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Consumer Welfare & the Rule of Law:

The Case Against the New Populist Antitrust Movement

Antitrust and Consumer Protection

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[1] This article draws from other works by the authors, including Joshua D. Wright, Elyse Dorsey, Jan Rybnicek & Jonathan Klick, Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. STATE L.J. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking, COMPETITION POL'Y INT'L (Apr. 18, 2018), https://www.competitionpolicyinternational.com/hipster-antitrust-meets-public-choice-economics-the-consumer-welfare-standard-rule-of-law-and-rent-seeking/; and Henry G. Manne & Geoffrey A. Manne, Henry G. Manne: Testimony on the Proposed Industrial Reorganization Act of 1973 — What's Hip (in Antitrust) Today Should Stay Passé, ICLE Antitrust and Consumer Protection Research Program White Paper 2018-2, at 14-15, https://laweconcenter.org/wp-content/uploads/2018/05/hgm-testimony_on_indust_reorg_act_1974-2018-05-03.pdf.

Introduction

Populist antitrust notions suddenly are fashionable again. At their core is the view that antitrust law is responsible for a myriad of purported socio-political problems plaguing society today, including but not limited to rising income inequality, declining wages, and increasing economic and political concentration. Seizing on Americans' fears about changes to the modern US economy, proponents of populist antitrust policies assert the need to fundamentally reshape how we apply our nation's competition laws in order to implement a variety of prescriptions necessary to remedy these perceived social ills. The proposals are varied and expansive but have the unifying theme of returning antitrust to the "big-is-bad" enforcement era prevalent in the first half of the twentieth century. They would ban broad categories of procompetitive mergers, forbid businesses from pursuing commercial arrangements that benefit consumers, and protect inefficient high-cost producers from precisely the type of competition the antitrust laws are intended to foster. In doing so, the populist antitrust proposals reject fundamental lessons gleaned from developments in modern economics and would send antitrust careening back to the equivalent of its Stone Age.

The criticisms populist antitrust proponents raise are generally unsupported and often dramatized, and the resulting policy proposals are, accordingly, fatally flawed. There is sparse evidence today suggesting that the underlying trends these critics purportedly identify are real or in any way linked to lax antitrust enforcement. For instance, critics frequently cite data indicating significant increases to concentration across a wide range of US industries as evidence of failed antitrust policy. But these statistics typically lump products together, such as fishing reels and pick-up trucks, that cannot seriously be considered competitive alternatives and which, moreover, suggest several dozen (or more) competitors exist within each of these broad industries. Nevertheless, in response to these sensationalized concerns, populist antitrust proponents seek to abandon the current and well-developed legal framework, which makes consumer welfare the lodestar of the antitrust laws, in favor of vague multi-factor tests or a general hostility to large firms.

Ironically, populist antitrust proponents ignore that antitrust law debated over 50 years ago the same proposals that they are raising anew today. At that time, leading jurists, economists, enforcers, and practitioners from across the political spectrum rejected the use of liability standards that seek to evaluate a variety of vague and often contradictory socio-political goals or that condemn conduct based simply on the size of a company. They recognized that these tests led to incoherent and paradoxical results that often did more to hinder than to promote competition by undermining the rule of law and fostering corporate welfare. These regimes were roundly—and rightly—condemned. In their place, antitrust evolved an elegant framework that simplified the core issue of what constitutes harm to competition into a straightforward question: does the conduct at issue harm consumers?

Today, the consumer welfare standard offers a rigorous, objective, and evidence-based framework for antitrust analysis. It leverages developments in modern economics more reliably to predict when conduct is likely to harm consumers as a result of harm to competition. It offers a tractable test that is broad enough to contemplate a variety of evidence related to consumer welfare but also sufficiently objective and clear to cabin discretion and honor the principle of the rule of law. Perhaps most significantly, it is inherently an economic approach to antitrust that benefits from new economic learning and is capable of evaluating an evolving set of commercial practices and business models. These virtues are precisely the target of the new populist antitrust movement, which seeks to reject economics in favor of mere supposition.

Antitrust is an attractive regulatory tool. The vague, terse language of the Sherman Act readily lends itself to interpretation, imbuing it with virtually limitless scope. Indeed, the urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult to resist—as calls to do so resurface every few decades. Conflating size with market power, and market power with political power, the populist antitrust movement advocates for dramatically expanding industry regulation in nominally antitrust terms and would place vast political discretion in the hands of enforcers.

But that attraction is precisely why we should care about the scope, process, and economics of antitrust and the extent of its politicization. Antitrust in the US has largely resisted the relentless effort toward politicization. Endorsing the populist antitrust approach would prioritize political expediency over the rule of law. It would open the floodgates of antitrust litigation and facilitate deleterious tendencies, such as rent-seeking, regulatory capture, and politically motivated enforcement. It would thus unlock a veritable Pandora's box of concerns that are currently kept in check. Chief among them is the use of antitrust laws to evade democratically and judicially established rules and legal precedent.

This paper makes the case in support of the current consumer welfare standard and against a sweeping set of unsupported populist antitrust reforms. There is significant room for debate within the consumer welfare model for what types of conduct should face antitrust scrutiny, what evidence is relevant, and where liability standards should be drawn. Such debate is healthy and to the benefit of antitrust enforcement. But it does not require abandoning decades of experience and economic learning that would turn back the hands of time and return us to an era where antitrust enforcement was incoherent and deleterious.

Part I traces the history of antitrust enforcement, examining the conflicting and contradictory results of the big-is-bad approach to antitrust and explaining the serious debate that led to the adoption of the consumer welfare standard. **Part II** develops the benefits of the consumer welfare approach, namely offering consistency and coherency to a previously wayward area of law; tethering antitrust analysis and outcomes to economics, empirics, and evidence; fostering the rule of law domestically and abroad; and providing a standard that evolves alongside economic developments. **Part III** articulates the shortcomings of the populist antitrust approach, which has little to no empirical support for its contentions or proffered solutions. **Part IV** discusses the serious dangers of adopting the populist antitrust approach, including reducing consumer welfare, and fostering corporate welfare and rent-seeking.

I. The Rise of the Consumer Welfare Standard in Antitrust Enforcement

The broad strokes of US antitrust law are articulated in the concise language of the governing federal statutes, the first of which was passed in 1890.[2] As a result of the exceptionally brief nature of these statutes, antitrust law has developed primarily through common law judicial interpretations.[3] The contours of the antitrust laws therefore primarily have been driven by the case selection of US enforcers and private plaintiffs, and ultimately articulated in the decisions issued by the federal courts. In true common law fashion, antitrust law has evolved considerably during this time. To understand how antitrust law is applied today and why, it is important to examine where antitrust law has come from and how it has developed over the course of more than 125 years.

A. The Early Years: From Nebulous Standards to "Big-is-Bad"

Starting in 1890 with the passage of the Sherman Act, courts began to give shape to the inchoate text of the antitrust laws. The period from 1890 to 1914 was marked by courts struggling to operationalize a law that "directly implicated economic concepts"[4] and yet was so brief and unspecific that it was difficult to discern how these economic concepts should be applied. As a result, the courts faced a monumental task in attempting to develop a coherent set of antitrust law principles. The difficulties faced by these early courts are easy to understand. For instance, the Sherman Act forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade"[5]—a command that courts eventually realized was impossible to enforce literally, as *every* contract imposes *some* degree of a restraint on trade. Nevertheless, in the early case law, the Supreme Court was willing to take the Sherman Act's prohibition literally.[6] This proved to be an unworkable approach, however, and soon thereafter courts began to distinguish between unlawful "naked" restraints that clearly harmed competition and "ancillary" restraints necessary to effectuate an otherwise lawful commercial contract.[7] Antitrust thus began to develop a functional jurisprudence that recognized that not every restraint violated the Sherman Act.

This reasoning opened the door to the first arguments for why some conduct is harmful and should be prohibited and other conduct is beneficial or benign and should be permitted. In the earlier case law, however, the basis for drawing these distinctions was not well developed and courts struggled

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[2] The principal federal antitrust laws are the Sherman Antitrust Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914).

[3] *See, e.g.,* Aaron Director and Edward H. Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. R. 281 (1956) ("The durability of the antitrust laws is perhaps their main characteristic. In large measure, this is a common law durability, built on a case by case development, and exhibiting that flexibility which is the strength of the common law").

[4] *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

[5] 15 U.S.C. § 1 (2012).

[6] *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 311 (1897)*.

[7] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd sub nom. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

to identify a coherent framework for applying admittedly vague statutory language. The passage of the Sherman Act itself fueled the uncertainty about when competition could be "ruinous" or when efficiency at scale was considered anticompetitive even when it delivered lower prices or more output. The big trusts in oil, tobacco, beef, sugar, and gunpowder that inspired the Sherman Act, after all, had been overseeing industries that experienced continual price decreases in expanding markets.[8] Yet, despite this increase in social welfare, some members of Congress nonetheless felt the need to pass a law that would rein in these firms — not because of their effect on consumers, but because of their effect on certain competitors. Thus, following its formative phases, early twentieth century antitrust law was interpreted largely as existing to protect "small dealers and worthy men"[9] or, put more simply, to prevent "bigness."[10]

For much of the twentieth century, antitrust doctrine focused on market structure and firm size, and condemned companies that were viewed as too large.[11] In *Aluminum Co. of America*, the Second Circuit explicitly adopted the view that Congress passed the antitrust laws to allow courts to correct the coercive effects of large firms:

> We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, ***regardless of their economic results***. . .. [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the *helplessness of the individual* before them."[12]

An approach that frames "big" corporations as bad, however, necessarily works to benefit "small" firms — even when they do not earn such success by providing superior, lower-cost goods and services to consumers. Indeed, some viewed too much competition as harmful because it led to falling prices that could make it more difficult for small businesses to operate. The Second Circuit explained: "A competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force."[13] In the name of protecting "helpless individuals" (small business owners) the courts therefore condemned conduct that lowered prices (thus harming consumers). "Big" was interpreted as "bad" during this period, even where administration of the antitrust laws to favor small business meant

[8] DOMINICK T. ARMENTANO, THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES 70, 77 (1972) ("Between 1870 and 1885 the price of refined kerosene dropped from 26 cents to 8 cents per gallon. In the same period, the Standard Oil Company reduced the [refining] costs per gallon from almost 3 cents in 1870 to .452 cents in 1885. Clearly, the firm was relatively efficient, and its efficiency was being translated to the consumer in the form of lower prices for a much improved product, and to the firm in the form of additional profits . . . . at the very pinnacle of Standard's industry 'control,' the costs and the prices for refined oil reached their lowest levels in the history of the petroleum industry.").

