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## Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement

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# Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement

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## *Abstract*

*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*

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*the unifying theme of returning antitrust to the “big-is-bad” enforcement era prevalent in the first half of the twentieth century.*

*But 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. 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. Instead, antitrust evolved the elegant “consumer welfare standard” 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.*

*This Article 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.*

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## I. INTRODUCTION

Populist antitrust notions are suddenly 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.<sup>1</sup> Seizing on Americans' fears about changes to the modern U.S. 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.<sup>2</sup> 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.<sup>3</sup> Among other things, 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.<sup>4</sup> 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.<sup>5</sup>

The criticisms that populist antitrust proponents raise are generally unsupported and often dramatized, and the resulting policy proposals are, accordingly, fatally flawed.<sup>6</sup> 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.<sup>7</sup> For instance, critics frequently cite data

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1. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 715–17, 746 (2018).

2. *Id.* at 717–21.

3. *Id.* at 745.

4. See Matt Stoller, *How Antitrust Became Mainstream Part 3: The Antimonopoly Political Revolution*, PRO-MARKET (July 23, 2019), <https://promarket.org/how-antitrust-became-mainstream-part-3-the-antimonopoly-political-revolution/>; see also Client Memorandum from Davis Polk & Wardwell LLP, *The New Populist Movement in Antitrust: Could It Change the Status Quo and Does It Threaten American Businesses?* 1, 2, 4 (Oct. 26, 2018), [https://www.davispolk.com/files/2018-10-26\\_the\\_new\\_populist\\_movement\\_in\\_antitrust\\_could\\_it\\_change\\_the\\_status\\_quo\\_and\\_does\\_it\\_threaten\\_american\\_businesses.pdf](https://www.davispolk.com/files/2018-10-26_the_new_populist_movement_in_antitrust_could_it_change_the_status_quo_and_does_it_threaten_american_businesses.pdf) [hereinafter Client Memo] (analyzing the ramifications of the populist movement on anti-trust law and policy, and specifically how it could impact American businesses); Geoffrey A. Manne & Justin (Gus) Hurwitz, *Big Tech's Big-Time, Big-Scale Problem*, CATO POL'Y REP., May/June 2018, at 1, 6.

5. See Manne & Hurwitz, *supra* note 4, at 6; Stoller, *supra* note 4.

6. Manne & Hurwitz, *supra* note 4, at 6–7.

7. See discussion *infra* Sections IV.B–C.

indicating significant increases to concentration across a wide range of United States industries as evidence of failed antitrust policy.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

Ironically, populist antitrust proponents ignore that over fifty years ago antitrust law debated the same proposals that they are raising anew today.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> These regimes were roundly—and rightly—condemned.<sup>14</sup> In their place, antitrust evolved an elegant framework that simplified the core conception of what constitutes harm to competition into a straightforward question: does the conduct at issue harm consumers?<sup>15</sup>

Today, the consumer welfare standard supports a rigorous, objective, and

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8. See, e.g., William A. Galston & Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS (Jan. 5, 2018), <https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/> (discussing the increase in concentration of the “retail trade” industry); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 807–08 (1987).

9. Galston & Hendrickson, *supra* note 8; *infra* Section IV.A (arguing that “retail trade” covers a broad range of businesses that cannot compete against one another).

10. See Davis Polk & Wardwell LLP, *supra* note 4, at 1–2; Manne & Hurwitz, *supra* note 4, at 6.

11. See, e.g., Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282–83 (1956); Shapiro, *supra* note 1, at 722; Manne & Hurwitz, *supra* note 4, at 7–8.

12. See Turner, *supra* note 8, at 812–13.

13. See *id.* at 807–08; Shapiro, *supra* note 1, at 716–17; Manne & Hurwitz, *supra* note 4, at 7–8.

14. Client Memo, *supra* note 4, at 2; Manne & Hurwitz, *supra* note 4, at 8.

15. Shapiro, *supra* note 1, at 742–43.

evidence-based framework for antitrust analysis.<sup>16</sup> It leverages developments in modern economics more reliably to predict when conduct is likely to harm consumers as a result of harm to competition.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> These virtues are precisely the target of the new populist antitrust movement, which seeks to reject economics in favor of mere supposition in order to achieve decidedly political, not economic, ends.<sup>20</sup>

Antitrust is an attractive regulatory tool.<sup>21</sup> The vague, terse language of the Sherman Act readily lends itself to interpretation with virtually limitless scope.<sup>22</sup> Indeed, “the urge to treat antitrust as a legal Swiss Army knife capable of [rectifying] all manner of [perceived] social and economic ills is apparently [quite] difficult to resist,”<sup>23</sup> as calls to do so resurface every few decades. “Conflating size with market power, and market power with political power, many recent calls for regulation of the tech industry are framed in antitrust terms.”<sup>24</sup>

But that attraction is precisely why we should care about the scope, process, and economics of antitrust and the extent of its politicization.<sup>25</sup> Antitrust in the U.S. has largely resisted the relentless effort toward politicization.<sup>26</sup> Endorsing the populist antitrust approach would prioritize political expediency over the rule of law.<sup>27</sup> It would open the floodgates of antitrust litigation

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16. Manne & Hurwitz, *supra* note 4, at 8, 12; Shapiro, *supra* note 1, at 742; *Competition and Consumer Protection in the 21st Century: Hearing Before Fed. Trade Comm’n*, 115 Cong. 61–63 (2018) [hereinafter *FTC Hearing #1*] (statement of Janet McDavid, Senior Counsel, Hogan Lovells LLP, past Chair of the ABA Antitrust Section).

17. Director & Levi, *supra* note 11, at 287; Turner, *supra* note 8, at 798–99.

18. Manne & Hurwitz, *supra* note 4, at 8, 12; Client Memo, *supra* note 4, at 2.

19. Shapiro, *supra* note 1, at 745.

20. *Id.* at 716, 745; see Stoller, *supra* note 4; see also Client Memo, *supra* note 4, at 2–3.

21. Manne & Hurwitz, *supra* note 4, at 6.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 6, 12; Galston & Hendrickson, *supra* note 8.

