examples above highlight a market failure in the insufficient consumer demand for sustainable products. However, there is a market failure at play on the supply side, as well. It is often impossible for companies to bring a sustainable product to market without collaborating with competitors to achieve sufficient scale. The plastic waste crisis represents the increasingly disastrous side-effect of this limitation. Plastic recycling legislation is being enacted globally, and many companies are entering into voluntary commitments that go above these legal mandates.³⁴⁶ Notwithstanding these strides, the infrastructure

341. *See id.*

342. *See* William Boulding & Markus Christen, *First-Mover Disadvantage*, HARV. BUS. REV., Oct. 2001.

343. *See Lidl Backs Away from Fairtrade Bananas*, BANANALINK (May 20, 2019), <https://www.bananalink.org.uk/news/lidl-backs-away-from-fairtrade-bananas>.

344. IN-HOUSE COMPETITION L. ASS'N, CONTRIBUTION LETTER ON COMPETITION POLICY SUPPORTING THE E.U. GREEN DEAL CALL FOR CONTRIBUTIONS 1, 2 (Nov. 20, 2020), http://competitionlawyer.co.uk/ICLA/Documents_files/201120%20-%20ICLA%20Input%20-%20Competition%20Policy%20supporting%20the%20Green%20Deal_1.pdf.

345. *See generally* Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216 (2012).

346. FOODDRINKEUROPE, *supra* note 7, at 1 (discussing the first mover disadvantage).

for recycling plastic remains nascent, and many companies will simply fail to meet these goals without such laws.³⁴⁷ In 2018, the European food and drink industry consumed eight million metric tons of plastic packaging, resulting in a cumulative 16.8 billion kilos of European plastic packaging waste.³⁴⁸ Yet, there is currently a global shortage of affordable food-contact recycled plastic.³⁴⁹ To overcome this shortage, competitors could jointly finance recycling infrastructure, including funding third-party recycling facilities. To avoid a free-rider problem, however, these companies would have to agree to a mandatory commitment to purchase all of the plastics collected and sourced from specific facilities. A mandatory commitment to source plastic from specific suppliers is a textbook example of anticompetitive conduct.³⁵⁰ Similar to plastic producers, leather tanneries won't make the investment necessary to make sustainable leather without sufficient demand. But leather producers who compete horizontally cannot make these mandatory commitments due to competition policy.³⁵¹ A similar logic can be applied to airlines, which have recently faced public scrutiny for their carbon footprint.³⁵² Airlines could, for example, enter into industry-wide commitments to demand that suppliers invest in greener production. But, to incentivize sufficient production, airlines may have to enter into mandatory joint purchasing agreements, raising the specter of antitrust.

3. *To Phase Out Unsustainable Products*

As discussed above, competition policy prevents companies from setting mandatory industry-wide standards. But as scholars and NGOs have lamented, voluntary standards feebly affect meaningful change.³⁵³ This challenge has led to an impasse. It is not surprising that E.U. companies are gun shy about mandatory standard setting when failed initiatives like “Chicken of Tomorrow” loom large.³⁵⁴ Chicken of Tomorrow was an initiative by farmers, supermarkets, and meat processors that sought to improve animal welfare conditions

347. *Id.* at 3, 4.

348. See ING ECON. DEP'T., PLASTIC PACKAGING IN THE FOOD SECTOR 5 (2019), [https://think.ing.com/uploads/reports/ING_-_The_plastic_puzzle_-_December_2019_\(003\).pdf](https://think.ing.com/uploads/reports/ING_-_The_plastic_puzzle_-_December_2019_(003).pdf); FOODDRINKEUROPE, DECARBONISATION ROAD MAP FOR THE EUROPEAN FOOD AND DRINK MANUFACTURING SECTOR (2021), <https://www.fooddrinkeurope.eu/wp-content/uploads/2021/07/Decarbonising-the-European-food-and-drink-manufacturing-sector.pdf>.

349. FOODDRINKEUROPE, *supra* note 7, at 5.

350. *Id.* at 3.

351. See IN-HOUSE COMPETITION L. ASS'N, *supra* note 344, at 2.

352. Jessica Baron, *Flight-Shaming Is Now a Thing – Will It Keep You From Traveling?*, FORBES (July 2, 2019), <https://www.forbes.com/sites/jessicabaron/2019/07/02/flight-shaming-is-now-a-thing--will-it-keep-you-from-traveling/?sh=25b8a1fe71a3>.

353. See generally David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261 (2008) (providing a literature review of voluntary “civil regulations” including codes and soft laws).

