The Antitrust Alternative: Promoting Public Health Through Competition

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The United States has a food problem. Every year, millions experience food insecurity—a chronic lack of access to healthy, affordable food—and suffer from a plethora of health consequences as a result. Hardest hit are the most vulnerable in society, single parent and minority households, making this an issue of public health and inequity. Extant solutions are incredibly important to mitigate these effects but are ultimately insufficient given their inability to address the impact that highly concentrated markets have on food prices and food insecurity. Concentrated markets are the expected result of a purposeful narrowing of the goals of the antitrust laws by the Chicago School and the prevailing Establishment Antitrust.

Heeding the original goals of the antitrust laws (competition, small business, and democracy), a growing body of scholars are reimagining how antitrust can be interpreted and used to address crucial problems in society in addition to pure economic ones, such as racial justice. This Article draws from and expands upon this movement, arguing that the same can be said for using competition law to address public health disparities and better public health in general. Equipping antitrust enforcement agencies with a plurality of enforcement values (antitrust pluralism), in addition to economic concerns, can enable these agencies to leverage antitrust as an alternative remedy to a host of pressing social issues beyond economic efficiency, such as food insecurity. Antitrust pluralism as applied to food insecurity requires increased merger enforcement scrutiny to stem corporate consolidation in food markets and tailored enforcement discretion where small local entities engage in traditionally taboo economic coordination that promotes competition and lowers food prices. Such a structural solution is more faithful to the goals of public health and the original goals of the antitrust laws.

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INTRODUCTION

The United States has a food problem, one of excess and deprivation. Millions suffer from food insecurity every year. Often, the food that is available is unhealthy, and healthy alternatives are too expensive for many who live paycheck to paycheck. The repercussions of food insecurity are devastating: the lack of quality healthy food has been linked to a myriad of detrimental health outcomes ranging from birth defects to increased rates of mental illnesses and suicidal ideation. An epic in its own right, food insecurity is a key social determinant of health (SDOH) that requires greater attention by policymakers, especially in the wake of the COVID-19 pandemic and soaring inflation rates.

Public health officials are often guided by SDOHs, broad social conditions that correlate to public health outcomes. Some examples of SDOHs include safe housing, exposure to racism, and educational opportunities. For instance, we would generally expect someone without consistent, safe housing (a person experiencing chronic homelessness) to have, on average, a shorter life expectancy (and potentially other negative health outcomes). By imposing targeted interventions to promote affordable and available housing, we can hopefully counteract and prevent similar negative outcomes for future “statistical lives.” Typical interventions can take many forms, but some familiar to most would be taxes on certain products to

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4 Craig Gundersen & James P. Ziliak, Food Insecurity and Health Outcomes, 34 HEALTH AFNS. 1830, 1830 (2015).
9 Statistical lives are those likely to be lost due to known risk factors absent some public health or other intervention. For a discussion on statistical lives, see Johann Fricke, Treatment Versus Prevention in the Fight Against HIV/AIDS and the Problem of Identified Versus Statistical Lives, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE 182, 183–84 (I. Glenn Cohen, Norman Daniels, & Nir Eyal eds., 2015).
disincentivize their use (think tobacco taxes or other “sin” taxes), the imposition of informational requirements on vendors to allow consumers to make more informed decisions (restaurants are generally required to provide nutritional information on their menus, for example), or government-provided resources to alleviate particular access issues.

If we apply a framework using Lawrence Lessig’s four modalities describing legal regulation, public health tends to focus on two: laws (enforceable government mandates: do not pollute the river or you will be fined, for example) and norms (inspiring new social conventions: promotion of healthier eating habits through educational outreach, for example). But what about another key modality, markets? Markets are economic forces, ones that impact access and opportunities through price. For instance, Lessig describes how markets work to constrain behavior:

The market limits the amount that I can spend on clothes; or the amount I can make from public speeches; it says I can command less for my writing than Madonna, or less from my singing than Pavarotti. Through the device of price, the market sets my opportunities, and through this range of opportunities, it regulates.

Key here is Lessig’s idea of opportunities; by raising or lowering prices, markets indirectly regulate behavior. If we wanted to reduce the number of people buying a specific elastic good, for example, we could simply raise prices. But food is different. Food is incredibly inelastic, people cannot simply decide to stop buying food. Despite its essential nature, the status of food has been successfully reduced to that of a commodity, subjecting it to questionable notions of economic efficiency which have failed to protect our markets and consumers. What about making these markets work better to improve access to healthy food?

The predominant model of public health interventions has a major shortcoming: it overlooks the role that anticompetitive markets play in producing public health harms as well as competition-based solutions for harms caused by market structures and concentration. Antitrust and public health are connected. Food insecurity is a potent example of the link between (dys)functioning markets and public health and the shirking of this relationship by the relevant regulating bodies. To be considered food secure, one must have access to quality, affordable food.

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10 See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (describing four broad modalities that make up our current conception of legal regulation: norms, laws, markets, and code/architecture).


12 Id.


14 See, e.g., Sandeep Vaheesan, Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission, 19 U. PENN. J. BUS. L. 645, 675-76 (2017) (discussing how the “efficiency paradigm” utilized by antitrust scholars and courts over the last several decades has led to “oligopolistic and monopolistic markets that harm consumers, restrict entry, and undermine democratic institutions”).
food. Extant solutions, such as donating to food banks or providing subsidies to families through programs like the Supplemental Nutrition Assistance Program (SNAP) or the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), are individualized, reactive, and do not prevent new incidents of food insecurity from arising since large, dominant corporations remain relatively free to raise prices and collect higher profits at the expense of the consumer, often protected by significant market power.

Food insecurity is in part exacerbated by corporate consolidation and the aggregation of market and monopoly power in the food industry, a market devoid of meaningful competition. As control over the production and distribution of food has shifted into the hands of the few and the large, prices have increased, and quality has decreased, to the detriment of consumers and public health. Moreover, this is an issue of equity. The negative effects of this shift are disproportionately felt by the most vulnerable subsets of our population, such as low-income, single-mother, and minority households. Advocates at the federal level, like Elizabeth Warren, have brought needed attention to the unaddressed antitrust concerns in the food industry, and this has been accompanied by a rekindled push for a more competitive landscape by the federal government under the Biden administration.

There is a clear competition component to food insecurity, and this requires a like solution: the proper and pointed enforcement of competition laws.

Some scholars have already posited how antitrust laws can be leveraged to promote societal values detached from pure neoliberal economics. Dani Kritter, for example, has creatively and constructively argued for using antitrust to dismantle

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18 Id.

