

## Antitrust Gaps, Income Inequality, and Principled Reforms: A Response to Professor Elhauge

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### I. INTRODUCTION

These are extraordinary times for antitrust law and enforcement policy. One would not be mistaken in thinking that antitrust is having more of a “moment” than at another time in recent decades. Government antitrust investigations of, and lawsuits against, Google, Facebook, Amazon, and Apple in the United States and Europe are proliferating. A major private antitrust lawsuit against Apple was recently tried and decided in federal court in California. And Congress is investigating and considering legislation to reform the scope and application of the antitrust laws, particularly as they govern major technology companies.

More broadly, we see in many quarters a growing complaint that America’s current approach to antitrust law, policy, and enforcement is too narrow. Critics say the prevailing approach fails to account for market structures and business conduct that may cause significant increases in concentration: excessive corporate control and power; harm to small businesses and labor; worsened income inequality; and damage to social engagement, democracy, and society in general. Numerous advocates have called for more expansive interpretation and application of current antitrust laws and for reform of those laws to ensure they more fully address what the critics perceive to be major gaps and unaddressed harms.

In the midst of this extraordinary moment, Professor Einer Elhauge has published *The Causal Mechanisms of Horizontal Shareholding*,<sup>1</sup> the latest

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<sup>1</sup> Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 OHIO ST. L.J. 1 (2021) [hereinafter Elhauge, *Causal Mechanisms*].

installment in a remarkable six-plus year body of work in which he has demonstrated the existence of the practice of horizontal shareholding, developed evidence and proof of its anticompetitive effects, and proposed appropriate antitrust interventions. Elhaug's project involves a discrete set of activities—horizontal shareholding—that he defines as a market condition where “the leading shareholders [often large institutional investors] of different corporations overlap.”<sup>2</sup> *Causal Mechanisms* is a careful and detailed rebuttal of recent critiques of his work. But the article—and his horizontal shareholding project in general—also provide important lessons and cautions for the broader debate over whether current antitrust law is falling short and how it might be reformed to fill perceived gaps.

## II. ANTITRUST'S EXTRAORDINARY MOMENT

The pace and scope of antitrust investigations and cases, and the breadth of the debate among academics, policy makers, and the public about the state of antitrust and the degree to which it needs reform, is remarkable. Among many other developments: In the first half of 2021 alone, the U.S. Justice Department's Antitrust Division filed a major antitrust lawsuit against Google,<sup>3</sup> the Federal Trade Commission sued Facebook,<sup>4</sup> and numerous state attorneys general have joined these federal lawsuits and/or filed their own.<sup>5</sup> Meanwhile, in Europe, the European Commission competition authorities have brought

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<sup>2</sup> *Id.* at 2.

<sup>3</sup> See Press Release, U.S. Dep't of Justice, Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> [https://perma.cc/6NEY-T8QB].

<sup>4</sup> Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> [https://perma.cc/BC98-X4FM]; Press Release, Fed. Trade Comm'n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), <https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush> [https://perma.cc/6GHD-9BK9].

<sup>5</sup> See, e.g., Press Release, N.Y. Att'y Gen., Attorney General James Leads Multistate Lawsuit Seeking to End Facebook's Illegal Monopoly (Dec. 9, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-leads-multistate-lawsuit-seeking-end-facebooks-illegal> [https://perma.cc/TAV4-ZYYV]; Lauren Fiener, *Google Hit with Its Third Antitrust Lawsuit Since October, this Time by a Bipartisan Coalition of States*, CNBC (Dec. 17, 2020), <https://www.cnbc.com/2020/12/17/google-faces-a-third-government-antitrust-lawsuit.html> [https://perma.cc/5PPC-X9T3]; Press Release, Att'y Gen. for D.C., AG Racine Files Antitrust Lawsuit Against Amazon to End Its Illegal Control of Prices Across Online Retail Market (May 25, 2021), <https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon> [https://perma.cc/6JFR-WNRR].

charges against Apple related to its app store<sup>6</sup> and three separate charges against Google over the last four years,<sup>7</sup> and are currently investigating Google<sup>8</sup> and Facebook.<sup>9</sup>