354. See *Industry-Wide Arrangements for the So-Called Chicken of Tomorrow Restrict Competition*, NETH. AUTH. FOR CONSUMERS & MKTS. (Jan. 26, 2015), <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>.

by adopting mandatory, industry-wide standards.³⁵⁵ Supermarkets agreed only to buy chicken that complied with the measures.³⁵⁶ The Dutch Competition Authority concluded that this violated Dutch and E.U. competition laws because it reduced supply and increased costs.³⁵⁷ Along similar lines, the Dutch Competition Authority found that an agreement between four large competing electricity producers to voluntarily shut down coal plants to reduce emissions violated competition laws since it increased energy prices and reduced the Dutch energy production capacity by 10%.³⁵⁸

The submissions described a myriad of ambitious mandatory, industry-wide, standard-setting proposals designed to address climate change. The food industry could reduce plastic waste by requiring all industry participants to abandon virgin plastics, reduce energy consumption by creating frozen products that require lower freezer temperatures, or protect soil degradation by requiring all farmers to use regenerative and low carbon farming practices, and excluding suppliers that refuse to remediate.³⁵⁹ Additionally, European wood processors could address deforestation by entering into an industry-wide mutually binding and mandatory agreement to only buy wood from preapproved regions on a “green list.”³⁶⁰ These wood processors proposed investing a portion of sales to enforce compliance, which would necessitate a fixed surcharge on sales to compensate for additional costs.³⁶¹ Similarly, the European paper industry wants to develop mandatory stricter standards to enhance sustainability, including a commitment not to use coating designed for hot beverages on drinking water cups, or a mandatory agreement to phase out less sustainable products like non-recyclable papers.³⁶² To the extent that these efforts are currently initiated through non-binding guidelines and recommendations, they are falling short.³⁶³ The inability to set mandatory standards is also severely hampering progress on addressing human rights abuses in the supply chain. The European food and drink industry could agree to mandatory rules for plastic packaging that would improve recyclability.³⁶⁴ It could also agree to integrate new technologies for

355. *Id.*

356. *Id.*

357. See Letter from Spanish Ass’n for Def. of Competition to EU Comm., Contribution to the European Commission’s Consultation on Competition Policy Supporting the Green Deal 4, <http://www.aedc.es/documento/aedc-contribution-to-the-european-commissions-consultation-on-competition-policy-supporting-the-green-deal/>.

358. See *id.* at 5.

359. See UNILEVER, *supra* note 333.

360. Letter from Am. Chamber of Com. to EU Comm., Consultation Response: Competition Contributing to the European Green Deal 4, https://www.amchameu.eu/system/files/position_papers/amcham_eu_comp_contributing_to_the_egd_response.pdf.

361. See *id.*

362. See Confederation of Eur. Paper Indus., Contribution Letter on Competition Policy Supporting the EU Green Deal Call for Contributions 4 (Nov. 19, 2020), https://ec.europa.eu/competition/information/green_deal/index_en.html.

363. See *id.*

364. See FOODDRINKEUROPE, *supra* note 7, at 6, 9.

sorting food-contact and non-food-contact plastic packaging waste like digital watermarking and fluorescent markers.³⁶⁵ Mandatory standards raise important antitrust concerns given that they create barriers to entry. But they are also increasingly necessary to address financially material ESG risks, creating a fundamental tension between business realities and antitrust law.

4. *To Address Sustainability and Human Rights Challenges*

Competition policy also prevents companies from sharing competitively sensitive information. It is difficult to implement joint efforts to address human rights abuses in the supply chain without this data. Admittedly, there is a number of workarounds, including using anonymized or aggregated data sets. But often, the anonymity of the information removes its usefulness. For example, AB Inbev could enter into logistics collaborations and data sharing with other beverage or fast-moving consumer goods companies to improve efficiencies.³⁶⁶ These agreements would enable companies to reduce distances traveled and therefore emissions.³⁶⁷ However, delivery routes are considered commercially sensitive information.³⁶⁸ Of course, AB Inbev can, and sometimes does,³⁶⁹ conduct this coordination through a third party. But that adds an additional cost, rendering potential collaborations commercially infeasible.

Often, commercially sensitive information necessarily relates to cost. For example, the food industry wants to collaborate on the cost-benefit analysis of switching to more sustainable packaging.³⁷⁰ This granular data would provide detailed information on the environmental impact and costs and is therefore considered competitively sensitive.³⁷¹

D. WHY REGULATION ALONE CAN'T ADDRESS SYSTEMIC RISKS

Before turning to policy recommendations, this Part concludes by addressing why companies cannot advocate for various policy goals by lobbying for regulation.³⁷² After all, that is why the *Noerr-Pennington* exception immunizes private entities from liability under the antitrust laws for collaborating to influence new laws or regulation, or the enforcement of existing ones.³⁷³ Importantly, the exception applies even if the intent or actual impact of

365. *See id.* at 6.

366. *See* Letter from Ben Graham, Eur. Legal Dir., AB InBev, Contribution Letter on Competition Policy Supporting the EU Green Deal Call for Contributions (Nov. 2020) (on file with author).