19 See infra text accompanying notes 22–25.


aspects of systemic racism. This Article argues the same can be said for using competition law to address public health disparities and to better public health in general. Antitrust enforcers should use a public-health-tinted lens to prioritize enforcement efforts that will advance public health by promoting competition in markets that impact SDOHs like food insecurity—this is more faithful to the goals of both antitrust and public health. Part I of this Article will explore food insecurity as an SDOH and existing solutions. Part II will provide a backdrop of the antitrust landscape and how it has tacitly approved of, if not promoted, corporate consolidation in the food industry. Finally, Part III will reframe antitrust as an alternative remedy to food insecurity, one that more faithfully seeks to alleviate the systemic causes of food insecurity by altering the structure of competition law enforcement to align more closely with the original goals of the antitrust laws.

I. THE PUBLIC HEALTH CONCERN: FOOD INSECURITY IN THE U.S.

It would be an understatement to suggest that food is important; our very existence depends on our ability to consume enough food to power our bodies and minds. Fortunately, the United States is a top global producer in many staple foods like corn, wheat, potatoes, and rice and is overall incredibly food abundant. Despite our tremendous global food output and supply, there are still millions of hungry mouths to feed in our own country. It is paradoxical that one of the richest and most food-abundant countries allows millions of its citizens to suffer from food insecurity. This Part will explore food insecurity as an SDOH and examine the current solutions that exist.

A. Food Insecurity: Price and Quality

Food insecurity is a pervasive circumstance throughout the United States, affecting over ten percent of households. In real terms, this means approximately 12.3 million households (32 million individual people based on an average of 2.6 people per U.S. household) experience food insecurity. This group of over 32 million often faces higher risks of negative health outcomes and chronic diseases. As defined by the U.S. Department of Agriculture (USDA), food insecurity refers to the “lack of consistent access to enough food for an active, healthy lifestyle.” It is

26 Id.
important to distinguish hunger from food insecurity, the former referring to a vague feeling of discomfort (suggesting a temporary nature), with the latter referring to a consistent lack of access to food, often stemming from insufficient resources. While food insecurity is intuitively and often correlated with poverty, it is worth mentioning that poverty does not guarantee food insecurity, nor does being above the poverty line guarantee food security—there are those in poverty that are food secure and those that are not in poverty that are food insecure.

Food insecurity is also an issue of inequity, for its impact is felt disproportionately across certain disadvantaged subsets of the population. While over 10% of households suffer from food insecurity, this number rises to approximately 15% for households with children. The rate is slightly higher for households with younger children (under 6) at 15.3%. Single-parent households, particularly those headed by a single mother, have the highest rates of food insecurity at 27.7%. Across racial groups, we also see dramatically increased rates of food insecurity compared to the national average in Black, non-Hispanic households (21.7%), and Hispanic households (17.2%).

The negative health outcomes experienced within these groups also varies, typically by age. For instance, adults suffering from food insecurity (particularly adult mothers) have been documented to experience increased rates of depression and other mental health issues, diabetes, and poor sleep. Of perhaps heightened concern is the wellbeing of seniors and children. Senior adults experiencing food insecurity are likely to have higher rates of depression, limitations in daily activities, and poorer nutrient intake, a metric closely related to quality of life for seniors. Children seemingly face the greatest number of health repercussions from food insecurity; negative outcomes can include birth defects (where the mother is food insecure during pregnancy), cognitive problems, depression, suicidal ideation, and an increased risk of hospitalization.

The concerns around racial equity and social justice that arise from food insecurity are amplified when considering the intersectional nature of SDOHs. The impacts of food insecurity are not siloed; educational success, for instance, is often

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27 Id.
28 See id.
30 Id.
31 Id.
32 Id.
33 See Gundersen & Ziliak, supra note 2, at 1834; John T. Cook, et al., Are Food Insecurity’s Health Impacts Underestimated in the U.S. Population? Marginal Food Security Also Predicts Adverse Health Outcomes in Young U.S. Children and Mothers, 4 ADVANCES IN NUTRITION 51, 54 (2013).
34 Id.
36 See Gundersen & Ziliak, supra note 2, at 1832.
hampered by food insecurity.\textsuperscript{37} The intersection between SDOHs and the continuing disparities among underprivileged groups is well known and presents a “complex web of problems associated with inequality and inequity.”\textsuperscript{38} While poor outcomes in one SDOH would likely negatively impact others, we would expect the opposite to be true as well. If not compelled by public health notions alone, the reinvigoration of social and racial justice in the United States surely compels meaningful action to address this glaring injustice.\textsuperscript{39}

But what causes food insecurity? Often, it is the high cost of the food itself: “[L]ocal food prices ‘significantly’ affect food insecurity for those households at 200% or less of the poverty line.”\textsuperscript{40} Research has shown a strong correlation between the price of food and rates of food insecurity.\textsuperscript{41} The relationship seems intuitive enough. If one is struggling with poverty, it seems reasonable and likely that their access and ability to purchase healthy food would decrease. In addition to cost, food insecurity incorporates a component of quality. Cost is correlative to access, but quality encompasses the type of foods necessary for an “active, healthy lifestyle.”\textsuperscript{42} To analyze the sufficiency of food quality, we must look to characteristics of the foods available, such as caloric content, variety, the abundance of healthy foods, and the limitation of unhealthy foods, such as those high in saturated fat or added sugars.\textsuperscript{43} Imagine a neighborhood where all of its residents could reasonably afford to buy enough food, where they never experienced even hunger, but the only food option was a McDonald’s or some affordable equivalent. Even though the food is accessible, this is not how we would want to eliminate food insecurity since these residents would not have access to the quality of food necessary for a healthy life (assuming food access is localized in this example).\textsuperscript{44}

The quality of food is interrelated with price and accessibility. Higher quality, healthier foods tend to be more expensive and thus less accessible to low-income

\textsuperscript{37} See, e.g., Suzanna M. Martinez, Edward A. Frongillo, Cindy Leung & Lorrene Ritchie, \textit{No Food for Thought: Food Insecurity is Related to Poor Mental Health and Lower Academic Performance Among Students in California’s Public University System}, 25 J. HEALTH PSYCH. 1930, 1930 (2020) (describing how food insecurity correlates to poorer academic performance in a study in the California public university system).


\textsuperscript{39} See Kritter, supra note 22 (“The year 2020 also marked an awakening to racial injustice in America. The deaths of George Floyd, Breonna Taylor, and Ahmaud Arbery sparked nationwide outrage and demands to reform institutions built on systemic racism.”).


\textsuperscript{42} ALTARUM, supra note 25.