26. Manne & Hurwitz, *supra* note 4, at 6.

27. See *infra* Section V.B (explaining the many pitfalls of the populist antitrust approach in greater detail).



and facilitate harmful tendencies, such as rent-seeking, regulatory capture, and politically motivated enforcement.<sup>28</sup> It would thus unlock a veritable Pandora's box of concerns that are currently kept in check.<sup>29</sup> Chief among them is the use of antitrust laws to evade democratically and judicially established rules and legal precedent.<sup>30</sup>

This Article makes a case in support of the current consumer welfare standard and against a sweeping set of unsupported populist antitrust reforms.<sup>31</sup> 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.<sup>32</sup> Such debate is healthy and to the benefit of antitrust enforcement.<sup>33</sup> 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.<sup>34</sup>

Part II 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.<sup>35</sup> Part III explains the benefits of the consumer welfare approach: namely, offering consistency and coherency to a previously wayward area of

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28. See Michael E. DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 HARV. J.L. & PUB. POL'Y 205, 206 (1991) ("[A] populist antitrust regime would induce increases in rent-seeking behavior, including increases in antitrust litigation.")

29. See *infra* Section V.B (comparing the current antitrust enforcement policies with predicted consequences of the populist approach).

30. See Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1172–74 (1988) (discussing the "basic policy choices of the 1890 Congress" that enacted the Sherman Act, and concluding that the widening scope of economic regulations is not supported by legislative history).

31. See *infra* Parts III–V.

32. Compare Arthur, *supra* note 30, at 1205 (describing a "hands off" approach to antitrust policy that requires a high standard of evidence for antitrust plaintiffs to meet their burden of proving injury), with Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 369 (1965) (suggesting that any evidence that a competitor has been injured may be used to show a lessening of competition).

33. See Arthur, *supra* note 30, at 1169 (encouraging debate about antitrust policy because a "relaxed attitude toward wholesale judicial policymaking fails to recognize either the questionable legitimacy of unelected judges making society's basic policy choices or the reality that standardless, political decisionmaking undermines a coherent and stable rule of law").

34. See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 44–46 (2000) (illustrating the clarification and development of the Sherman Act's meaning through case law from 1890–1914).

35. See *infra* Part II.

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.<sup>36</sup> Part IV articulates the shortcomings of the populist antitrust approach, which has little to no empirical support for its contentions or proffered solutions.<sup>37</sup> Part V discusses the serious dangers of adopting the populist antitrust approach, including reducing consumer welfare and fostering corporate welfare and rent-seeking.<sup>38</sup>

## II. THE RISE OF THE CONSUMER WELFARE STANDARD IN ANTITRUST ENFORCEMENT

The broad strokes of United States antitrust law are articulated in the concise language of the governing federal statutes, the first of which was passed in 1890.<sup>39</sup> As a result of the exceptionally brief nature of these statutes, antitrust law has developed primarily through common law judicial interpretations.<sup>40</sup> The contours of the antitrust laws therefore have been primarily driven by the case selection of United States enforcers and private plaintiffs, and ultimately articulated in the decisions issued by the federal courts.<sup>41</sup> In true common law fashion, antitrust law has evolved considerably over time.<sup>42</sup> To understand how antitrust law is applied today and why, it is important to examine where antitrust law came from and how it has developed over the course of more than 125 years.<sup>43</sup>

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36. See *infra* Part III.

37. See *infra* Part IV.

38. See *infra* Part V.

39. The principal federal antitrust laws are the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2012); the Clayton Act of 1914, 15 U.S.C. §§ 12–27 (2012); and the Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012).

40. See, e.g., Director & Levi, *supra* note 11, at 281 (“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.”).

41. See Arthur, *supra* note 30, at 1190 (“Even more than in other areas, the Supreme Court in antitrust law has mixed its jurisprudential styles, alternating among three distinct modes of antitrust decisionmaking.”); Kovacic & Shapiro, *supra* note 34, at 43–46 (defining current antitrust policy).

42. See Kovacic & Shapiro, *supra* note 34, at 58 (“The consciously evolutionary quality of the U.S. antitrust statutes, with their implicit recognition of the need to adjust doctrine over time in light of experience and new learning, gives economists considerable power to influence competition law and policy.”).

43. See generally Kovacic & Shapiro, *supra* note 34 (explaining the entire 125-year judicial history of antitrust law).

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.<sup>44</sup> The period from 1890 to 1914 was marked by courts struggling to operationalize a law that “directly implicated economic concepts” and yet was so brief and unspecific that it was difficult to discern how these economic concepts should be applied.<sup>45</sup> As a result, the courts faced a monumental task in attempting to develop a coherent set of antitrust law principles.<sup>46</sup> The difficulties faced by these early courts are easy to understand.<sup>47</sup> For instance, the Sherman Act nominally forbids “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade”<sup>48</sup>—a command that courts eventually realized was impossible to enforce literally, as *every* contract imposes *some* degree of a restraint on trade.<sup>49</sup> Nevertheless, in the early case law, the Supreme Court was willing to take the Sherman Act’s prohibition literally.<sup>50</sup> 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.<sup>51</sup> Antitrust thus began to develop a functional jurisprudence that recognized that not every restraint violated the Sherman Act.<sup>52</sup>

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44. *See id.* at 44 (“Although the Sherman Act’s first two decades featured no whirlwind of antitrust enforcement, the courts began shaping the law’s vague terms.”).

45. *See id.* at 43 (noting the shifting “contours of antitrust doctrine” that resulted from the court’s duty to “elaborate the Sherman Act’s broad commands”).

46. *See id.* at 43–44 (explaining the ambiguity of the Sherman Act); Arthur, *supra* note 30, at 1172–73 (“After four decades of judicial construction, the Act had a settled meaning that was consistent with the basic policy choices of the 1890 Congress.”).

47. *See Comment, Labor and the Sherman Act*, 49 YALE L.J. 518, 523 (1940) (“Within the broad scope of interpretation offered by the general words of the Statute, the Supreme Court could have chosen almost any path.”).