367. *See id.*

368. *See id.*

369. *See id.*

370. *FoodDrinkEurope Submission—Farm2Fork Consultation*, FOODDRINKEUROPE (Dec. 3, 2020), <https://www.fooddrinkeuropa.eu/resource/fooddrinkeuropes-submission-farm2fork-consultation>.

371. *See* FOODDRINKEUROPE, *supra* note 7, at 12.

372. *See* Hovenkamp, *Progressive Antitrust*, *supra* note 138, at 78, 112 (“Concerns with wealth distribution, universal service, or management of risk are all legitimate regulatory goals for progressive statutory intervention, although not for antitrust.”).

373. *See supra* Part III.B.

the legislation is anticompetitive.³⁷⁴ Competitors are free to lobby for lower emissions standards, a ban on single-use plastic, stricter human rights due diligence, or a generous federal minimum wage.

This Article does not disagree that the *Noerr-Pennington* doctrine offers businesses a powerful tool that they should and do utilize, nor does it dispute or discount the value of regulation. But regulation does not replace the complimentary and unique role that antitrust policy should play. As this Article has argued, the claim that regulation is better at addressing “environmental” or “social” issues relies on the false presumption that actions to address these issues are not procompetitive and welfare-enhancing. This Article emphatically agrees that antitrust law should remain firmly tethered to economic considerations. To honor this devotion, though, courts and enforcement agencies must honestly account for the economic impacts of climate change and other systematic risks.

There are other obvious shortcomings of regulation. First, passing it in the first place is often impractical or impossible. In fact, Congress has not successfully passed a comprehensive environmental law since the 1990s.³⁷⁵ With respect to climate change, fossil fuel companies that are benefiting the most from externalizing their negative environmental impacts are also the ones that tend to influence lawmakers and regulators through lobbying and campaign contributions.³⁷⁶ To the frustration of large diversified shareholders, there is also limited visibility into the fossil fuel industry’s influence over lawmakers and regulators due to a lack of mandatory disclosure obligations for corporate lobbying practices.³⁷⁷ It should come as no surprise that shareholder proposals seeking to increase transparency on corporate political activities won in record numbers in the 2021 proxy season.³⁷⁸

Second, as the case studies discussed in Part IV stressed, “legislation may provide the framework for action but leave the practical consequences to businesses that may struggle to achieve compliance with regulatory requirements unilaterally”³⁷⁹ Third, for multinational companies, the need for collaboration is often driven by a lack of influence on human rights or environmental regulation in local jurisdictions where the climate change and human rights impacts are being felt.³⁸⁰

374. See *supra* Part III.B.

375. See Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 132–33 (2013) (advocating for private environmental governance and noting that Congress has not passed meaningful environmental reform since 1990).

376. See Steve Cohen, *Scott Pruitt, Andrew Wheeler, and Regulatory Capture at the EPA*, COLUM. CLIMATE SCH.: BLOG (Apr. 16, 2018), <https://blogs.ei.columbia.edu/2018/04/16/pruitt-wheeler-regulatory-capture-epa>.

377. See Press Release, Ceres, Major U.S. Investors Call on Largest Corporate Emitters to Disclose How Their Climate Lobbying Aligns with Climate Science (Oct. 26, 2020), <https://www.ceres.org/news-center/press-releases/major-us-investors-call-largest-corporate-emitters-disclose-how-their>.

378. See H. Rodgin Cohen & Melissa Sawyer, *Corporate Political Contributions*, HAR. L. SCH. F. ON CORP. GOVERNANCE (Feb. 3, 2021), <https://corpgov.law.harvard.edu/2021/02/03/corporate-political-contributions>.

379. See FOODDRINKEUROPE, *supra* note 7, at 2.

380. See, e.g., Pacheco, George Schoneveld, Ahmad Dermawan, Heru Komarudin & Marcel Djama, *Governing Sustainable Palm Oil Supply: Disconnects, Complementarities, and Antagonisms Between State*

Consumer rights advocates advance a related critique that private industry and regulators are not democratically accountable to consumers and, therefore, shouldn't make ethical decisions for them.³⁸¹ Consumers, they argue, ought to have the freedom to make those decisions through their buying decisions.³⁸² While that is an important critique, this Article takes issue with it on several grounds. First, the low prices that the consumer welfare standard incentivizes disproportionately inflict negative externalities on the most vulnerable consumers in the form of polluted air or water, among other negative impacts.³⁸³ Although both wealthy and poor consumers typically pay the same prices for the same goods, the poorest consumers effectively subsidize those low prices.³⁸⁴ Often, those costs are also borne by communities of color.³⁸⁵ Moreover, relying on low prices as a tool for wealth distribution and economic empowerment raises a critique reminiscent of an argument that Professor Abbye Atkinson makes with respect to relying on “credit as [a] social provision.”³⁸⁶ Similar to credit, upholding consumer price as a normative goal reflects our tendency to overly rely on market-based solutions as an “expedient diversion from the more difficult and intractable” questions concerning economic inequality.³⁸⁷

A third critique that is practical rather than normative maintains that measuring a standard broader than consumer welfare is far more difficult than

Regulations and Private Standards, 14 REGUL. & GOVERNANCE 568, 580 (2020); Ronnie D. Lipschutz, *Global Civil Society and Global Governmentality: Or, the Search for Politics and the State Amidst the Capillaries of Social Power*, in POWER IN GLOBAL GOVERNANCE 229–248 (Michael Barnett & Raymond Duvall eds., 2004) (discussing private civil regulation or self-regulation by companies as an effort “to compensate for the decreasing capacities of national governments for providing public goods.”).