\textsuperscript{44} Morgan Spurlock demonstrated the dangers of an all-McDonald’s diet, for instance, in the movie \textit{Super Size Me} (The Con 2004).
groups, resulting in a reliance on cheaper, unhealthier foods. This is partially related to the establishments where people buy their food. Convenience stores tend to pop up in poorer neighborhoods and charge higher prices for healthier options like fruits and vegetables. Here too the impact tends to disproportionately rest on the shoulders of racial minority groups. The good news is that reducing the costs of healthier foods tends to result in increased rates of purchases, showing that people want to buy healthier foods. Thus, we don’t need to necessarily drive out unhealthy options; we just need to promote access to healthy ones. For every McDonald’s or KFC that pops up, there should be a healthy alternative provided and available. The problem is, existing solutions are not designed to address the root problem: the high costs of healthy foods. Instead, solutions like SNAP benefits and food banks are retroactive measures that raise individuals up to the ever-increasing price of food only after they have fallen into food insecurity.

B. Solutions for Food Insecurity

Food insecurity persists despite the rich history of programs designed to prevent it. The most familiar preventative program is likely the Supplemental Nutrition Assistance Program (SNAP), colloquially known as food stamps. The SNAP program provides qualifying individuals with an “Electronic Benefits Transfer” (EBT) card that can be used to purchase foods in preapproved locations. A somewhat unique feature about SNAP is that the program “provides a sliding scale of support based on . . . income.” The program is lauded for its success, reducing food insecurity by as much as thirty percent in some populations.

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45 Access to Foods that Support Healthy Dietary Patterns, supra note 43; Simone A. French, Pricing Effects on Food Choices, 133 J. NUTRITION 841S, 842S (2003) (“Price incentives can be an effective intervention strategy to influence individual food purchases. Price reductions had consistent and strong effects on purchasing patterns of targeted foods in work site and school cafeteria settings. These results were generalizable across diverse foods such as prepackaged snacks and fresh fruits and vegetables. Food choices were consistent across adolescent and adult populations and across diverse socioeconomic groups.”). French’s analysis in 2003 identified the benefits of lowering costs for healthy foods but, worried about the financial feasibility, looking to government subsidies as a funding option. However, rather than artificially deflating prices after they have been raised, an antitrust remedy could lower prices for these foods to begin with, eliminating the artificial inflation of healthy food prices.

46 See Access to Foods that Support Healthy Dietary Patterns, supra note 43.

47 Id.

48 Id.

49 ALTARUM, supra note 25.

50 See id.


52 ALTARUM, supra note 25.

A similar program is the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).\(^{54}\) In addition to access to food, WIC provides both nutrition education and breastfeeding support to new and expecting mothers.\(^ {55}\) The National School Lunch Program (NSLP) provides meals to children of qualifying families, often at little to no cost to the family.\(^ {56}\) Additional solutions exist at the state level, such as food policy councils, coordinated efforts to roll back legislation that prevents food donations from entities like restaurants, and state-funded transport to food banks.\(^ {57}\) Grassroots efforts to address food insecurity, such as food banks, are also common.\(^ {58}\) Food banks have a proven track record of effectiveness and provide nutritional education to help participants pick healthier food choices.\(^ {59}\)

These solutions are vital—they provide food for hundreds of thousands of families that would otherwise be forced to go without and undoubtedly make a positive contribution to public health. However, each has a unique set of issues. SNAP, for instance, provides fixed funding for states, making the program inherently inflexible—this was problematic during the COVID-19 pandemic when there was a surge of food insecurity.\(^ {60}\) SNAP participants are limited in the number of authorized retailers where they can use the EBT cards, and benefits fail to take into account whether one resides in an area with a higher cost of living and food.\(^ {61}\) Most damning is the paradoxical work requirement—those who are without work for a period of time may be cut off from SNAP benefits when they are needed most.\(^ {62}\)

WIC recipients suffer from many structural barriers to access, such as being stuck on waitlists, not having time to attend application appointments or to pick up vouchers, language barriers between recipients and administrative staff, misconceptions of eligibility, and the difficulty of actually using the benefits in authorized food retailers.\(^ {63}\) Similar barriers exist for the NSLP, “including those

\(^{54}\) ALTARUM, supra note 25.

\(^{55}\) Id.


\(^{57}\) Keith-Jennings, supra note 53.


\(^{59}\) Id.


\(^{61}\) Oliveira et. al, supra note 60.

\(^{62}\) See id.

related to enrollment and outreach, limited menu options, student preferences, lunch service capacity, and open campuses.”64 Children may also be resistant to utilizing the NSLP due to a strong stigmatization of participants.65 The NSLP is also funded by students who pay full cost for lunch—but as more students qualify for free and reduced lunch, the NSLP loses funding, making it harder to provide healthier meal options, which tend to cost more to make.66

Despite their success, food banks also fall short. The types of food often donated cannot sustain the type of healthy diet identified by the USDA.67 While food banks are receiving more donations than ever, they will never receive enough to eliminate food insecurity, and ultimately, food banks can only “mitigate rather than end[] hunger.”68 Equally concerning are the moral conundrums of food bank boards that are often filled with corporate elites from the food industry.69 Can we really expect the same people setting the prices of foods, those with inordinately high salaries, to spearhead a revolution of free (or at least affordable) food?70 Moral qualms aside, the bottom line is that food banks are inherently “limited in their capacity to improve overall food security outcomes . . . .”71

The shortcomings of these solutions are evident based on the fact alone that food insecurity continues.72 The crux of the issue, however, is that these are not “public health” solutions; programs like SNAP, WIC, and the NSLP are more akin to “healthcare” solutions. SNAP helps with the symptoms of the issue—a current lack of access to food based on high prices and insufficient funds—but it does not deal with the issue itself, the continuing inability to afford food in the first place. A structural solution is needed, one that can address the market issues that increase food prices and create food insecurity. Antitrust is a potent potential solution since it would “predistribute” the beneficial effects these programs seek to bestow without their stigmatic effect.

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65 Id.
69 Id.
70 See id.
II. THE ANTITRUST PROBLEM: CONCENTRATION AS “INNOCENT” ECONOMIC COORDINATION

Economic markets and market structures influence the availability, price, and quality of items that move through them. The market for food is vast—U.S. citizens spend approximately ten percent of their income on food every year, totaling nearly $1.7 trillion (a number that continues to grow despite the trend of decreasing disposable income per household).73 To be frank, there is much money to be made in selling food. However, legal restrictions loom over the actions of potential sellers.

