ANTITRUST AS ANTIRACISM:

ANTITRUST AS A PARTIAL CURE FOR SYSTEMIC RACISM

(AND OTHER SYSTEMIC "ISMS")

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SYNOPSIS

We usually think of antitrust law as addressing violations of free market norms, not equality norms. The two, however, may be related. Systemic racism (and other systemic "isms") are about power and its abuse. So is antitrust law. Moreover, antitrust may be able to fill gaps left by antidiscrimination law. In particular, antitrust law can address:

(1) entire markets, not just individual firms or discrete actions;

(2) power imbalances from differences in capital, not just disparities in compensation;

(3) financial allocations between owners and workers, not just between workers;

(4) legal violations that shrink total worker pay, and do not just distort its allocation.

Antitrust law also relies on centrist free market principles. Those may be less controversial than tackling issues of race directly. To be sure, in part for that reason, antitrust laws are limited. They can at best remedy a small portion of the potential wrongs caused by systemic racism. But antitrust may nevertheless contribute valuably to systemic racial equality. It also may provide a model for how antidiscrimination law might be reframed to make it more effective in that regard.

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I. Introduction

We usually think of antitrust law as addressing violations of free market norms, not equality norms. The two, however, may be related. Systemic racism (and other systemic "isms") are about power and its abuse. So is antitrust law. Moreover, antitrust may be able to fill gaps left by antidiscrimination law. In particular:

(1) **Individual Entities or Actions v. Economic Systems.** Employment discrimination law tends to focus on when the policies of discrete employers—and especially their discrete acts—result in differential treatment of similarly situated workers. It is most useful, for example, when a specific employer—or, better yet, a specific manager—hires or promotes white people instead of equally or better qualified African Americans. But discrimination law tends to founder when, instead, an entire system is designed in a way that places people of color at a disadvantage. Antitrust law, in contrast, assesses entire systems. It can and does take into account how an entire market is structured and whether a firm has exploited the structure of a market—or distorted it—to its advantage. It also can evaluate the conduct of multiple firms.

(2) **Income v. Capital.** Discrimination law emphasizes income. It offers redress when a protected group receives less compensation than it should. Antitrust law also attends to capital. It can offer relief when those with capital—disproportionately white men—distort markets to harm workers in general—in many industries, disproportionately people of color.

(3) **Apples to Apples v. Apples to Oranges.** Discrimination law is designed for apple to apple comparisons—*e.g.*, whether similarly situated workers are treated differently. Antitrust law to some extent can make apples to oranges comparisons—*e.g.*, assessing whether workers (labor) are being exploited by owners (capital).

(4) **Dividing the Pie v. Enlarging the Pie.** Discrimination law can pit workers against each other for limited resources. Antitrust law can increase the resources of workers generally.

(5) **Centrist Economic Principles.** Antitrust law relies on centrist free market principles. Those may be less controversial than tackling issues of race directly. To be sure, in part for that reason, antitrust laws are limited. They can at best remedy a small portion of the potential wrongs caused by systemic racism. But they can still contribute valuably to racial equality.

This Essay will explore antitrust law's potential and limitations as a tool for dismantling systemic racism (and, by implication, dismantling other systemic "isms"). It will focus in particular on workers and discuss both cases in which antitrust law has fulfilled or may fulfill some of its potential as well as cases in which courts may have missed an opportunity to address systemic racism. We will see that, for the reasons noted above, antitrust law can offer a powerful corrective when, for example, disproportionately white ownership and management of one or more firms distorts an entire market to take advantage of a pool of workers containing a disproportionally high percentage of African Americans or other traditionally disadvantaged

groups. Part II explores the relationship between systemic racism and economics. Part III compares how antidiscrimination and antitrust doctrine address claims by workers. Part IV provides examples of the use of antitrust litigation on behalf of workers to combat systemic racism. Part V concludes and, in doing so, briefly notes some issues antitrust law raises about how antidiscrimination law might be reframed to address systemic racism more effectively.

II. Systemic Racism and Economics

This section does not attempt to choose between competing definitions of systemic racism. Nor does it attempt to analyze the scope and effect of systemic racism. Rather it identifies some of its likely features, especially the economic ones. The aim is to show that using plausible understandings of systemic racism and its scope, antitrust law has potential as a way to counter it.

A. Systemic v. Individual

A crucial—if obvious—point about systemic racism is that it is *systemic*. Racism is not merely the product of individual bias or ill will. Indeed, while this Essay focuses on systemic racism in the civil context, it is worth noting that commentators also focus on the shelter and comfort systemic racism has found in America's criminal justice system.[1] Social and economic structures can create or maintain racial inequality. For example, what scholars call "economic

[1] *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903); J. BALDWIN, THE FIRE NEXT TIME (1963); T. COATES, BETWEEN THE WORLD AND ME (2015)) ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them").

apartheid"[2] was propagated by "redlining"[3] and "white flight"[4] from American cities such as Philadelphia and Detroit. Scholars argues that these practices, perpetuated by baked-in racism, have contributed to the socio-political environment in which race-based discriminatory outcomes are "the usual way society does business, the common, everyday experience of most people of color" in America.[5] Scholar also argue that economic apartheid has reinforced a workforce geographically divided by race.[6] American workers, who in large part live and work in racially homogenous spaces, may be unaware of their shared interest in destroying systems of economic imbalances; segregated neighborhoods often lead to segregated social networks, decreasing the opportunities for workers of different races to communicate and discover common ground.[7] As

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[2] Scholars have noted that the principles of historical racism and segregation permeate American social, political and economic institutions, which in turn shape the labor pool, political, educational, residential and economic institutions to benefit white Americans and disadvantage Black Americans. *See* Sherry Cable & Tamara L. Mix, *Economic Imperatives and Race Relations: The Rise and Fall of the American Apartheid System*, 34 J. OF BLACK STUDIES 183 (2003); *see also* CHUCK COLLINS & FELICE YESKEL, ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY, & INSECURITY (2005).

[3] A commonly recognized feature of economic apartheid in America is the practice championed by lenders and co-signed by the federal government that outlined what was deemed as financially undesirable neighborhoods, populated by African Americans and other minority groups, on maps by using red lines to outline these neighborhoods as undesirable. Elizabeth McClure et al., *The Legacy of Redlining in the Effect of Foreclosures on Detroit Residents' Self-Rated Health*, 55 HEALTH PLACE 9-19 (2019). Additionally, lenders have engaged in practices that prevented African American and other minority groups from moving to better resourced neighborhoods. *Id.* Scholars describe how these practices have had an adverse impact on African American wealth and that group's ability to maintain economic and physical health. *Id.* Today, racialized economic apartheid is institutionalized and perpetuates an ever-growing housing gap between whites and African Americans. *See* Aaron Glantz & Emmanuel Martinez, *Modern-Day Redlining: How Banks Block People of Color from Homeownership*, THE CHICAGO TRIBUNE (Feb. 17, 2018), https://www.chicagotribune.com/business/ct-biz-modern-day-redlining-20180215-story.html.

[4] White flight—the physical and economic migration of whites from urban centers to homogenous white spaces—occurred in multiple waves, each time propagated by fears of declining values of capital and a way of life due to the influx of African Americans into formerly white-dominated urban neighborhoods. *See* Jack Schneider, *Escape from Los Angeles: White Flight from Los Angeles and Its Schools*, 34 J. OF URBAN HIST. 995 (2008).

[5] *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7 (2012).

[6] *See, e.g.*, Kate Bahn & Carmen Sanchez Cumming, "U.S. Occupational Segregation by Race, Ethnicity, and Gender," WASH. CTR. FOR EQUITABLE GROWTH 3 (July 2020), https://equitablegrowth.org/wp-content/uploads/2020/07/063020-occup-seg-fs.pdf. (discussing higher wage gaps for Black Americans due to discrimination in employment in metropolitan areas due to high minority populations).

[7] *See* Jen Kinney, "To Better Understand Segregation, Look at Social Networks," NEXTCITY.ORG (Feb. 9, 2018), https://nextcity.org/daily/entry/to-better-understand-segregation-look-at-social-networks.

we will see in Part III below, systemic racism also may contribute to the exploitation of workers of color. In each of these settings, systemic racism, as the name suggests, involves systems. It should not be surprising, then, if efforts to dismantle systemic racism address systems, and not merely individual entities or actions.[8]

B. Power Disparities v. Unequal Treatment of Different Disempowered Groups

Many of the social and economic structures in the U.S. that perpetuate systemic racism also harm disempowered white people. Critical race theorists have noted that as the U.S. has taken some steps to root out and prohibit *de jure* racial oppression in the form of chattel slavery, housing, public accommodations, and employment, racism has been driven underground. *De jure* racism has given way to race-neutral economic policies that adversely impact the underclass from all races, including whites. Indeed, cynical political leaders arguably have employed race as a means to encourage low-income whites to vote against their own economic interests. For example, politicians have met with success stirring up hostility among indigent white people to social assistance programs by focusing on African Americans as their supposedly undeserving primary beneficiaries.[9] However, poor whites face many of the same barriers to increasing their wealth as their minority counterparts.[10] Disempowered white people could thus benefit from economic policies, such as aid to needy families, food stamps, government-subsidized healthcare, unemployment insurance, and the like. Yet these government programs are often opposed by the politicians that disempowered white people support.

Similarly, legal protections for union organizing, on their face, affect the economic well-being of all workers. However, there is a good argument that the rights of Americans to unionize have been undermined by racism. For example, from 1932 until 1964, the Democratic Party lost a significant portion of its base because of its liberal wing's push for minority civil and economic rights.[11] A stark example can be found in the politics surrounding labor union rights in the late 1940s. Republicans and conservative southern Democrats created a coalition to pass the Taft-

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[8] *See* Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 149–52 (2020) (discussing four pillars of white supremacy that support systemic racism and that should be addressed: (1) race-motivated impairments, (2) race-motivated benefits, (3) colorblind impairments, and (4) colorblind benefits).

[9] Richard C. Fording, *Laboratories of Democracy or Symbolic Politics? – the Origins of Welfare Reform*, *in* RACE AND THE POLITICS OF WELFARE REFORM 88–89 (Sanford F. Schram, et al. ed., 2003).

[10] *See* Reba L. Chaisson, *The Forgotten Many: A Study of Poor Urban Whites*, 23(2) J. OF SOCIOLOGY & SOC. WELFARE 42 (1998); *see also*, Tracy Jan, *The Biggest Beneficiaries of the Government Safety Net: Working Class Whites*, THE WASHINGTON POST (Feb 16, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/02/16/the-biggest-beneficiaries-of-the-government-safety-net-working-class-whites/.

[11] *See* Lee Drutman, *How Race and Identity Became the Central Dividing Line in American Politics*, VOX (Aug. 30, 2016), https://www.vox.com/polyarchy/2016/8/30/12697920/race-dividing-american-politics.