[9] Trans-Missouri Freight Ass'n, 166 U.S. at 323.

[10] LOUIS D. BRANDEIS, THE CURSE OF BIGNESS (1934).

[11] United States v. Aluminum Co. of Am., 148 F.2d 416, 421 (2d Cir. 1945).

[12] *Id*. at 428-29 (emphasis added). Even here, however, Judge Hand observed that, notwithstanding a dislike for large economic powers, antitrust law could not be used to punish firms that had been successful. Id. Thus, even in this period, marked by a less economically-grounded sensibility, courts instinctively sensed the destructive tendency of disregarded economic efficiency in antitrust analysis.

[13] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 699 (1967).

that "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[14]

The end result was a rudderless analysis that deployed the antitrust laws against perfectly procompetitive practices that benefited consumers. By arbitrarily pegging the distinction between permissible and impermissible conduct to firm size, there was no meaningful way to distinguish procompetitive conduct from anticompetitive conduct. And, despite antitrust law's ostensible focus on preserving competition, economic factors that could be used to judge firm performance were sometimes even treated as irrelevant.[15]

B. The Antitrust Revolution: Toward a Coherent Economic Framework

The unprincipled approach to antitrust adjudication that dominated through the early twentieth century eventually gave rise to serious criticism of, and ultimately to reflection on, the state of antitrust law.[16] A rigorous debate, catalyzed by Aaron Director at the University of Chicago, arose, as scholars and lawyers sought to develop a coherent, rigorous foundation for antitrust laws that would lead to an analytically tractable framework.[17] Director was one of the first to observe that "bigness" was an insufficient gauge for determining when firms were acting anticompetitively and sought to implement a test that distinguished between those firms that were large as a result of successfully outcompeting rivals and those that succeeded by undermining the competitive process.

Advocates for the *status quo* of politically administered antitrust, by contrast, believed that focusing on economic efficiency was inappropriate because the existence of large firms implied the need for a large government apparatus that would regulate those firms.[18] Reviewing the spotty judicial history

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[14] Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962).

[15] For example, if a manufacturer transferred title to a dealer or announced retail prices itself was treated differently under the antitrust laws than if that same conduct was effected by a resale price maintenance agreements. See, e.g., United States v. Colgate & Co., 250 U.S. 300, 306-08 (1919) (stating that companies have the power to decide with whom they do business and can unilaterally terminate a business arrangement without violating the per se ban on retail price maintenance).

[16] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under [the antitrust laws], the Government always wins").

[17] RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS xvi (2d ed. 1981) ("Much of the economic analysis expounded in these notes is based on ideas first proposed by Director. A number of these ideas were later developed and published by other economists whose work we cite, but these citations conceal Director's seminal role in the development of the economics of competition and monopoly presented in this book."); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time To Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 150 (2012) ("The historical accounts of the Chicago School of Antitrust uniformly agree on the central influence of Aaron Director and the Antitrust Law course he taught with Edward Levi at the University of Chicago."); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1229–30 (1989); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282–83 (1956).

[18] Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, Fortune, 135 (Aug. 1964), *reprinted in* 65 Colum L. Rev. 377 (1965) ("[A]ntitrust operates to forestall concentrations of economic power which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy. Reliance on competitive

of the pursuit of the political aim of a fragmented economy filled with small firms, these advocates believed that "[w]hen it becomes necessary to subordinate the political objective of self-policing markets to the economic objective of increased efficiency, the decision must be made by Congress."[19] Thus, in their view, regardless of whether antitrust eschewed efficiency to the detriment of consumers, society was clearly better served by limiting firm size, and it was up to Congress to say otherwise.

Reformers, on the other hand, observed that antitrust was marred by a history of internal contradictions where, with little appreciable rationale, courts would vacillate between preserving competition itself on the one hand, and protecting firms from more efficient rivals on the other.[20] Moreover, the reformers recognized that economic efficiency as a measure of antitrust efficacy was not a good in itself, but served as a signal of the revealed preferences of society. Therefore, an economic efficiency standard sought to maximize societal welfare and brought coherency to antitrust law.[21]

While significant debate over appropriate rules and standards remained among antitrust reformers, some unifying themes emerged. First, antitrust should be focused on fostering consumer welfare.[22] The debates that started with Director and Bork forced legal scholars to consider the first principles that guided antitrust and to answer why competition is valuable. In other words, scholars, judges, and lawyers were forced to evaluate whether competition was a valuable good in itself or was instrumentally good because it could *produce* a better result. The answer that emerged was that competition leads to lower prices, expanded output, better quality, and more innovation — that is to say, it produces outcomes that benefit consumers.[23] The precise number of *competitors* was only indirectly relevant in discovering whether the desirable result obtained from the competitive process.

The second major contribution of the antitrust reformers was to introduce the importance of economic theory, empirical evidence, and the error-cost framework in guiding antitrust enforcement decisions.[24] By aligning legal theories of harm with economic theories regarding when and how

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markets accommodates our interest in material well-being with our distrust of concentrations of political and economic power in private or governmental hands.").

[19] Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy,* 65 Colum L. Rev. 422 (1965).

[20] *See* Robert H. Bork & Ward S. Bowman, Jr., The Crisis in Antitrust, FORTUNE, 138 (Dec. 1963), reprinted in 65 COLUM. L. REV. 363, 363-64 (1965) ("The difficulty with stopping a trend toward a more concentrated condition at a very early stage is that the existence of the trend is prima facie evidence that greater concentration is socially desirable.").

[21] *Id*. at 368.

[22] There is a debate — and confusion — over whether the exact welfare standard used in antitrust should be focused on "consumer welfare" or "total welfare." The relevant point for our purposes here is that antitrust law came to incorporate a standard solely based on economic welfare while rejecting an ambiguous socio-political standard that shifted based on enforcement preferences and judicial discretion.

[23] *See*, e.g., Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 695 (1978); accord FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990) ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers").

[24] *See, e.g.,* Frank H. Easterbrook, *The Limits of Antitrust,* 63 TEX. L. R. 1 (1984).

conduct was anticompetitive, rigor and predictability were introduced into the antitrust enforcement process.[25] Importantly, it is both theory *and* evidence that governs the enforcement process. If economic theory indicates that anticompetitive outcomes are possible, but empirical evidence shows that they are rarely observed in practice, the analysis is correspondingly adjusted.[26]

These insights provided a coherent framework for analyzing allegedly anticompetitive conduct — and specifically for distinguishing between procompetitive and anticompetitive conduct. A good example of this approach is the evolution of predatory pricing claims to incorporate economic learning and empirical reality.[27]The empirical evidence demonstrates that predatory pricing is rarely effective.[28] Firms that price below cost in order to drive competitors from the market suffer a loss on every sale they make, which generates the need to recover those losses during the post-predatory monopolization of the market.[29] But, as the firm raises prices above a competitive level, other firms are attracted to the market, which in turn risks nullifying the advantage the predatory firm sought to realize.[30] Under an error-cost framework, the theory presented — that a firm could drive competitors from the market by pricing below cost — is tempered by the reality that the predatory firm is not likely to hold onto its advantage. Thus, without recoupment — that is, a demonstrated or likely ability to raise and maintain prices above a competitive level — courts are unable to distinguish between procompetitive and anticompetitive practices.

C. Modern Antitrust: Adoption of the Consumer Welfare Standard

Today, there is widespread, bipartisan support for the modern consumer welfare standard. That standard has been repeatedly embraced by majorities in Supreme Court decisions that recognize and embrace the economic foundation that the standard provides. In *Reiter v. Sonotone*, the Court recognized that the Sherman Act is a "consumer welfare prescription."[31] Later, in *U.S. v. Baker Hughes*,[32] then Judge Clarence Thomas—joined by then-Judge Ruth Bader Ginsburg—wrote that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." And, more recently, in her confirmation hearings, Justice

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[25] *Id.* at 14. (Erring on the side of permitting questionable firm conduct "would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution").

[26] *Id.* at 17-18. Easterbrook posited a set of filters for determining whether courts should proceed with an antitrust case that included plaintiffs first demonstrating that market power exists, and a harm theoretically could occur, and then, subsequently whether the evidence of industry practice and actual firm behavior results in lowered output.

[27] As far back as Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 31 S.Ct. 502 (1911), the Supreme Court held that there was an offense when a firm merely lowered its prices with an intent to harm rivals. Ultimately, the courts updated the laws as economists developed better theoretical and empirical work on predatory pricing. *See, e.g.*, Brooke Group Limited v. Brown & Williamson Tobacco Co., 509 U.S. 209, 113 S.Ct. 2578 (1993).

[28] *See* ROBERT BORK, THE ANTITRUST PARADOX 145 (1978).

[29] *See* Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 589 (1986).