The antitrust laws (collectively including the Sherman Act, the FTC Act, and the Clayton Act) were passed as a societal check on the previously uncontrolled power of megacorporations.74 The inaugural federal competition law, the Sherman Act, promoted broad, sweeping goals: key were political values that protected well-functioning markets, sought to democratize economic power, and most importantly, condemned corporate concentration as a public threat.75 Much of the history of federal enforcement of the antitrust laws was indeed colored by such a political, populist, anti-concentration hue.76 However, over time the perceived goals of the antitrust laws have been purposefully narrowed from broad political goals to limited economic ones. Robert Bork’s The Antitrust Paradox spearheaded a movement of scholars (now dubbed the “Chicago School”) who sought to rein in what they perceived as the overly harsh enforcement regime and strict structural rules of the populist antitrust movement that captured Congress and the courts alike for the majority of the 20th century.77

As judicial interpretation began to favor the Chicago School approach (paving the way for today’s “Establishment Antitrust”),78 populist per se assumptions of illegality were slowly overturned,79 and the Consumer Welfare (CW) standard, the

74 See Kritter, supra note 22.
75 Lina Khan, Amazon’s Antitrust Paradox, 126 YALE L.J. 710, 742 (2017).
76 See id at 741–42.
77 See Frank H. Easterbrook, Vertical Arrangements and the Rule of Reason, 53 ANTITRUST L. J. 135, 139–40 (1984) (“The Court is free to change the rules on RPM, too. Congress could have adopted legislation in 1975 to ‘freeze’ the law. It could have approved the per se rule for resale price maintenance, yet it did not. . . . [RPM] became unlawful in practice only in the 1960s. What the Court decides from 1911 to 1926, and reconsiders in the 1960s, it can review yet again in the 1980s. And everyone should expect it to do so.”); Leon B. Greenfield, Perry A. Lange, & Nicole Callan, Antitrust Populism and the Consumer Welfare Standard; What Are We Actually Debating?, 83 ANTITRUST L.J. 393, 396 (2020).
78 The “Establishment Antitrust” refers to the Chicago School and its progeny, a movement of antitrust scholars, practitioners, and judges that promote an antitrust system focused on price and output. While modern proponents of today’s Establishment have moved away from the “Chicago” moniker, their policies are rooted in the same laissez faire principles that gave rise to the Chicago School. See Frank Pasquale & Michael L. Cederblom, The New Antitrust: Realizing the Promise of Law & Political Economy 4 (2022) (working paper) (on file with the Indiana Journal of Law and Social Equality).
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legacy of Bork’s antitrust philosophy, was embraced. The CW standard is extremely narrow in scope and seeks to promote two specific outcomes for the benefit of consumers: lower costs of goods and increased output. Implicit in the embrace of the CW standard is the shirking of the originally contemplated goals of the antitrust laws. For instance, if these limited outcomes can be accomplished by a few massive firms operating at scale, then the CW standard and the Establishment Antitrust crowd would arguably embrace this arrangement. This is a clear departure from the original principles that held concentration and bigness as inherently suspect. It should come as no surprise then that the CW standard has favored, or at least tacitly endorsed, concentration. This is the expected result of a shift from a Brandeisian vision of small business competition to a Borkian one of “bigger is better” (in terms of achieving high quality and low cost). Complicit are the federal agencies that have been extremely hesitant in recent memory to bring enforcement challenges to highly contestable mergers, leading to the consolidation of many U.S. markets. The result is a cabal of megacorporations that, collectively or individually, hold a high degree of “market power,” the ability to raise prices above the “competitive level” and gain supracompetitive profits. If our antitrust laws were working as intended and promoted truly competitive markets, we would assume that raising prices in this way would cause an immediate loss of customers and revenue, driving the price back down. But in key markets like the food industry, we are quickly seeing that is not the case. Prices are raised, and consumers are left without options to switch to, resulting in increased corporate profit at the consumer’s expense.

Concentration of corporate power in the food industry is reaching record highs, flowing from a sea of unchallenged mergers starting (coincidentally) in the 1980s. Monolithic corporations, like Walmart, have tried to mask the extent of

81 See id.; Khan, supra note 75, at 720; Harry First, American Express, the Rule of Reason, and the Goals of Antitrust, 98 NEB. L. REV. 319, 324 (2019); Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 9–10 (2018) (“What we must realize is that, once again, we face what Louis Brandeis called the ‘Curse of Bigness’. . . . For roughly a century, the antitrust law served . . . as an antimonopoly code that sought to limit excessive industrial concentration and to police monopoly conduct. . . . Yet over the span of a generation, the law has shrunk to a shadow of itself, and somehow ceased to have a decisive opinion on the core concern of monopoly. The law . . . no longer condemns monopoly, but has grown ambivalent, and sometimes even celebrates the monopolist—as if the ‘anti’ in ‘antitrust’ has been discarded.”).
84 See id.
their acquisition activities by utilizing subsidiaries and subsidiaries of subsidiaries to effect mergers, but a pattern has emerged where corporate supermarkets are shutting down small businesses and increasing prices for consumers, often to the detriment of Black and Latinx neighborhoods. The research is clear—concentration is directly linked to higher food prices, and companies are indeed raising prices. The meat industry has been hit the hardest; pork prices increased by fourteen percent and beef by twenty percent between 2020 and 2021. The corporations responsible blame weather issues, the pandemic (which admittedly had an impact on prices), and increased labor costs, but these same organizations are simultaneously reporting record profit margins. The implication is that these corporations are using consumers to subsidize rising costs in order to maintain and increase their own profits—this is the definition of market power.

The story of Tyson Foods, Inc., detailed by a 2022 episode of The Daily (a podcast by The New York Times), provides a compelling case study of the problem. A rancher, Steve Charter, recounts how he inherited his family ranching business in the late 1970s following his grandfather’s death. Immediately thereafter, the Reagan Administration brought about an era of deregulation championed by neoliberal principles of a free market untainted by government intervention. As Bork’s work spurred the development of Chicago School antitrust (taking hold in academia, the judiciary, and government agencies), the meatpacking industry changed quickly and radically. The docket of merger challenges by federal antitrust agencies dried up, allowing dominant corporations to buy and squeeze out any meaningful competition, couched on the empty promise of lower prices. Despite the claimed “efficiencies” of consolidation, consumer prices did not fall in turn—profits increased. In 2020 under the guise of the pandemic, Tyson raised beef prices between forty and seventy percent. All the while, Tyson, one of the only outlets available for cattle farmers, made sure to bleed ranchers like Steve Charter dry, offering consistently lower prices despite turning record profits.
Another pressing example is the concentration of the baby formula industry, one that directly impacts families with young children, often the recipients of SNAP and WIC benefits. Nearly the entire U.S. market (ninety-five percent of baby formula) is controlled by three companies: Abbott Laboratories, Reckitt Benckiser, and Nestlé.\footnote{Bryce Covert, \textit{The Visible Hand: How Monopolies Define Everyday Life in the United States}, NATION (Nov. 30, 2020), https://www.thenation.com/article/culture/david-dayen-monopolized-review/. Part of the reason why these companies have such a stranglehold on the market is that they are the only WIC-approved companies that produce baby formula. See Kevin Ketels, \textit{The Current Baby Formula Shortage Sheds Light on Longstanding Weaknesses Within the Industry}, PBS NEWS HOUR (May 19, 2022, 2:53 PM), https://www.pbs.org/newshour/economy/the-current-baby-formula-shortage-sheds-light-on-longstanding-weaknesses-within-the-industry.} A conundrum specific to baby formula is the discrepancy between the extremely low cost of baby formula’s ingredients and the extremely high cost charged to consumers; regular formula typically costs fifteen dollars per can, and specialty varieties for specific nutritional needs can cost up to three times as much.\footnote{Chris Pomorski, \textit{The Baby-Formula Crime Ring}, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/interactive/2018/05/02/money-issue-baby-formula-crime-ring.html.} However, low availability and unexplainably high costs have forced families to turn to black markets just to get enough formula, with some individuals waiting eagerly on the other side to sell it to them at a profit.\footnote{Id. As the baby formula shortage has persisted through 2022, the FTC has turned its attention to price gougers reselling baby formula for a steep profit. See Dominick Reuter, \textit{The FTC Says It Will ‘Fully Enforce the Law’ Against Baby Formula Sellers Who Are Price Gouging Parents}, BUS. INSIDER (May 26, 2022, 8:55 AM), https://www.businessinsider.com/ftc-to-investigate-baby-formula-seller-price-gouge-scam-parents-2022-5 (“[FTC Chair Lina Khan’s] announcement comes a day after NBC News reported parents were seeing markups of 300% and up on websites like Ebay, Amazon, Craigslist, and Facebook.”).}