381. See, e.g., Joseph Congilio, *Economizing the Totalitarian Temptation: A Risk-Averse Liberal Realism for Political Economy and Competition Policy in a Post-Neoliberal Society*, 59 SANTA CLARA L. REV. 703, 717 (2020) (“By seeking to correct individual preferences and market biases, libertarian paternalism would seem to support an antitrust regime that, in effect, goes beyond a conduct requirement and addresses outcomes directly for their failure to meet prior socio-economic goals.”).

382. EUR. CONSUMER ORG., CONSUMERS AT THE CENTRE OF THE DRIVE TO SUSTAINABILITY: BEUC’S VIEW ON THE EUROPEAN GREEN DEAL 5 (2020), https://www.beuc.eu/publications/beuc-x-2020-012_beuc_final_position_on_european_green_deal.pdf.

383. See Press Release, Data-Driven Lab, Most Cities Burdening Low-income Residents with Unfair Share of Environmental Hazards (Feb. 6, 2020), <https://datadrivenlab.org/featured/press-release-most-cities-burdening-low-income-residents-with-unfair-share-of-environmental-hazards-according-to-index-that-will-launch-at-the-world-urban-forum-on-feb-9>.

384. *Id.*

385. See Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 170 (2008); Nishan Degnarain, *Ten Ways That Racial and Environmental Justice Are Inextricably Linked*, FORBES (June 30, 2020), <https://www.forbes.com/sites/nishandegnarain/2020/06/30/eight-ways-that-the-fight-for-racial-and-environmental-justice-are-inextricably-linked/?sh=58a1c6873213>.

386. See Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1098 (2019) (“Thus, even as these advocates fight for economically disenfranchised communities, they do so in inherently market-based terms.”).

387. *Id.* at 1098, 1134 (“This notion of credit as social provision for the working poor is deeply flawed.”).

the alternative.³⁸⁸ Unfortunately, a tendency to resist accounting for the financial impacts of environmental and social risks because of its inherent difficulty stymies progress in corporate law and securities disclosure, as well.³⁸⁹ But the challenges of measuring systematic risk can no longer be a reason for seeking comfort in standards that ignore and conflict with market realities. After all, large asset managers and insurance companies are employing tools like total cost accounting and externality pricing to inform their own business and investment decisions.³⁹⁰ These problems are difficult, but not insurmountable. The next Part calls on antitrust to embrace this challenge and articulates how antitrust enforcement agencies and courts could enhance the consumer welfare analysis to incorporate systematic risks.

V. THE UNIVERSAL CONSUMER STANDARD

A. INCORPORATING SYSTEMATIC RISKS INTO THE MARKET FAILURE TEST

As this Article introduced in Part III, the current market failure test cannot account for systematic portfolio-wide risks.³⁹¹ This limitation is attributable to the market failure test's reliance on the prevailing consumer welfare standard.³⁹² Under that analysis, a particular restraint of trade is procompetitive only if it alleviates a market failure by increasing consumer surplus, as measured by lower price or more supply.³⁹³ In applying the market failure test, courts have traditionally assumed the perspective of a single market for an individual product as it exists today.³⁹⁴ This narrow perspective fails to capture systematic risks, many of which are inherently future-oriented, such as climate change. This perspective also does not align well with the perspective of Universal Owners, who are rationally motivated to reduce the systematic risk in their large and highly diversified portfolios.³⁹⁵ This conflict is becoming untenable in certain contexts as large asset managers are increasingly shifting from a "firm-specific" to "systematic risk" approach in their engagements and proxy campaigns.³⁹⁶ As

388. See Hovenkamp, *Antitrust's Consumer Welfare Principle*, *supra* note 181, at 107 ("While application of any welfare test poses significant difficulties of measurement, in most close cases estimating consumer welfare effects is far easier than measuring general welfare effects that require a tradeoff.").

389. See generally Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923 (2019).

390. See, e.g., *Aladdin Climate*, ALADDIN BY BLACKROCK, <https://www.blackrock.com/aladdin/products/aladdin-climate> (last visited July 31, 2022); see Surminski, *supra* note 95 (describing how insurance companies use environmental and social factors to assess risk in its underwriting process). See generally Viral V. Acharya & Thomas Philippon, *Measuring Systemic Risk*, 30 REV. FIN. STUD. 2, 34 (2017).