[30] *Id.*

[31] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[32] 908 F. 2d 981, 984 (D.C. Cir. 1990).

Kagan stated that "it is clear that antitrust law needs to take account of economic theory and economic understandings."[33]

In its adjudications the Court has likewise been faithful to the goal of promoting consumer welfare. In *Brooke Group* the Court elaborated on predatory pricing actions, aligning such claims under the Sherman Act and the Robinson-Patman Act.[34] In reaching its holding, the Court reasserted the requirements that predatory pricers have some possibility for recoupment because, without such a requirement, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."[35]

In *Leegin*, the Court had occasion to consider resale price maintenance restraints, and their effect on consumer welfare. In moving resale price maintenance restraints from *per se* illegal to subject to a rule of reason analysis, the Court held that "Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[36] Further, "[the prior approach to resale price maintenance restraints] hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices."[37]

Recent criticisms of the consumer welfare standard, rooted in populist preferences for a return to political antitrust,[38] ignore both this bipartisan support as well as the rigorous analysis and debate that led to the creation of this standard.

II. The Benefits of the Consumer Welfare Standard

Experience over the last 50 years demonstrates that the consumer welfare standard has had a significant positive influence on antitrust jurisprudence and enforcement decisions. Today, the consumer welfare standard offers a workable, coherent, and objective framework that elegantly translates the core antitrust inquiry of whether there has been harm to competition into a simple question: does the conduct make consumers better or worse off? In unifying antitrust under a singular objective, the consumer welfare standard abandons the use of vague tests that incorporate multiple, and often contradictory, social and political goals that fail to meaningfully cabin discretion and thus ultimately permit decision makers to reach almost any result they desire. Significantly, the consumer welfare standard grounds antitrust decisions in economics and economic evidence, which has the dual virtues of reducing the role of conjecture and supposition driven by personal

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[33] The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 82 (2010) (statement of Elena Kagan).
[34] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[35] *Id.* at 224.
[36] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 9 (2007).
[37] *Id.* at 22.
[38] *See*, e.g., The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition and Consumer Rights of the S. Comm. on the Judiciary, 115th Cong. (2017) (statement of Barry Lynn); Lina M. Khan, Amazon's Antitrust Paradox, 126 YALE L.J. 710 (2017).

preference, and of increasing the consistency of decisions across disparate political administrations. Proposals to abandon the consumer welfare standard as the lodestar of the antitrust laws thus bear a heavy burden to deliver a similarly robust set of virtues that help ensure that antitrust is a force for good in society.

A. Consumer Welfare is a Clear, Consistent, and Coherent Legal Framework

The consumer welfare standard is widely recognized across the political spectrum as the superior model for antitrust enforcement because it is clear, consistent, and coherent.[39] Today, the consumer welfare standard is well-developed, and its meaning and the evidence required to show harm is well established. As a result, a key benefit of the consumer welfare standard is that it offers an objective and concrete framework for evaluating whether a challenged conduct has harmed competition. It does so by examining a singular factor: whether consumers have been made better or worse off as a result of the conduct.

The consumer welfare standard therefore stands in sharp contrast to earlier multi-pronged approaches that sought to weigh a variety of vague socio-political factors that were at the decision-maker's discretion and often led to inconsistent and incoherent results.[40] This earlier approach had the result of weaponizing antitrust against the competitive process and, paradoxically, not only failed to promote competition but actively dissuaded lower prices, increased innovation, and other competitive benefits.

Critics of the consumer welfare standard argue that the decision to focus on the welfare of *consumers* (rather than some other group or on non-welfare objectives) is inherently a political decision and therefore no more justified than alternative tests. There are at least two errors with this position. First, the decision to adopt the consumer welfare model is political only in the sense that any policy decision is a political decision. That is neither remarkable nor interesting for assessing the benefits of the consumer welfare standard. The more important question is whether the consumer welfare standard, as applied, is better or worse than alternative tests at minimizing the discretion of a decision maker and therefore the potential influence of politics and rent-seeking in antitrust decisions. Significantly, what experience shows is that because the consumer welfare model is clear and objective it cannot easily be contorted by a decision maker who may be motivated by a desire to pick winners and losers in a specific case. The singular focus on consumer welfare thus creates a predictable methodology that leads to more consistency across different antitrust cases and treating similarly situated parties equally under the law. Indeed, by exporting the consumer welfare standard

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[39] *See* Deborah Garza, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on Modernization of Antitrust Law – Private and Public Enforcement and Abuses – Europe and the U.S. (May 29, 2008), https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and ("Even the most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning . . . . We won't return to what antitrust enforcement looked like 40 years ago.").

[40] *See, supra*, notes 1 – 25 and accompanying text.

to other jurisdictions around the world, the US has helped to foster the rule of law and limited the use of antitrust to promote protectionist goals.

Second, although the consumer welfare standard may be imperfect, it is by far the best available antitrust framework, because it maximizes the welfare of all Americans. Alternative tests pick between different groups or classes of people or, worse yet, allow decision makers to make those distributional choices based on personal preference. Not all Americans are small business owners or have the same social policy preferences as a decision-maker. But every American is a consumer. And therefore, all Americans benefit from maximizing consumer welfare. The new populist antitrust movement aims to address a wide range of non-welfare policy preferences through antitrust because it is a convenient and potentially expeditious tactic for implementing progressive policies. But as history shows, these distributional decisions are inherently political; they are not well-suited for law enforcement agencies and judges and are better achieved through the legislative efforts of elected officials.

Importantly, the clarity of the consumer welfare standard does not require promoting an overly narrow test that is unable to incorporate key evidence relevant to assessing harm to competition. Critics of the consumer welfare standard frequently assert that it is too narrowly focused only on price and therefore is unable to assess the full context of a conduct's effect on competition. They claim that the narrow focus on price leads to many types of conduct going unchallenged and therefore requires a fundamental shift to a new test. These arguments are either disingenuous or represent a profound misunderstanding of the robustness of the consumer welfare standard. In reality, a long list of cases shows that the consumer welfare standard considers a host of factors beyond price, including quantity, variety, quality, and innovation. While it is not always easy to assess non-price factors, these factors fall well within the consumer welfare standard. As is discussed in the next section, there exist numerous, sophisticated economic tools to evaluate whether a challenged conduct harms consumers.

B. Consumer Welfare Tethers Decisions to Economics and Economic Evidence

A key feature of the consumer welfare standard is that it institutionalizes an economics-based approach to competition policy in the US. At its core, the consumer welfare standard takes antitrust law's mandate of protecting competition and gives it meaning through the common language of economics. By tethering antitrust decisions tightly to modern economics, the consumer welfare standard creates an evidence-based framework for distinguishing when conduct results in anticompetitive or procompetitive effects.[41] Moreover, although the consumer welfare standard offers a concrete framework for competition analysis, it is flexible enough to incorporate

[41] As D.C. Circuit Judge Douglas H. Ginsburg explained, the "increasing embrace of the economic approach to antitrust law[]—relative to approaches based upon amorphous sociopolitical goals—limits liability to those relatively few business practices truly inimical to consumers." Douglas H. Ginsburg, *Originalism and Economic Anslysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 219 (2010).

developments in economics and learning regarding the likely effects of new commercial business practices and business models that would never have been contemplated by the drafters of the antitrust laws.

The consumer welfare standard is tethered to economics in at least two significant ways. First, the goal of promoting consumer welfare ultimately informs what type of liability rules a courts should apply in any particular case depending on the specific conduct at issue. By relying on economic theory and empirical evidence, the consumer welfare standard allows courts to apply filters and presumptions as part of liability rules that decrease the probability of error and increase the probability that antitrust benefits consumers. Second, in cases requiring a more detailed assessment, the goal of promoting consumer welfare influences the factors a court will examine and how those factors are weighed against each other. The emergence of the consumer welfare standard has driven significant advances in antitrust economics, and spurred debate about economic theories, empirical research, and the sufficient conditions for concluding the presence of anticompetitive conduct. Indeed, antitrust economics has developed significantly since courts first adopted the consumer welfare standard, providing an increasingly insightful basis for decisions.

The consumer welfare standard's inherent economic framework also has resulted in antitrust decisions and enforcement efforts being remarkably consistent across administrations.[42] While enforcement may change on the margin based upon the agency leadership, the economic approach to antitrust prevents wild swings in enforcement based on ideology.

III. The Inadequacy of the Empirical Claims and Evidence underpinning the Populist Antitrust Movement [43]

The populist antitrust movement argues vociferously for abandoning the well-established consumer welfare standard. To many within this movement, the consumer welfare standard is an impediment to successful antitrust enforcement and to the achievement of socio-political goals such a regime may foster. As such, they argue, the consumer welfare standard should not be allowed to persist. This line of argument views with the rosiest of glasses the well-trod history, described above, of antitrust enforcement pre-consumer welfare standard—which experts, scholars, Nobel Laureates, judges and Supreme Court Justices across the political spectrum have recognized to be a disaster that undermined fundamental principles of our democracy, including the rule of law.[44]

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[42] *See*, e.g., U.S. DEPT. OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS, https://www.justice.gov/atr/file/788426/download (DOJ Antitrust Division enforcement statistics showing consistency across years 2008-2017).

[43] This section draws in part from Joshua D. Wright, Elyse Dorsey, Jan Rybnicek & Jonathan Klick, Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. STATE L.J. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524.

[44] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under § 7, the Government always wins."); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (1978) (finding the collection of socio-political goals at the time to be "mutually incompatible"); GEORGE J. STIGLER, THE ECONOMIST AS PREACHER AND OTHER ESSAYS

Nonetheless, populist antitrust proponents advocate returning to this pre-consumer welfare standard world. Some of the many benefits of the consumer welfare standard—and the commensurate costs of abandoning this standard—are described above. This section explores the empirical evidence upon which populists rely when arguing to abandon the consumer welfare standard.