48. 15 U.S.C. § 1 (2012).

49. *See Kovacic & Shapiro, supra* note 34, at 44 (“Some early cases . . . applied [the Sherman Act’s] language literally, yet even these decisions recognized that prohibiting all agreements which curbed commercial freedom could imperil beneficial forms of cooperation, such as partnerships.”).

50. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 312 (1897).

51. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff’d sub nom. Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

52. Kovacic & Shapiro, *supra* note 34, at 44–45 (exposing the issues with interpreting the statute literally); *see, e.g., Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400, 409 (1911) (recognizing that the defendant’s agreements placed a restraint on trade, but nevertheless upholding the agreements).

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.<sup>53</sup> In the earlier case law, however, the basis for drawing these distinctions was not well developed and courts struggled to identify a coherent framework for applying admittedly vague statutory language.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> In this they were bolstered by the influential thinking of Louis Brandeis, who “was willing to burden consumers with higher prices if those prices provided an umbrella of protection for small business.”<sup>58</sup>

Brandeis was far more concerned with the presumed exploitation of

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53. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63–64 (1910) (“The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade . . . [means it intended] to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.”).

54. See Kovacic & Shapiro, *supra* note 34, at 44; Arthur, *supra* note 30, at 1174 (“[T]he Court provided no analytical tools for trial judges untrained in economics to use in detecting ‘undue’ restraints in hard cases.”).

55. See Bork & Bowman, *supra* note 32, at 363–64 (footnote omitted) (“From its inception with the passage of the Sherman Act in 1890, antitrust has vacillated between the policy of preserving competition and the policy of preserving competitors from their more energetic and efficient rivals.”).

56. D.T. ARMENTANO, *THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES* 70, 77, 86 (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. . . . [A]t 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.”).

57. See Arthur, *supra* note 30, at 1171–72 (arguing that Congress made “real policy choices” in the Sherman Act by “ban[ning] cartels and monopolistic mergers, regardless of their social worth or economic efficiency,” but allowed other conduct so long as it did not involve “predatory practices”).

58. Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 *TOURO L. REV.* 277, 314 (2017).

citizens *through* consumerism, than he was with the protection of consumers qua consumers: “Far-seeing organized capital secures [,with its tendency to cut prices,] . . . the co-operation of the short-sighted[,] unorganized consumer to his own undoing. Thoughtless or weak, [the consumer] yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage[,] becomes himself an instrument of monopoly.”<sup>59</sup> Indeed, Brandeis saw consumers as inherently unworthy of protection: “The Consumer,” wrote Brandeis, “is servile, self-indulgent, indolent, ignorant.”<sup>60</sup>

Thus, following its formative phases, early twentieth-century antitrust law was interpreted largely as existing to protect “small dealers and worthy men”<sup>61</sup> or, put more simply, to prevent “bigness.”<sup>62</sup> And for much of the twentieth century, antitrust doctrine focused on market structure and firm size, and condemned companies that were viewed as too large.<sup>63</sup> 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.<sup>64</sup>

An approach that frames “big” corporations as bad, however, necessarily works to benefit “small” firms—even when they do not earn such success by

59. LOUIS D. BRANDEIS, *BUSINESS—A PROFESSION* 254 (1914).

60. Draft Letter from Louis D. Brandeis to George Henry Soule (Apr. 22, 1923), in 5 *LETTERS OF LOUIS D. BRANDEIS, 1921–1941: ELDER STATESMEN* 92 (Melvin I. Urofsky & David W. Levy eds., 1st ed. 1978).

61. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

62. See LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 109–11 (Osmond K. Fraenkel ed., 1935) (expressing concern about large corporations and government).

63. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 421 (2d Cir. 1945).

64. *Id.* at 428–29. 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. *Id.* at 446.

providing superior, lower-cost goods and services to consumers.<sup>65</sup> 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.<sup>66</sup> 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.”<sup>67</sup> In the name of protecting “helpless individuals” (small business owners) the courts therefore condemned conduct that lowered prices (thus harming consumers).<sup>68</sup> “Big” was interpreted as “bad” during this period, even where administration of the antitrust laws to favor small business meant that “occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”<sup>69</sup>

The end result was a rudderless analysis that deployed the antitrust laws against perfectly procompetitive practices that benefited consumers.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

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65. See generally *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1967) (finding that the Clayton Act disfavors large corporations in favor of smaller firms because it seeks to promote and protect competition).

66. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699–700 (1967).

67. *Id.*

68. See *Brown Shoe Co.*, 370 U.S. at 344.

69. *Id.*

70. *Id.* at 344, 346.

71. See *id.* at 329 (“Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor *de minimis* proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive. In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe.”).

72. See generally *id.* at 334–35 (listing factors to be considered in determining whether a horizontal merger is valid). For example, a manufacturer who transferred title to a dealer or announced retail prices itself was treated differently under the antitrust laws than if that same conduct was affected by a resale price maintenance agreement. 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).

*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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> Reviewing the spotty judicial history 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

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73. *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.”).

74. 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.”); Director & Levi, *supra* note 11, at 282–83; 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).

75. Page, *supra* note 74, at 1239–40.

76. Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, *FORTUNE* 135 (Aug. 1964), *reprinted in* 65 *COLUM L. REV.* 377, 383 (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 markets accommodates our interest in material well-being with our distrust of concentrations of political and economic power in private or governmental hands.”).

objective of increased efficiency, the decision must be made by Congress.”<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> 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.<sup>80</sup> Therefore, an economic efficiency standard sought to maximize societal welfare and bring coherency to antitrust law.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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

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77. Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 426 (1965).

78. *See id.* at 426–27 (noting cases in which Congress chose to exempt rate coordination from antitrust laws).

79. *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, 368 (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.”).

80. *Id.* at 368 (“This increased efficiency is valuable to society at large, for it means that fewer of our available resources are being used to accomplish the same amount of production and distribution.”).

81. *Id.* at 368–69.