Hartley Act over President Truman's veto—restricting the power and activities of labor unions.[12] The bipartisan coalition's efforts to pass the Act were a direct response to the labor movement's "Operation Dixie."[13] Operation Dixie was a concerted effort by the Congress of Industrial Organizations to unionize the Southern textile industry, which was predominately helmed by African Americans.[14] Racialized animus and Jim Crow laws prevented Operation Dixie from becoming a reality. Unions have long been seen as promoting economic equality.[15] While there is evidence that much of the support for the law was racially motivated,[16] its race-neutral language limits the rights of all union workers, irrespective of race. In this way, the background motivation of racism behind fundamental American institutions and laws can harm not only people of color, but all disempowered people.

As a result, efforts to combat racism may struggle if they rely solely on evidence that similarly situated people are treated differently based, for example, on the color of their skin. Systemic racism may have the intent and effect of causing disproportionate economic harm to people of color. Nevertheless, the mechanisms by which it operates can appear colorblind. Given that people of color are disproportionately represented among the poor and jobless, polices that disfavor those groups can reflect the operation of systemic racism. Yet efforts to detect and remedy racism by focusing on differential treatment of low-income white people and low-income people of color will miss this underlying racialized dynamic. A more fundamental effort may be necessary that takes on power disparities that result from systemic racism.

C. Capital v. Income

Scholars, at least in the U.S., have pointed to a gap in capital, more so than income, as a consequence of systemic racism.[17] To be sure, the "distribution of wealth and income is highly

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[12] Paul C. Mishler, *Trade Unions in the United States and the Crisis in Values: Towards A New Labor Movement*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 861, 867 (2006).
[13] Charlotte Garden & Nancy Leong, *"So Closely Intertwined": Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1163–65 (2013).
[14] MICHAEL GOLDFIELD, THE SOUTHERN KEY: CLASS, RACE, AND RADICALISM IN THE 1930S AND 1940S, 167–68 (2020).
[15] *See* LAWRENCE MISHEL AND MATTHEW WALTERS, HOW UNIONS HELP ALL WORKERS, ECON. POL. INST. (Aug. 26, 2003), https://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf.
[16] *See supra* notes 13 & 14 and accompanying text. *See also* William P. Jones, *Black Workers and the CIO's Turn Toward Racial Liberalism: Operation Dixie and the North Carolina Lumber Industry, 1946-1953*, 41(3) LAB. HIST. 279, 289 (2000).
[17] Race and class are economically and systematically integrated in the social hierarchy of the United States, and thus perpetuate the inequitable (re)distribution of wealth/capital. *See* Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 207, 209–16 (2009); *see also*, Benjamin P. Bowser, *Racism: Origin and Theory*, 48(6) J. OF BLACK STUD. 572-90 (2017) (discussing three levels of racism—(1) institutional, (2) cultural, and (3) individual—as the "unfolding of racial hierarchy as a cultural script through institutional and individual levels of social" stratification).

skewed in general and along [racialized] lines."[18] However, the correlation between "capital"[19] and race is much stronger than the correlation between income and race.[20] We do not mean to dismiss the importance of the income gap. Nor do we deny that it may result in part from the capital gap. Financial investments—including in education and in business ventures—can enhance income. As the saying goes, it takes money to make money. We acknowledge that the lack of both disposable income and capital place African Americans at a significant disadvantage and can create a vicious cycle, in which they continue to fall behind other groups economically.[21] Further, we recognize that enhancing income may be the most promising way to increase the financial capital of people of color over time.[22]

The gap in wealth, however, poses a particularly formidable problem for addressing systemic racism. It can be relatively obvious when people of color receive lower pay than white people for the same work, especially when they receive compensation from the same business. It is harder to detect, however, when racism contributes to the allocation of funds between those with capital—say, the owners and executives at a business—and those without capital—the workers. For a legal regime to tackle systemic racism, it may need to address when those with

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[18] *Id.* at 209.

[19] Capital is defined as "the accumulat[ion] of ***assets*** unvested or available for investment." *Capital*, MERRIAM-WEBSTER DICTIONARY (emphasis added), https://www.merriam-webster.com/dictionary/capital#:~:text=1%20%3A%20accumulated%20assets%20(as%20money,%E2%80%94%20debt%20capital.

[20] *Compare* Kriston McIntosh, et al., *Examining the Black-white Wealth Gap*, BROOKINGS.EDU (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ (finding that the average wealth of white Americans is $929,800 is 6.7 times greater than Black American average wealth of $138,100), *with* Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, (Sep. 16, 2020), https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019/ (finding that the average income of white Americans is $76,057 is approximately .60% times greater than Black Americans average income of $46,073 as of 2019).

[21] *See* PRUDENTIAL, THE AFRICAN AMERICAN FINANCIAL EXPERIENCE: 2011 PRUDENTIAL RESEARCH STUDY 5 (2011), http://research.prudential.com/media/managed/documents/research_perspective/AAStudy_final_04_04_2011.pdf (noting that African Americans are "forced to deal with income restraints to a greater degree than others"); *see*, *e.g.*, Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WIS. L. REV. 295 (2019) (discussing how the widening wealth gap has created a cyclical phenomenon in which the lack of redistribution of wealth constricts subsequent generations from growing wealth).

[22] Income is a crucial component, among others, for minorities to build wealth. *See* Janell Jones, *The Racial Wealth Gap, How African-Americans Have Been Shortchanged out of the Materials to Build Wealth*, ECONOMIC POLICY INSTITUTE (Feb. 13, 2017), https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/. "Steady well-paid employment during one's working life is important, as it allows for a decent standard of living plus the ability to save." *Id.*

capital exploit those without it and not just when those with capital treat white workers better than workers of color.

D. Benefits to Disempowered Non-Minorities

For the reasons discussed above, efforts to ameliorate systemic racism can benefit white people too. To the extent that systemic racism involves the exploitation of people lacking capital, for example, corrective measures may improve the situation not only of people of color but also of the most vulnerable whites.[23] That could be a good in itself. It also could help with political support. One of the challenges for eliminating systemic racism is that disempowered white people can perceive it as a threat.[24] If the pie has a fixed size, and people of color get more of it, white people would seem inevitably to get less. Cutting up a pie is what game theorists call a zero-sum game. But reducing systemic racism could increase the pie available to all disempowered people.[25] If so, the interests of disempowered people of color can align with the

[23] Along similar lines, one commentator has argued that, in 2014, if the income gap between minorities and whites was closed, the U.S. could be wealthier with a 14% increase in the country's GDP. *See* Tom McKay, *Why Racial Equality is Good for the Economy*, in One Chart, MIC.com (Oct. 28, 2014), https://www.mic.com/articleshttps://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf/102566/why-racial-equality-is-good-for-the-economy-in-one-chart#.gDxogx3E9. Historically, when African Americans made economic gains during the Civil Rights era and during the economy post-recession in the 1990s, all other demographics did better as well. *See* Emily Badger, *What the US Economy Would Look Like if Racial Inequality Didn't Exist*, THE WASHINGTON POST (Oct. 28, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/10/28/what-the-u-s-economy-would-look-like-if-racial-inequality-didnt-exist/.

[24] *See* Cyra Akila Choudhury, *In the Shadow of Gaslight: Reflections on Identity, Diversity, and the Distribution of Power in the Academy*, 20 CUNY L. REV. 467, 467–71 (2017) (discussing the backlash that resulted in the election of Donald Trump, partially spurred by Trump's appeal to white nationalistic views as a way to quell perceived insecurities that arose from perceived civil right gains by the LGBTQ community and the election of President Barrack Obama).

[25] Increasing the economic pie to the disempowered may strengthen the collective economic health of the nation. One reason is the propensity of rich and high-income earners to save marginal increases in their wealth whereas poor and low income earners tend to spend it (often on essential goods and services. *See* Stephen Koukoulas, *Economic Growth More Likely When When Wealth Distributed to Poor Instead of Rich*, theguardian.com (June 3, 2015), https://www.theguardian.com/business/2015/jun/04/better-economic-growth-when-wealth-distributed-to-poor-instead-of-rich. As illustrated in post-World War II America, the poor and working classes spur economic growth with good wages, which in turn "fueled the ability of families to buy homes, cars, and appliances." Karen Kahn, Reconnecting Work & Wealth: A Report from the 2017 Aspen Economic Security Summit 9 (June 2018), https://www.aspeninstitute.org/wp-content/uploads/2018/06/2018_ESS_REPORT_WEB.pdf.

interests of disempowered white people. That can suggest a less divisive metaphor—a rising tide lifts all boats.

III. Comparing Employment Discrimination and Antitrust Laws as Applied to Workers

This Essay focuses on the possibility of ameliorating the effects of systemic racism through antitrust litigation on behalf of workers. It takes as a useful point of comparison such efforts as pursued through employment discrimination and antitrust laws. Of course, there is no need for a binary choice. Employment discrimination lawsuits can work in tandem with antitrust lawsuits toward a common goal. Nor is there a competition between the two. The goal of the Essay is *not* to show that antitrust is a better tool for taking on systemic racism than anti-discrimination law. We do not claim it is. Still, antitrust laws may hold some important advantages in some contexts, especially given some of the crabbed ways in which the courts have interpreted employment discrimination laws in recent years.

From this perspective, antitrust laws have five potential advantages over employment discrimination laws:

(1) **Individual Employers and Actions v. Systems.** Employment discrimination laws tend to focus on individual employers and, increasingly, on individual employment decisions, whereas antitrust laws focus on systemic effects in a market as a whole.

(2) **Income v. Capital.** Employment discrimination law focuses on disparities in pay. Antitrust law can address harms that flow from disparities in capital.

(3) **Apples to Apples v. Apples to Oranges.** Employment discrimination laws generally compare how workers in a protected group are treated with how other workers are treated. In contrast, antitrust laws address economic imbalances between, on one hand, workers as a whole and, on the other hand, ownership and management.

(4) **Dividing the Pie v. Enlarging the Pie.** Employment discrimination generally addresses how to allocate a firm's pay whereas antitrust law can increase the total compensation firms pay to workers.[26]

[26] It is also worth noting that while the protections of employment discrimination law are limited only to employees, antitrust law applies to all workers, employees, and independent contractors alike. *Compare* "Coverage," U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/employers/coverage-0 ("People who are not employed by the employer, such as independent contractors, are not covered by the anti-discrimination laws."), *with United States v. Nat'l Ass'n of Real Estate Bds,* 339 U.S. 485, 490 (1950) (even though an association of real estate brokers was actually an association of independent contractors, the brokers were engaged in the "sale of personal services"); *Am. Med. Ass'n v. United States,* 317 U.S. 519 (1943) (same for physicians); *see* I Phillip Areeda & Donald F. Turner, *Antitrust Law,* § 229c at 196 (1978) (analyzing *American Med. Ass'n* and stating that an independent "physician, like an ordinary employee, sells his personal services"); *Castegneto v. Corp. Exp., Inc.*, 13 F. Supp. 2d 114, 118 (D. Mass. 1998) ("the employment market is one in which employees and independent contractors alike are the vendors").