A threshold question raised by the populist movement's call to abandon the consumer welfare standard is whether this standard is systematically flawed such that abandoning it is warranted. The move to reject a standard that has been uniformly embraced by the Supreme Court and the lower courts for decades should be supported by clear economic consensus that the standard is doing more harm than good. In other words, strong empirical support should exist for the populist movement's allegations that the consumer welfare standard is not doing what it purports to do, that it is, in any event, attempting to maximize the wrong set of values, and that wholesale retargeting of antitrust enforcement would achieve the goals the populist movement has identified.

Thus far, however, the populist antitrust movement has not demonstrated such a sound economic basis. The evidence upon which it relies is mixed, at best. At most, it calls into question the level of enforcement under the consumer welfare standard, not the utility of the standard itself. As an initial matter, then, rejecting the consumer welfare standard today would risk all the observed benefits of the standard without compelling evidence of an actual problem—and with no persuasive reason to believe the proffered solutions would enhance outcomes.

Populist antitrust supporters make numerous assertions and policy proposals. Some of the most frequently articulated include: (1) concentration is increasing, competition has weakened, and weak antitrust enforcement is to blame; (2) lax antitrust enforcement has allowed prices to increase and output to decrease; and (3) increased antitrust activity would reduce economic inequality. This section addresses each claim in turn.

A. Concentration Has Increased and Competition Has Decreased — And the Consumer Welfare Standard Is to Blame

41-42 (1982) (emphasizing the "lack of enthusiasm, and . . . downright hostility, with which economists greeted the Sherman Act"); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 177 (2007) (explaining the " 'social and political values' paradigm of the 1960s and 1970s . . . proved standardless and unduly hostile to business"); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 364 (1965) (explaining how "a fundamental and widespread misconception of the nature and virtues of the competitive process . . . coupled occasionally with real hostility to the free market" led to "the result that in crucial areas the doctrines of antitrust are performing a 180-degree turn away from competition"); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J. L. & PUB. POL'Y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases."); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 44 (2000) ("Most economists in the late 19th century scorned the Sherman Act."); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405 (2013) ("The Court interpreted the Sherman and Clayton Acts to reflect a hodgepodge of social and political goals, many with an explicitly anticompetitive bent …").

One of the populist movement's primary critiques is the purported increase in industry concentration and the resulting conclusion that competition has diminished, and the consumer welfare standard is to blame.

To begin, however, there is, in fact, no rigorous economic support for claims that high concentration levels are a strong indicator of harm to competition or that they should trigger a presumption of such harm in antitrust analysis.[45]

> As it stands, there is no empirical foundation on which to conclude that monopoly power is rising. To the extent that markups are increasing, other studies show that output has increased and that quality-adjusted prices have remained stable. Claims that concentration has increased at least find somewhat consistent empirical support, although the extent of those changes are up for debate. There is no reliable empirical basis, however, to support the inference that the United States economy has experienced a systematic increase in market power.[46]

Indeed, this has been true since at least the 1970s:

> [T]he studies done to date strongly indicate that there is little or no significant correlation between industrial concentration and corporate profits. To be sure, if one selects a particular year with peculiar characteristics, the figures can be made to appear otherwise, but in general, over a significant period of time, this lack of correlation seems well substantiated....
>
> Indeed, one thing on which there is unequivocal agreement among economists… is that monopoly rates of return are realized regularly in some of the least-concentrated industries imaginable: those for personal services…. In the industrial sector on the other hand, where remedies for unproved problems abound, monopoly rates of return, when they do occur, seem unlikely to persist for a significant period of time.[47]

Instead, such assertions are based on a simple inference of competitive effects from market structures, and the unsupported assumption that an increase in concentration can mean *only* a reduction in competition. The problem is that no such inference can be made: "[I]t is presumptuous to conclude… that markets populated by fewer firms perform less well or offer competition that is less intense."[48] As Yale Brozen so aptly put it back in 1978:

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[45] In that regard, it should be noted that recent studies cast doubt on the idea that industry concentration has increased in the United States. *See, e.g.*, Rossi-Hansberg, Esteban, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration* 1-15 (NBER Working Paper No. w25066, 2018) (The authors show that while concentration may have increased at a national level, it has decreased at a local level).

[46] Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, Note submitted as background material for OECD Hearing on Market Concentration, DAF/COMP/WD(2018)69 (Jun. 2018), at 9-16, *available at* http://www.oecd.org/daf/competition/market-concentration.htm.

[47] Henry G. Manne, Testimony on the Industrial Reorganization Act before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly (Apr. 1974), reprinted in Manne, *supra* note 1.

[48] Harold Demsetz, *The Intensity and Dimensionality of Competition*, in HAROLD DEMSETZ, THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 140-41 (1995).

> Industries have become concentrated where that was the road to lower costs. It is these lower costs that have created temporary, above-average profitability in concentrated industries when it has occurred. Where concentration was not the road to lower costs, industries have remained unconcentrated. The market has worked surprisingly well, where it has been permitted, to conserve our resources and maximize our output. *The antitrust agencies' concentration on concentration in recent years is misdirected and should cease.*[49]

Properly considered, a superficial increase in concentration is just as consistent with an *increase* in competition as with a decrease; the contrary claim — that there is a clear causal link between increased concentration and reduced competition — simply disregards the weight of economic evidence.[50] Put simply: market share and industry concentration are poor predictors of competitive effects.[51]

The fact is that economists know very little about the relationships among market structure, firm size, competition, profits, prices, entrepreneurship, and innovation.[52] Market shares and structural presumptions are not capable of predicting competitive effects and, thus, of specifying optimal policy choices.

In particular, in markets in which competition occurs significantly through innovation, the effect of increased concentration on competitiveness is ambivalent, at best.[53] Where effective competition requires significant up-front investment and where economies of scale predominate (because of

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[49] Brozen, *The Concentration-Collusion Doctrine*, *supra* note 97, at 856.

[50] *See infra* pp. 21-23. See also Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L. J. 2, 205 (2015) (noting that, during revision of the Horizontal Merger Guidelines in 2010, the FTC and DOJ were pressed by economists to abandon structural presumptions as they were poor indicators of market power).

[51] *See, e.g.*, Luke M. Froeb (Former Director, Fed. Trade Comm'n Bureau of Econ.), *From Theory to Praxis: Quantitative Methods in Merger Control*, at 6 (Oct. 30, 2014), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/theory-praxis-quantitative-methods-merger-control/041030como.pdf.

[52] *See, e.g.*, Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951 (Richard Schmalensee & Robert Willig eds., 1989); Tim Bresnahan, *Empirical Studies of Industries with Market Power, in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert Willig eds., 1989).

[53] *See, e.g.*, Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in INNOVATION POLICY AND THE ECONOMY (VOL. 6) 159, 206 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2006) ("There is little evidence that there is an optimal degree of competition to promote R&D. Empirical studies that use market concentration as a proxy for competition fail to reach a robust conclusion about the relationship between market concentration and R&D when differences in industry characteristics, technological opportunities, and appropriability are taken into account."); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 22 (2007) ("[T]he literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role."); J. Gregory Sidak & David F. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 588 (2009) ("[D]espite 50 years of research, economists do not appear to have found much evidence that market concentration has a statistically significant impact on innovation."); Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J.1, 4 (2012) ("To this day, however, the complex relationship between static product market competition and the incentive to innovate is not well understood.… [E]conomic theory does not support a confident conclusion as to which antitrust policies will elicit a higher rate of innovation.").

these high fixed costs),[54] the assumption that concentration leads to reduced competition is especially misguided.

Excessive reliance on obsolete, market-share-based analysis to evaluate antitrust practices is tantamount to a rejection of modern antitrust principles and the economic learning that undergirds them. Moreover, such an analysis is likely to lead to decisions that *reduce* rather than *promote* consumer welfare and the public interest.

As evidence of the purported increase in concentration underpinning these alleged defects, promoters of populist antitrust frequently cite studies that examine high-level industry designations (often based upon NAICS codes) and find, for instance, the 50 largest firms in a broad industry sector increased in revenue share over a recent ten-year period.[55] From this evidence, populist antitrust supporters conclude that allegedly lax antitrust enforcement over the last thirty years has led to a highly concentrated, uncompetitive economy.

This logic has several critical flaws. One is that the ability to measure the 50 largest firms in a sector itself demonstrates there are at least 50 competitive firms, which would seem, in the abstract, to be a not-insignificant number of firms. Another, related, logical flaw is that the industry-level designations upon which these studies rely have little to no utility for antitrust purposes. They are far too broad to offer insight into actual market power. Authors of the concentration studies themselves, leading economists across the political spectrum, and the Antitrust Agencies all acknowledge this basic point.[56]

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[54] *See generally* Joseph P. Kendrick, Comment, *Does Sound Travel in Cyber Space,* 8 J. SMALL & EMERGING BUS. L. 39, 46-47 (2004); *see also* Mark A. Lemley and David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479, 595 (1998).

[55] *See, e.g.*, Jason Furman & Peter Orszag, Presentation at "A Just Society" Centennial Event in the Honor of Joseph Stiglitz at Columbia University: A Firm-Level Perspective on the Role of Rents in the Rise in Inequality 11 (Oct. 16, 2015), http://gabriel-zucman.eu/files/teaching/FurmanOrszag15.pdf; *see also Business in America: Too Much of a Good Thing*, THE ECONOMIST (May 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing.