82. There is a debate—and confusion—over whether the exact welfare standard used in antitrust should be focused on “consumer welfare” or “total welfare.” *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11 (1984) (describing the difficulty in determining the welfare implications of various forms of business conduct). The relevant point for our purposes here is that antitrust law came to incorporate a standard based solely on economic welfare while rejecting an ambiguous socio-political standard that shifted based on enforcement preferences and judicial discretion. *See infra* Part II.C (describing the adoption of the modern consumer welfare standard).

83. *See* Tom Laskawy, *Don't Like Today's Food Monopolies? Blame Robert Bork*, GRIST (Dec. 21, 2012), <https://grist.org/food/dont-like-todays-food-monopolies-blame-robert-bork/> (discussing Robert Bork's impact on antitrust debate and laws).



produce a better result.<sup>84</sup> 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.<sup>85</sup> The precise number of *competitors* was only indirectly relevant in discovering whether the desirable result obtained from the competitive process.<sup>86</sup>

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.<sup>87</sup> By aligning legal theories of harm with economic theories regarding when and how conduct was anticompetitive, rigor and predictability were introduced into the antitrust enforcement process.<sup>88</sup> Importantly, it is both theory *and* evidence that governs the enforcement process.<sup>89</sup> 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.<sup>90</sup>

“These . . . insights provided a coherent framework for analyzing allegedly anticompetitive conduct—and specifically for distinguishing between pro[competitive] and anticompetitive conduct.”<sup>91</sup> A good example of this approach is the evolution of predatory pricing claims to incorporate economic

84. See Laskawy, *supra* note 83.

85. See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978) (“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”); *accord* FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 423 (1990).

86. See Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 692 (“[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.”); see, e.g., Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2413 (2013) (illustrating how the specific number of firms does not have to be exact in order to make the competitive process produce desirable results for consumers).

87. See, e.g., Easterbrook, *supra* note 82, at 10–11.

88. *Id.* at 9–10 (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.”).

89. *Id.* at 10–12; see *infra* note 90.

90. *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. *Id.* at 19–39.

91. Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 *ARIZ. ST. L.J.* 293, 306 (2019).

learning and empirical reality.<sup>92</sup> The empirical evidence demonstrates that predatory pricing is rarely effective.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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 anti-competitive practices.<sup>97</sup>

### C. Modern Antitrust: Adoption of the Consumer Welfare Standard

Today there is widespread, bipartisan support for the modern consumer welfare standard.<sup>98</sup> 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.”<sup>99</sup> Later, in *United States v. Baker Hughes*, then-Judge Clarence Thomas—joined by then-Judge Ruth Bader Ginsburg—wrote that “[e]vidence of market concentration simply

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92. See *Standard Oil Co. v. United States*, 221 U.S. 1, 80–82 (1911) (noting that as far back as this case, 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 Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 228–29 (1993).

93. See ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 144–45 (1978).

94. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986).

95. *Id.* at 589.

96. *Id.*; see Wright, *supra* note 91, at 305–06 (discussing the implications of error-cost framework).

97. *Matsushita Elec. Indus. Co.*, 475 U.S. at 589; see Wright, *supra* note 91, at 305–06.

98. See *Hearing #2 On Competition and Consumer Protection in the 21st Century: Hearing Before Fed. Trade Comm’n*, 115 Cong. 2–4, 12 (2018) [hereinafter *FTC Hearing #2*] (Comments of the American Antitrust Institute) (noting that the FTC, an antitrust enforcement agency, employs the consumer welfare standard in its antitrust enforcement, and “[t]he agency’s work consistently attracts bipartisan support”).

99. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

provides a convenient starting point for a broader inquiry into future competitiveness.”<sup>100</sup> And, more recently, in her confirmation hearings, Justice Kagan stated that “it is clear that antitrust law needs to take account of economic theory and economic understandings.”<sup>101</sup>

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.<sup>102</sup> In reaching its holding, the Court reasserted the requirement that predatory pricers must have some possibility for recoupment because, without such a requirement, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”<sup>103</sup>

In *Leegin Creative Leather Products v. PSKS, Inc.*, the Court had occasion to consider resale price maintenance restraints, and their effect on consumer welfare.<sup>104</sup> In moving resale price maintenance restraints from *per se* illegal to subject to a rule of reason analysis, the Court held that “[t]hrough 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.”<sup>105</sup> 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.”<sup>106</sup>

Recent criticisms of the consumer welfare standard, rooted in populist preferences for a return to political antitrust, ignore both this bipartisan support as well as the rigorous analysis and debate that led to the creation of this standard.<sup>107</sup>

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100. *United States v. Baker Hughes*, 908 F.2d 981, 984 (D.C. Cir. 1990).

101. *The Nomination of Elena Kagan to Be an Assoc. Justice of the Supreme Court of the U.S.: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 82 (2010) (statement of Elena Kagan during her Supreme Court confirmation hearings).

102. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993).

103. *Id.* at 224.

104. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007).

105. *Id.* at 889.

106. *Id.* at 902.

107. *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). *See generally* Lina M. Khan,

## III. THE BENEFITS OF THE CONSUMER WELFARE STANDARD

Experience over the last fifty years demonstrates that the consumer welfare standard has had a significant positive influence on antitrust jurisprudence and enforcement decisions.<sup>108</sup> 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?<sup>109</sup> 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 decisionmakers to reach almost any result they desire.<sup>110</sup> 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 preference, and of increasing the consistency of decisions across disparate political administrations.<sup>111</sup> 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.<sup>112</sup>

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*Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (arguing that the process of “gauging real competition in the twenty-first century marketplace . . . requires analyzing the underlying structure and dynamic of markets.”).

108. See generally *infra* Part III (describing the last fifty years of antitrust law under the consumer welfare standard).

109. Wright & Ginsburg, *supra* note 86, at 2406–07 (discussing the goals of consumer welfare and why they are an improvement over the old, vague goals). See generally *infra* Section III.A (describing how the consumer welfare standard is clear, consistent, and coherent).

110. Wright & Ginsburg, *supra* note 86, at 2406–07. See generally *infra* Section III.A (noting how the consumer welfare standard “offers an objective and concrete framework for evaluating whether a challenged conduct has harmed competition”).