(5) **Centrist Economic Principles.** Antitrust law tends to rely on relatively popular and uncontroversial free market principles. Antidiscrimination laws depend on notions of racial equality that have become fraught as the nation finds itself embroiled in "culture wars."

A. Individual Employers and Actions v. Systems

Courts have interpreted employment discrimination laws to emphasize individual employment decisions—or at most individual employers—at the expense of assessing the discriminatory impact of market structures or other larger systems. That has limited the effectiveness of employment discrimination law at combatting systemic racism.[27]

Antitrust laws, in contrast, focus on larger economic systems, including entire markets. They can reach beyond the boundaries of a single employer or firm to address a multitude of market actors, even across different levels of the supply chain. For example, both government and private enforcement actions against illegal "no poach" or wage-fixing agreements address anticompetitive conduct across multiple employers that can affect entire markets or types of workers.[28] Similarly, the "reasonable interchangeability" standard widely employed by courts and economists to define product and labor markets can extend the analysis of relevant harms beyond the workers for a single firm.[29] Further, antitrust litigation is capable of targeting conduct that extends beyond, and upstream from, the terms or manner of employment. Targeted conduct can include, for example, mergers or acquisitions that create market power over workers, or agreements among competitor employers that reduce the relative leverage that workers have versus management.[30] Antitrust laws can also consider a broader range of detrimental effects flowing from challenged conduct than employment laws might, including effects experienced beyond an individual or group of complainants or outside the boundaries of a particular

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[27] *See generally* TRISTIN GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (2017).

[28] *See, e.g.*, government actions such as: *U.S. & State of Ariz. v. Ariz. Hosp. & Healthcare Assoc., et al.*, No. 07-cv-1030 (D. Ariz. 2007); *U.S. v. eBay, Inc.*, No. 12-cv-58690 (N.D. Cal. 2012); *U.S. v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C.); *U.S. v. Adobe Sys., Inc., et al.*, No. 1:10-cv-02220 (D.D.C.); and private class actions including: *Seaman v. Duke Univ.*, 2018 WL 671239 (M.D.N.C. Feb. 1, 2018); *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270 (N.D. Cal. 2016); *In re High-Tech Empl. Antitrust Litig.*, 985 F. Supp. 2d 1167 (N.D. Cal. 2013).

[29] *See* Suresh Naidu, Eric A. Posner, Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 574-75 (2018).

[30] *See generally* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018); *see also U.S. v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (competitor acquisitions constitute exclusionary conduct under antitrust laws); *Standard Oil Co. v. U.S.*, 221 U.S. 1, 72-75 (1911) (Section 2 prohibits competitor acquisitions "with the purpose of excluding others from trade"); *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1565 (7th Cir. 1991) ("a marketplace rendered non-competitive by its merger with a competitor is an injury that can be said to be directly caused by an absence of competition, the kind of injury the antitrust laws were intended to prevent and redress").

employer. Antitrust actions can address wage, price, quality, and output effects market-wide.[31] They take into account how different firms can interact to subvert competition on the whole.

B. Income v. Capital

Employment discrimination law focuses on differences in pay, for example, between people of color and white people. As noted above, however, the greater disparity pertains to capital. Systemic racism often involves those with capital—disproportionately white people—exploiting those without capital—disproportionately people of color.[32] Antitrust laws can be used to rectify some of these situations, even if the exploitation is not only of people of color but also of white people.

C. Apples to Apples v. Apples to Oranges

Employment discrimination laws generally use as a benchmark the treatment of workers not in a protected group.[33] For example, under Title VII, the use of a "comparator"[34] can be a powerful tool to prove discrimination.[35] Employment discrimination claims generally succeed only if workers in a protected group are treated worse than similarly situated workers not in the protected group. Under employment discrimination laws, the comparison is in that sense apples to apples.

Systemic racism, however, can manifest as poor treatment of all workers by owners and management—treatment that may be motivated by race and that may have disproportionate effects on people of color but that does not operate by treating disempowered white people better than their peers. That limits employment discrimination law's ability to address poor treatment of

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[31] *See* Jeff Miles, "Principles of Antitrust law," ABA Sections of Antitrust Law and Health Law 3, 4, 26 (April 2016), https://www.americanbar.org/content/dam/aba/administrative/healthlaw/01_antitrust_primer_01.authcheckdam.pdf.

[32] *See supra* Section II.C.

[33] *See* Cyra Akila Choudhury, *In the Shadow of Gaslight: Reflections on Identity, Diversity, and the Distribution of Power in the Academy*, 20 CUNY L. REV. 467 (2017) (discussing the use of the "comparator" to prove discrimination under race and gender discrimination under Title VII and the "McDonnell-Douglas Test").

[34] Litigants are substantially more successful in Title VII discrimination cases when they have identified a comparator of another race (or gender or age) in relation to the aggrieved plaintiff who "was treated more favorably than she" *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745–51 (2011).

[35] *See* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 200–02, n. 42 (2009). Note that as social norms have evolved regarding race and racial identity, the current permitted use of comparators may not reflect the current systems of discrimination in the employment context—thus creating limits to Title VII's efficacy even when relying on comparisons between similarly situated employees. *See* Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789 (2015).

all workers, including when systemic racism is the root cause of the mistreatment. Employment discrimination law is not designed to compare apples to oranges—workers to capital.

Antitrust laws, in contrast, can redress wrongs that occur because ownership or management uses improper means to exploit workers as a whole—people of color and white people alike. Antitrust views worker harms through the lens of relevant labor markets in which management are buyers and workers are sellers of their labor or human capital.[36] The relevant effects and harms are to workers as a whole, not necessarily to one group of workers in contrast to another. When systemic racism sweeps in white workers as victims, antitrust law may thus have an advantage over employment discrimination law.

D. Dividing the Pie v. Enlarging the Pie

Without meaning to criticize employment discrimination law, we can acknowledge that it can create tensions between workers. The gains of some workers can come at the expense of others.[37] Often, as a practical matter, the size of the proverbial pie is fixed. Employment discrimination law addresses how to divide it.

Antitrust law, on the other hand, can increase the size of the proverbial pie. It can obtain compensation for the underpayment of all workers. It can also end practices that artificially decrease the compensation firms pay to workers. Antitrust law, then, may pit workers against those who pay them—just as employment discrimination law does—but it may avoid dividing workers from each other.

E. Antitrust Law's Limitations and Corresponding Advantages

We acknowledge that antitrust law has significant limitations as a tool to combat systemic racism. Most obviously, antitrust law does not target racism directly. It is framed in terms of market efficiency. To be sure, in an important sense, racism is inefficient. As the Nobel Prize-winning economist Milton Friedman observed, "The man who objects to buying from or working alongside a Negro, for example, thereby limits his range of choice. He will generally have to pay a higher price for what he buys or receive a lower return for his work."[38] Economists have long recognized racism as an obstacle to ensuring that the most capable and competent people perform the tasks they are best suited to perform.[39] Labor economists sometimes use the

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[36] Hemphill, supra n.30 at 2079; Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 Santa Clara L. Rev. 579, 610 (2020); Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 Santa Clara L. Rev. 663, 665 (2020).

[37] An example is *United Steelworkers v. Weber*, 443 U.S. 193 (1979), where a white employee brought suit against an employer and union, challenging the legality of a plan for on-the-job training that reserved 50% of opening for African American employees. The white employee perceived the benefit of the program for African American as a loss to whites.

[38] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 110 (1912).

[39] *See* David Futrelle, "Discrimination Doesn't Make Dollars, or Sense," TIME (Feb. 19, 2013), https://business.time.com/2013/02/19/discrimination-doesnt-make-dollars-or-sense/ ("Economists see discrimination as a form of economic inefficiency—a massive, systematic

term "human capital frictions"[40] to describe this type of "systematic misallocation of human resources."[41] Nevertheless, while antitrust law may be able to understand and explain the anticompetitive effects of racism, it is not built to detect or rectify racism. Nor can antitrust law effectively distinguish economic power imbalances that are specifically motivated by race. Put simply, antitrust is no substitute for employment discrimination law. Nor is it a substitute for political and social efforts to reduce racism and its manifestations.

Antitrust law also has been interpreted largely to address corruption of free market principles through the abuse of market power. Systemic racism does not always—and may not even mostly—involve the abuse of market power as framed by antitrust doctrine. Moreover, the free market, as conceived and defined by courts, can often allow for what many would consider financial exploitation of workers. In particular, the so-called "consumer welfare standard"—sometimes interpreted to mean that consumers are more important than all other economic agents—may allow firms to offset worker harms by pointing to allegedly offsetting consumer benefits.[42] As economist Hal Singer explains, "Valuing consumers over other 'trading partners' allows many anti-competitive schemes, including those that harm Black athletes, employees, and business owners, to go unchecked."[43]

That said, when antitrust law does provide a basis for challenging systemic racism, its limitations can confer certain advantages. Its lack of a direct focus on race can cause it to appeal to all workers, as noted above. Further, limiting antitrust to the enforcement of free market principles should make it attractive to a broad swath of the population. It is not designed to pick winners and losers—as politicians sometimes frame the issue—but to protect honest businesses and punish cheaters. It aims to ensure that firms compete on the merits rather than distort the free market to their own economic advantage. That limits the potential impact of antitrust law, perhaps in unfortunate ways. But it also makes it harder to criticize the impact that the antitrust laws can have.[44]

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misallocation of human resources. Those in the discriminated-against groups can't bring their full talents to the table, languishing in jobs that are in many ways 'beneath them,' while less-talented members of more privileged groups take high-powered, high-paying jobs that are beyond their abilities, dragging down everyone with their relative incompetence.").

[40] *See, e.g.*, Hsieh, Hurst, Jones & Klenow, *The Allocation of Talent and U.S. Economic Growth*, 87 ECONOMETRICA 5 (Sept. 2019).

[41] *See* Futrelle *supra* n.39.

[42] *See* Eugene K. Kim, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L.J. 428, 432 (2020); Randy M. Stutz, "The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice," American Antitrust Institute (July 31, 2018), at 2-5; *see infra* Section IV.A.

[43] Hal Singer, "Antitrust Can Address Racial Inequities," THE AMERICAN PROSPECT (Feb. 10, 2021), https://prospect.org/economy/antitrust-can-address-racial-inequities/; *see also* Sandeep Vaheesan, "How Antitrust Perpetuates Structural Racism," THE APPEAL (Sep. 16, 2020), https://theappeal.org/how-antitrust-perpetuates-structural-racism/.

[44] We do not mean to suggest that resistance to racial equality is appropriate or justified. Our point is just that resistance to racial equality exists and, given its existence, that challenging

IV. The Potential of Antitrust Laws in Combatting Systemic Racism: Worker Claims as an Example

The above discussion is abstract. Part IV illustrates how antitrust law works in practice. It offers examples of antitrust litigation on behalf of workers that can be understood at least in part as challenging systemic racism. Some of those efforts have been (at least preliminarily) successful. Others less so. Part IV.A provides a primer on relevant antitrust doctrine. Part IV.B offers examples of antitrust litigation on behalf of workers with significant racial implications. Part IV.C explores how that antitrust litigation did and could affect non-minorities.