Were the baby formula market truly competitive, it would seem there is ample room for a company to provide these inelastic products at a lower cost (should they receive the same WIC approval as the current dominant companies like Abbot and co.). But extremely high barriers to entry may effectively prohibit new competitors from entering the market.\footnote{Research and Markets: \textit{The US Baby Food and Formula Market – Nurturing Demand for Organic Baby Food Products}, BUSINESSWIRE (July 19, 2012), https://www.businesswire.com/news/home/20120719005593/en/Research-and-Markets-The-US-Baby-Food-and-Formula-Market--Nurturing-Demand-for-Organic-Baby-Products.} Further, this industry has undergone “sustained merger and acquisition activity . . . [and] ‘terminal’ consolidation” across the globe, often resulting in corporations buying competitors that were themselves “products of various mergers and acquisitions, going back many decades.”\footnote{Phillip Baker, Katheryn Russ, Manho Kang, Thiago M. Santos, Paulo A.R. Neves, Julie Smith, Gillian Kingston, Melissa Mialon, Mark Lawrence, Benjamin Wood, Rob Moodie, David Clark, Katherine Sievert, Monique Boatwright & David McCoy, \textit{Globalization, First-Foods Systems Transformations and Corporate Power: A Synthesis of Literature and Data on the Market and Political Practices of the Transnational Baby Food Industry}, 17 GLOBALIZATION & HEALTH 1, 10 (2021).} Should a nascent competitor arise, it would likely be bought out of existence by one of the industry’s major players before it could begin to pose a threat to the industry’s top dogs. Adding insult to injury, instead of pursuing the serial acquisitions of major
corporations, government investigators have been more concerned with suburban parents selling baby formula on the side.\footnote{See Pomorski, supra note 99. Khan and the FTC’s attention to second-selling price gougers is noble on its face but replicates this issue of misdirected attention. Reuter, supra note 92. Price gouging is the result of concentration, after all. See Robert Kuttner, Inflation and Price-Gouging, AM. PROSPECT (Feb. 7, 2022), https://prospect.org/blogs-and-newsletters/tap/inflation-and-price-gouging/ (“This price-gouging reflects the extreme economic concentration that has resulted from deregulation coupled with a four-decade failure to enforce the antitrust laws.”).}

The problem is clear. Our antitrust laws are failing us. In one sense, it may be true that merger activity between competitors is not always harmful. However, extreme corporate consolidation has run unchecked, and the result has been sustained increases in food prices, which contributes to food insecurity. The Brandeisian presumption against “bigness”\footnote{The “Curse of Bigness,” as coined by Justice Louise Brandeis and later revitalized by Tim Wu and other New Antitrust scholars, “represents a profound threat to democracy itself... Where the middle class has no apparent influence on policies like health insurance, taxes, working conditions, housing, or other matters that determine how life is really lived?” TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 12 (2018).} and the threat that it poses was not without merit, yet it was foolishly ignored. The current solutions to food insecurity do nothing to prevent profit-driven corporations from abusing their market dominance to maximize their profits at the expense of the consumer.\footnote{See, e.g., Kuttner, supra note 103 (“[T]he meat giant Tyson reported earnings per share up 50 percent over last year . . . . These price hikes to consumers go neither to farmers nor to supermarkets but to giant monopoly middlemen like Tyson.”).} In essence, we have a competition problem. What is needed is a structural competition solution—a reformation of antitrust enforcement.

III. THE ANTITRUST ALTERNATIVE: PROMOTING PUBLIC HEALTH BY REDEFINING “TABOO” ECONOMIC COORDINATION

SNAP, WIC, the NSLP, and food bank donations are not true public health solutions; they are band-aids that treat the symptoms of systemic public health issues. Relying solely on these programs ignores the impact of market factors like consolidation in the food industry, which has increased prices and exacerbated the impact of food insecurity on the most vulnerable members of society. To truly protect public health, we must utilize a solution that is structural in nature, one that targets the system that is creating new incidences of food insecurity in the first place. What is needed is a more robust remedy: public-health-cognizant enforcement of the antitrust laws. Promoting antitrust enforcement to deter corporate consolidation and stemming enforcement to protect beneficial downstream coordination and effects for public health (dispelling the longstanding myth—created by the Establishment Antitrust—of beneficial intra-firm coordination and maleficent inter-firm coordination\footnote{See infra text accompanying notes 131-134.}) can directly address the structural causes of food insecurity.
A. Towards Antitrust Pluralism

The idea of antitrust pluralism (antitrust enforcement and regulation that utilizes alternative modes of expertise and aims to promote a broader range of goals) is novel as applied using a public-health-centered lens and to food insecurity but draws on similar clarion calls for antitrust enforcement to employ a plurality of values to guide enforcement.\footnote{For many scholars of what we have dubbed the “New Antitrust,” antitrust enforcement and regulation are two sides of the same coin. See, e.g., Pasquale & Cederblom, supra note 78, at 34–42.} Dani Kritter’s \textit{Antitrust as Antiracist} is emblematic of this reformed movement for societal change through altering market structures. Kritter brings attention to the racial disparities in healthcare, another industry plagued by concentration.\footnote{See Kritter, \textit{supra} note 22.} In order to combat systemic racism, Kritter calls for “antiracist” merger review, where federal enforcement agencies and the courts are cognizant of “racially disparate outcomes like health care costs, insurance premiums, and the quality of care provided as anticompetitive effects.”\footnote{\textit{Id}.} Antiracist antitrust also requires federal enforcement agencies to bring heightened scrutiny to the potentially anticompetitive business practices of companies where those practices particularly harm minority groups and people of color.\footnote{\textit{Id}.} Focusing on enforcement in healthcare is one way to accomplish this goal, since the harms of anticompetitive behavior in this industry disproportionately burden people of color.\footnote{\textit{Id}.}