Advocates of aggressive antitrust enforcement and fundamental reforms reign supreme at the U.S. enforcement agencies. Lina Khan, a leading critic and reform advocate, is the new chairperson of the FTC.<sup>10</sup> Jonathan Kanter, a fervent proponent for reining in major technology companies (often referred to as “Big Tech”), has been nominated to head the DOJ’s Antitrust Division.<sup>11</sup> And Tim Wu, also an outspoken advocate for a return to a more progressive vision of antitrust enforcement, is President Biden’s special assistant for technology and competition policy on the National Economic Council.<sup>12</sup>

Congress too has been very active, conducting a variety of investigations and hearings focused primarily on concerns about the power of Big Tech<sup>13</sup> and

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<sup>6</sup> Adam Satariano, *Apple’s App Store Draws E.U. Antitrust Charge*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/technology/apple-antitrust-eu-app-store.html> [<https://perma.cc/Z8T5-K844>].

<sup>7</sup> *Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising*, EUR. COMM’N (Mar. 20, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1770](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770) [<https://perma.cc/XN89-BK6S>].

<sup>8</sup> *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector*, EUR. COMM’N (June 22, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3143](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143) [<https://perma.cc/7BTA-KMZZ>].

<sup>9</sup> *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct of Facebook*, EUR. COMM’N (June 4, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_2848](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848) [<https://perma.cc/MSX5-XG7D>].

<sup>10</sup> See Shannon Bond, *New FTC Chair Lina Khan Wants to Redefine Monopoly Power for the Age of Big Tech*, NPR (July 1, 2021), <https://www.npr.org/2021/07/01/1011907383/new-ftc-chair-lina-khan-wants-to-redefine-monopoly-power-for-the-age-of-big-tech> [<https://perma.cc/A4GK-2XUD>].

<sup>11</sup> See Ryan Tracy & Aruna Viswanatha, *Biden to Nominate Jonathan Kanter as Chief of Justice Department’s Antitrust Division*, WALL ST. J. (July 20, 2021), <https://www.wsj.com/articles/jonathan-kanter-to-be-nominated-as-doj-antitrust-chief-white-house-says-11626805273> [<https://perma.cc/YJ6N-SRPB>].

<sup>12</sup> See Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, WASH. POST (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html> [<https://perma.cc/QQY8-87NN>]. Among Wu’s many antitrust writings is the 2018 book *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE*, which warns of the dangers of increasing corporate and industrial concentration and their risks for economic and political liberty. See generally TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

<sup>13</sup> See Tony Romm, *Amazon, Apple, Facebook and Google Grilled on Capitol Hill over Their Market Power*, WASH. POST (July 29, 2020), <https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/> [<https://perma.cc/UN6H-JDQ6>].

issuing an extensive House report on competition in digital markets.<sup>14</sup> Currently at least six bipartisan bills are pending in Congress that would in various ways strengthen antitrust enforcement, primarily against the major technology companies.<sup>15</sup>

Khan has led much of the recent charge for reexamining what the proper purpose and scope of antitrust enforcement should be, starting with her 2017 note in the *Yale Law Review*, *Amazon's Antitrust Paradox*.<sup>16</sup> There, she argues that modern antitrust has lost its way by abandoning Congress's original intent to "safeguard against excessive concentrations of economic power" as a means of promoting "a variety of aims, including the preservation of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control."<sup>17</sup> To Khan, current antitrust wrongly limits its focus to a "narrow set of outcomes" and measures of consumer welfare rather than the "neutrality of the competitive process and the openness of market structures"<sup>18</sup> and *process*, alternatives that "will offer better insight into the state of competition than do measures of welfare."<sup>19</sup>

Khan's follow-up 2018 article, *The Ideological Roots of America's Market Power Problem*, focuses even more directly on the "variety of aims" toward which she and many other reformers' believe antitrust should be directed:

Mounting research shows that America has a market power problem. In sectors ranging from airlines and poultry to eyeglasses and semiconductors, just a handful of companies dominate. The decline in competition is so consistent across markets that excessive concentration and undue market power now look to be not an isolated issue but rather a systemic feature of America's political economy. This is troubling because monopolies and oligopolies produce a host of harms. They depress wages and salaries, raise consumer costs, block entrepreneurship, stunt investment, retard innovation, and render supply chains and complex systems highly fragile. Dominant firms' economic power allows them, in turn, to concentrate political power, which they then use to win favorable policies and further entrench their dominance.<sup>20</sup>

If Khan was an early crusader, she is now one of a multitude clamoring for reform, leading a movement that is sometimes characterized as "neo-Brandeisian antitrust," a reference to then-lawyer Louis Brandeis's warnings

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<sup>14</sup> See generally H. COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519) [<https://perma.cc/D333-MAPA>].