A. A Brief Overview of Relevant Doctrine: Monopsony Power and Workers

Antitrust law focuses on competition within markets. Economic markets consist of both buyers and sellers, and so antitrust laws are naturally concerned with both the competition that occurs between sellers and the competition that occurs between buyers, as well as the effects of such competition, or the lack thereof, on market actors.

Many people are familiar with the terms "monopoly" and "monopolist." A monopoly describes market power wielded by a dominant *seller*. A monopolist is said to have market power in the "output market." For example, a monopolist can be thought of as the only seller of a given product or service in a small town. The monopolist can profitably raise its prices above competitive levels or reduce the output or quality of its products and services, all without fear of losing too many of its customers as a result. On the other hand, "monopsony" or "monopsonist" refers to market power held by a dominant *buyer*, *i.e.,* market power in the "input market." In important respects, "monopsony is the mirror image of monopoly."[45] As the Supreme Court explained, "Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'"[46]

The classic example of monopsony is the one-factory town where a person either works on the company's terms or not at all.[47] A firm with monopsony power can profitably lower the prices it pays for the goods or services it buys below competitive levels. In other words, the factory can pay its workers below-competitive wages without worrying that too many workers will leave.[48] A monopsonist can also purchase fewer goods or hire fewer workers than it would

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racism and its effects by appealing to popular economic principles is worth exploring and pursuing.

[45] Organization for Economic Co-Operation and Development, "Round-Table on Monopsony and Buyer Power: Note by The United States," 2 (2008), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf.

[46] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (citation omitted).

[47] *See* Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L. J. 1509, 1510 (2013).

[48] *See* Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, SSRN (Feb. 14, 2019), at 2-3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335174

in a competitive market. Economic modeling demonstrates that it is more profitable for a monopsonist to offer fewer jobs at a lower salary than to hire additional workers at a competitive rate.[49]

The Sherman Act has long been interpreted to provide protection for sellers of goods and services, including workers, from powerful purchasers. As enacted, the statute applies to restraints of "trade or commerce,"[50] and "trade" has been defined broadly to include employment.[51] Legislative history makes clear that Congress intended to safeguard the freedom of workers, farmers, and other laborers from monopolies and trusts.[52] The eponymous Senator Sherman himself observed on the Congress floor that a trust can "command the price of labor without fear of strikes, for in its field it allows no competitors."[53]

Since the Sherman Act's passage, the Supreme Court has consistently held that the law protects sellers from restraints of trade as well as buyers.[54] Most notably, in *Anderson v. Shipowners' Association of Pacific Coast*, 272 U.S. 359 (1926), the Court held that the antitrust laws apply to wage-fixing conspiracies and showing effects on employees is sufficient for liability even without addressing other possible economic effects.[55] In a subsequent buyer-side

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[49] Caroline C. Corbitt, *Monopsony and Its Impact on Wages and Employment: Past and Future Merger Review*, 29 COMPETITION: J. ANTI., UCL & PRIVACY SEC. CAL. L. ASSOC. 34, 34–35 (2019) (citing Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets,* Faculty Scholarship at Penn Law (April 2019), at 7-8, available at https://scholarship.law.upenn.edu/faculty_scholarship/1965/; Jee-Yeon K. Lehmann, *et al., Antitrust in Labor Markets: Insights from the FTC Hearings on Competition and Consumer Protection in the 21st Century*, Analysis Group (Feb. 15, 2019), at 3, https://www.analysisgroup.com/globalassets/uploadedfiles/content/news_and_events/news/2019-antitrust-in-labor-markets-insights-ftc-hearings-competition-consumer-protection.pdf)); *see also* COUNCIL OF ECONOMIC ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 2 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_labor_mrkt_monopsony_cea.pdf..

[50] 15 U.S.C. § 1.

[51] *See United States v. Nat'l Assoc. of Real Estate Bds*, 339 U.S. 485, 489 (1950) (defining "trade" under the Sherman Act as "equivalent to occupation, employment, or business, whether manual or mercantile").

[52] *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 714 (2007) ("The legislative history leaves no doubt that Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions."); *see generally* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1226 (1988); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 143-52 (1955).

[53] 21 Cong. Rec. 2457 (1890).

[54] *Swift & Co. v. United States*, 196 U.S. 375 (1905) (upholding antitrust liability of stockyard owners who had collusively suppressed the price of cattle paid to ranchers).

[55] *Id.* at 363 ("It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate employment of men, and not to restrain commerce."); *see also Eichorn v. AT&T Corp.*, 248 F.3d 131, 140–41 (3d Cir. 2001)

price-fixing case, the Court explained, "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[56] In a pair of 1950s cases involving the National Football League and professional boxing, the Court reiterated this principle of protecting workers as sellers from antitrust violations.[57]

Yet, at least until recently, the competition that occurs between buyers has historically received less attention from courts and enforcers than the competition that occurs between sellers.[58] This disparity has been frequently attributed to conservative judicial interpretations that have emphasized the underlying policies of labor and antitrust law as distinct, as well as "hyper-literal" interpretations of antitrust law's consumer welfare standard.[59] Nevertheless, in recent years, government regulators and private practitioners alike have begun paying closer attention to the effects of market power and excessive bargaining leverage on the buyer-side of labor markets, especially as such power has been wielded by employers in the hiring and retention of workers.[60]

In the 1990s, the Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") brought a trio of cases relating to competition for employment, all resulting in consent judgments. In 1992, the FTC charged six Illinois-area nursing homes with entering into agreements to boycott temporary nurses' registries to eliminate competition among the nursing homes for the purchase of nursing services.[61] In 1994, the DOJ sued a group of human resource professionals at Utah hospitals for conspiring to exchange non-public prospective and current

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("[E]mployees may challenge antitrust violations that are premised on restraining the employment market."); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544-45 (10th Cir. 1995) ("Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment SERVICES."); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶352, at 430 (2d. ed. 2000) ("Antitrust addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there.").

[56] *Mandeville Island Farms v. Am. Crystal Sugar*, 334 U.S. 219, 236 (1948).

[57] *Radovich v. Nat'l Football League*, 352 U.S. 445, 453-54 (1957) (football player-coach who alleged a group boycott of his services had the right to take his claim to trial); *Int'l Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 262-63 (1959) (affirming judgment holding that a boxing association had improperly monopolized the market for championship contests by imposing exclusivity contracts on the leading fighters).

[58] Randy M. Stutz, "The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice," American Antitrust Institute (July 31, 2018), at 1; *cf. No-Poach Approach*, U.S. Dep't of Justice Antitrust Div. (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

[59] Stutz, *supra* n.58 at 2-5.

[60] *Id.* at 2.

[61] *In the Matter of Debes Corporation, et al.*, Docket C-3390, 701 (Aug. 4, 1992), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf.

wage information about registered nurses.[62] In 1995, the FTC claimed that the Council of Fashion Designers of America and the organization that produces the fashion industry's two major fashion shows attempted to reduce the fees and other terms of compensation for models.[63]

In 2007, the DOJ filed a civil enforcement action against the Arizona Hospital & Healthcare Association for acting on behalf of hospitals to set a uniform bill rate schedule for temporary and per diem nurse pay, resulting in a consent judgment. In 2010, the DOJ filed two cases—one against Adobe, Apple, Google, Intel, Intuit, and Pixar and another against Lucasfilm and Pixar—for entering into unlawful no poach agreements.[64] In 2012, the DOJ filed a similar case against eBay and Intuit.[65] All three cases ended in consent judgments against the technology companies. The DOJ's actions also paved the way for a series of successful private class actions against these same defendants, obtaining significant recoveries for the workers involved.[66]

In October 2016, the DOJ and FTC jointly issued "Antitrust Guidance for Human Resource Professionals."[67] As part of that release, the DOJ also announced that it would criminally prosecute agreements among companies to not hire competitors' employees, explaining, "These types of agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[68] That same month, President Obama's Council of Economic Advisers released an issue brief titled, "Labor Market Monopsony: Trends, Consequences, and Policy Responses." It explained that monopsony, or wage-setting power, in the labor market reduces the wages, employment, and overall welfare of workers.[69] Of particular note for this Essay, the Council of Economic Advisers observed that the general reduction in competition among firms shifting the balance of bargaining power towards employers "could explain not only the redistribution of revenues from worker wages to

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[62] *United States v. Utah Soc'y for Healthcare Human Resources Admin.*, No. 94C282G (D. Utah filed Mar. 14, 1994).
[63] *In the Matter of The Council of Fashion Designers of America, et al.*, Docket C-3621, 817 (Oct. 17, 1995), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-120/ftc_volume_decision_120_july_-_december_1995pages_814_-_892.pdf.
[64] *United States v. Adobe Systems, Inc., et al.*, 1:10-cv-01629 (D.D.C. filed Sept. 24, 2010); *United States v. Lucasfilm, Ltd.*, 1:10-cv-02220 (D.D.C. filed Dec. 21, 2010).
[65] *United States v. eBay, Inc.*, 5:12-cv-05869 (N.D. Cal. filed Nov. 16, 2012).
[66] *See, e.g., Johnson v. Arizona Hosp. & Healthcare Assoc.*, No. 07-cv-1292 (D. Ariz.) ($23 million settlement); *In re High Tech Empl. Antitrust Litig.*, No. 11-cv-2509 (N.D. Cal.) ($435 million settlement).
[67] *Antitrust Guidance for Human Resource Professionals*, U.S. Dep't of Justice & Fed. Trade Comm. (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf
[68] *Id.* at 4.
[69] COUNCIL OF ECONOMIC ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 4 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_labor_mrkt_monopsony_cea.pdf.

managerial earnings and profits, but also the rising disparity in pay among workers with similar skill."[70]

The DOJ's focus on labor markets has continued through subsequent administrations as well.[71] In April 2018, the DOJ filed a complaint against several rail equipment supplier companies for engaging in three different no-poach agreements.[72] More recently, the DOJ filed several statements of interest in private no-poach cases involving medical school faculty members and fast food franchise employees.[73]

In short, antitrust has increasingly been used as a means to remedy systemic imbalances in power between workers and employers. Given that in many firms and industries, workers are disproportionately composed of people of color, antitrust law has the potential to ameliorate some of the effects of systemic racism in a meaningful way. Below we discuss the promise and pitfalls of antitrust in the context of specific cases.