111. Maurice Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 603 (2012).

112. See Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND. 1, 1 (Oct. 2018), <https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf>.

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.<sup>113</sup> Today, the consumer welfare standard is well-developed, and its meaning and the evidence required to show harm is well-established.<sup>114</sup> 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.<sup>115</sup> It does so by examining a singular factor: whether consumers have been made better or worse off as a result of the conduct.<sup>116</sup>

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.<sup>117</sup> 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

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113. See, e.g., Deborah Garza, *Remarks on "Modernization of Antitrust Law – Private and Public Enforcement and Abuses—Europe and the U.S."*, U.S. DEP'T JUST. (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.").

114. Cristine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, *Luncheon Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?* (Feb. 15, 2019), in *FTC.GOV*, Feb 2019, at 1 ("Under the consumer welfare standard, business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act.").

115. *Id.* at 16.

116. See Garza, *supra* note 113 ("[A]gencies should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the merging firms to increase innovation.").

117. See *supra* Section II.A.

than alternative tests.<sup>118</sup> 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 *every* policy decision is a political decision.<sup>119</sup> That is neither remarkable nor interesting for assessing the benefits of the consumer welfare standard.<sup>120</sup> 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 decisionmaker and therefore the potential influence of politics and rent-seeking in antitrust decisions.<sup>121</sup> Significantly, what experience shows is that because the consumer welfare model is clear and objective, it cannot easily be contorted by a decisionmaker who may be motivated by a desire to pick winners and losers in a specific case.<sup>122</sup> The singular focus on consumer welfare thus creates a predictable methodology that leads to more consistency across different antitrust cases and to treating similarly situated parties equally under the law.<sup>123</sup> Indeed, by exporting the consumer welfare standard to other jurisdictions around the world, the United States has helped to foster the rule of law and limited the use of antitrust to promote protectionist goals.<sup>124</sup>

Second, although the consumer welfare standard may be imperfect, it is by far the best available antitrust framework because it maximizes the welfare

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118. See Kennedy, *supra* note 112, at 2–3 (noting that opponents to the consumer welfare standard argue that large firms “concentrate political power into the hands of a fortunate few, thereby undermining democracy”).

119. Wilson, *supra* note 114, at 3.

120. See *id.*

121. See, e.g., Stucke, *supra* note 111, at 574–77 (questioning whether the consumer welfare method is actually more objective because “consumer welfare” has yet to be explicitly defined).

122. Wilson, *supra* note 114, at 10 (explaining that distortion is much easier in other antitrust models).

123. See Kennedy, *supra* note 112, at 5 (explaining that the consumer welfare standard is important because it has “freed companies from having to worry that they will become antitrust targets even if they do not engage in clear anticompetitive behavior such as price fixing or enter into mergers that violate the government’s rough guidelines regarding market concentration”).

124. See, e.g., A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 272–73 (2008) (“The Chicago School played a major role in reversing traditional interventionist views about vertical pricing and distribution practices by developing arguments as to why such activities rarely are a cause for [antitrust] concern. William Kovacic . . . has also documented the complementary contributions of the Harvard School, based largely on considerations related to administrability and the institutional capacity of courts and enforcement agencies, which have combined with the Chicago School to provide a ‘double helix’ of intellectual support for a restrained approach towards dominant firm conduct.”).

of all Americans.<sup>125</sup> Alternative tests pick between different groups or classes of people or, worse yet, allow decisionmakers to make those distributional choices based on personal preference.<sup>126</sup> Not all Americans are small business owners or have the same social policy preferences as a decisionmaker. 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.<sup>127</sup> But as history shows, these distributional decisions are inherently political; they are not well-suited for law enforcement agencies and judges; and they are better achieved through the legislative efforts of elected officials.<sup>128</sup>

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.<sup>129</sup> 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.<sup>130</sup> They claim that the narrow focus on price leads to many types of conduct going unchallenged and therefore requires a fundamental shift to a

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125. John Kirkwood, *The Goals of Antitrust: The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2459–60 (2013); see also Kennedy, *supra* note 112, at 3 (“[Antitrust] experts argue that the consumer welfare standard, properly defined, protects all counterparties from an excess of market power. It incorporates nonprice harms to consumers, such as lower quality, reduced variety, or slower innovation. It gives regulators the power to look at the effect of the monopsony power on other sellers, including on workers, and allows antitrust agencies to consider the effect of an action on innovation.”).

126. See Wilson, *supra* note 114, at 8–9 (explaining the “five different welfare standards that could be applied in antitrust analysis”).

127. See Client Memo, *supra* note 4, at 2 (“Today’s emerging antitrust populism movement is a reaction to this post-Chicago status quo, which the movement criticizes as having resulted in under-enforcement, industry concentration, and greater wealth inequality. . . . [T]his loose-knit coalition promotes the incorporation of factors currently not included in antitrust analysis. These factors include loss of employment, increase in political influence, economic inequality, and impact on startup companies.”).

128. See 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, 222–23 (2010) (explaining that there is almost universal agreement “that the Court should answer questions of antitrust law by promoting consumer welfare and economic efficiency and not by making political judgments about economically irrelevant matters”).

129. See Wilson, *supra* note 114, at 5 (explaining how the consumer welfare standard is administered).

130. *Id.*

new test.<sup>131</sup> These arguments are either disingenuous or represent a profound misunderstanding of the robustness of the consumer welfare standard. In reality, as discussed below, a long list of cases shows that the consumer welfare standard considers a host of factors beyond price, including quantity, variety, quality, and innovation.<sup>132</sup> While it is not always easy to assess non-price factors, these factors fall well within the consumer welfare standard, and there exist numerous, sophisticated economic tools to evaluate whether a challenged conduct harms consumers on balance.<sup>133</sup>

*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.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> Moreover, although the consumer welfare standard offers a concrete framework for competition analysis, it is flexible enough to incorporate 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.<sup>137</sup>

The consumer welfare standard is tethered to economics in at least two

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131. See Kennedy, *supra* note 112, at 2 (stating that those who challenge the consumer welfare standard argue that a “predominant focus on consumers—and specifically prices—blinds antitrust regulators to other market impacts that can come about through mergers and other behavior”).

