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Introduction: Improvements, Complements, and Alternatives to Quantitative Analysis in Competition Law and Industrial Regulation

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The fundamental legal, normative, and politico-economic assumptions underpinning both competition law and administrative governance are in a period of considerable flux (Harris and Varellas 2020, 3; Britton-Purdy et al. 2020, 1801-02; Khan 2019; Rahman 2018). Past calls for a renewed economic analysis of law are striking a chord with present scholars.[1] In this issue of the *Journal of Law and Political Economy*, we commence a specially edited series of articles focused on the value, shortcomings, and potential improvement of quantitative analysis in competition law and regulatory decision-making. This multi-year project aims to provide guidance and insight to advocates, judges, and regulators on the proper nature and scope of quantitative methods in several important areas of law and policy.

While the precise future path of competition law and regulation is unclear, we do not anticipate a return to the status quo consensus of the post-Reagan and pre-Trump interregnum.[2] We believe that close consideration of the current and future roles of quantitative analysis should inspire further development of the reinvigorated field of Anti-Monopoly and Regulated Industries (AMRI). Careful analysis of the scope and nature of quantitative evidence (in litigation) and utilitarian policy evaluation (in administration) is critical.

Quantitative methods have an uneasy place in administration. They promise to bring rigor and objectivity to policy evaluation; however, they have also accelerated predictable injustices, marginalization, and alienation (Pasquale 2023). The articles in this series will present critiques of problematic quantitative standards, particularly when those standards arbitrarily or unfairly set

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[1] For an example of such past calls for renewal, see McCluskey, Pasquale, and Taub (2016).

[2] For a summary of advances in methodology in US competition law discourse from roughly 2016 to 2023, see Pasquale and Cederblom (2023).

unrealistic burdens of justification for urgently needed reforms. They will also include proposals to improve quantitative analysis in American governance, regulation, and litigation, or to complement it with more qualitative, narrative approaches.[3]

A key aim of this work is improving our understanding of the benefits of robust antitrust enforcement, consumer and worker protection, and regulation generally. These benefits are often obscured in current quantitative approaches. For example, formal cost-benefit analysis (CBA) fails to include benefits of regulation that are impossible to monetize (Sinden 2015). As a result, scholars in the area have called for more capacious approaches to recognizing such benefits. A related movement in antitrust has encouraged policymakers and judges to look beyond narrowly defined "consumer welfare" (CW) estimates. Both CBA and CW offer utilitarian metrics for evaluating policy, and they can enhance rigor in their respective fields. But these and other neoliberal elements of the architecture of administrative governance and litigation also suffer from serious infirmities, including the failure to fully acknowledge the entire range of benefits arising out of regulation and the enforcement of competition, labor, and privacy law. They may also lead to discriminatory outcomes, leading scholars to emphasize the need for courts and policymakers to take into account the racial impacts of mergers and other potentially anti-competitive conduct (Hafiz 2023; Capers and Day 2023).

The Biden Administration recognized these problems, and it made serious efforts to address them. Biden appointed bold new leaders to better interpret and enforce antitrust and consumer protection laws. Lina Khan, Tim Wu, Jonathan Kanter, and many other political appointees revived some of the more robust understandings of antitrust law that preceded the Chicago School's consumer welfarist approach, while drawing on the latest scholarship to inform and refine their work. Since publishing an influential critique of Amazon in 2017 (Khan 2017), Khan has been a leading advocate for protecting consumers from unfair and deceptive business practices. Her FTC has sued many large technology firms for anti-competitive conduct. It has also vastly improved its privacy enforcement efforts, initiating long-overdue investigations into commercial surveillance in general and surveillance pricing in particular.

Biden's Office of Management and Budget (OMB) re-examined the methodology of cost-benefit analysis. It promoted some significant reforms, better articulating methods for assessing the benefits of regulations, including those for which quantification of benefits is impossible or difficult. It also elevated distributional concerns, including impacts on disadvantaged, vulnerable, or marginalized communities (Rahman 2023). It could have gone further, to be sure (Herrine 2023). But considering how rarely critical assumptions behind CBA are re-examined, there is much to applaud in the Biden OMB's approach here.

The increasing salience of critiques of CBA and Chicago School antitrust has created new opportunities and challenges for regulators and competition authorities. Once-sleepy fields of inquiry have become centers of attention for new political battles and intellectual inquiry. By refining quantitative analysis and recognizing its limits, these fields may evolve to become far more attentive to concerns about distribution, social justice, and power.

[3] For an example of legal theory promoting and justifying narrative evaluation as a complement to or replacement of quantitative evaluation in a field dominated by the latter, see Pasquale and Kiriakos (forthcoming 2025).

Admittedly, they may also congeal around new efforts to re-legitimize the CW and CBA approaches that have all too often failed to do justice to the concerns of consumers, workers, and communities. Prediction is difficult here, particularly as a new administration begins. Nevertheless, even if reformers face a hostile or indifferent executive branch, more accurate and inclusive forms of evidence and policy evaluation may develop. For example, both federal and state judges may demand more comprehensive accounts of the effects of business practices when deciding antitrust, employment, and consumer protection cases.

Legal systems in the US and around the world also often supplement public regulation with private enforcement. Such litigation can be especially important when new technologies or business strategies upend existing balances of power between companies, workers, consumers, and other stakeholders. To be sure, these strategies often seek to avoid existing mechanisms of legal accountability. Nonetheless, advocates may deploy refined and improved methods of calculating or narrating the magnitude of damages, bolstering the case for accountability (Dubal 2023). Methodological innovations in these areas can also advance efforts to protect consumers, workers, and the public. Similarly, AI and machine vision technologies present new opportunities for both public and private enforcement and governance, via monitoring and measurement of harms.

Admittedly, the apex of the US judicial branch, as well as many federal and state appellate courts, may well be hostile to the type of analysis this series explores. The Supreme Court's conservative super-majority has undermined claims of administrative authority based on expertise, by embracing unitary executive theories (which undermine agency independence) and doctrinal shifts that transfer to judges interpretive authority long thought to be vouchsafed to agencies. These decisions raise serious questions about whether present forms of quantitative analysis will be improved and complemented (ideally along the lines suggested in this series), entrenched despite all their present shortcomings, or abandoned (perhaps to be replaced with little more than crude executive decisionism and judicial legalism). Despite such uncertainty, we believe further scholarly inquiry in the area is well-merited—not only to inform federal and state policymakers in the US, but also to shape other jurisdictions' approaches.

The relationship between expertise, authority, and public responsibility will be a recurrent theme in the series. We begin the series in this issue with Greg Day's article, "Is the Problem with Antitrust Law or Antitrust Enforcement?" Day's work both critically and sympathetically examines calls for reform of the consumer welfare standard, demonstrating the promise and limits of quantitative metrics in competition law. Articles in the series will continue to be published over the course of several future issues. We will conclude the series with our reflections on the contributions of the authors and the directions for future academic inquiry and practical engagement their work inspires.

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