B. Applications: Potential and Shortfalls

1. Potential: UFC Antitrust Litigation

The world of professional mixed martial arts ("MMA") fighting illustrates the potential advantages of antitrust over employment discrimination law in addressing systemic racism. *Cung Le, et al. v. Zuffa, LLC d/b/a Ultimate Fighting Championship and UFC* is a class action currently pending in federal court in the District of Nevada.[74] MMA fighters have sued the owners of the Ultimate Fighting Championship (the "UFC"), the dominant promoter of live MMA events. The plaintiffs allege that the UFC gained monopsony power in the market for MMA fighter services through an anticompetitive scheme involving acquisitions of rival MMA promoters and the use of long-term exclusionary contracts with fighters. According to the plaintiffs, as a result of the success of the scheme, the UFC has paid its fighters significantly less than the fighters would have earned in a competitive marketplace.[75] The plaintiffs claim that the scheme has allowed the UFC to pay its fighters less than 20% of the revenues from its MMA

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[70] *Id.* at 1, 3 ("[One] implication of monopsony is a weakened link between labor productivity and wages. Because firms no longer compete aggressively for workers, monopsony power opens up the possibility that wages can differ—both between and within firms— even among workers with similar skills. . . . Further, if employers with monopsony power are able to differentiate among workers' reservation wages, then they can also set wages that discriminate among their own employees. . . . [D]iffering degrees of worker bargaining power across different groups of workers—for example by age, race or gender—may lead to varying degrees of wage depression, promoting within-firm wage inequality.").

[71] *See No-Poach Approach*, U.S. Dep't of Justice Antitrust Div. (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach (describing current DOJ approach to no-poach enforcement).

[72] *United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp.*, 1:18-cv-00747 (D.D.C. filed Apr. 3, 2018).

[73] *See No-Poach Approach*, *supra* n.71.

[74] 2:15-cv-01045-RFB-BNW (D. Nev.).

[75] *See Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1167-70 (D. Nev. 2016).

events, whereas boxing and the four major U.S. team sports—NBA, NFL, NHL, and MLB—all pay over 50% of their total revenues to the athletes.[76] In September 2015, the court denied the UFC's motion to dismiss,[77] and in December 2020, it announced its intention to grant the plaintiffs' motion for class certification.[78]

Despite an oft-reported cultural perception of MMA as a "white sport" with predominantly white fans, athletes, and management,[79] black and brown fighters in fact constitute a significant portion of the UFC's roster and of its top fighter ranks in particular.[80] This is true with regards to Black fighters,[81] and even more so when other non-white minorities, such as Latinx fighters, are taken into account. The UFC has crowned over a dozen Black champions and currently boasts four Black champions across only eight total male weight divisions, including its first three champions from continental Africa.[82] Many of the promotion's most popular non-champion stars have also historically been athletes of color. And yet the sport of MMA has a long and well-documented history with racism, white supremacy, and the far right. Observers have long noted MMA's popularity with racist and extremist groups. In 2008, the Southern Poverty Law Center warned of an alarming increase in the popularity of MMA

[76] Pls.' Opp. to Zuffa's Mot. for Summ. J., *Le v. Zuffa*, 2:15-cv-01045-RFB-BNW (D. Nev. Sep. 21, 2018), ECF No. 596, at 2.
[77] 2:15-cv-01045-RFB-BNW (D. Nev. Sep. 25, 2015), ECF No. 205; *supra* n.75 (written opinion).
[78] *See* Minute Entry, 2:15-cv-01045-RFB-BNW (D. Nev. Dec. 10, 2020), ECF No. 781.
[79] Martenzie Johnson, "Where are the black women in UFC?" THE UNDEFEATED (June 6, 2019), https://theundefeated.com/features/where-are-the-black-women-in-ufc-first-female-african-american-angela-hill (identifying and discussing the "white sport" label); Kendrick E. Johnson, "Three of UFC's most dominant champions are black – why it's worth noting," The Undefeated (July 6, 2018), https://theundefeated.com/features/three-of-ufcs-most-dominant-champions-are-black-why-its-worth-noting/ ("MMA is a sport in which most of the fighters and fans are white, which makes it significant to have three African-Americans dominate at the same time."); George Willis, "UFC out to attract the African-American market," ESPN (Dec. 26, 2008), https://www.espn.com/extra/mma/news/story?id=3792904 (noting that MMA's core audience "remains predominantly white men and white women").
[80] The number of African American female athletes competing in the UFC has been comparatively limited to the number of male athletes. *See* Johnson *supra* n.79, ("Black women, specifically black American women, have not broken through to mainstream recognition in the promotion's 26-year history. The UFC currently has 101 female athletes, of whom four are black Americans. Of the four UFC women's weight divisions, there never has been a black American champion, and a black American woman has never challenged for a title. . . .").
[81] We use the term "Black" here rather than "African American" because not all of the fighters are American.
[82] Maurice Smith (1997); Kevin Randleman (1999); Carlos Newton (2001); Anderson Silva (2006); Quinton Jackson (2007); Jon Jones (2011, 2016, 2018); Benson Henderson (2012); Demetrious Johnson (2012); Daniel Cormier (2015, 2018); Tyron Woodley (2016); Kamaru Usman (2019); Israel Adesanya (2019); Aljimain Sterling (2021); Francis Ngannou (2021).

among racist groups.[83] A decade later, the UK's Guardian reported that white nationalists were forming fight clubs and using MMA promotions as a recruiting tool in North America and Europe.[84]

For the UFC's part, its disproportionately white executive management and Hollywood investor owners have not shied away from issues of race. They instead have proven "willing to polarize a large segment of [the UFC']s roster and sacrifice a portion of its fanbase in exchange for the benefits that come from an alliance with" the conservative right.[85] The promotion has been historically lax in regulating fighter speech related to racist comments, while other times invoking conduct provisions in athlete contracts to police fighters in wide array of other issues.[86] The UFC has not faced any known legal challenges to date by either fighters or employees alleging racial discrimination, but top Black stars have publicly complained that race may have affected whether they were paid the same amount as white fighters ranked similarly to them and whether they were granted the same degree of promotional exposure as white fighters.[87] As

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[83] David Holthouse, "Racists Active in Mixed Martial Arts," SOUTHERN POVERTY LAW CENTER (Mar. 1, 2008), https://www.splcenter.org/fighting-hate/intelligence-report/2008/racists-active-mixed-martial-arts.

[84] Karim Zidan, "Fascist fight clubs: how white nationalists use MMA as a recruiting tool," THE GUARDIAN (Sep. 11, 2018), https://www.theguardian.com/sport/2018/sep/11/far-right-fight-clubs-mma-white-nationalists ("So why are white supremacist groups forming fight clubs and MMA promotions? The answer lies in the violent nature of the sport and their ability to thrive within it. Over the years, fighters with links to the far-right have been involved in some of the world's most recognizable promotions, including the Ultimate Fighting Championship (UFC) and Strikeforce.").

[85] Karim Zidan, "Conservative Cagefighting: How the UFC became fashionable among the American right," BLOODY ELBOW (Sep. 2, 2020), https://www.bloodyelbow.com/2020/9/2/21418354/ufc-fashionable-american-right-wing-politics-donald-trump-mma-news.

[86] Robert Silverman & Ahmar Khan, "How MMA Fighters Magnify QAnon for MAGAWorld," POLITICO MAGAZINE (Nov. 2, 2020), https://www.politico.com/news/magazine/2020/11/02/mma-ufc-qanon-conspiracy-trump-433852 ("Other sports leagues with more robust public relations offices might crack down on players who sully their brand by spewing thoughts untethered to reality. But UFC is run by Dana White, a longtime Trump supporter who has spoken on behalf of Trump at both of his nominating conventions. Far from stifling his front-facing talent, White has given them a green light. Last month, Colby Covington, the current No. 1-ranked UFC welterweight, used a recent postfight moment on national television to ask a Nigerian-born UFC fighter who was interviewing him if he'd sent 'smoke signals' to his 'little tribe,' comments widely perceived as racist. That evening, Covington, who routinely wears a 'Make America Great Again' hat, received a congratulatory call from the president.)").

[87] *See, e.g.*, Anton Tabuena, "Woodley: Race affects treatment of UFC champs like me and Demetrious Johnson," BLOODY ELBOW (Jan. 19, 2017), https://www.bloodyelbow.com/2017/1/19/14320020/tyron-woodley-race-affects-treatment-of-ufc-champs-like-me-and-demetrious-johnson.

explained below, the current antitrust litigation holds several key advantages over prospective employment discrimination litigation for improving the UFC's treatment of minority fighters.

The Entire Market System, Not Just an Entity in a Vacuum or Individual Actions. The UFC litigation illustrates how antitrust law can evaluate an entire market rather than just a single firm in a vacuum or a discrete action. Plaintiffs' argument is that the UFC distorted the entire market for professional MMA fighters' services in North America, including by locking up MMA fighters in long-term exclusive contracts and acquiring or driving out rivals. Plaintiffs claim that these and related actions have starved other promoters of the top fighters they need to compete with the UFC and deprived fighters of equivalent alternative promoters to compete for their services. What matters from this perspective, for example, is not the effect of a long-term contract on the fighter subject to it. Rather it is the cumulative effect of all of the long-term contracts on the market as a whole.

Consider another example. The fighters allege that the UFC used coercion to force fighters to renew their long-term contracts during their terms, rendering the contracts effectively perpetual. The point of this allegation, however, is not that a particular fighter subject to coercion suffered resulting harm. That might be the conclusion if one focused only on a discrete act and its consequences. Instead, the point is the cumulative effect of this coercion in conjunction with the UFC's other behavior. The argument is that the UFC's course of conduct as a whole conferred market power on the UFC, enabling it to pay 20% or less of its event revenues to its fighters whereas in a competitive market those fighters would have earned 50% or more of the revenues from the events in which they participated.[88]

Capital v. Income. The UFC antitrust litigation addresses the ongoing effects of disparities in capital by race, not just on disparities in income. It challenges the power the UFC, its owners, and its managers use—or abuse—to suppress the compensation of the UFC's MMA fighters. Its arguments are not limited to disparities between the pay of white MMA fighters and MMA fighters of color, accepting uncritically the distortions the concentration of capital can have on the free market.

Apples to Oranges v. Apples to Apples. The UFC antitrust litigation seeks to shift revenues from ownership and management to workers. It aims to do so retrospectively through damages and prospectively through injunctive relief. It does not accept as a baseline the compensation paid to white workers, demanding that workers of color are treated comparably well—or poorly. It has the resources to determine how much compensation all UFC fighters would have received and would receive if the UFC had to compete for fighter services in a free market. It seeks damages to compensate fighters of color—indeed, all fighters—for the difference between the pay they would have received in a free market and the pay they actually received in the market distorted by the UFC's alleged anticompetitive scheme.

Dividing the Pie v. Enlarging the Pie. It follows from the above considerations that the UFC antitrust litigation has the potential to increase the overall compensation MMA fighters receive for their services. The gains to fighters of color in the future in particular need not—and

[88] *See* Pls.' Opp. to Zuffa's Mot. for Summ. J., *Le v. Zuffa*, 2:15-cv-01045-RFB-BNW (D. Nev. Sep. 21, 2018), ECF No. 596, at 16.

will not—come at the cost of white fighters. Rather, if the litigation is successful, all fighters should enjoy significant increases in pay. That will result from the UFC, its owners, and its management limiting themselves to the profits they can obtain in a market that more closely approximates free competition, not the profits they enjoy from monopoly power that they obtained and maintain through anticompetitive conduct.