391. See *supra* Part III.

392. See Newman, *supra* note 217, at 531.

393. *Id.* There is also an analytical shortcoming to this approach. By fastening the market failure to consumer welfare, the market failure test becomes indistinguishable from the "type of effect" approach, which also focuses on impacts on consumers of a specific product, such as price or output.

394. *Id.*

395. See *supra* Part IV; see also John C. Coffee, *The Coming Shift in Shareholder Activism, From "Firm Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)* (Aug. 26, 2021) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3908163 [hereinafter Coffee, *The Coming Shift*].

396. Coffee, *The Coming Shift*, *supra* note 395.

this Article explored in Part IV, mitigating certain systematic risks requires competitor collaboration.

To harmonize the current market failure test with the market reality of concentrated ownership, antitrust must evolve to use a welfare standard that will account for systematic risks. Antitrust traditionalists point to regulation as the appropriate vehicle for addressing systematic risks.³⁹⁷ But, as explained above, regulation is either infeasible, impractical, or cannot respond with sufficient speed or specificity to anticipate every permutation of competitor collaboration.³⁹⁸ The Neo-Brandesians, on the other hand, argue that antitrust ought to address social and environmental externalities, but do not tether this analysis to the consumer welfare test.³⁹⁹ This Article introduces a pragmatic approach to resolving this impasse, and introduces a new welfare standard called “the universal consumer standard.”⁴⁰⁰ While the universal consumer standard will require further development, this Article outlines its basic contours.

As a first prong, this Article argues that a competitor collaboration which seeks to address a systematic risk should always be analyzed under a rule of reason as opposed to a per se rule, even if the collaboration will necessarily increase price or reduce output. Given that the per se analysis has been largely abandoned in practice, this approach is largely consistent with how antitrust enforcement agencies and courts approach competitor collaboration.⁴⁰¹ Nonetheless, clearly articulating that competitor collaboration aimed at addressing systematic risks will always trigger a rule of reason analysis could minimize the chilling effect that is preventing competitors from collaborating.

As this Article explained in Part IV, in applying the rule of reason analysis, courts currently consider three factors: first, whether the plaintiff has shown a significant anticompetitive effect from the challenged practice; second, whether the defendant has offered procompetitive reasons to justify these negative effects; and third, whether the plaintiff has rebutted these procompetitive justifications by showing that the restraint is not reasonably necessary to attain the defendant’s objectives.⁴⁰² Alleviating a market failure can serve as a procompetitive justification. This Article argues that the market failure should be analyzed from the perspective of a universal consumer. An initial framework for the universal consumer standard could allow competitor collaboration if the parties demonstrate that: (1) the collaboration is designed and narrowly tailored to mitigate a specifically identified systematic risk; (2) the collaborators’ investors have identified the systematic risk as a focus area through public

397. See Hovenkamp, *Progressive Antitrust*, *supra* note 138, at 78.

398. See *supra* Part IV.

399. See *supra* Part III.

400. I would like to thank Rick Alexander, the CEO and founder of the Shareholder Commons and Professor Johnathan Newman for helpful feedback on the universal consumer standard.

401. See, e.g., *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); see also Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018) (“Courts evaluate most antitrust claims under a “rule of reason,” which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct.”).

402. See Carrier, *supra* note 243, at 50.

statements, engagement priorities, shareholder proposals, or proxy voting; (3) one competitor's unilateral action will not sufficiently mitigate the systematic risk; (4) prohibiting the collaboration will reduce the welfare of future consumers (i.e., decreased supply or increased cost),⁴⁰³ and (5) the universal consumer welfare exceeds any harm from the collaboration.

There are several benefits to a universal consumer standard along these lines.⁴⁰⁴ First, it would not expand antitrust's purview or require incorporation of non-welfare concerns or social goals that have no bearing on consumers. While there is a growing number of scholars who argue that purely social and non-economic issues should be considered in antitrust analysis, measuring and weighing them against consumer welfare is challenging. As many have warned, this "thumb on the scale" for non-economic concerns bears the risk of devolving into a purely normative exercise, leading to a lack of consistency in applying antitrust scrutiny to competitor collaboration.⁴⁰⁵ In contrast, the universal consumer standard remains rooted in the consumer welfare paradigm, which makes consumers the arbiter of whether restraints on trade should be permitted.

The universal consumer standard also avoids the pitfalls that the total welfare standard has faced. While there is a resurgent interest in labor antitrust and consumers are in fact also workers, a total welfare analysis has not gained much traction.⁴⁰⁶ As commentators have argued, the total welfare standard has been thwarted by the challenges in measuring total societal welfare.⁴⁰⁷ In contrast, the universal consumer analysis, which considers harms to future consumers, is far narrower and hence more feasible.