132. See Wilson, *supra* note 114, at 5–6 n.32.

133. *Id.*; see *supra* Section II.C (explaining how the Court has been incorporating the consumer welfare standard into its analyses successfully for years).

134. See Wilson, *supra* note 114, at 9.

135. *Id.* at 4.

136. As D.C. Circuit Judge Douglas H. Ginsburg explained, the “increasing embrace of the economic approach to antitrust law, which—relative to approaches based upon amorphous sociopolitical goals—limits liability to those relatively few business practices truly inimical to consumers.” Ginsburg, *supra* note 128, at 219.

137. Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice Antitrust Div., Opening Remarks of the Federalist Society National Lawyers Convention: The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals (Nov. 14, 2019).



significant ways. First, the goal of promoting consumer welfare ultimately informs what type of liability rules a court should apply in any particular case depending on the specific conduct at issue.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup> Indeed, antitrust economics has developed significantly since courts first adopted the consumer welfare standard, providing an increasingly insightful basis for decisions.<sup>141</sup>

The consumer welfare standard's inherent economic framework has also resulted in antitrust decisions and enforcement efforts being remarkably consistent across administrations.<sup>142</sup> 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.<sup>143</sup>

#### IV. THE INADEQUACY OF THE EMPIRICAL CLAIMS AND EVIDENCE UNDERPINNING THE POPULIST ANTITRUST MOVEMENT<sup>144</sup>

The populist antitrust movement argues vociferously for abandoning the well-established consumer welfare standard.<sup>145</sup> 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

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138. See Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 343 (2010); see also *supra* note 136.

139. See Salop, *supra* note 138, at 343; see also *supra* note 137 and accompanying text.

140. See *supra* Part I–II.

141. Kennedy, *supra* note 112, at 5.

142. See, e.g., U.S. DEPT. OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS (2009–2018), <https://www.justice.gov/atr/file/788426/download> (DOJ Antitrust Division enforcement statistics showing consistency across years 2009–2018).

143. *Id.*

144. This section draws in part from Wright et al., *supra* note 91.

145. *Id.* at 296.

may foster.<sup>146</sup> As such, they argue that 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.<sup>147</sup>

Nonetheless, populist antitrust proponents advocate returning to this pre-consumer welfare standard world.<sup>148</sup> Some of the many benefits of the consumer welfare standard—and the commensurate costs of abandoning this standard—are described above.<sup>149</sup> This section explores the empirical evidence upon which populists rely when arguing to abandon the consumer welfare standard.<sup>150</sup>

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.<sup>151</sup> 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.<sup>152</sup> In other words, strong empirical support

146. *Id.*

147. *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 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 how the “‘social and political values’ paradigm of the 1960s and 1970s . . . proved standardless and unduly hostile to business”); Bork & Bowman, *supra* note 32, at 364 (explaining how “a fundamental and widespread misconception of the nature and virtues of the competitive process. . . . [C]oupled occasionally with real hostility toward the free market” led to “the result that in crucial areas the doctrines of antitrust are performing a 180-degree turn away from competition”); Ginsburg, *supra* note 128, at 217 (“Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases.”); Kovacic & Shapiro, *supra* note 34, at 44 (internal citations omitted) (“Most economists in the late 19th century scorned the Sherman Act.”); Wright & Ginsburg, *supra* note 86, at 2405 (“The Court interpreted the Sherman and Clayton Acts to reflect a hodgepodge of social and political goals, many with an explicitly anticompetitive bent . . .”).

148. Wright et al., *supra* note 91, at 294.

149. *See supra* Part III.

150. *See infra* Part IV.

151. *See* Wright et al., *supra* note 91, at 314.

152. *Id.* at 362–65, 295 n.6.

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.<sup>153</sup>

Thus far, however, the populist antitrust movement has not demonstrated such a sound economic basis.<sup>154</sup> The evidence upon which it relies is mixed, at best.<sup>155</sup> At most, it calls into question the level of enforcement under the consumer welfare standard, not the utility of the standard itself.<sup>156</sup> 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.<sup>157</sup>

Populist antitrust supporters make numerous assertions and policy proposals.<sup>158</sup> 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.<sup>159</sup> This section addresses each claim in turn.<sup>160</sup>

*A. Faulty Claim 1: Concentration Has Increased and Competition Has Decreased—And the Consumer Welfare Standard Is to Blame*

One of the populist movement's primary critiques is that the consumer welfare standard is to blame for the purported increase in industry concentration and the resulting assertion that competition has diminished.<sup>161</sup>

To begin, there is in fact no rigorous economic support for claims that high concentration levels are a strong indicator of harm to competition or that

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153. *See id.*

154. *Id.* at 350–51.

155. *Id.*

156. *Id.* at 347.

157. *Id.* at 362–65.

158. *Id.* at 314.

159. *Id.* at 314, 350–51.

160. *See infra* Section IV.A–C.

161. Wright et al., *supra* note 91, at 314.

they should trigger a presumption of such harm in antitrust analysis.<sup>162</sup>

For example, Professor Joshua Wright states:

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.<sup>163</sup>

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.

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162. *Id.* at 318–24. 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*, PRINCETON 1, 1–15 (Jan. 2020), <https://www.princeton.edu/~erossi/DTNLC.pdf> (showing that while concentration may have increased at a national level, it has decreased at a local level).

163. Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, ORG. FOR ECON. CO-OPERATION & DEV. 14 (Jun. 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf).

....

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.<sup>164</sup>

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.<sup>165</sup> 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.”<sup>166</sup> As Yale Brozen so aptly put it back in 1978:

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.*<sup>167</sup>

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.<sup>168</sup>

164. Henry G. Manne, Testimony on the Industrial Reorganization Act before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly (Apr. 1974), in 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*, INT'L CTR. FOR L. & ECON. 1, 15–16 (2018).

165. Wright et al., *supra* note 91, at 318–24.

166. HAROLD DEMSETZ, *The Intensity and Dimensionality of Competition*, in THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 140–41 (1995).