The method applied by Kritter and like scholars in one sense rejects the simplistic assumptions of Chicago School and Establishment Antitrust—there is more worth considering than simply price and output. It calls for more purposeful enforcement by the relevant federal agencies. Fortunately, judges are typically highly deferential to enforcement decisions (and discretion) so long as the relevant agency is not completely abandoning its duties under a “broad statutory mandate.”\footnote{See, e.g., Norton v. S. Utah Wilderness All., 542 U.S. 55, 66–67 (2004) (holding that general complaints about agency inaction rooted in policy preferences are not cognizable claims under the Administrative Procedure Act).} Should the Federal Trade Commission (FTC) or Department of Justice (DOJ) choose, they could make food industry competition their number one priority. An emphasis on plural values also brings attention to the equitable concerns of monopolistic and oligopolistic market structures. The same principles apply to the food industry and food insecurity as a public health concern.

Food insecurity is in part caused by, or at least exacerbated by, rising food prices and diminished access to high quality, healthy food. While public health solutions thus far have tried to target those directly impacted, an alternative, supplementary way to address this issue is to lower food prices and to increase access to healthy food options for everyone. The efficacy of such a broad swath approach has been demonstrated (again in the intersection of racial injustice and
antitrust) by Joshua P. Davis, Eric L. Cramer, Reginald L. Streater, and Mark R. Suter.\textsuperscript{113} These authors explore the advantages of antitrust as a remedy to racial discrimination over employment discrimination lawsuits, looking to \textit{Cung Le v. Zuffa} as a case study.\textsuperscript{114} By leveraging antitrust as an alternative remedy against wage discrimination in the Ultimate Fighting Championship (UFC) generally (as opposed to trying to prove discrete instances of discrimination between fighters based on race), the wages of all fighters would increase but to the disproportionate \textit{benefit} of Black and Brown fighters.\textsuperscript{115} The same approach can and should be taken towards food insecurity—by reducing the overall cost of food for everyone, food becomes universally more accessible to the disproportionate \textit{benefit} of millions of (typically) single-mother, Black, and Latinx households. And as food prices drop, we would surely see an uptick in healthy food consumption.\textsuperscript{116}

\textit{B. Increased Merger Enforcement}

The market for soybeans, meat, cereal, soft drinks, beer, salty snacks, bread, ice cream, fresh cut salad, wine, retail groceries, convenience stores, fast food, and food distribution is dominated (between thirty and eighty percent market control) by as few as three or four companies.\textsuperscript{117} This concentration trend must be addressed. One facet of public-health-conscious antitrust enforcement is increased enforcement to block incipient concentration. Increased enforcement should specifically target the pattern of serial mergers and consolidation by the market’s largest players that has led to the increased food prices we are seeing today.\textsuperscript{118}

The FTC and DOJ must bring challenges to potential mergers that threaten to and continue to bring these and other industries into the hands of the few. Scant merger enforcement has been discussed at length by scholars like John Kwoka. Consistently, the FTC has limited its merger enforcement challenges to mergers creating \textit{extreme} concentration (industries where mergers result in less than four firms) while failing to challenge any mergers that would result in as few as five to


\textsuperscript{114} Id. at 371; \textit{Le v. Zuffa, LLC}, 216 F. Supp. 3d 1154, (D. Nev. 2016).

\textsuperscript{115} Id. at 374.


\textsuperscript{117} Howard & Hendrickson, supra note 85. Often, discussions in the United States concerning “monopoly” power or “or market dominance” take the view that for a competitor to be dominant, they must control an overwhelming share of the requisite market (sixty to seventy percent or more market share), in addition to aggravating factors like difficulty in entering the market. However, this is a restrictive view of market dominance. Competition laws in the European Union, for example, define dominance much more broadly: “dominance’ can be found with market shares below [forty] percent as long as the Commission finds that the firm has the ability to behave independently of its competitors, customers, and consumers.” James Keyte, \textit{Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement is So Difficult to Bridge}, 33 ANTITRUST 113, 116–18 (2018). For a comparison of U.S. antitrust law and EU “dominance law,” and the disparate treatment by each country’s competition authorities for the same types of behaviors, see id.

\textsuperscript{118} See Howard & Hendrickson, supra note 85.
eight real competitors. One may think that six or seven major competitors is a significant amount, and thus a merger reducing competition to this many firms may still be competitive. But work by Kwoka suggest that these mergers are often highly anticompetitive:

But it turns out that it is not only those mergers with the very fewest firms that are overwhelmingly anticompetitive. The same is true for mergers with five competitors. And for those with [six] remaining firms, [eighty] percent were anticompetitive. And half of those with [seven] remaining firms. What this evidence shows is for those very mergers where policy shifted from some challenges back [twenty] years ago, to none at all—those with [five] or [six] or [seven] remaining competitors—those mergers are in fact very often anticompetitive.¹²⁰

This trend must be reversed—federal agencies must challenge mergers that reduce the number of competitors to a medium-to-high competition threshold (five to seven firms), and not only when a merger would reduce the number of competitors to extreme concentration levels. Allowing these to go unchallenged in all circumstances is a flagrant shirking of the agencies’ public duty.

To strengthen the likelihood of success for merger review (under subsequent judicial review), the FTC should take advantage of § 5 of the Federal Trade Commission Act¹²¹ to challenge mergers in highly concentrated industries as unfair acts instead of under the Sherman and Clayton Acts. This pre-Chicago School principle was first raised by scholars in response to increased “conglomerate merger” activity in the 1960s.¹²² Notably, in a recent policy statement the FTC


¹²⁰ Id. at 6.