This is particularly so given economists' increasing focus on the impacts that climate change, sustainability, and the loss of biodiversity will have on future generations. This is spurring the development of economic models that focus on prospective consumer welfare, and account for future harms.⁴⁰⁸ A recent example is a "Willingness to Pay" (WTP) standard that Professors Roman Inderst and Stefan Thomas have proposed, which projects what future

403. While it may be possible to expand the focus beyond a single product, the universal consumer standard as articulated here refers to welfare impacts on consumers of the same product, or a sustainable version of that product.

404. While this Article seeks to introduce the universal consumer standard, it acknowledges that the standard raises many implementation issues. Specifically, the standard will introduce complex geographic and temporal issues that will need to be fleshed out further.

405. See Hovenkamp, *Progressive Antitrust*, *supra* note 138, at 79.

406. There is a long-standing debate on whether the total welfare standard should replace the consumer welfare standard. See, e.g., Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 149–79 (2007).

407. See, e.g., Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 850 (2000).

408. See e.g., Roman Inderst & Stefan Thomas, *Prospective Welfare Analysis—Extending Willingness-to-Pay Assessment to Embracing Sustainability*, J. COMPETITION L. & ECON. (Sept. 2021) (explaining how a future change in consumers' willingness-to-pay can be accounted for in a consumer welfare effects analysis in antitrust.).

consumers would be willing to pay for a sustainable product.⁴⁰⁹ This Article is not advocating for the WTP standard, per se. However, the WTP standard illustrates the growing interest in welfare accounting that considers future harms.

To illustrate the universal consumer standard, consider the following hypothetical. The loss of biodiversity threatens the long-term sustainability of an increasing number of products in the food industry. Universal owners invested in the food industry have identified the loss of biodiversity as a systematic risk. For example, BlackRock has identified the loss of biodiversity as a key engagement priority in an effort to protect the “natural capital” in its portfolio.⁴¹⁰ This is not all too surprising given that, by some estimates, half of the world’s global GDP (an estimated forty-two trillion dollars) depends on preserving biodiversity.⁴¹¹ Imagine now that a group of competitors in the food industry wants to reduce soy bean output in order to forestall deforestation, which is accelerating the loss of biodiversity. This competitor collaboration will reduce soybean supply and increase soybean price. Applying a universal consumer standard to this collaboration, the competitors can demonstrate that this output restriction and resulting price increase is in fact procompetitive because it ensures continued soy production for future generations.

B. HOW ENFORCEMENT AGENCIES, COURTS, AND CONGRESS CAN ADVANCE THE UNIVERSAL CONSUMER STANDARD

This Article has introduced the universal consumer standard as a concept that will align the consumer welfare standard with universal ownership. This Part concludes by exploring how antitrust enforcement agencies, courts, and Congress can define and implement that standard.

1. *The DOJ and FTC Should Update the Antitrust Guidelines for Collaboration Among Competitors.*

The DOJ and FTC should initiate a public debate on whether and how competition policy is preventing companies from addressing systematic risks that will harm future consumers.⁴¹² The agencies then should update their guidelines for competitor collaboration and incorporate a universal consumer perspective into that analysis.⁴¹³

Issuing updated guidance is consistent with how the DOJ and FTC have responded to shifting policy priorities in the past. For example, when President Obama issued a statement stressing that “[c]yber threats pose one the gravest

409. *Id.*

410. Chris Flood, *BlackRock Steps Up Drive to Protect Natural Environment*, FIN. TIMES (Mar. 18, 2021), <https://www.ft.com/content/11285871-f0a7-4573-b638-5391e713eac8>.

411. *A Fifth of Countries Worldwide at Risk from Ecosystem Collapse as Biodiversity Declines, Reveals Pioneering Swiss Re Index*, SWISS RE (Sept. 23, 2020), <https://www.swissre.com/media/news-releases/nr-20200923-biodiversity-and-ecosystems-services.html>.

412. *See supra* Part IV.

413. Of course, this will require the agencies conduct workshops and studies, to hear from experts, and to develop the necessary knowledge and to refine their guidance.

national security dangers that the United States faces,”⁴¹⁴ the DOJ and FTC issued an “Antitrust Policy Statement on Sharing of Cybersecurity Information.”⁴¹⁵ This joint statement acknowledged that antitrust could be unwittingly chilling valuable collaboration: “private entities may, however, be hesitant to share cyber threat information with others, especially competitors, because they believe such sharing may raise antitrust issues.”⁴¹⁶ To further the policy goal of a “more secure and productive nation,”⁴¹⁷ the DOJ and FTC delineated the contours of information that would be permissible under antitrust policy. Relying on *United States v. United States Gypsum Co.*,⁴¹⁸ the agencies also clarified that they would impose a rule of reason analysis to information sharing in the context of cybersecurity in light of the public policy goal.⁴¹⁹

On January 27, 2021, President Biden issued an executive order that begins with a commitment to put “the climate crisis at the center of United States Foreign Policy and National Security.”⁴²⁰ Crucially, the administration has also stressed that climate justice and economic justice are dependent upon one another.⁴²¹ The same day, Defense Secretary Lloyd Austin committed to “immediately take appropriate policy actions to prioritize climate change considerations in our activities and risk assessments, to mitigate this driver of insecurity.”⁴²² Treasury Secretary Janet Yellen also responded by creating a new senior treasury post for a “Climate Czar” to mitigate the risks to the financial system posed by climate change.⁴²³

U.S. antitrust enforcement agencies must recognize the unique role that competition policy plays in advancing the administration’s policy goals by issuing guidelines for competitor collaboration that account for the impact of current activities on future consumers.