Centrist Economic Principles. The argument in support of the UFC plaintiffs' position rests on economic principles that have a good chance of appealing to many center-right, center-left, and plain old centrist judges and jurors. The plaintiffs do not challenge the free market or ask to constrain free choice. Instead, they seek to vindicate well recognized principles for free market competition. They aim to punish the UFC, in effect, for cheating—for using anticompetitive tactics rather than competing on the merits. Not all judges and jurors will find this framing of the case attractive. Some may tolerate or even approve of the kind of cheating in which plaintiffs claim the UFC engaged. Others may reject much of the free market entirely. But many judges and jurors may agree with the free market principles embodied in antitrust law and that arguably underpin the American economic system. They may decide in favor of the UFC plaintiffs out of a commitment to the free market, not because they hope to dismantle systemic racism—even though such a decision could contribute to that effort.

2. Possible Shortfall: NCAA Antitrust Litigation

In contrast to the UFC antitrust litigation, the current litigation by student-athletes against the National Collegiate Athletic Association ("NCAA") is shaping up to be a missed opportunity for antitrust to redress racial wrongs. Presently on appeal before the U.S. Supreme Court, the *NCAA v. Alston* case concerns restrictions on the compensation of collegiate football and basketball athletes.[89] These two sports generate the majority of revenue for college athletic departments, together accounting for nearly two-thirds of revenue growth over the last 15 years.[90] Yet current NCAA rules prohibit players from earning compensation beyond the value of a scholarship and a cost of attendance stipend.[91] One article explains that "the college sports industrial complex has grown with TV deals, new stadiums, corporate sponsorships and ballooning salaries for everyone—except the players."[92]

According to the NCAA's own statistics, college football and basketball athletes are overwhelmingly men and women of color, while university administrators and coaching staffs in these sports remain mostly white.[93] In 2019, the last year for which the NCAA released such

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[89] Nos. 20-512 & 20-520.
[90] *See* Garthwaite, Kenner, Notowidigdo & Ozminkowski, "Who Profits from Amateurism? Rent-Sharing in Modern College Sports," NBER Working Paper No. 27734 (2020).
[91] *In re Nat'l Collegiate Athletic Assoc. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1244-45 (9th Cir. 2020).
[92] Amira Rose Davis, "Black college athletes are rising up against the exploitative system they labor in," THE WASHINGTON POST (Aug. 11, 2020), https://www.washingtonpost.com/outlook/2020/08/11/black-college-athletes-are-rising-up-against-exploitative-system-they-labor/.
[93] NCAA Demographics Database, National Collegiate Athletic Association, https://www.ncaa.org/about/resources/research/ncaa-demographics-database.

data, 56% of all Division I men's basketball players identified as black, 23% as white, and the remaining 21% "other."[94] However, nearly 70% of head coaching slots were occupied by white men.[95] That same year, 49% of Division I football players identified as black, 37% as white, and yet 82% of head football coaches were white.[96] Further, recent studies[97] have shown how "[t]he performances of these unpaid players, many of whom come from low-income families, are often subsidizing sports like tennis, where 48% of the men's players in the power conferences are white and just 12% are black, and other sports that are even more exclusively white, like men's water polo (82%), [and] women's rowing (75%)."[98]

In March 2019, following a ten-day bench trial, Judge Claudia Wilken issued a 104-page ruling in *Alston*, finding that the challenged NCAA rules indeed violated federal antitrust law by limiting the compensation the athletes could receive in exchange for their athletic services.[99] However, the court ended up invalidating only one piece of the NCAA system—limits on payments related to education—leaving the rest intact.[100] While acknowledging the rules' anticompetitive effects, the court ultimately accepted the NCAA's alleged procompetitive justification that preserving "amateurism" by maintaining a distinction between college and professional sports was necessary to protect consumer choice. In other words, the court deferred to the special thrill that predominantly white NCAA fans presumably can get only when watching predominantly African American athletes who are severely underpaid.[101] Following an appeal by the NCAA, the Ninth Circuit affirmed, again deferring to consumer interests.[102] As one commenter put it, "two courts sacrificed the players' interest in the name of catering to viewers' taste for labor exploitation."[103]

The NCAA case appears to involve a misapplication of antitrust law. That misapplication may yet be corrected, depending on how the Supreme Court rules on appeal. It should be. An appropriate and traditional application of antitrust law would remedy the structural racism which arguably plagues collegiate sports.

Traditionally, antitrust law has not allowed courts to balance the harms suffered in one market—*e.g.,* the athletes (workers)—against the benefits in another market—*e.g.,* consumers (fans). The Supreme Court has made clear on multiple occasions, "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this. . . is a decision that must be made by Congress and not by private forces or by the

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *See, e.g.,* Garthwaite, et al., *supra* n.90.
[98] Sean Gregory, "The College Admissions Scandal Is Yet More Evidence of Collegiate Sports' Inequality Problem," TIME (Mar. 14, 2019), https://time.com/5550994/college-admissions-scandal-sports/.
[99] *In re Nat'l Collegiate Athletic Assoc. Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019).
[100] *Id.* at 1109-10.
[101] *Id.* at 1102.
[102] 958 F.3d 1239 (9th Cir. 2020).
[103] Vaheesan *supra* n.43.

courts."[104] In addition to being administratively burdensome and unfeasible,[105] this type of broad cross-market balancing also contravenes Supreme Court precedent that the rule of reason is restricted to a challenged restraint's costs and benefits in the market directly at issue.[106]

Properly framed, the antitrust analysis in *Alston* is straightforward. It would result in a rejection of the amateurism defense. The reason is that the NCAA's argument boils down to its dislike of the choices it anticipates athletes would make if universities were free to compete for their services. The athletes would probably sell their services to the highest bidder or, at least, to a reasonably high bidder. The universities would thus enter into a bidding war for the services of top athletes. That is how free markets work. Some universities might try to peddle the benefits of amateurism, perhaps exploiting the supposed preferences of fans for underpaid athletes. That strategy would likely fail. Otherwise, the NCAA would not be so resistant to free competition. Fans would presumably watch great athletes rather than underpaid athletes, if forced to choose. Athletes would perceive the commitment to amateurism as antiquated and benighted. The NCAA resists this state of affairs. In other words, it resists the free market. That is generally an admission of an antitrust liability, not a cognizable defense.

A useful analogy is *NCAA v. Bd. of Regents*,[107] where the NCAA engaged in a similar effort to thwart competition. It limited the televising of football games for fear that too few fans would attend games in person. The Supreme Court found this justification not legally cognizable. It explained:

> By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, the petitioner forwards a justification that is inconsistent with the basic policy of the Sherman

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[104] *See also United States v. Topco. Assocs.*, 405 U.S. 596 (1972); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963) (an "ultimate reckoning of social or economic debits and credits" is "[a] value choice of such magnitude" as to be "beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress").

[105] *See* JONATHAN B. BAKER, THE ANTITRUST PARADIGM 191 (2019) ("The judicial prohibition against multi-market welfare trade-offs has an obvious administrability justification. . . . Once the analysis extends beyond the market in which harm is alleged, there may be no principled stopping point short of undertaking what is unrealistic if not impossible: a general equilibrium analysis of harms and benefits throughout the entire economy."); Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 21-22 (2016) (observing the difficulties of balancing costs and benefits to different groups); Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 409-10 (2015) (cost-benefit analysis introduces significant administrative difficulties and risks severely weakening antitrust law).

[106] *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 688 (1978) ("[T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.").

[107] 468 U.S. 85 (1984).

> Act. '[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.'[108]

The same reasoning applies to the current NCAA antitrust litigation. By seeking to insulate the market for college athlete services from the full spectrum of competition based on an assumption that collegiate amateurism is insufficiently attractive to athletes, the NCAA is forwarding a justification that is inconsistent with the basic policy of the Sherman Act. It is arguing that competition itself is unreasonable. Antitrust law does not support that defense.

Appropriately interpreted, then, antitrust law can offer a valuable tool to address what can credibly be argued is systemic racism in college sports. The harms of the NCAA's amateurism policy fall mainly on athletes of color, whereas the supposed benefits accrue largely to white college administrators, coaches, and fans.[109] That is at least suggestive of unwholesome racial dynamics.

Some of these points came out at the Supreme Court oral argument. True, the Court did not address the racial issues underlying the NCAA's amateurism policy. But it did recognize the risk of schools exploiting student-athletes. And the Court expressed discomfort that fans might prefer watching those athletes precisely because they are being underpaid. Particularly relevant for present purposes, the Court appeared to be open to arguments about economic exploitation, even though it would likely have resisted similar arguments about racial exploitation. The Justices' comments and questions suggest a commitment to free market norms—ones that may in some cases benefit people of color—that they do not seem to have to equality norms—at least when facially neutral policies have racially discriminatory effects.

To be clear, the issues before the Court are limited. The plaintiffs in *NCAA* did not appeal the Ninth Circuit's decision.[110] So the best plausible result they can obtain for themselves would be an affirmance.[111] That would leave them with a modest victory, one that gives them significantly more modest relief than they originally sought in the trial court.[112] The plaintiffs' appellate strategy may have been wise. Asking for more could have gotten them less. However, there was at least some indication that the Supreme Court might have imposed a more favorable standard for the plaintiffs than did the lower courts.

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[108] *Id*. at 117 (quoting *Prof'l Engineers*, 435 U.S. at 696).

[109] As one scholar has explained, the expansive rule of reason in which courts must balance the effects in one market against the effects in another completely different market "leads to the abhorrent result of allowing purchasers of labor to unlawfully exploit one class of people (in this case, predominantly African American college athletes) for the purpose of benefiting another, presumably a more important class of people (the consumers of college athletics, in particular the viewers of televised men's football and basketball games)." Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 366- 67 (2005).

[110] *NCAA v. Alston* (March 31, 2021 oral argument) at 53:1-10.

[111] The Supreme Court can and has resolved issues that did not seem to be before it, so it is conceivable it would rule more favorably for plaintiffs than the arguments they themselves made.

[112] *Id.* at 55:2-17.

Justice Thomas, for example, queried why schools do not limit the compensation of college coaches the way they limit the compensation of college students: "But is there a similar focus on the compensation to coaches to maintain that distinction between amateur coaches, coaches in the amateur ranks, as opposed to coaches in the pro ranks?"[113]

Justice Alito was more full-throated about potential criticisms of the NCAA amateurism policy. He acknowledged that some of the briefs in the case "paint a pretty stark picture, and they argue that colleges with powerhouse football and basketball programs are really exploiting the students that they recruit."[114] He seemed troubled by the tough reality for many college athletes:

> [T[he athletes themselves have a pretty hard life. They face training requirements that leave little time or energy for study, constant pressure to put sports above study, pressure to drop out of hard majors and hard classes, really shockingly low graduation rates. Only a tiny percentage ever go on to make any money in professional sports.
>
> So the argument is they are recruited, they're used up, and then they're cast aside without even a college degree. So they say, how can this be defended in the name of amateurism?[115]

We do not mean to leave the impression that only conservative justices expressed skepticism about the NCAA's legal position. Consider Justice Kagan's pointed question: "[W]hy shouldn't we think of it in just that kind of way, that these are competitors, all getting together with total market power, fixing prices?"[116]

Justice Gorsuch built on Justice Kagan's line of reasoning, expressing concerns about the anticompetitive effects of joint ventures that have monopoly power:

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[113] *Id.* at 10:23-11:2.