<sup>15</sup> Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/> [<https://perma.cc/X7RD-7Z6H>].

<sup>16</sup> Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017) [hereinafter Khan, *Amazon's Antitrust Paradox*].

<sup>17</sup> *Id.* at 743 (citation omitted).

<sup>18</sup> *Id.* at 717, 744 (emphasis added).

<sup>19</sup> *Id.* at 745.

<sup>20</sup> Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 960–61 (2018) [hereinafter Khan, *Ideological Roots*] (citations omitted).

about the harms that can occur when corporations become too large and powerful.<sup>21</sup> In Congress, calls for antitrust updates are coming fast and furious from across the political spectrum. For example, on the left, Senator Elizabeth Warren has regularly inveighed against corporate consolidation and power.<sup>22</sup> Senator Amy Klobucher has written an entire book with an appropriately provocative title – *Antitrust: Taking on Monopoly Power From the Gilded Age to the Digital Age* – in which she calls for fundamental antitrust reform; seeks to tie the Chicago-School and subsequent narrowing of antitrust enforcement to increased industrial consolidation and concentration; and asserts that reduced antitrust scrutiny has corresponded to higher income and wealth inequality, a decline in investment and innovation, slow wage growth, and a stagnant middle class.<sup>23</sup>

Conservative politicians are jumping on the antitrust bandwagon as well (at least as long as that wagon is rolling toward Big Tech). Missouri Senator Josh Hawley recently opined that, “[w]e need a new era of trustbusting, an agenda to break up Big Tech and the other concentrations of woke capital that threaten to turn the U.S. into a corporate oligarchy.”<sup>24</sup> His complaints sound surprisingly like those of Warren and Klobucher: “We are living in an age of monopoly power. Since the 1990s, two-thirds of American industry has become more concentrated.”<sup>25</sup> He argues that “[b]ig-business consolidation strips Americans of economic opportunity, . . . small and new businesses struggle,” concentration leads to “a smaller share of gross domestic product for labor” and flat wages for workers, along with reduced business investment and “less spending on innovation and less productivity growth.”<sup>26</sup>

For its part, the White House recently issued an executive order on “Promoting Competition in the American Economy,” which begins with the premise that “excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small

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<sup>21</sup> See, e.g., Greg Ip, *Antitrust’s New Mission: Preserving Democracy, Not Efficiency*, WALL ST. J. (July 7, 2021), <https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424> [<https://perma.cc/2L9B-BU8P>]; Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

<sup>22</sup> See, e.g., Elizabeth Warren, U.S. Senator, Keynote Remarks at New America’s Open Markets Program Event, Reigniting Competition in the American Economy (June 29, 2016), [https://www.warren.senate.gov/files/documents/2016-6-29\\_Warren\\_Antitrust\\_Speech.pdf](https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf) [<https://perma.cc/5VR3-QY5Y>] (“[T]oday, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.”).

<sup>23</sup> See generally AMY KLOBUCHER, *ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE* (2021).

<sup>24</sup> Josh Hawley, *The Big Tech Oligarchy Calls Out for Trustbusters*, WALL ST. J. (Apr. 30, 2021), <https://www.wsj.com/articles/the-big-tech-oligarchy-calls-out-for-trustbusters-11619816008> [<https://perma.cc/56B4-4QQK>].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

businesses, startups, and consumers,” and finds that “decades of industry consolidation have often led to excessive market concentration.”<sup>27</sup>

These widespread calls for “a new era of trustbusting” that harken back to more progressive eras are fundamentally different than anything we have seen in many years. They are grounded in a variety of divergent and often conflicting motivations: some political, some economic, some populist. But the concerns they raise share a belief that current antitrust law and enforcement policy, as it has evolved over the last 40 years, has become too narrow and now fails to recognize and address the significant harms of greater concentrations of corporate wealth and power on a wide variety of important societal interests that reach far beyond prices and consumer welfare. As Khan diagnoses “[t]he sweeping market power problem,” one of her conclusions is that “the core of antitrust has been warped”<sup>28</sup> and we must “go to the heart of why the current regime is crippled, enabling us to tackle the underlying theories and assumptions that have defanged antitrust.”<sup>29</sup>