167. Yale Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST L.J. 826, 856 (1978) (emphasis added).

168. See also Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 381, 384 (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).

Put simply: market share and industry concentration are poor predictors of competitive effects.<sup>169</sup>

In short, there is no well-defined “causal effect of concentration on price,” but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration. . . .

Some of the recent literature on concentration, profits, and markups has simply reasserted the relevance of the old-style structure-conduct-performance correlations. For economists trained in subfields outside industrial organization, such correlations can be attractive. Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates. Such correlations will not produce information about the causal estimates that policy demands.<sup>170</sup>

The fact is that economists know very little about the relationships among market structure, firm size, competition, profits, prices, entrepreneurship, and innovation.<sup>171</sup> Market shares and structural presumptions are not capable of predicting competitive effects and, thus, of specifying optimal policy choices.<sup>172</sup>

In particular, in markets where competition occurs significantly through innovation, the effect of increased concentration on competitiveness is

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169. See *supra* note 168 and accompanying text.

170. Steven T. Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44, 48 (2019); see also, e.g., Luke M. Froeb, Former Dir., Fed. Bureau of Economics, U.S. Fed. Trade Comm’n, Summit at Como: A Discussion of Competition Policy, Law and Economics: From Theory to Praxis: Quantitative Methods in Merger Control 6 (Oct. 30, 2004), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/theory-praxis-quantitative-methods-merger-control/041030como.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/theory-praxis-quantitative-methods-merger-control/041030como.pdf).

171. 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); Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011 (Richard Schmalensee & Robert Willig eds., 1989).

172. See Froeb, *supra* note 170, at 6.

ambivalent, at best.<sup>173</sup> Where effective competition requires significant upfront investment and where economies of scale predominate (because of these high fixed costs),<sup>174</sup> 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.<sup>175</sup> Moreover, such an analysis is likely to lead to decisions that *reduce* rather than *promote* consumer welfare and the public interest.<sup>176</sup> “This approach faces severe measurement problems and worse conceptual problems. As we will explain, there are numerous, quite different economic scenarios, with different welfare implications, which can result in a positive correlation between industry concentration and [price, or] markups.”<sup>177</sup>

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 fifty largest firms in a broad industry sector

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173. See, e.g., Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in 6 INNOVATION POLICY AND THE ECONOMY 159, 206 (Adam B. Jaffe et al. 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) (“The 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) (“Despite 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.”).

174. See also Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 595 (1998) (“Economies of scale frequently occur in industries characterized by high fixed costs.”). See generally Joseph P. Kendrick, Comment, *Does Sound Travel in Cyber Space?*, 8 J. SMALL & EMERGING BUS. L. 39, 46–47 (2004) (discussing the basics of economies of scale and the indivisibilities giving rise to them).

175. Berry et al., *supra* note 170, at 44–45.

176. *Id.* at 47–48.

177. *Id.* at 45.

increased in revenue share over a recent ten-year period.<sup>178</sup> 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.<sup>179</sup>

This logic has several critical flaws. One is that competition and concentration are inherently different and inherently in opposition.<sup>180</sup> Thus, according to this logic, increased concentration and reduced competition are two separate claims that must be measured differently.<sup>181</sup> Another flaw is that the ability to measure the fifty largest firms in a sector itself demonstrates there are at least fifty competitive firms, which would seem, in the abstract, to be a not-insignificant number of firms.<sup>182</sup> Furthermore, this increased concentration is not indicative of the aggregate economy in the United States. For example, high concentration has been apparent in only “three broad [industry] sectors[:] services, wholesale, and retail[,]” whereas in other sectors, such as manufacturing, concentration has fallen.<sup>183</sup> A 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 officials at the antitrust agencies all acknowledge this basic point.<sup>184</sup>

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178. See, e.g., Jason Furman, Chairman, President’s Council of Econ Advisers & Peter Orszag, Vice Chairman, Corp. & Inv. Banking at Citi & Non-Resident Fellow in Econ. Studies at the Brookings Inst., 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*, ECONOMIST (Mar. 26, 2016), <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing> (arguing that American firms’ profit levels are too high, indicating a need for added competition within overly-concentrated industries).

179. See Furman & Orszag, *supra* note 178, at 12.

180. See Peter C. Carstensen & Robert H. Lande, *The Merger Incipency Doctrine and the Importance of “Redundant” Competitors*, 2018 WIS. L. REV. 783, 808–09 (2018).

181. *Id.* at 808–12; see also *Business in America*, *supra* note 178.

182. See Furman & Orszag, *supra* note 178, at 11.

183. Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services* 4 (Mar. 17, 2020) (unpublished manuscript) (on file with Princeton University), <https://www.princeton.edu/~erossi/IRS.pdf>.

184. See, e.g., United States, Hearing on Market Concentration, ORG. FOR ECON. CO-OPERATION & DEV., May 27, 2018, at 2, para.1, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)59/en/pdf](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



Consider, for instance, that the “Retail Trade” designation, which is used in several studies by populist authors,<sup>185</sup> includes over *1.5 million* United States businesses.<sup>186</sup> 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.<sup>187</sup> 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, for example, a tobacco store is not a suitable place to shop.<sup>188</sup> Simply identifying that concentration across these vastly different retail segments has increased in the aggregate cannot illuminate our understanding of actual market power.<sup>189</sup>

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:

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(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://pro-market.org/wp-content/uploads/2018/04/Is-There-a-Concentration-Problem-in-America.pdf> (noting that the CEA “[s]omewhat embarrassingly . . . looked at the 50-firm concentration ratio in two-digit industries” and that he was not sure what “IO [industrial organization] economist [would] think that[] very informative regarding market power”); Joe Simons, Chairman, Fed. Trade Comm’n, Welcome Remarks at FTC Hearing #1, *supra* note 16, Session 1: The Current Landscape of Competition and Consumer Protection Law and Policy (Sept. 13, 2018), <https://www.ftc.gov/news-events/audio-video/ftc-hearing-1-competition-consumer-protection-21st-century-welcome> (transcript available at FTC.gov); *see also* Jonathan Baker, Steven Berry, Fiona Scott Morton & Joshua D. Wright, Panel at the FTC Hearing #1, *supra* note 16, Session 2: 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/ftc-hearing-1-session-2-has-us-economy-become-more-concentrated-less> (with all economists acknowledging this point); Noah Phillips, Comm’r, Fed. Trade Comm’n, Prepared Remarks before the United States 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](https://www.ftc.gov/system/files/documents/public_statements/1416803/phillips_-_us_chamber_of_commerce_10-17-18.pdf).