[114] *See id.* at 17:8-18:4 ("The briefs that are . . . submitted in support of the Respondents paint a pretty stark picture, and they argue that colleges with powerhouse football and basketball programs are really exploiting the students that they recruit. They have programs that bring in billions of dollars. As Justice Thomas mentioned, . . . this money funds enormous salaries for coaches and others in huge athletic departments. But the athletes themselves have a pretty hard life. They face training requirements that leave little time or energy for study, constant pressure to put sports above study, pressure to drop out of hard majors and hard classes, really shockingly low graduation rates. Only a tiny percentage ever go on to make any money in professional sports. So the argument is they are recruited, they're used up, and then they're cast aside without even a college degree. So they say, how can this be defended in the name of amateurism?").

[115] *Id.*

[116] *See id.* at 24:18-25:7 ("[T]he way you talk about amateurism, it . . . sounds awfully high-minded. But there's another way to think about what's going on here, and that's that schools that are naturally competitors as to athletes have all gotten together in an organization, an organization that has undisputed market power, and they use that power to fix athletic salaries at extremely low levels, far lower than what the market would set if it were allowed to operate. So why shouldn't we think of it in just that kind of way, that these are competitors, all getting together with total market power, fixing prices?").

> I think the trick comes for me at least sort of where Justice Kagan was alluding to, which is, here, the agreement that's really at the center of the case is an agreement among competitors to fix price with the labor market, where you have monopsony control, and that's unusual.[117]

Nor did Justice Kavanaugh's questions to counsel for the NCAA offer it much succor. He too recognized that appeals to amateurism could mask real harms: "I start from the idea that the antitrust laws should not be a cover for exploitation of the student-athletes, so that is a concern, a[n] overarching concern here." [118] He bristled at the idea that schools might conspire not to pay college athletes and that they might justify doing so because consumers of the games—*i.e.*, fans—enjoy knowing the athletes are not being paid:

> It does seem . . . that schools are conspiring with competitors, agreeing with competitors, I'll say that, to pay no salaries to the workers who are making the schools billions of dollars on the theory that consumers want the schools to pay their workers nothing. And that just seems entirely circular and even somewhat disturbing.[119]

He also placed the NCAA's argument in the larger historical context of athletic leagues, like professional baseball, using pretexts to compensate athletes below competitive levels. He pointed out that the NCAA's claim that fans do not want college athletes to receive any compensation is

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[117] *See id.* at 29:10-25 ("I think the trick comes for me at least sort of where Justice Kagan was alluding to, which is, here, the agreement that's really at the center of the case is an agreement among competitors to fix price with the labor market, where you have monopsony control, and that's unusual. The normal joint venture is . . . in a competitive market. But, here, the NCAA has monopsony control over labor price. There aren't other leagues which might compete with the NCAA that might allow payments, and you could test consumer demand that way. So why . . . isn't the monopsony control over the labor market at least an appropriate basis for a . . . more searching rule of reason analysis?").

[118] *See id.* at 32:20-34:6 ("I start from the idea that the antitrust laws should not be a cover for exploitation of the student-athletes, so that is a concern, a[n] overarching concern here. I see your rhetoric and tradition and history argument being very similar to the arguments that were made for exempting baseball from the antitrust laws, Flood v. Kuhn, . . . Federal Baseball, and. . . that exemption has not been replicated in other sports in other cases. And then, in Regents, as Justice Kagan said, that really was from a different era, it . . . was dicta, not sure it was fully considered dicta, and, in any event, from a different era. So then we get to regular antitrust law, rule of reason, and I just want to drill down on your asserted procompetitive justification and how you say the product is differentiated. It does seem, as Justice Kagan and Justice Gorsuch suggested, Justice Alito, that schools are conspiring with competitors, agreeing with competitors, I'll say that, to pay no salaries to the workers who are making the schools billions of dollars on the theory that consumers want the schools to pay their workers nothing. And that just seems entirely circular and even somewhat disturbing. And then, as Justice Kagan says, it's not even factually supported in the record in this case. It seems to blend back to the tradition argument, and all things circle back to this idea, well . . . just don't worry about it, college athletics is different, just like baseball.")

[119] *Id.*

"not even factually supported in the record in this case. It seems to blend back to the tradition argument, and all things circle back to this idea, well . . . just don't worry about it, college athletics is different, just like baseball."

Finally, Justice Barrett went so far to challenge the notion that the anticompetitive effects of conduct in one market can be justified by procompetitive effects in another,[120] an issue that was not raised by the parties.[121]

Overall, the Court expressed concern about the actual effects of the NCAA's amateurism policy on students' lives. It did not manifest a rigid belief in the incorruptibility of markets or their supposed limitless capacity for self-correction. Nor did it reject out of hand the worry that the NCAA would use its monopoly power to exploit workers.

Contrast the reaction the Court would likely have had if plaintiffs had made an argument based on systemic racism—say, that the NCAA's amateurism policy should be struck down because it disproportionately harms low-income people of color and disproportionately benefits wealthy white men. There would be difficulty in finding a legal peg on which to hang such an argument. So too would it require the Court to accept a view of the world to that most of the Justices would likely resist. They have not generally been willing to view facially race-neutral polices in racial terms.

None of this is to say that the Court will affirm the Ninth Circuit's decision. Much less do we claim that the Court will rule that the Ninth Circuit might have—or even might now—go further than it did to protect the economic interests of student-athletes. Predicting how the Court will rule is speculative at best, foolish at worst. The *NCAA* oral argument does suggest, however, that the free market principles embodied in antitrust law may gain traction with the current judiciary that equality principles might not. Those free market principles may help to promote racial equality and to dismantle systemic racism. Antitrust law, then, may sometimes succeed when antidiscrimination law would fail.

3. Other Examples: Nurses and Fast Food Workers

The antitrust approach to addressing systemic racism also merits consideration outside the context of sports. Two other illustrative examples are the nursing and fast food industries.

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[120] *Id.* at 85:9-21 ("I have a question about the cross-market analysis that the court performed at step 2. So it balanced the competition in the labor market against the market for college sports. And I understand that that's the way the case came to us because that's the framework the lower courts used and the one on which the parties agreed. But some of the amici have criticized it. So I'm wondering if you think it is, you know, performing any kind of distorting effect that would influence the way we think about this case in a bad way?").

[121] *Id.* at 85:22-86:6.

a) Nurses

Registered nurses are predominantly female and often minority workers.[122] The nursing profession has a long history of systemic racism,[123] dating back to the late 19th century when racial quotas were present in northern U.S. nursing schools and black women were denied admission entirely to southern nursing schools.[124] Even in the early 20th century, most state nursing organizations denied membership to black nurses,[125] and many states prevented black nurses from taking the examination to become registered nurses.[126] Agencies that employed both black and white nurses often paid black nurses considerably less than white nurses.[127] By the late 1960s and early 1970s, the civil rights movement saw the emergence of the National Black Nurses Association. It was formed to address issues of racial discrimination in the nursing profession and currently represents over 200,000 black nurses, nursing students, and retired nurses.[128]

Nurses of color still face various forms of racism within the industry today.[129] One article explains, "Despite the relentless efforts and progress made over the years, it's still not

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[122] According to data from the 2019 U.S. Census Bureau, approximately 90% of registered nurses in the U.S. are female, and over 30% of the worker population identify as minority populations. Registered Nurses, DATA USA, https://datausa.io/profile/soc/registered-nurses#demographics; *see also* Smiley, et al., "The 2017 National Nursing Workforce Survey," 9 JOURNAL OF NURSING REGULATION 3 (Oct. 2018), https://www.journalofnursingregulation.com/article/S2155-8256(18)30131-5/pdf; "Racial ethnic composition of the RN workforce in the U.S.," Campaign for Action (Jan. 14, 2021), https://campaignforaction.org/resource/racialethnic-composition-rn-workforce-us/.

[123] *See generally*, Carole Bennet, Ellen Hamilton & Haresh Rochani, *Exploring Race in Nursing: Teaching Nursing Students About Racial Inequality Using the Historical Lens*, 24 OJIN: THE ONLINE JOURNAL OF ISSUES IN NURSING 2 (May 2019), https://ojin.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Vol-24-2019/No2-May-2019/Articles-Previous-Topics/Exploring-Race-in-Nursing.html; Mary Caldwell & Fiza Pirani, "Racism against black nurses is a historic problem that still exists today, " THE ATLANTA JOURNAL-CONSTITUTION (July 2, 2020), https://www.ajc.com/news/racism-against-black-nurses-historic-problem-that-still-exists-today/WXgpiNAYHIuIKnoZRdZnxI/.

[124] D.C. HINE, BLACK WOMEN IN WHITE: RACIAL CONFLICT AND COOPERATION IN THE NURSING PROFESSION, 1890-1950 6 (Indiana University Press, 1989)

[125] South Carolina Nurses Association Records. (n.d.). 1897; 1907-1992. Atlanta, GA: Southern Labor Archives, University Library, Georgia State University.

[126] Andrews, L. (1926, February 24). Ludie Andrews to Mrs. Kemper Arnold Correspondence in *History of Grady Memorial Hospital School of Nursing, 1917-1964,* ed. Verdelle Bellamy.

[127] D.C. Hine, "The Ethel Johns report: Black Women in the Nursing Profession," 67 JOURNAL OF NEGRO HISTORY 3, 212-228 (1982).

[128] Caldwell & Pirani, *supra* n.123.