Of course, this neo-Brandeisian view that antitrust has lost its way and is “crippled” is highly contested and faces strong criticism,<sup>30</sup> with some deriding it as “hipster antitrust.”<sup>31</sup> Core elements of this disagreement over the proper scope of antitrust were captured succinctly at the 2019 University of Chicago symposium, “Reassessing the Chicago School of Antitrust Law.” Proponents of reform asserted that “the sad reality . . . is that competition, under the consumer welfare standard, has diminished significantly in many markets. The consumer welfare standard, it turns out, benefited neither consumers nor their welfare.”<sup>32</sup> These skeptics instead seek to return antitrust law to “its initial aim of dispersing private economic power” and, like Khan, believe it should “consider factors beyond consumer welfare, including the interests of downstream purchasers, labor, and producers.”<sup>33</sup>

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<sup>27</sup> *Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> [<https://perma.cc/8EF4-59L9>].

<sup>28</sup> Khan, *Ideological Roots*, *supra* note 20.

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65 (2019); Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2019).

<sup>31</sup> See, e.g., Andrea O'Sullivan, “What Is ‘Hipster Antitrust?’,” MERCATUS CTR. AT GEORGE MASON UNIV. (Oct. 18, 2018), <https://www.mercatus.org/bridge/commentary/what-hipster-antitrust> [<https://perma.cc/Q628-EJWZ>].

<sup>32</sup> See Ianni Drivas, *Reassessing the Chicago School of Antitrust Law*, UNIV OF CHI. L. SCH. (June 4, 2019), <https://www.law.uchicago.edu/news/reassessing-chicago-school-antitrust-law> [<https://perma.cc/G9BM-2GRB>] (quoting remarks by Professor Maurice Stucke and Professor Marshall Steinbaum).

<sup>33</sup> *Id.*

Defenders of current antitrust theory respond that the consumer welfare standard represents not a Chicago-School hobbling but “a logical continuation of consumer-focused analysis developed during preceding decades.”<sup>34</sup> They point out that “arguments that antitrust should weigh interests other than those of consumers have been floated in the past and have failed because ‘alternatives are not workable . . . they have no coherent means of resolving competing policy objectives.’”<sup>35</sup> And defenders characterize the call to replace the consumer welfare standard as a “misguided throwback to the incoherent antitrust regime of the mid-twentieth century” and caution against “allowing economic populism to turn the focus of the antitrust regime away from economic efficiency.”<sup>36</sup>

It is with this ongoing, vigorous debate in mind that I read Professor Elhauge’s *Causal Mechanisms* article. On the surface, the article and his work on horizontal shareholding appear to tackle one discrete issue and have little to do with broad calls to reject the consumer welfare standard or return antitrust to “dispersing private economic power” or other populist aims. But in fact, Elhauge’s project has recognized these broader concerns and has a great deal to teach us about the right way to approach and analyze ongoing disagreements over the proper future of antitrust.

### III. PROFESSOR ELHAUGE’S HORIZONTAL SHAREHOLDING PROJECT

Professor Elhauge has pioneered the field of horizontal shareholding. Since his first article on the subject, *Horizontal Shareholding*, a 2016 essay in the *Harvard Law Review*,<sup>37</sup> he has steadily refined and defended his analysis in a series of papers that closely examined, squarely engaged with, and, in my view, usually bested a slew of critics and naysayers.<sup>38</sup> *Causal Mechanisms* is his latest.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (quoting remarks by former FTC Chairman, Professor Timothy Muris and former FTC general counsel, now antitrust attorney, Jonathan Nuechterlein).

<sup>36</sup> *Id.*

<sup>37</sup> Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1267 (2016) [hereinafter Elhauge, *Horizontal Shareholding*]. Prior drafts of the article were posted as early as July 2015. Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. (published 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2632024](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632024).

<sup>38</sup> A few of his other articles on this topic include Einer Elhauge, *The Growing Problem of Horizontal Shareholding*, COMPETITION POL’Y INT’L CONCURRENCES (June 2017), [http://awa2018.concurrences.com/IMG/pdf/ssrn-id2988281\\_1\\_.pdf](http://awa2018.concurrences.com/IMG/pdf/ssrn-id2988281_1_.pdf) [<https://perma.cc/PEV4-V2M8>] [Elhauge, *The Growing Problem*]; Einer Elhauge, *New Evidence, Proofs, and Legal Theories on Horizontal Shareholding*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Feb. 14, 2018), <https://corpgov.law.harvard.edu/2018/02/14/new-evidence-proofs-and-legal-theories-on-horizontal-shareholding/> [<https://perma.cc/7ZZV-A2Y2>]; Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 207 (2020) (in part, further analyzing legal theories that could be used to address common ownership).