[56] *See, e.g.*, United States, Hearing on Market Concentration, OECD Doc. DAF/COMP/WD(2018)59, ¶ 1 (May 27, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf [hereinafter U.S. Antitrust Agencies OECD Submission] ("Academics and journalists recently made claims of increasing concentration throughout the U.S. economy. . . . The U.S. Department of Justice (Department) and Federal Trade Commission (collectively, the U.S. Agencies) find the claims of increasing concentration are unsupported by data for meaningful markets."); Carl Shapiro, Panel at the Stigler Center for the Study of the Economy and the State: Is There a Concentration Problem in America? What Do the Data Tell Us? Trends in Concentration and Competition (Mar. 27, 2017), https://media.chicagobooth.edu/Mediasite6/Play/766c5a67c95b48118e248715bde80c2e1d (noting that the CEA "somewhat embarrassingly . . . looked at the 50 firm concentration ratio in two digit industries" and that he was not sure what "IO [industrial organization] economist would find that informative regarding market power"); Jonathan Baker, Steven Berry, Fiona Scott Morton & Joshua D. Wright, Panel at the FTC Hearings on Competition and Consumer Policy in the 21st Century: Has the US Economy Become More Concentrated and Less Competitive: A Review of the Data (Sept. 13, 2018), https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-1-competition-consumer-protection-21st-century-welcome (with all economists acknowledging this point); Noah Phillips, Commissioner, Fed. Trade Comm'n, Prepared Remarks before the U.S. Chamber of Commerce: Post Hoc Ergo Propter Hoc 4-6 (Oct. 17, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416803/phillips_-_us_chamber_of_commerce_10-17-18.pdf.

Consider, for instance, that the "Retail Trade" designation, which is used in studies several populist authors cite, includes over *1.5 million* US businesses. It also covers an expansive breadth of businesses, such as new and used car dealers, boat dealers, furniture stores, floor covering stores, household appliance stores, electronics stores, supermarkets and other grocery (but not convenience) stores, fish and seafood markets, various clothing stores, jewelry stores, sporting goods stores, musical instrument and supplies stores, florists, art dealers, tobacco stores, and more![57] This designation, in other words, includes numerous retail segments that clearly do not compete with one another: if one were looking to buy fresh seafood, a tobacco store is not a suitable place to shop. So, identifying that concentration across these vastly different retail segments, in the aggregate, increased cannot illuminate our understanding of actual market power.[58]

As a point of comparison to the expansive "Retail Trade" designation, courts and antitrust agencies have identified the following—far narrower—relevant antitrust markets in recent cases falling under this broader umbrella:

- "premium, natural, and organic supermarkets;"[59]
- "the sale and distribution of consumable office supplies to large B-to-B [business-to-business] customers;"[60] and
- "Discount general merchandise retail stores", meaning "small-format, deep-discount retailers that sell an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under $10 (*i.e.*, dollar stores) and the retailer Walmart."[61]

These carefully delineated antitrust markets underscore the limited utility of citing to industry-level designations within antitrust debates.

Another threshold flaw in the populist logic is that it assumes concentration is *per se* bad and something that antitrust law should always condemn. As discussed above, economic theory and empirical work has debunked this notion—and for good reason. Again, simply counting the number of firms in existence fails to shed any real light on the underlying competitive dynamics of a given industry.

Consider an Olympic example. Followers of recent Summer Olympic Games might have noticed that the number of different Olympic gold medal winners in men's swimming events have been lower of late—that is, gold medals in these events have become more highly concentrated among

[57] NAICS, Six Digit NAICS Codes & Titles, https://www.naics.com/six-digit-naics/?code=44-45 (last visited Nov. 21, 2018).
[58] *See* U.S. Antitrust Agencies OECD Submission, *supra* note 4, ¶ 4 ("Concentration is meaningless for competition analysis when measured in an economic sector much narrower or much broader than a relevant market."); *see also* Wright et al., *supra* note 1, at 21-23.
[59] FTC v. Whole Foods Mkt., 548 F.3d 1028, 1032 (D.C. Cir. 2008).
[60] FTC v. Staples, Inc., 190 F. Supp. 3d 100, 127 (D.D.C. 2016).
[61] Complaint at ¶ 5, *In re* Dollar Tree, Inc. & Family Dollar Stores, Inc., No. C-4530 (July 2, 2015), https://www.ftc.gov/system/files/documents/cases/150702dollartreecmpt.pdf.

fewer swimmers. This concentration in men's swimming event gold medals was largely the result of Michael Phelps winning an unprecedented 23 gold medals over four Olympic Games.

Simply observing that men's swimming event gold medals became more concentrated, however, tells us nothing about how competitive these events were at each Olympic Games. While it might have been the case that competition in this field was lower over the last 16 years (maybe competitors were just slower than average, making it easier to win gold), it might very well have been that competition was just as strong—if not stronger—than ever. To understand the competitiveness of the field, we would have to examine several additional facts. As it happens, the clear consensus is that Phelps faced an incredibly competitive field—he broke several world and Olympic records (including some of his own!) in his gold-medal winning swims.[62] So it was not a lack of competition, but the presence of a particularly skilled competitor driving concentration. Consider, then, that a rule prohibiting concentration of men's swimming event gold medals above a certain level (or, for instance, imposing upon a competitor with a certain percentage concentration a delayed start) might have prevented Phelps from competing in additional races—but this prohibition would have *decreased* competition in the event(s), not increased it.

The same basic idea holds in economic competition. An increase in concentration might be correlated with a decrease in competition, but it might also be the natural result of a healthy competitive process and consistent with constant or increasing competition.[63] After all, successful firms are often successful because of some meritorious reason(s), like lower pricing, higher quality, better customer service, etc.[64] This is why the U.S. opted deliberately to foster a free-market economy and not to outlaw monopolies *per se*.[65] In fact, the Supreme Court and the lower courts have repeatedly recognized that the draw of monopoly profits is what drives firms to enter, compete, and innovate.[66] Counting firms and calculating concentration, alone, cannot distinguish

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[62] *See* Jess Yomtov, *Full List of Every Olympic Medal Michael Phelps has Won*, USA TODAY (Aug. 7, 2016), https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/07/michael-phelps-medals/88361712/.

[63] Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity* 2 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966 ("[M]onopolies could be caused by innovation from 'superstar' firms or scale economies, leading to falling prices or increased output."); *see also* Wright et al., *supra* note 1, at 23-28; *see generally* HANDBOOK OF INDUSTRIAL ORGANIZATION (Mark Armstrong & Robert Porter eds., 2007); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION (1988).

[64] *See* section III.A.2, *infra*, developing evidence indicating concentration is not correlated with higher prices, but does correspond to increased output.

[65] *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." (emphasis in original)).

[66] *Id*. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."); *see also* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 454-55 (2009) (quoting same); Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1221 (10th Cir. 2009) (quoting same).

meritorious wins from suspicious ones. In other words, identifying an increase in concentration—particularly an increase in industry-level concentration rather than in antitrust-market concentration—is not the same as identifying a failure of antitrust enforcement.

A corollary is that altering antitrust rules to respond to concentration, alone, threatens to undermine competitive and anticompetitive outcomes alike. It would punish the victorious firm for winning and successfully growing larger—which both economic learning and the courts tell us is a poor outcome.[67]

B. Weak Antitrust Enforcement Has Allowed Prices to Increase and Output to Decrease

Another assertion populist antitrust supporters regularly make is that prices have increased and output has decreased. Again, the evidence here is mixed at best.

The movement's proponents claim increased monopoly power economy-wide has led to increased prices for consumers. One study by De Loecker and Eeckhout, for instance, purports to demonstrate an increase in markups since 1980, which they argue indicates market power has increased over this period.[68] This study utilizes Compustat-compiled input and output data for firms across the U.S. economy to calculate firm-level markups, examining measures of sales, input expenditure, capital stock information, industry activity classifications, and accounting data measuring profitability and stock market performance.

While this study purports to demonstrate an increase in markups and, therefore, an increase in market power, there are several problems with this methodology and reasoning. Fundamentally, industrial organization economics literature has clearly established that profit margins, alone, are not reliable evidence of market power.[69] Additionally, it is clear that increased markups, alone, are not reliable evidence of price increases. To understand whether higher markups translated to higher prices, we would need to understand additional factors, such as whether marginal costs have changed.[70] If, for example, marginal costs decreased, markups could increase even if prices remained the same; indeed, depending upon how much marginal costs decreased, margins could increase even while prices decreased. Moreover, a trend toward higher markups does not necessarily indicate firm profits are likewise trending higher, as De Loecker and Eeckhout acknowledge. As they explain, a

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[67] *See* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945) (sitting as the court of last resort, the Second Circuit explained, "The successful competitor, having been urged to compete, must not be turned upon when he wins."); *but see* Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 286 (1956) (criticizing early antitrust enforcement and the Court's holding in Alcoa, specifically, noting, "Perhaps, then the successful competitor can be turned upon when he wins, because he has been told not to compete.").

[68] Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* (NBER Working Paper No. 23687, 2017), https://www.nber.org/papers/w23687.

[69] *See, e.g.*, Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. COMP. L. & ECON. 511, 511 (2013).

[70] *See* Ganapati, *supra* note 63, at 3; see also Wright et al., *supra* note 1, at 24-25.

technological change that reduces variable, but increases, fixed costs might result in increased markups but not increased profits.

In addition, higher markups might simply reflect a shift in the composition of firms within the economy. Today, high-tech (and other) firms with low marginal costs but substantial R&D costs comprise a more significant percentage of the economy than they have historically. Consider, for instance, a software company that spends a tremendous amount developing an innovative new software that consumers download on their personal devices. While the marginal cost of selling each new unit of software would be miniscule, the company—to stay in business—would need to charge a price that helped it recoup the costs incurred to create its innovative product. The more firms within the economy employing this business model, the more we would expect to see higher markups, and so the less we could assume, based upon the existence of higher markups, alone, that those markups derive from increased market power.