[129] *See* Kechinyere C. Iheduru-Anderson & Monika M. Wahi, "Rejecting the myth of equal opportunity: an agenda to eliminate racism in nursing education in the United States," 20 BMC NURS. 30 (2021), https://doi.org/10.1186/s12912-021-00548-9.

uncommon for black nurses to face discrimination in the workplace, especially from patients."[130] Minority nurses experience inequity in the form of professional barriers to entering nursing leadership or serving on nursing faculties.[131] Fewer black nurses advance to leadership positions and become faculty with doctoral degrees, which in turn leads to systemic restrictions on wage growth.[132] According to Nurse.org, racism from patients is "a bit of an open secret in the medical industry" with some patients refusing to be helped by non-white nurses and some hospitals abiding by those requests.[133] That has led to a number of discrimination lawsuits filed against hospital employers by nurses.[134]

In recent years, the nursing profession has seen a number of successful antitrust challenges initiated by workers. In 2006, a group of registered nurses filed a class action against various hospital owners and operators in the Albany-Schenectady-Troy metropolitan area, alleging a conspiracy to depress the compensation of registered nurses in violation of Section 1 of the Sherman Act.[135] Following a partial class certification ruling and subsequent appeal,[136] in 2011, the plaintiffs obtained over $9.3 million in settlements on behalf of all of the registered nurses that were employed by the defendants during the relevant period.[137] In 2007, the U.S. Department of Justice filed a civil enforcement action against the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona to set a uniform bill rate schedule that the hospital would pay for temporary and per diem nurses, resulting in a consent judgment.[138] In 2012, a subsequent civil case resulted in settlements totaling more than $23 million for nurses whose wages were suppressed through illegal wage-fixing agreements.[139] In 2015, a class action alleging that a group of Detroit metropolitan area hospitals and medical

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[130] Caldwell & Pirani, *supra* n.123.
[131] K.C. Iheduru-Anderson, "The White/Black hierarchy institutionalizes White supremacy in nursing and nursing leadership in the United States," J. OF PROF. NURSING (2020), http://www.sciencedirect.com/science/article/pii/S875
[132] "Diversity and disparities: A benchmarking study of US hospitals in 2015," Institute for Diversity in Health Management (2015).
[133] Angelina Gibson, "Racism Against Nurses of Color is an Open Secret and This Is Why," NURSE.ORG (Aug. 15, 2017), https://www.usatoday.com/story/news/nation/2013/02/18/black-nurse-lawsuit-father-request-granted/1928253/.
[134] *Id.*; *see also* Robin Erb, "Nurse sues after hospital grants dad's racial request," USA TODAY (Feb. 18, 2013), https://www.usatoday.com/story/news/nation/2013/02/18/black-nurse-lawsuit-father-request-granted/1928253/.
[135] Complaint, *Fleischman v. Albany Med. Ctr.*, No. 06-cv-0765 (N.D.N.Y. Sept. 7, 2006), ECF No. 1.
[136] *Fleischman v. Albany Med. Ctr.*, No. 06-cv-0765, 2008 WL 2945993 (N.D.N.Y. Jul. 28, 2008); *Fleischman v. Albany Med. Ctr.*, 693 F.3d 28 (2d Cir. 2011).
[137] Judgment and Final Order Approving Settlement with Albany Medical Center, *Fleischman v. Albany Med. Ctr.*, No. 06-cv-0765 (N.D.N.Y. Feb. 24, 2011), ECF No. 395; Judgment and Final Order Approving Settlement with Ellis Hospital and Plan of Allocation, *Fleischman v. Albany Med. Ctr.*, No. 06-cv-0765 (N.D.N.Y. Nov. 21, 2011), ECF No. 415.
[138] Final Judgment, *U.S. & State of Ariz. v. Ariz. Hosp. & Healthcare Assoc. & AZHHA Serv. Corp.*, No. 07-1030 (D. Ariz. Sept. 12, 2007).
[139] *Johnson v. Ariz. Hosp. & Healthcare Assoc.*, No-07-cv-1292 (D. Ariz.).

centers conspired to fix compensation paid to their nurse employees settled for over $90 million.[140]

Certain of the successful no-poach and wage-fixing litigation involving nurses have addressed multiple employers as opposed to targeting only a single firm. As such, they have also achieved redress on behalf of larger groups of economic victims—not just a single protected group obtains compensation; all of the workers employed by the firm and its competitors across the entire relevant labor market do. The relevant focus is not how much one nurse or group of nurses was paid relative to another, but how much all nurses were paid overall as a result of their employers' misuse of market power. Moreover, whereas employment discrimination claims have been lamented by scholars as notoriously unsuccessful and difficult to bring,[141] these antitrust successes have achieved higher pay for minority nurses, as well as for non-minority nurses. And because of industry demographics, pay gains for nurses are likely to accrue disproportionately to minority workers. Antitrust litigation may not eliminate inequity in pay as between nurses of different races, but it can ensure that all nurses are paid more by their employers and, by placing nurses in solidarity with each other versus management, may encourage solidarity among nurses as they strive for fair and competitive wages.

b) Fast Food Workers

The fast food industry is another labor market arguably long affected by systemic racism. As a result, minority workers stand to benefit from increased antitrust enforcement. The fast food industry employs predominantly low-wage workers of color.[142] A 2015 report by the Restaurant Opportunities Centers United found that workers of color are largely concentrated in the lowest paying segments and sections of the restaurant industry, such as fast food jobs.[143] The report explains, "White males appear to be afforded the opportunity to work in the highest paying, most exclusive bartender and server positions in fine-dining restaurants; women, in general, appear channeled towards lower paying positions in casual full-service restaurants; while Latinos and African Americans seem largely channeled to lower paying busser, runner, or kitchen positions

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[140] *See* Final Order and Judgment as to VHS of Michigan, Inc., d/b/a Detroit Medical Center, *Cason-Merendo et al. v. VHS of Michigan, Inc. et al.*, 2:06-cv-15601 (E.D. Mich. Jan. 27, 2016), ECF No. 970.

[141] Naomi Schoenbaum, *A Modest Proposal? Regulating Customer Discrimination Through the Firm*, 102 IOWA L. REV. ONLINE 310, 314 (2017) ("Scholars have long lamented the dismal success rates of employment discrimination plaintiffs."); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012) (noting that "less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief," and that "dismissals (on motions to dismiss or at summary judgment) are extremely common in discrimination litigation, accounting for a full 86% of litigated outcomes").

[142] Cynthia Greenlee, "How fast food 'became black,' VOX (Jan. 10, 2020), https://www.vox.com/identities/2020/1/10/21058393/mcdonalds-fast-food-black-franchise-marcia-chatelain.

[143] Restaurant Opportunities Centers United, "Ending Jim Crow in America's Restaurants: Racial and Gender Occupational Segregation in the Restaurant Industry" (New York, NY: ROC United, 2015).

in full service restaurants and to limited-service, fast food establishments."[144] After adjusting for education and language proficiency, the report determined that workers of color receive 56% lower earnings than their white counterparts in the restaurant industry.[145] Yet despite the disadvantages of fast food work, inequalities in access to employment and institutional racism make these jobs a critical gateway into the labor market for many African Americans.[146]

In 2018, ten states and the District of Columbia launched an investigation into the use of no-poach provisions by various fast food companies in franchise agreements. Those agreements would "impact some employees' ability to obtain higher paying or more attractive positions with a different franchisee."[147] A letter sent to the companies by the states' attorneys general noted, "When taken in the aggregate and replicated across our States, the economic consequences of these restrictions may be significant."[148] Less than a week later, seven companies, including McDonald's, Arby's, and Jimmy John's, entered into binding agreements with the state of Washington to drop no-poach provisions from their franchise agreements and to stop enforcing the provisions in existing franchise agreements at all of their locations nationwide.[149] In the wake of the government investigations, numerous private antitrust class actions were filed on behalf of workers against fast food companies in federal court.[150] To date, these lawsuits have met with mixed success. A class action on behalf of Pizza Hut employees was voluntarily dismissed without prejudice,[151] and a case against Little Caesars was dismissed pursuant to Fed. R. Civ. P. 12(b)(6).[152] Consolidated worker cases against Carl's Jr., Auntie Anne's, and Arby's were all settled in 2019 for undisclosed amounts.[153] Class actions on behalf of McDonald's and Jimmy John's employees both remain pending and are awaiting rulings on class certification.[154]

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[144] *Id.*
[145] *Id.*
[146] Naa Oyo A. Kwate, "Fried chicken and fresh apples: Racial segregation as a fundamental cause of fast food density in black neighborhoods," 14 HEALTH & PLACE 32-44 (2008).
[147] Jiamie Chen, "'No-Poach' Agreements as Sherman Act §1 Violations: How We Got Here and Where We're Going," 28 J. OF THE ANTITRUST AND UNFAIR COMPETITION LAW SECTION OF THE CAL. LAWYERS ASSOC. 1, 88-99, 97 (2018); *see also* Jeff Stein, "States launch investigation targeting fast-food hiring practices," THE WASHINGTON POST (July 9, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/07/09/11-states-launch-investigation-targeting-fast-food-hiring-practices/.
[148] Chen, *supra* n.147 at 97.
[149] *Id.* at 98.
[150] *See, e.g., Deslandes v. McDonald's USA, LLC*, No. 17-4857 (N.D. Ill. June 28, 2017) (McDonald's employees); *Ion v. Pizza Hut, LLC*, No. 17-788 (E.D. Tex. Nov. 3, 2017) (Pizza Hut employees); *Butler v. Jimmy John's Franchise, LLC*, No. 18-133 (S.D. Ill. Jan. 24, 2018) (Jimmy John's employees); *Ogden v. Little Caesar Enterps., et al*., No. 18-12792 (E.D Mich. Sept. 7, 2018) (Little Caesar employees).
[151] *Ion v. Pizza Hut, LLC*, No. 17-788 (E.D. Tex. Jul. 16, 2018), ECF No. 45.
[152] *Ogden v. Little Caesar Enterps., et al*., No. 18-12792 (E.D Mich. Jul. 29, 2019), ECF No. 56.
[153] *Stigar, et al. v. Dough Dough, Inc., et al.*, No. 2:18-cv-00244 (E.D. Wash. Mar. 18, 2019), ECF No. 38.
[154] *See Deslandes v. McDonald's USA, LLC*, No. 17-4857 (N.D. Ill); *Butler v. Jimmy John's Franchise, LLC*, No. 18-133 (S.D. Ill.).

If successful, these cases have the potential to address the wrongful treatment of large groups of workers across nationwide networks of franchises. Unlike employment discrimination claims, they do not just focus on individual employers or policies, but systemic abuses of economic power within entire labor markets. The multitude of private cases and enforcement actions have also targeted a large number of employers addressing conduct widespread within an industry. Because antitrust cases do not need to make worker-to-worker comparisons, these efforts can rebalance the unfair balance of power between workers and management in industries where the workers are predominantly minority. They may, then, strike an important blow against systemic racism.

V. Conclusion

Antitrust litigation may provide a valuable tool in dismantling systemic racism. In that regard, it holds some advantages over antidiscrimination litigation. Antitrust laws:

(1) are designed to assess entire systems;

(2) take into account capital and not just income,

(3) can compare the allocation of money between workers and owners—apples and oranges—and not just workers and workers—apples;

(4) can expand the financial pie available to all workers rather than reallocate the slices; and

(5) appeal to centrist free market principles.

None of this is to say that antitrust litigation is more effective than antidiscrimination litigation at combatting systemic racism, much less that one should displace the other. Our points are more modest. They are that antitrust law has a role to play in promoting racial justice and that the design of antitrust law confers important advantages in that effort.

This Essay also may raise some questions in the inquisitive reader. Why is it that antitrust law has the advantages it does over antidiscrimination law? Legislators and courts might be able to formulate antidiscrimination doctrine to focus more on entire markets and other systems and less on discrete employers or individual actors. They might be able to tackle the unjust exploitation of workers by capital. They might be able to assess how money is allocated between employers and workers. They might increase the pie for all workers. They might appeal to principles that benefit not just workers of color and other protected groups but all workers. Perhaps there are sound reasons antidiscrimination law is not designed in that way. Perhaps not. At the least, antitrust law provides a useful contrast and comparison.