Elhauge's project built on a pair of earlier papers that empirically studied the phenomenon of common horizontal shareholding and found that it resulted in anticompetitive effects in two specific contexts: higher average prices for airline tickets<sup>39</sup> and increased fees charged and lower deposit rates paid by banks.<sup>40</sup> Elhauge took these research results and their largely descriptive analyses and did several things: He validated their empirical conclusions, established the prevalence and operation of horizontal shareholding more generally, articulated and sought to prove a theoretical basis for why overlapping shareholders in firms that are horizontal competitors will lead to lessened competition and higher prices, and developed a set of legal theories for how existing antitrust law, particularly Section 1 of the Sherman Act and Section 7 of the Clayton Act, could be used to combat them.<sup>41</sup>

Elhauge's work launched an extensive field of research into and theorizing about horizontal shareholding and a robust ongoing scholarly conversation around it. His articles have stimulated a host of empirical studies that confirm his core premise that overlapping shareholders leads to a lessening of competition, as well as a large number of articles criticizing or seeking to rebut his conclusions about horizontal shareholding's purported effects on company behavior and competition. The debate spawned by Elhauge's work has, to one commentator, become "one of the most contentious issues in corporate law today."<sup>42</sup>

#### IV. THE CAUSAL MECHANISMS OF HORIZONTAL SHAREHOLDING

Professor Elhauge's new article largely responds to and rebuts several specific critiques of his work. Its most significant contribution to the debate is, as its title indicates, to counter claims that horizontal shareholding does not and/or could not cause corporate managers to alter their behavior so as to act in less competitive ways. The article also tackles criticisms that the law should "not act on the empirical findings that horizontal shareholdings have anticompetitive effects . . . until we have stronger proof on the causal mechanisms by which common shareholders influence corporate behavior."<sup>43</sup>

Elhauge begins with an updated demonstration of the degree to which the empirical research and theory literature increasingly support his position,

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<sup>39</sup> José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. FIN. 1513, 1513–14 (2018); see also Elhauge, *Horizontal Shareholding*, *supra* note 37, at 1267.

<sup>40</sup> José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition 1* (May 4, 2019) (unpublished manuscript), <http://ssrn.com/abstract=2710252>; see Elhauge, *Horizontal Shareholding*, *supra* note 37, at 1267.

<sup>41</sup> Elhauge, *Horizontal Shareholding*, *supra* note 37, at 1271–72.

<sup>42</sup> Jennifer G. Hill, *The Conundrum of Common Ownership*, 53 VAND. J. TRANSNAT'L L. 881, 882 (2020).

<sup>43</sup> Elhauge, *Causal Mechanisms*, *supra* note 1, at 4 & n.5 (citing a number of recent articles raising this criticism).

confirm the “economic reality that common shareholding alters corporate behavior,” and establish that “horizontal ownership often has anticompetitive effects in concentrated markets.”<sup>44</sup> He details evidence of the prevalence of common horizontal shareholding, a necessary predicate for assessing the significance of various “causal mechanisms” by which horizontal shareholding leads managers to act in less competitive ways. Elhauge clarifies that the “extremely high levels of common shareholding across the economy”<sup>45</sup> by institutional investors include not just the “Big Three” index fund families (BlackRock, Vanguard, and State Street), on which most attention has been focused, but in fact “all institutional investors, including active funds.”<sup>46</sup>

With that foundation in place, the bulk of Elhauge’s argument is a thorough response to two strands of objections regarding the “precise mechanisms by which large horizontal shareholdings and votes are likely to influence corporate management” and therefore lead to lessened competition and anticompetitive outcomes.<sup>47</sup> On the first strand, Elhauge focuses largely on addressing criticisms of potential mechanisms by Hemphill and Kahan,<sup>48</sup> which Elhauge accurately characterizes as “the most thoughtful critique of the causal mechanisms by which horizontal shareholding might cause anticompetitive effects.”<sup>49</sup> He demonstrates at length that the currently available evidence “more than suffices” to show that corporate managers will be “influenced by the interests of horizontal shareholders in lessened market competition.”<sup>50</sup> In the end, I believe Elhauge has the better of this argument.