¹²² Conglomerate mergers are those between large businesses in unrelated markets. These mergers often lack “the horizontal or vertical characteristics of most traditional mergers.” Peter C. Carstensen & Nina H. Questal, Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers, 63 CORNELL L. REV. 841, 841 (1978). A relatable example would be Amazon’s (a digital market platform and web services provider) acquisition of Whole Foods (a supermarket chain). While Amazon’s online marketplace likely hosted the sale of many goods that overlap with Whole Foods, this merger was Amazon’s first venture into the supermarket industry. Even under today’s lax standards, many feared the anticompetitive results of Amazon’s purchase of Whole Foods. See, e.g., Diane Bartz, Critics Say Whole Foods Deal Would Give Amazon an Unfair Advantage, REUTERS (June 22, 2017, 5:04 PM), https://www.reuters.com/article/us-whole-foods-m-a-amazon-com-antitrust/critics-say-whole-foods-deal-would-give-amazon-unfair-advantage-idUSKBN19D2Q8 (“Critics believe Amazon’s strengths in logistics, its scale and leverage with suppliers could enable it to dominate groceries as it did with bookselling.”). Amazon so far, however, has not come to dominate the food spending market. That monopoly (or oligopoly) title remains with Walmart. Today in Retail: Walmart Still Leads Amazon in Food Spending; Contextual Rewards Help Consumers Overlook Inflation, PYMNTS (Apr. 14, 2022), https://www.pymnts.com/news/retail/2022/today-in-retail-walmart-still-leads-amazon-in-food-spending/. But, of equal concern to those bringing a plural perspective to the analysis was the effects that Amazon’s purchase of Whole Foods has on its existing monopolies and the advantages it gains by essentially leveraging this monopoly. For instance, Amazon now has access to a “laboratory” that it can use to test
made clear its intentions to revitalize § 5, which it acknowledged goes beyond the scope of the Sherman Act. This alone is a remarkable incident and may represent a true sea change in antitrust enforcement should the agency follow through on its promises.

Success under § 5 review can be maximized through the FTC’s administrative rulemaking power. Rulemaking has a host of benefits: it can promote predictability that adjudication alone lacks, save valuable resources by avoiding drawn out trials, and democratize enforcement policies through the participatory process of notice-and-comment rulemaking. Further, rulemaking can meaningfully deter lucrative illicit conduct that is financially resistant to the occasional enforcement action and private litigation. Turning to the competition issues in the food industry, should the FTC take full advantage of its Congressionally bestowed powers, it could provide parameters that, for instance, presume mergers unfair where they create an entity of a certain size or foreclose a certain percentage of the food market or specific submarkets. By characterizing the rules of the game, this would give the FTC needed flexibility to define unfair conduct beyond the constraints of the judicial CW standard and promote meaningful competition to the benefit of all, as originally intended by Congress.

If the FTC uses its § 5 powers, it would then be able to take full advantage of bringing an administrative complaint against the offending corporations rather than resorting to judicial resolution, thereby entitling the agency to Chevron.

consumer reactions to prices. It is not hard to see how this can help its dominance in its own self-preferenced products on Amazon marketplace. See Hermann Simon, Whole Foods is Becoming Amazon’s Brick-and-Mortar Pricing Lab, HARV. BUS. REV. (Sept. 12, 2017), https://hbr.org/2017/09/whole-foods-is-becoming-amazons-brick-and-mortar-pricing-lab. Small competitors, either on the grocery side or online retail side, cannot afford to buy a national chain simply to toy with pricing models and consumer reactions. Any loss by Amazon through Whole Foods can be subsidized by profits from Amazon Marketplace, to the ultimate benefit of Amazon Marketplace. The acquisition of Whole Foods was also premised on this idea—it provided another incentive for customers to join Amazon Prime. See Seth Stevenson, It’s Finally Clear Why Amazon Bought Whole Foods, SLATE (June 28, 2021, 4:11 PM), https://slate.com/business/2021/06/why-amazon-bought-whole-foods-groceries-online.html. Let us not forget the treasure trove of data that Amazon captured through this acquisition. See Greg Petro, Amazon’s Acquisition of Whole Foods is About Two Things: Data and Product, FORBES (Aug. 2, 2017, 12:13 PM), https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/?sh=4aac9180a808. While the narrow scope of price and output did not yield concern for the antitrust agencies, surely there are anticompetitive effects that were overlooked by allowing this conglomerate merger.


125 Id. at 372.

126 Carstensen & Questal, supra note 122, at 866–67.

127 Chevron deference refers to judicial deference that is granted when a federal agency interprets an ambiguous provision of its enabling act. The two step inquiry of Chevron requires (1) a court to determine whether the statute is ambiguous as to the issue at hand, and (2) whether the agency’s construction of the statute is reasonable. So long as the agency’s construction is “reasonable,” a court cannot substitute its own judgment in lieu of that of the agency. Chevron U.S.A. v. Nat’l Res. Def. Couns., Inc., 467 U.S. 837 (1984).
(and, if the agency is interpreting its own regulations, perhaps Auer\textsuperscript{128} deference.\textsuperscript{129} Scholars like Sandeep Vaheesan have called for the FTC to utilize the administrative enforcement route in the pursuit of Big Tech for this very reason—it creates a more favorable battleground for the FTC.\textsuperscript{130} Some may point to the Biden administration’s pointed emphasis on battling concentration,\textsuperscript{131} as well as the recent successes of agencies like the DOJ in blocking highly questionable mergers like the Penguin Random House-Simon & Schuster mega-deal,\textsuperscript{132} to push back against the notion that we need a radical push by the FTC. Such victories are significant and should be celebrated. In the Penguin Random House merger, for instance, the judge quite notably disregarded any notion of efficiency due to a lack of credible justification by the would-be merging parties\textsuperscript{133}—this strikes right at the heart of Chicago and Establishment antitrust principles. And given recent findings concerning the credibility of claimed merger efficiencies, there is “reason to suspect that market concentration thresholds as they are applied are too lax ... and should be re-examined and, very probably, lowered.”\textsuperscript{134}

While this outcome is laudable, it is inadequate. The Penguin Random House merger is quite an extreme case than many expected to be blocked (perhaps on different grounds),\textsuperscript{135} and, although the deal was soon dropped by Paramount after

\textsuperscript{128} While Chevron deference applies to an agency’s interpretation of its enabling act, Auer deference applies where an agency is interpreting its own regulations promulgated under its rulemaking powers granted by the enabling act. While recently limited by the Supreme Court in Kisor, Auer deference follows a similar, yet more demanding process as Chevron: (1) The court must determine the agency’s regulation is ambiguous; (2) the court must find the agency’s interpretation of the regulation to be reasonable; (3) if reasonable, the court must decide whether the interpretation is entitled to controlling weight; and (4) the interpretation must be understood as authoritative policy of the agency, not merely the interpretation of low-level employees. Auer v. Robbins, 519 U.S. 452 (1997); Kiser v. Wilkie, 588 U.S. ___ 139 S. Ct. 2400 (2019).

\textsuperscript{129} It should be noted, however, that the current Supreme Court is quite hostile to agency action and deference. See David Yaffe-Bellany, Biden’s Agenda Faces a Court System More Hostile to Agency Power, BLOOMBERG (Dec. 15, 2020, 4:00 AM), https://news.bloomberg.com/us-law-week/courts-skeptical-of-chevron-may-stymie-bidens-agenda (“Trump’s appointees to the Supreme Court have expressed skepticism of Chevron.”).