2. *The DOJ & FTC Should Extend the Fast-Tracked Review Process*

414. Press Release, White House Off. of the Press Sec’y, Statement by the President on the Cybersecurity Framework (Feb. 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/02/12/statement-president-cybersecurity-framework>.

415. See Dep’t of Just. & Fed. Trade Comm’n, *Dep’t of Justice & Fed. Trade Comm’n: Antitrust Policy Statement on Sharing of Cybersecurity Information* (2014), https://www.ftc.gov/system/files/documents/public_statements/297681/140410ftcdojcyberthreatstmt.pdf.

416. See *id.*

417. See *id.*

418. 438 U.S. 422, 422 (1978).

419. See *id.*

420. See Exec. Order No. 14008, 86 Fed. Reg. 7,619, 7,620, 7,631 (Jan. 27, 2021) (urging “comprehensive attention to environmental justice throughout the Department of Justice” and promises to “develop a climate finance plan” but makes no mention of antitrust policy).

421. See *id.*

422. See Aaron Mehta, *Climate Change Is Now a National Security Priority for the Pentagon*, DEFENSENEWS (Jan. 27, 2021), <https://www.defensenews.com/pentagon/2021/01/27/climate-change-is-now-a-national-security-priority-for-the-pentagon>.

423. See Kate Davidson, *Yellen Is Creating a New Senior Treasury Post for Climate Czar*, WALL ST. J. (Feb. 12, 2021), <https://www.wsj.com/articles/yellen-is-creating-a-new-senior-treasury-post-for-climate-czar-11613138479>.

for the COVID-19 Pandemic to Collaboration to Address Climate Change.

In response to the COVID-19 pandemic, the DOJ and FTC sprang into action and issued a fast-tracked review process for collaborations among corporate competitors seeking to advance health and safety.⁴²⁴ The agencies pledged to respond to applications within a week, whereas the standard process takes several months.⁴²⁵ The United States was not alone; competition agencies from Europe to Asia and South America have tried to support, or at least not obstruct, the pandemic response.⁴²⁶ The United Kingdom, for example, temporarily relaxed competition rules to help the dairy industry avoid waste and sustain productive capacity by allowing dairy producers to share information like surplus milk quantities and stock levels.⁴²⁷

But U.S. agencies have specifically limited their guidance to joint efforts “to address the spread of COVID-19 and its aftermath.”⁴²⁸ This Article argues that climate change deserves the same level of exigency and warrants a fast-tracked review process. For competitor collaborations that seek to address systematic risks, the DOJ and FTC should incorporate the universal consumer standard into their analysis.

3. Courts and Antitrust Enforcement Agencies Should Recognize the Procompetitive Justifications Underlying Competitor Collaboration to Address Sustainability.

The Sherman Act’s broad wording has left courts with wide latitude to define procompetitive justifications for competitor collaboration. Although they have already largely abandoned the per se analysis,⁴²⁹ courts and enforcement agencies should recognize that addressing systematic risk serves a valid procompetitive purpose. This is true even if the activity involves traditionally per se illegal categories, such as price-fixing and group boycotts. This will require courts and enforcement agencies to consider the economic benefits

424. See DEP’T OF JUST. & FED. TRADE COMM’N, JOINT ANTITRUST STATEMENT REGARDING COVID-19 (March 2020), https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.

425. See *id.*

426. See *generally Impact of COVID-19 New Exemptions Under Antitrust Law*, LATHAM & WATKINS (Feb 1, 2021), <https://www.lw.com/thoughtLeadership/covid-19-impact-new-exemptions-under-antitrust-law>; see also *supra* Part IV.

427. See LATHAM & WATKINS, *supra* note 426, at 7.

428. See DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 424 at 2.

429. See *supra* Part III.

of any prosocial collaboration from a universal consumer perspective.⁴³⁰ For example, if the prosocial collaboration raises prices for current consumers but ensures the long-term sustainability and supply of the produce for future consumers, then the activity should be permitted to proceed as procompetitive. This will, of course, require more robust externality accounting grounded in natural resource and environmental economics as opposed to the neoclassical economics that discounts scarcity.⁴³¹ As noted above, courts can readily rely on existing economic models that account for prospective consumer welfare.