Elhauge also responds to the second strand, a set of specific claims by Bebchuk, Cohen, and Hirst<sup>51</sup> that any causal mechanisms are implausible because horizontal shareholders, especially index funds, have both “negative incentives that oppose the creation of anticompetitive effects” as well as “insufficient positive incentives” to create anticompetitive effects.<sup>52</sup> Again, Elhauge engages closely and in detail with these criticisms. He notes that Bebchuk and Hirst have backed away from some of their initial claims and now concede some of his points about incentives and influence.<sup>53</sup> And Elhauge again

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<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.* at 7–8 (detailing the high percentage of shares in publicly-traded companies held by institutional investors and the percentage of votes cast by (and thus high level of influence of) institutional investors at publicly-held firms); *see also id.* at 61–72.

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *See generally* C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 *YALE L.J.* 1392 (2020).

<sup>49</sup> Elhauge, *Causal Mechanisms*, *supra* note 1, at 33–34.

<sup>50</sup> *Id.* at 23.

<sup>51</sup> *See generally* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 *J. ECON. PERSP.* 89 (2017); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 *COLUM. L. REV.* 2029 (2019) [hereinafter Bebchuk & Hirst, *Index Funds*].

<sup>52</sup> Elhauge, *Causal Mechanisms*, *supra* note 1, at 46; *see also id.* at 46–72.

<sup>53</sup> *Id.* at 67–68 (citing Bebchuk & Hirst, *Index Funds*, *supra* note 51, at 2116–33).

refocuses the debate on the empirical evidence of the influence of horizontal shareholding on corporate behavior, reasoning that Bebchuk, Cohen, and Hirst's "theoretical argument" that index funds lack sufficient incentives to influence corporations is inconsistent with available empirical evidence, including on the actual effects that common shareholding have on reducing competition.<sup>54</sup> Elhauge concludes that, "at some point, theoretical claims that it is implausible that common shareholding could affect corporate behavior must give way to the dozens of empirical studies showing that it does just that."<sup>55</sup>

Where Elhauge is most effective is in methodically and systematically examining and countering, point by point, each of his critics' specific claims that the causal mechanisms necessary for horizontal shareholding to lead to anticompetitive outcomes are impossible, implausible, or unproven. One of the core strengths of this article is how well Elhauge succeeds, in my view, in building precise, concrete rebuttals to each claim. But whether one ultimately agrees with his rejoinders, there is no question that they effectively narrow the points of disagreement and sharpen the remaining issues for the next round of responses from his critics. The rich debate he spurred is now even clearer and more productive.

#### V. HORIZONTAL SHAREHOLDING IN ANTITRUST'S CURRENT MOMENT

But how is Elhauge's work helpful to the broader controversy about the correct ways to analyze the impacts of certain novel market structures or conduct and the ways antitrust law might be reformed to better address those impacts? I find Elhauge's project in general and certain of the arguments in *Causal Mechanisms* in particular to be highly instructive for antitrust reformers and their critics alike, offering important insights and cautions in at least three areas.

First, Elhauge's horizontal shareholding project is an excellent example of identifying a previously unrecognized gap in antitrust enforcement and articulating how that gap can cause broad harms well beyond the current focus of most antitrust policy. Elhauge began *Horizontal Shareholding* by proclaiming that "an economic blockbuster has recently been exposed. A small group of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other."<sup>56</sup> Others called it "[t]he great, but mostly unknown, antitrust story of our time."<sup>57</sup>

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<sup>54</sup> Elhauge, *Causal Mechanisms*, *supra* note 1, at 68.

<sup>55</sup> *Id.* at 72.

<sup>56</sup> Elhauge, *Horizontal Shareholding*, *supra* note 37, at 1267 (referring to Azar, Schmalz & Tecu, *supra* note 39).

<sup>57</sup> Eric Posner, Fiona Scott Morton & Glen Weyl, *A Monopoly Donald Trump Can Pop*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/opinion/a-monopoly-donald-trump-can-pop.html> [https://perma.cc/NGD6-KZU8].