Aside from the methodological issues with these studies, there is the added complication that other work finds conflicting results. Robert E. Hall, for instance, finds "no evidence that mega-firm-intensive sectors have higher price/marginal cost markups."[71] Notably, while he finds no real evidence of increasing markups in less regulated sectors like Manufacturing or Transportation and Warehousing, he does find a fairly strong trend of increasing markups in heavily regulated sectors like Finance and Insurance, and Health Care and Social Assistance—which is consistent with something other than concentration driving increased markups.[72]

Others examining the effect of concentration upon prices likewise find results that conflict with the populist antitrust movement's claims. James Traina, for example, analyzes this same question, attempting to correct for another flaw in De Loecker and Eeckhout's methodology: namely, De Loecker and Eeckhout focus only on the "cost of goods sold" (COGS) facet of firms' operating expenses, omitting the "selling, general, and administrative expenses" (SGA) facet. Traina argues that SGA is an increasingly significant share of variable costs for firms in the U.S. economy, and demonstrates that once SGA is incorporated into De Loecker and Eeckhout's measure of cost, markups actually remain flat (or decline).[73]

Similarly, Ganapati examines data from 1972-2012, and finds concentration issues do not lead to higher prices, but in fact correspond with increased output.[74] He concludes that the concentrated industries he analyzes are concentrated not due to anticompetitive behavior, but "likely due to technical innovation or scale economies."[75] His findings are consistent with other work that finds

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[71] Note that he does find "some evidence that markups grew in sectors with rising mega-firm intensity." Robert E. Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the US Economy*, at 1 (2018), https://web.stanford.edu/~rehall/Evidence%20on%20markup%202018.

[72] *Id.* at 15.

[73] James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* 6-10 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849.

[74] Ganapati, *supra* note 63, at 13.

[75] *Id.*

that the trends in concentration populists condemn may, in fact, be related to changes in economies of scale and to their corresponding productivity improvements.[76]

Other studies upon which populist antitrust proponents rely purport to identify higher prices using different metrics. One such regularly-cited study is John Kwoka's meta-analysis of retrospective studies of mergers, joint ventures, and other horizontal arrangements.[77] Here, Kowka compiles data covering more than 3,000 mergers and concludes the average price effect for the studied mergers is a 7.22% increase.[78] His findings have, however, been called into serious question. Experienced economists in the FTC's Bureau of Economics, Michael Vita and David Osinski, identify several objections to Kwoka's methodology and, accordingly, his findings. They explain why various methodological failings—including not using standard meta-analytic techniques to compute average price effects and standard errors, not weighting observations by their estimated variances (meaning all price estimates are treated the same regardless of their certainty), and omitting standard errors from his report—undermine Kwoka's fundamental findings regarding price effects.[79]

The evidence upon which populist antitrust supporters rely in asserting that prices have increased is, accordingly, mixed at best. The studies they cite often attempt to examine very important—but also difficult to measure—questions. The limits of these studies must be acknowledged in any serious debate regarding the state of antitrust enforcement today. While many of these studies offer good initial insights, they mostly identify areas for further research. And in no case do they clearly identify systemic shortcomings in current antitrust enforcement efforts.

In addition to questionable empirical premises, the argument that we must abandon the consumer welfare standard because prices are higher and output is lower under this standard is in serious tension with remedies the populist antitrust movement proposes. Each of the proposed remedies would, as described above, diminish consumer welfare. If, for instance, we adopted a public interest standard, prices and output might be one concern—but employment, democracy, the environment, and inequality might be competing concerns. And lower prices, higher output, and product improvements would not have the trump card in the analysis they do today. Similarly, if we decided to ban vertical mergers or prohibit any transactions over a certain size, we would be preventing at least some transactions that would lower prices and increase output. This would appear to be particularly likely in the case of banning vertical mergers, a move which empirical evidence indicates has anticompetitive outcomes—i.e., higher prices or lower output—result only rarely.[80] And it would

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[76] *See, e.g.*, HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra* note 11; TIROLE, *supra* note 11.

[77] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

[78] *Id.* at 110-12.

[79] Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361, 363-64 (2018).

[80] *See* James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648 (2005) ("[T]here is a paucity of support for the proposition that vertical restraints/vertical integration are likely to harm consumers."); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 680 (2007) ("[U]nder most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view."); Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* REPORT: THE

lead to the perverse result of antitrust law deliberately fostering higher prices or lower output, meaning consumers would be less able to purchase products or services they desire.

Accordingly, even if prices and output have, in fact, trended in directions harmful to consumers, the better question to be asking is whether this is because enforcement under the consumer welfare standard is not at the optimal level. The consumer welfare standard focuses on just such factors—along with innovation, quality, and other consumer concerns. If the goal is to lower prices and increase output, it is difficult to see what better standard could be adopted than one that makes these consumer concerns its sole focus.

C. Increasing Antitrust Enforcement Would Reduce Inequality

Populist antitrust supporters further note that income inequality in the United States has increased dramatically in recent decades, and proffer that lax antitrust enforcement is (to varying degrees) to blame.[81] The general intuition here is fairly easily stated: lenient antitrust enforcement allows firms to obtain market power, which allows them to reduce output, raise prices, and generate monopoly profits—all of which enriches shareholders. Shareholders are, by and large, in the top percentage of wealth and income distribution, so these increasing returns increase the wealth of the wealthiest and, thus, inequality.[82]

Imbedded in this theory are a couple key assumptions, both of which can be empirically tested. First, that inequality is increasing. The evidence here suggests inequality is likely increasing, though the magnitude of this increase is probably overstated. Second, that increasing antitrust enforcement would reverse this trend. On the proffered causal link between antitrust enforcement and inequality, there is, so far, a notable dearth of empirical support or development.

First, consider the evidence on inequality trends. Populist claims regarding increasing inequality largely rely upon analysis of the Gini coefficient for US incomes over the last 50 years, which

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PROS AND CONS OF VERTICAL RESTRAINTS 40, 76 Konkurrensverket, Swedish Competition Authority (2008), http://www.konkurrensverket.se/globalassets/english/research/report-the-pros-and-cons-of-vertical-restraints-18mb.pdf, (explaining that regarding vertical restraints and integration, "the literature does not support the view that these practices are used for anticompetitive reasons. …these practices are unlikely to be anti-competitive in most cases."); *see also* Wright et al., *supra* note 1, at 48-50 (summarizing and citing the literature).

[81] *See* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 13-14 (2015); Marc Jarsulic et al., *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy*, CENTER FOR AMERICAN PROGRESS 1-2 (June 2016), https://cdn.americanprogress.org/wp-content/uploads/2016/06/28143212/RevivingAntitrust.pdf.

[82] *See* Jonathan B. Baker, *Market Power in the U.S. Economy Today*, Washington Center for Equitable Growth 10 (March 2017), https://equitablegrowth.org/market-power-in-the-u-s-economy-today/ ("The exercise of market power also probably contributes to economy-wide inequality because the returns from market power go disproportionately to the wealthy."); Sean Ennis et al., *Inequality: A Hidden Cost of Market Power*, OECD 25 (2017), http://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf ("Market power may contribute substantially to wealth inequality … [p]olicies that enhance competition … can therefore help reduce inequality."); Khan, *supra* note 38, at 743; Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents* 11 HARV. L. & POL'Y REV. 235, 235-36 (2017) ("[M]arket power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few . . . at the top of the income and wealth distribution."); see also Wright et al., *supra* note 1, at 31-34.

appears to show a steep increase in inequality. Examining the ratio of the share of US income among the 5th quintile of income-earning households to the share among the 1st quintile of households likewise seems to show increasing inequality.[83]

While these data points offer interesting insights, it is again important to understand their limitations. As Robert Kaestner and Darren Lubotsky emphasize, for example, failing to account for government transfers and employee benefits—that presumably substitute, in part, for cash income—can meaningfully affect these kinds of inequality measures.[84] One important example they explore is that of healthcare benefits. As healthcare costs have rapidly increased in recent years, omitting a measure of health insurance benefits (provided by employers or by the government) could significantly affect ultimate inequality findings. Kaestner and Lubotsky, in fact, analyze inequality measures accounting for this omission, and find that including health insurance benefits substantially lessens the difference between high-end and low-end incomes.[85] They find the ratio of income between households at the 90th percentile and the 10th percentile to be approximately 5 in 1995, 5.2 in 2004, and 5.6 in 2012.[86] So while their findings support the notion that inequality is increasing, they also suggest that the trend is significantly smaller than reported.

Examining household consumption trends tells a similar story. Scholars have argued that consumption might be a superior measure of welfare, given a "closer link between consumption and well-being."[87] Consumption trends would also seem to be relevant when considering antitrust enforcement efforts, as they offer more information regarding economic effects than isolated income or wealth measurements. Examining household consumption over the last couple decades indicates that inequality is increasing but at a muted rate.

Accordingly, the evidence does seem to indicate inequality is increasing by some amount. Potentially more-accurate measures of income and welfare, however, suggest this trend is not as significant as populists claim. So, the first assumption in this particular populist theory appears to be valid, if often overstated. That leads us to the second—and for this discussion, the critical—assumption that antitrust enforcement is driving the apparent inequality trend.

Second, consider the empirical evidence supporting a causal link between antitrust enforcement and inequality. This proffered link remains, thus far, largely theoretical and undeveloped empirically. Populist papers advocating for increased antitrust as a salve for increasing inequality do not offer empirical support for their preferred course of treatment. But other authors have begun to explore empirically the proposed tie between antitrust enforcement and inequality. Wright et al., for instance, present time series regressions relating measures of inequality to antitrust enforcement measures.[88]

83 Data available at: https://www.census.gov/data/tables/time-series/demo/incomepoverty/historical-income-inequality.html.