4. *Congress Should Pass Legislation that Authorizes the DOJ and FTC to Oversee Temporary Collaboration Safe Harbors.*

While fast-tracking the review process is a good start, it may not go far enough to ensure that competition enforcement is not stifling companies' ability to address systematic risks. To that end, Congress should pass legislation requiring the DOJ and FTC, or another agency such as the EPA, to provide a safe harbor for competitor collaboration that addresses systematic environmental and social risks. The contours of that exemption will emerge out of a consultative process, but global competition authorities offer some recent examples.

On July 9, 2020, the Netherlands Authority for Consumers and Markets (ACM) was the first in the European Union to publish draft guidelines containing a proposed approach to addressing sustainability agreements.⁴³² The Draft Guidelines would exempt agreements where sustainability benefits outweigh the anticompetitive effects. The Dutch Guidelines are bold in at least two respects. First, they do not require quantitative evidence of sustainability benefits if the companies involved in the agreement represent less than 30% of combined market share. Second, they take into account the benefits of the agreements for future consumers—a perspective that is consistent with the universal consumer standard.

Similarly, Greek competition authorities have proposed the use of a regulatory “sandbox” in which companies can collaborate with competitors to advance sustainability goals under the supervision

430. See, e.g., Reed Hundt, *Companies Colluding to Fight Climate Change Don't Need to Worry About Antitrust Laws*, WASH. POST (Sept. 11, 2019), <https://www.washingtonpost.com/opinions/2019/09/11/companies-colluding-fight-climate-change-dont-need-worry-about-antitrust-laws> (discussing an opinion from former chair of the FCC advocating for private firms to bring a test case to define the contours of prosocial collaboration and clarify that addressing climate change should count).

431. See generally Elmar Altvater, *The Capitalocene, or, Geoengineering Against Capitalism's Planetary Boundaries*, in ANTHROPOCENE OR CAPITALOCENE? NATURE, HISTORY, AND THE CRISIS OF CAPITALISM, 138–52 (Jason W. Moore ed., 2016) (“Today’s great questions are about how capitalism works through, and actively creates, planetary nature.”).

432. See Emma Cochrane, Sima Ostrovsky & Lodewick Prompers, *Dutch Competition Regulator Leads the Way on Sustainability*, LINKLATERS (July 14, 2020), <https://www.linklaters.com/en-us/insights/blogs/linkingcompetition/2020/july/dutch-competition-regulator-leads-the-way-on-sustainability>.

of the competition authority.⁴³³ Yet another example comes from Australia's competition authorities (the ACCC), which have long had the authority to exempt competitor collaboration if the public benefits outweigh the public detriments. The ACCC has recently applied this exemption to sustainability collaborations, including a five-year exemption for a voluntary, industry-led initiative to address the disposal of used batteries.⁴³⁴

The regulatory agencies would be tasked with determining the scope and duration of any safe harbor. But those agencies will need to acquire more robust expertise in environmental economics to ensure that the procompetitive justifications for these competitor collaborations can be adequately measured. Moreover, any antitrust safe harbor would have to be closely monitored with sunset provisions. This activity-specific exception will undoubtedly trigger increased enforcement and monitoring costs as well. Congress appears poised to increase funding for antitrust enforcement. This Article argues that Congress should also allocate funding for the oversight of prosocial collaboration.⁴³⁵

CONCLUSION

Universal owners are demanding that companies address systemic risks. Corporate managers must respond to these calls—this is an economic imperative. But companies recognize that they cannot make meaningful progress unilaterally. Antitrust law currently prevents or discourages companies from working together to address systematic environmental and social risks, leading to an impasse.

This Article sheds light on the growing tension between antitrust law and the demands on companies today. It also takes the first step toward harmonizing antitrust law with these market realities by introducing the contours of a new standard: the universal consumer standard. In doing so, this Article invites additional research—both qualitative and quantitative—on how antitrust law can accommodate prosocial collaboration.

433. See David Little & Pierre Bichet, *Greek Sustainability Initiative Promotes Cooperation Between Competitors*, JD SUPRA (Oct. 2020), <https://www.jdsupra.com/legalnews/greek-sustainability-initiative-31046/>; see also *Competition Law & Sustainability*, HELLENIC COMPETITION COMM'N, <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html> (last visited July 31, 2022); *Sustainability and Competition Note by Greece*, ORG. FOR ECON. CO-OPERATION AND Dev. (Dec. 1, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)64/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)64/en/pdf).

434. *Battery Stewardship Council*, AUSTL. COMPETITION & CONSUMER COMM'N (Mar. 1, 2020), <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/battery-stewardship-council>.

435. See The Competition and Antitrust Law Enforcement Reform Act of 2021, 117th Cong. § 15 (2021) (arguing that it is possible to design the oversight so that it is coordinated with a different agency, such as the EPA for prosocial environmental collaboration, similar to the FDA's oversight of the Capper-Volstead Act; another option is having multi-stakeholder oversight to incorporate the perspective of experts from academia and NGOs).