He then explained that the resulting harm extends far beyond traditional price and consumer welfare effects and that addressing the practice would produce widespread benefits:

Horizontal shareholdings also help explain why, in the recovery from the recent Great Recession, firms that made record-high profits because of enormous fiscal and monetary stimuli have proven so reluctant to invest those high profits on increasing output and employment. Finally, *the rise of horizontal shareholdings in recent decades helps explain why, as Professor Thomas Piketty has famously observed, income inequality has risen in those recent decades.* Antitrust enforcement against horizontal shareholdings in concentrated markets thus offers the promise of improving management compensation, increasing economic growth and employment, and reducing income inequality.<sup>58</sup>

Elhaug's admonitions that reduced competition can have broad economic and social impacts, including increased income inequality, sound much like the claims being advanced today by Khan and others. So does Elhaug's prescription that antitrust intervention can help remedy these sorts of systemic problems. But what Elhaug also brings to his analysis is rigor, clarity, specificity, sound theoretical grounding, direct rebuttal of pointed critiques, and attention to balancing competing interests. He does not rest his arguments on unproven or unsubstantiated claims of anticompetitive effect, nor on vague or poorly developed assertions of causation.

Second, *Causal Mechanisms* is instructive in how we should think about expanded antitrust scrutiny in the face of uncertainty about whether and how anticompetitive effects occur. Elhaug notes that critics of his horizontal shareholding work contend that "enforcement should focus on causal mechanisms, rather than on anticompetitive market structures"<sup>59</sup> and that we should "delay antitrust enforcement against anticompetitive horizontal shareholding until we have clearer proof on causal mechanisms."<sup>60</sup> He also addresses critics' claims that only "direct evidence" of horizontal shareholders' successful "influence [on] corporate managers to act anticompetitively through one of these mechanisms" discussed in the paper should be sufficient to conclude that horizontal shareholding reduces competition.<sup>61</sup>

Similar criticisms about uncertain causal mechanisms and a lack of direct proof of effects are often raised in objections to neo-Brandeisian reform proposals. But Elhaug's approach in *Causal Mechanisms* demonstrates what to me is the appropriate way to analyze such arguments, whatever the context in which they are raised. On critics' claims that antitrust enforcement against

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<sup>58</sup> Elhaug, *Horizontal Shareholding*, *supra* note 37, at 1272 (emphasis added). A year later, Elhaug reported that the evidence that "anticompetitive effects of unchecked horizontal shareholding could also help explain some macroeconomic phenomena . . . has only become stronger," including the evidence "connecting horizontal shareholding to economic inequality." Elhaug, *The Growing Problem*, *supra* note 38, at 9–10.

<sup>59</sup> Elhaug, *Causal Mechanisms*, *supra* note 1, at 5.

<sup>60</sup> *Id.* at 75.

<sup>61</sup> *Id.* at 23.

horizontal shareholding should first require “clearer proof on causal mechanisms,” Elhaug begins by reminding us that there is currently “ample proof” of such mechanisms. More fundamentally, though, he argues that “the empirical evidence on anticompetitive effects justifies enforcement without requiring definitive proof” of those specific mechanisms.<sup>62</sup> Elhaug analogizes to how antitrust law treats mergers:

[D]efinitive proof on causal mechanisms is not necessary to make enforcement proper or desirable. The Clayton Act bans mergers and stock acquisitions that are likely to have anticompetitive effects regardless of whether the mechanism for those effects is known. It suffices that we know that the relevant market structure is likely to lead to anticompetitive effects, regardless of whether we can be sure about the causal mechanism by which that structure is likely to produce those effects. Nor is proof of causal mechanisms necessary to make enforcement desirable as a matter of policy.<sup>63</sup>

He also rejects critics’ insistence on direct evidence of anticompetitive influence by institutional investors on managers, characterizing it as “not a practical solution, but rather a recipe for blocking any realistic effort to deal with the anticompetitive problems raised by horizontal shareholding.”<sup>64</sup> This point applies equally to many criticisms of antitrust reform efforts. And the analogy to merger analysis is again on point: “Antitrust law blocks horizontal mergers that are likely to lead to oligopoly or unilateral effects without requiring any direct evidence that corporate managers admit a merger would likely make them change their pricing behavior;” instead the analysis looks to whether the merger “creates incentives to change their pricing behavior.”<sup>65</sup>

Current antitrust reformers likewise argue that assessing the impact of other types of corporate structures and conduct should “focus on the incentives created by market structure, rather than on direct evidence that shareholders or managers acted based on such incentives.”<sup>66</sup> The correct bottom line in both contexts is that “the problem lies in the structural incentives created . . . in concentrated markets, just as the problem with anticompetitive mergers and cross-shareholdings lies in the structural incentives they create.”<sup>67</sup> Elhaug’s approach to these points resembles that suggested in the broader context by Khan and others (e.g., Khan’s emphasis on the “competitive process and the openness of market structures”),<sup>68</sup> but again Elhaug brings a degree of specificity and precision of theory and solid empirical grounding that are sometimes missing or less well-developed in many of the reformist critiques.