\textsuperscript{133} Id. at *77 (“The Court, however, precluded the defendants’ evidence of efficiencies, after determining that the defendants had failed to verify the evidence, as required by law.”).


\textsuperscript{135} See, e.g., Bill Baer, Herbert Hovenkamp, & Steven Salop, When Rhetoric Confronts Economic Reality: Unsupported Efficiency Claims and Unenforceable Promises Cannot Save the Book Publishers Deal, BROOKINGS (Sept. 9, 2022), https://www.brookings.edu/blog/techtank/20220909/when-rhetoric-confronts-
the DOJ’s district court win,\textsuperscript{136} even if the decision had stood on appeal, another similar case may find a less-favorable judge or have more justifiable efficiency grounds. Resorting to a patchwork of judicial decisions and hoping for the best will result in inconsistent results. To avoid this, we need strong regulatory action by the FTC to prevent concentration.

C. Thoughtful Enforcement Discretion

In addition to stopping concentration, small businesses, especially in the food industry, must be protected and promoted. Antitrust laws were based on such a precautionary tale against the threat of big business, which (then and now) engages in abusive behavior.\textsuperscript{137} The goal of high quality, healthy foods is of little concern for large corporations; their duty to shareholders to maximize profit incentivizes the sale of largely junk food products that are unhealthy and wildly profitable.\textsuperscript{138} We must instead look to promote small businesses with an intrinsic passion for quality to provide healthier options to the neighborhoods they serve. This necessarily requires enforcement discretion where small firms may attempt to cooperate to provide lower food prices and/or better compete with large, dominant chains.

Currently, horizontal coordination between direct competitors is strictly illegal under the antitrust laws. This inter-firm coordination is deemed anticompetitive per se while intra-firm coordination (where former competitors become one under a single corporate entity and perhaps continue to sell “competing” brands, or vertical coordination down the stream of production) is permitted. This hard delineation of permitted and unpermitted coordination, referred to as the “firm exemption” by Sanjukta Paul,\textsuperscript{139} is rooted in the failures of Borkian Establishment Antitrust and works to the detriment of public health and food insecurity by promoting concentration.\textsuperscript{140} Paul discusses antitrust’s “firm exemption” at length and posits that the condemnation of horizontal coordination between small firms is not a core normative value of the original antitrust laws; it is simply the result of Chicago School scholars discrediting the former “substantive normative benchmarks of fairness, dispersal of power, and [the] commitment to small enterprise[s].”\textsuperscript{141} Changing how we conceptualize “permissible” economic coordination would, in


\textsuperscript{137} See, First, supra note 81, at 323 (quoting Harlan M. Blake & William K. Jones, In Defense of Antitrust, 65 COLUM. L. REV. 377, 384 (1965)) (describing how antitrust was meant to combat “abusive . . . economic giants”).


\textsuperscript{139} Sanjukta Paul, Antitrust as Allocator of Coordination Rights, 67 UCLA L. REV. 378, 380 (2020).

\textsuperscript{140} Id. at 415-25.

\textsuperscript{141} Id. at 386.
Paul’s words, “require[] justification no more and no less than the current one.” Antitrust need not be perpetually confined to promoting neoliberal economics and the CW standard which has given rise to our current concentration epidemic. Just like how the Chicago School and Establishment Antitrust uprooted the normative values of competition policy that preceded them, we can simply reconceptualize who should and who should not be allowed to engage in economic coordination. In other words, we can discredit the failings of the Chicago School and the prevailing Establishment Antitrust and replace them with the values and goals of a “New Antitrust.”

In the realm of public health and food insecurity, this means the FTC should exercise its enforcement discretion where small (often local) cooperatives join together to better compete with large chains and to provide higher quality, healthy food at lower prices. Consider United States v. Topco Associates, where grocery stores entered into a joint venture to promote private brand products under a common brand name. The goal of the association was lower prices for their consumers and better competitive prospects with national chains, yet the federal government successfully pursued and condemned this venture under § 1 of the Sherman Act. This is the type of economic coordination that, in the face of massive industry consolidation, the FTC should not pursue in the food industry. Instead, it should pursue the serial acquisitions that make the type of cooperation seen in Topco necessary in the first place.

To promote a competitive food industry that ultimately lowers prices and provides healthier foods, we must demystify the idea that inter-firm coordination is per se bad (from an economic and moral perspective) but becomes acceptable when under the monolithic roof of one company. Promoting public health through competition requires such a pluralistic lens, recognizing the public health benefits of such cooperation and the detriment of concentration. Both are crucial factors to consider. This type of socially conscious antitrust enforcement is truer to the original goals of the antitrust laws as it promotes competition (not a small subset of outcomes), small business, and democracy. Further, the goals of public health are more faithfully advanced as this structural solution ostensibly prevents new incidences of food insecurity, rather than treating the symptoms of market failures that cause food insecurity.

142 Id. at 382.
143 The “New Antitrust” is a moniker for the movement of antitrust reformation scholars like Sanjukta Paul, Tim Wu, Frank Pasquale, and Lina Khan. Key to the effectiveness of the approach of New Antitrust scholars is their reliance on methodological pluralism. This informs their two-pronged approach to antitrust enforcement: “a neo-Brandeisian emphasis on breaking up large firms or preventing mergers . . . and a regulatory emphasis on limiting the power of large firms generally.” See Pasquale & Cederblom, supra note 78, at 2.
145 Topco Assoc., 405 U.S. at 608.
CONCLUSION

Food insecurity is an enduring public health issue in the United States. Extant solutions are vital but inadequate when viewed through a true public health lens; they remedy the symptom of the issue, not the structural causes themselves. Public health problems like food insecurity are impacted by a multitude of factors, such as often-ignored machinations of the “free market” and the enforcement of antitrust laws. But poorly interpreted and enforced competition laws have allowed corporate consolidation to fester, increasing the price of food and exacerbating the impact of food insecurity on the most vulnerable parts of our communities. Structural problems require structural solutions. It is incumbent that federal antitrust agencies utilize social values like public health repercussions to guide their enforcement decisions, as their actions have appreciable consequences on public health. This requires greater merger enforcement scrutiny in concentrated food industries and tailored enforcement discretion for historically taboo economic coordination that may promote public health by providing healthier food at a lower cost. This more accurately upholds the original goals of the antitrust laws as well (including the promotion of small business and democracy). Antitrust enforcement is not a panacea for public health problems, but it can be leveraged as an alternative remedy for a myriad of societal issues. Doing so would be a major step forward for both antitrust and public health principles.