84 Robert Kaestner & Darren Lubotsky, Health Insurance and Income Inequality, 30 J. Econ. Persp. 53, 66 (2016).

85 Id. at 55.

86 Id. at 64.

87 Bruce D. Meyer & James X. Sullivan, Measuring the Well-Being of the Poor Using Income and Consumption, 38 J. Hum. Resources 1180, 1180 (2003).

88 Wright et al., supra note 1, at 38-46.

While the authors acknowledge the standard reasons that these analyses cannot isolate, with confidence, causation, their work provides a useful foray into the empirical basis for the notion that antitrust enforcement and inequality are causally linked. The authors examine data from DOJ investigations between 1984 and 2016, focusing first on merger investigations, given the populist emphasis on merger activity, and then broadly examine all DOJ investigations for a more general enforcement measure. Their results do not offer "much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality."[89]

Populist claims that increased antitrust enforcement is necessary to combat a severe trend of increasing inequality thus appear to be overstated. While inequality appears to be increasing, the rate is likely more modest than the populist movement implies. And there is, as of yet, no empirical support for the underlying proposition that increasing antitrust enforcement levels would slow, stop, or reverse this trend.

IV. The Dangers of the Populist Antitrust Movement

A. Excess Error: The Precautionary Principle Approach

At root, and in large measure because of the clear lack of evidence supporting its claims, the populist antitrust movement is fundamentally a "precautionary" approach. Largely unconcerned with problems that might arise from over-enforcement, the populist approach considers the merest *possibility* of harm to be a sufficient basis to proscribe uncertain conduct. But in an era of rapid technological innovation and evolving business models impelled by shifting consumer preferences and technological capabilities, such an approach is extremely costly.

The US Supreme Court has repeatedly recognized the limitations the courts face in distinguishing between pro- and anticompetitive conduct in antitrust cases, particularly the risk of false positives in monopolization cases.[90]

The Court has also expressed concerns, originally laid out in Judge Frank Easterbrook's seminal article, *The Limits of Antitrust*, that the cost to consumers arising from type I errors might be greater than those attributable to type II errors because "the economic system corrects monopoly more readily than it corrects judicial errors."[91]

The populist antitrust "precautionary principle" approach is the antithesis of this. It is rooted in a belief that markets do not — or, more charitably, are unlikely — to function well in general, and certainly not sufficiently to self-correct in the face of monopolization.

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[89] Wright et al., *supra* note 1, at 43.

[90] *See* especially Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 265 (2007); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

[91] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 7 (1984).

Of course, no one believes that markets are perfect, or that antitrust enforcement can never be appropriate. The question is the marginal, comparative one: *Given the realities of politics, economics, the limits of knowledge, and the errors they can lead to, which imperfect response is preferable at the margin?* That is: Should we give antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation in careful, economically grounded ways, aimed squarely at *optimizing* — not minimizing — the amount of antitrust enforcement?

This may be a question about changes at the margin, but it is far from marginal. It goes to the heart of the role of the market in the modern economy. While there are plenty of views on this, the arguments that the market has failed us *in ways that more antitrust would correct* are unsupported. We should certainly continue to look for conditions where market failures of one kind or another justify intervention, but we should not make policy on the basis of mere speculation, and we should certainly not do so without taking into account the likelihood and costs of *regulatory* failure, as well. In order to reliably adopt sound antitrust policy that might improve upon the status quo (which has evolved over 100 years of judicial decisions, generally along with the field's copious advances in economic understanding), we need far, far better information about the functioning of markets and the consequences of regulatory changes than is currently available. Unfortunately, there is little indication that this concern resonates with the proponents of a populist approach to antitrust.

Nowhere is this clearer than in the dominant populist antitrust position on unilateral conduct (monopolization or abuse of dominance) and vertical restraints. While the consumer welfare approach, as discussed, adheres closely to modern economic principles, economics is substantially disregarded by the populist approach in favor of unsupported inferences rooted in presumptions of competitive harm based on industry structure (e.g., the extent of concentration in a market), particularly in the case of unilateral, vertical restraints.

As discussed above, there is no reliable empirical support for claims that concentration is increasing, or that it necessarily leads to, or has led to, increased market power and the economic harm associated with it.[92] There is even *less* support for claims that concentration leads to the range of social ills advocates of populist antitrust ascribe to it. By the same token, there is little evidence that the application of antitrust or related regulation to more vigorously prohibit, shrink, or break up large companies would correct these asserted problems.

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[92] *See*, e.g., Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (April 5, 2018) (forthcoming, ANTITRUST MAGAZINE) at 10-11, *available* at https://ssrn.com/abstract=3156912, and papers cited therein. As Werden & Froeb conclude:

> No evidence we have uncovered substantiates a broad upward trend in the market concentration in the United States, but market concentration undoubtedly has increased significantly in some sectors, such as wireless telephony. Such increases in concentration, however, do not warrant alarm or imply a failure of antitrust.
> Increases in market concentration are not a concern of competition policy when concentration remains low, yet low levels of concentration are being cited by those alarmed about increasing concentration….

See also Joshua D. Wright et al., *supra* note 1.

Meanwhile, economic theory, empirical evidence, and experience teach that vertical restraints rarely harm competition and often benefit consumers by reducing costs, better distributing risk, better informing and optimizing R&D activities and innovation, aligning manufacturer and distributor incentives, lowering price, increasing demand by inducing greater supply of promotional services, and/or creating more efficient distribution channels.

As the FTC's former Director of the Bureau of Economics explained in summarizing the body of economic evidence analyzing vertical restraints: "it appears that when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision."[93] A host of other studies corroborate this assessment.[94] As one of these notes, "some studies find evidence consistent with both pro- and anticompetitive effects… virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition."[95] Similarly, "in most of the empirical studies reviewed, vertical practices are found to have significant procompetitive effects."[96]

At the very *outside*, we must consider ourselves to be profoundly uncertain of the effects of vertical conduct (particularly in the context of modern, high-tech and platform industries), with the proviso that, so far, most of what we do know suggests that this conduct is good for consumers. But even that worst-case version of the state of our knowledge is inconsistent with the approach promoted by populist antitrust. By adopting presumptions against conduct for which there is no economic basis, the populist stance is substantially hostile to novel business conduct, especially in these innovative contexts. As a result, antitrust populism necessarily errs on the side of their condemnation, deterring beneficial business activities where authorities should, rather, try to better understand them first.

B. More Politicized Antitrust

The populist movement's effort to shift the economic constraints on modern antitrust jurisprudence to more open-ended enforcement would expose antitrust law to increased politicization. If enforcers can call upon a large list of political justifications for their enforcement decisions, they will be able to pursue cases that best fit within a political agenda—which will necessarily change over time as

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93 Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy,* in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008).

94 *See, e.g.*, Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-76 (Swedish Competition Authority, 2008) ("[Vertical restraints] are unlikely to be anticompetitive in most cases."); James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference,* 23 INT'L J. INDUS. ORG. 639 (2005) (surveying the empirical literature, concluding that although "some studies find evidence consistent with both pro- and anticompetitive effects… virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition"); Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding,* 76 ANTITRUST L.J. 431 (2009); Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMP. L. & ECON. 707 (2005).

95 James Cooper, Luke Froeb, Daniel O'Brien & Michael Vita, *Vertical Restrictions and Antitrust Policy: What About the Evidence?,* COMPETITION POL'Y INT'L (Autumn 2005) at 45.

96 *Id.*

political administrations change—rather than being forced consistently to focus upon the limited practices that are most injurious to consumers. In proposing such a political regime, the populist antitrust model thus largely fails to offer a definable set of metrics to distinguish strong cases from weak ones. What would stand in its place is political discretion.

But our lived experience is that political discretion is a poor substitute for economically-grounded antitrust enforcement. As discussed above, US antitrust struggled to incorporate a wide variety of often conflicting values throughout the early and mid-twentieth century—and it was anything but successful.

Despite our nation's negative experiences with politicized antitrust, many modern populist antitrust calls sound remarkably similar to earlier ones. One particularly persistent effort relates to condemning market concentration and firm size independently of any evidence of actual anticompetitive effects, which is primarily rooted in a reflexive application of the largely-discredited[97] structure-conduct-performance (SCP) paradigm.[98]

Such calls are in vogue today, but it is far from the first time. In 1973, for instance, Michigan Senator Philip Hart introduced Senate Bill 1167, the Industrial Reorganization Act (IRA),[99] to address perceived problems arising from industrial concentration. Among other things,[100] the bill would have required the creation of an "Industrial Reorganization Commission" to "study the structure, performance, and control" of seven "priority" industries,[101] and, for each, to "develop a plan of reorganization… whether or not any corporation [was determined to possess monopoly power]."[102] The bill was grounded in the belief that industry concentration led inexorably to monopoly power; that monopoly power, *however obtained*, posed an inexorable threat to freedom and prosperity; and that the antitrust laws were insufficient to address the purported problems.[103] That sentiment has resurfaced today as the asserted justification for similar antitrust reform legislation.[104] But as discussed, the populist movement fundamentally fails to grapple with the reality that constraining

97 See generally Industrial Concentration: The New Learning (Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, eds., 1974), and see especially Harold Demsetz, Two Systems of Belief About Monopoly, in id. at 164-184. See also Sam Peltzman, The Gains and Losses from Industrial Concentration, 20 J. L. & Econ. 229 (1977); Yale Brozen, The Concentration-Collusion Doctrine, 46 Antitrust L. J. 826 (1978).