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<sup>62</sup> *Id.* at 75.

<sup>63</sup> *Id.* at 25.

<sup>64</sup> *Id.* at 24.

<sup>65</sup> Elhaug, *Causal Mechanisms*, *supra* note 1, at 24.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 31. Elhaug also offers insights that are valuable for thinking about effective remedies for anticompetitive conduct in the broader context, concluding that where the problem is “structural incentives,” the only effective remedy is preventing or undoing that anticompetitive structure. *Id.*

<sup>68</sup> See, e.g., Khan, *Amazon’s Antitrust Paradox*, *supra* note 16, at 744.

Third, Elhauge's article is instructive in the way it rebuts "a driving force" behind the arguments of some of his critics, the fear that antitrust enforcement for horizontal shareholding "will discourage desirable institutional investor influence on corporate conduct and greatly restrict diversification"<sup>69</sup>—in other words, the remedy will be more harmful than any potential competitive impact of the practice. Elhauge evaluates the competing interests and shows that limits on horizontal shareholding would in fact have opposite, positive impacts, increasing "desirable institutional investor influence on the efficiency of corporate conduct" while not necessarily reducing diversification.<sup>70</sup>

The import of this rebuttal is again broader than just to horizontal shareholding; it reminds us that proper consideration of the potential for unintended, negative consequences should be a necessary part of any new theory of potential anticompetitive harm and any call for more aggressive antitrust intervention. One of the most positive aspects of the evolution of antitrust over the last several decades is careful analysis of antitrust interventions to ensure that they do not harm legitimate, procompetitive conduct or needlessly reduce valuable economic efficiency in ways that outweigh their benefits. Not surprisingly, many of the most powerful criticisms of the neo-Brandeisian proposals are that those proposals are imprecise, ill-defined, not economically grounded, and lack rigorous analysis of their positive and negative impacts, and thus risk unintended consequences such as higher prices for consumers, reduced efficiency for businesses, reduced innovation, etc.<sup>71</sup> While it can be easy to dismiss "economic efficiency" as the primary goal of antitrust and instead urge loftier goals like "dispersing private economic power," it is much harder to demonstrate in a rigorous way that antitrust interventions to achieve those loftier goals will do more good than harm.

*Causal Mechanisms* reminds us of the need to diagnose potential anticompetitive practices and structures clearly and accurately, based on well-developed empirical evidence and rigorous theory, and then develop interventions and remedies that directly address those problems, that are precise and tightly focused, that are not likely to have harmful unintended effects, and that are administrable. Elhauge has done this for a new anticompetitive problem—horizontal shareholding—without abandoning rigorous economic analysis or resorting to new and untested antitrust theories or statutes. His steady, methodical work over the last six years has made a solid and economically grounded case, using proven modes of analysis and measures of anticompetitive outcomes, that horizontal shareholding lessens competition and causes serious harm. As a result, Elhauge's work largely avoids the risks that neo-Brandeisian reform proposals are often accused of courting: creating vague and unadministrable standards, stifling efficient and innovative conduct and corporate structures without sufficient proof of anticompetitive consequences,

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<sup>69</sup> Elhauge, *Causal Mechanisms*, *supra* note 1, at 75.

<sup>70</sup> *Id.* at 75.

<sup>71</sup> See generally Hovenkamp, *supra* note 30.

and creating interventions that do more harm than good. The current reform movement would be well-advised to embrace these lessons from Elhauge's rigorous approach.

## VI. CONCLUSION

Professor Elhauge's *Causal Mechanisms* article is almost certainly not his last word on the accuracy and legitimacy of his diagnosis of the competitive problems with horizontal shareholding or of his policy prescriptions. But it is a critical step in the debate, moving it an important step forward to a new level and clearing out objections and critiques that are empirically disproven or logically implausible. This ongoing robust conversation that Elhauge's writings have generated is itself an extremely valuable contribution. More importantly, Professor Elhauge's horizontal shareholding work provides important lessons that should guide antitrust reform advocates toward more concrete, rigorous, economically sound, and principled proposals for improving antitrust's scope and its benefits to society.