98 See Joe Bain, Industrial Organization 372-468 (1968).

99 Industrial Reorganization Act, S. 1167, 93rd Cong., 1st Sess. (1973).

100 Hart asserted that the bill to create a federal Industrial Reorganization Commission was offered as "an alternative to government regulation and control." Philip A. Hart, Restructuring the Oligopoly Sector: The Case for a New 'Industrial Reorganization Act', 5 Antitrust L. & Econ. Rev. 35, 37 (1972) (which reprints Sen. Hart's statement, along with the text of the bill and an analysis of the bill prepared by the Senate Antitrust and Monopoly Subcommittee staff).

101 Id. Title I, § 203(a)(1).

102 Id. Title I, § 203(a)(2).

103 Id. preamble ("[C]ompetition… preserves a democratic society, and provides an opportunity for a more equitable distribution of wealth while avoiding the undue concentration of economic, social, and political power; [and] the decline of competition in industries with oligopoly or monopoly power has contributed to unemployment, inflation, inefficiency, an underutilization of economic capacity, and the decline of exports….").

104 See, e.g., Consolidation Prevention and Competition Promotion Act, S. 1812, 115th Cong., 1st Sess. (2017).

firm size in an effort to promote the political and economic power of consumers (or of favored businesses) may actually have the *opposite* of its intended effect.[105]

Another driving force behind the IRA—which we also see echoed today—was the allegation that economic power leads to political power. This is, perhaps, the most consistently leveled attack today: that economic concentration and the presence of large firms lead inexorably to the subversion of democracy. But this purported causal relationship has already been rejected as having no basis in reality; and no new evidence suggests otherwise. As Henry G. Manne explained in his senate testimony on the IRA in 1974:

> There is, however, a "political" argument that should also be considered. It is that some corporations are so large that they are able to "control" the Government, presumably as it were, to "buy" the protection, the subsidy, the transportation system, the war, or whatever they want from the Government….
>
> Unfortunately, the energy utilized in making these assertions is about the only force behind them, and again it does not require complicated empirical studies to show the error, or perhaps the mendacity…, behind these assertions.
>
> **There is simply no correlation between the concentration ratio in an industry, or the size of its firms, and the effectiveness of the industry in the halls of Government. This scare argument about the political power of large corporations is a sham. We all know that the institutions that influence policies in Washington are those that can deliver the votes or utilize their finances to secure votes. And these are the very practices that large corporations are relatively weakest in performing, especially as compared to unions, farmers, consumer organizations, environmentalists, and other large voting blocks. There is even less substance to this political argument about corporate concentration than there is to the economic ones.**[106]

Many things other than dollars influence political decision-making. It can hardly be said that any large company succeeds in all its efforts to influence politics — just as it must be acknowledged that relatively small companies, labor unions, activist organizations, and even well-connected individuals

[105] For this reason, even Robert Pitofsky, in his 1979 paper advocating in favor of incorporating political concerns into antitrust, noted that not all non-economic concerns were appropriate for consideration by antitrust enforcers. Robert Pitofsky, *The Political Content of Antitrust*, 127 PENN. L. REV. 1051, 1058 (1979). He found, in particular, at least two factors "protection for small businessmen against the rigors of competition" and "income redistribution to achieve social goals," could "play no useful role in antitrust enforcement" (id.)—yet both are constituent parts of the populist antitrust resurgence. *See*, e.g., Senate Democrats, "A Better Deal: Cracking Down on Corporate Monopolies" (Jul. 2017), *available* at https://democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf. The "Better Deal" claims that "[t]he extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors." *Id*. at 1. Its proscriptions are aimed at, among other things, using competition policy to address alleged "higher prices, lower pay, the squeezing out of competition, and increasing inequality." *Id*. at 3.

[106] Manne Testimony, *supra* note 47, at 19-20 (emphasis added).

often succeed in theirs.[107] Not only is the risk of political influence arising from concentrated industry overstated, the risks and costs of adopting politicized enforcement are, as discussed, significantly *understated*.

Indeed, we have observed the costs of politicized antitrust, and our experience is that they are both real and significant. When imbued with an ill-defined set of vague socio-political objectives, antitrust becomes a sort of "meta-legislation."[108] As a result, the return on influencing a handful of government appointees with authority over antitrust becomes huge, thereby increasing significantly the incentives to do so.

As Baumol and Ordover observe, antitrust law is inherently prone to rent-seeking, especially protectionism.[109] This rent-seeking, in turn, leads to numerous harms, including the misallocation of resources (both government and private), less efficient firms, and a diversion of firms' energies towards less productive ends, including both offensive (aimed at having enforcers investigate and prosecute competitors) and defensive (protecting oneself from such endeavors and actions) efforts.[110] It can also lead to regulatory capture, whereby enforcers may be "captured" by certain interests, and fail to act in a way that aligns with their stated objectives. Explicitly incorporating opaque socio-political goals into antitrust enforcement only exacerbates these harmful tendencies—and simultaneously decreases the ability to hold captured enforcers responsible, as they can justify nearly any outcome.[111] Indeed, evidence drawn from analyzing early enforcement actions, arising before antitrust fully embraced the consumer welfare standard—and when it was seeking to further a wider set of socio-political goals—indicates that such public interest factors failed to explain significant percentages of enforcement actions.[112]

The economically-grounded consumer welfare standard helped substantially to cabin such harms and align enforcement with consumer interests. But reintroducing a political dimension to antitrust law would reestablish a regime inherently prone to capture by rivals seeking to ride populist waves of protectionism to economic dominance. And so politicized antitrust is, quite contrary to the populist movement's stated goals, a recipe for a corporate welfare regime.

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[107] No doubt, at the margin, "small or medium size companies can rarely match the resources of a corporate leviathan in seeking government bestowed advantages." Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PENN. L. REV. 1191, 1198 (1977). But there are a lot of "corporate leviathans." Moreover, it must be "said that some small companies also have been adroit in securing favors from the state. The exemption which hog cholera serum producers have received from the antitrust laws is only one example. 7 U.S.C. § 852 (1970)." *Id.* There are, of course, countless other examples.

[108] Geoffrey Manne, *The Antitrust Laws Are Not Some Meta-Legislation Authorizing Whatever Regulation Activists Want: Labor Market Edition*, TRUTH ON THE MARKET (Sep. 22, 2017), *available at* https://truthonthemarket.com/2017/09/22/the-antitrust-laws-are-not-some-meta-legislation-authorizingwhatever-regulation-activists-want-labor-market-edition/.

[109] *See* William J. Baumol & Janusz A. Ordover, Use of Antitrust to Subvert Competition, 28 J. L. & ECON. 252 (1985).

[110] *Id.* 250-51.

[111] *See, e.g.*, Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking*, COMPETITION POL'Y INT'L (April 2018).

[112] *See id*. discussing the literature.

Moreover, as discussed, when antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions.[113] Perhaps most critically, attempting to promote socio-political goals through competition laws tends to undermine competition itself.[114] If competition law is unconstrained on its own terms — that is, if it is unmoored from a set of subject-specific limitations imposed by courts and legislatures — it threatens to morph into a large, sprawling, economy-wide set of regulations resembling a national industrial policy. The merits or demerits of actually having an economy-wide industrial policy aside, it is unquestionably a perversion of *competition* law to facilitate the imposition of policies from law and regulation outside of competition policy in ways that, of necessity, will promote other polices at the very *expense* of competition.

Finally, if the underlying basis for antitrust enforcement is extended beyond economic welfare effects, how long can we expect to resist calls to *restrain* enforcement precisely to further those goals? The effort and incentive to obtain exemptions would be significantly increased as the persuasiveness of the claimed justifications for those exemptions (which already encompass non-economic goals[115]) would be greatly enhanced. The end result could even be more concentration, as the exceptions could subsume the rules.

This discussion highlights the fundamental, underlying problem: *If antitrust becomes more political, the outcome will be less democratic, more politically determined results* — precisely the opposite of what proponents claim to want.

Conclusion

The populist antitrust movement of the last few years has struck a powerful chord that continues to resonate today. It purportedly identifies an array of dire problems and offers a simple and long-overlooked solution to them all: antitrust law. But analysis of these claims and purported solutions demonstrates systemic, fatal shortcomings. The trends which populist supporters allegedly identify are not supported by strong (or any) evidence. The connection between antitrust enforcement and the alleged problems is similarly weak, at best.

And these calls to dramatically upend antitrust law ignore our nation's experience of attempting to enforce antitrust laws in a regime remarkably similar to what populists today desire. This regime was internally inconsistent and allowed regulators to enforce (or not) based upon their subjective weighing of numerous, vague goals—and resulted in higher prices, less innovation, and lower

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[113] *See* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, U. of Penn, Inst. for Law & Econ. Research Paper No. 18-7 (Feb. 2018) at 3 (forthcoming, Notre Dame Law Review), *available at* https://ssrn.com/abstract=3097452 ("As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed.").

[114] *See supra* Section IV.

[115] *See generally* ANTITRUST MODERNIZATION COMM'N REPORT AND RECOMMENDATIONS, Chap. IV.B 333342 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

quality. This regime not only undermined the rule of law, but also fostered a regime where enforcers were exceptionally prone to rent-seeking and capture.

We have learned a tremendous amount about how to effectively enforce antitrust laws over the last several decades. This includes acknowledging its limitations and focusing upon on its strengths. Competition laws are powerful tools when properly targeted. But when improperly targeted, they tend not only to undermine competition itself, but also to fail to achieve other offsetting goals. Resisting populist calls to ignore this experience and to embrace politicized antitrust is critical to the continued viability of our competition efforts.