185. *See, e.g.*, Furman & Orszag, *supra* note 178, at 11.

186. *See* Galston and Hendrickson, *supra* note 8.

187. *Six Digit NAICS Codes & Titles*, NAICS ASS’N, <https://www.naics.com/six-digit-naics/?code=44-45> (last visited Nov. 21, 2018).

188. *See* Galston & Hendrickson, *supra* note 8 and accompanying text.

189. *See* U.S. Antitrust Agencies OECD Submission, *supra* note 184, at 3, para. 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 91, at 315–18.

- “premium, natural, and organic supermarkets[;]”<sup>190</sup>
- “the sale and distribution of consumable office supplies to large B-to-B [business-to-business] customers[;]”<sup>191</sup> and
- “[d]iscount 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.”<sup>192</sup>

Although not themselves without flaws, these far-more-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, however, economic theory and empirical work have debunked this notion—and for good reason.<sup>193</sup> 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 highly concentrated among fewer swimmers. This concentration in men’s swimming event gold medals was largely the result of Michael Phelps winning an unprecedented twenty-three gold medals over four Olympic Games.<sup>194</sup>

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

190. F.T.C. v. Whole Foods Mkt., 548 F.3d 1028, 1032 (D.C. Cir. 2008).

191. F.T.C. v. Staples, Inc., 190 F. Supp. 3d 100, 127 (D.D.C. 2016).

192. 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>.

193. See *supra* note 56 and accompanying text.

194. Andrew Gould, *Michael Phelps Poses with 23 Olympic Gold Medals on ‘Sports Illustrated’ Cover*, SPORTS ILLUSTRATED (Dec. 20, 2016), <https://bleacherreport.com/articles/2682937-michael-phelps-poses-with-23-olympic-gold-medals-on-sports-illustrated-cover>.

competition in this field was lower over the last sixteen 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.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> After all, successful firms are often successful for *meritorious* reasons.<sup>198</sup> For example, increased concentration might be attributable to firms adopting new technologies that enable them “to scale production over a large number of establishments dispersed across space” (horizontal expansion across more locations).<sup>199</sup> This results in firms exiting industries where they are less-efficient, or where the new technology is ineffective.<sup>200</sup> In other words, increased concentration can be the result of an industry weeding out its less-efficient firms—the remaining firms are seen

195. Beat Knechtle et. al., *The Age in Swimming of Champions in World Championships (1994–2013): and Olympic Games (1992–2012): A Cross-Sectional Data Analysis*, SPORTS 4, 20 (2016).

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

197. Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, Ctr. For Econ. Stud., U.S. Census Bureau, 2 (Nov. 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3030966](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 91, at 318–24. See generally HANDBOOK OF INDUSTRIAL ORGANIZATION (Mark Armstrong & Robert Porter eds., 2007); JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (1988).

198. See *infra* Section III.A.2 (developing evidence indicating concentration is not correlated with higher prices, but does correspond to increased output).

199. See Hsieh & Rossi-Hansberg, *supra* note 183, at 42.

200. *Id.* at 42–43.

as “superstar” firms.<sup>201</sup> Thus, the rise in concentration is predominantly driven by top firms serving more localized markets.<sup>202</sup> This means that competition is *increasing*, not decreasing.

This increase in industry-specific concentration does not necessarily result in an increase in concentration in the economy as a whole.<sup>203</sup> This is partially because today’s top firms are more specialized than they used to be: “[t]he number of industries of a top 0.001% firm (relative to the average firm) fell from 35 in 1977 to 17 in 2013. . . . [And industries of] a top 0.01% firm [fell from 21 in 1977 to 9 in 2013].”<sup>204</sup> This results in a “*decrease* in the power of top firms relative to the economy as a whole, as the largest firms specialize more, and are dominant in fewer industries.”<sup>205</sup>

Competition in labor markets is illustrative of this point. Because top firms are now more specialized, local employment concentration has decreased, especially in the services, retail, and wholesale industry sectors.<sup>206</sup> This negates the claim that higher industry concentration leads to monopsony in labor markets.<sup>207</sup> What appears to be happening instead is in fact the exact opposite; employment, in the industries with the greatest concentration at the national level, has *increased*.<sup>208</sup> In fact, the industries in which top firm concentration increased had an employment share that “grew from 70% in 1977 to 85% in 2013.”<sup>209</sup> Increased concentration appears not to lead to increased

201. See generally David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, & John Van Reenan, *The Fall of the Labor Share and the Rise of Superstar Firms* (Nat’l Bureau of Econ. Res. No. 23396, 2019) (discussing the data and evidence behind “superstar firms”).

202. Hsieh & Rossi-Hansberg, *supra* note 183, at 4.

203. See Hsieh & Rossi-Hansberg, *supra* note 183, at 5 (“The ‘super-star’ firms of today’s economy are larger in their chosen sectors and have unleashed productivity growth in these sectors, but they are not any larger as a share of the aggregate economy.”).

204. *Id.* at 17–18.

205. Geoffrey Manne, *What if Rising Concentration Were an Indication of More Competition, Note Less?*, TRUTH ON MARKET (Dec. 14, 2019), <https://truthonthemarket.com/2019/12/14/what-if-rising-concentration-were-an-indication-of-more-competition-not-less/>.

206. *Id.*

207. Josh Bivens, Lawrence Mishelm & John Schmitt, *It’s Not Just Monopoly and Monopsony: How Market Power Has Affected American Wages*, ECON. POLICY INST., <https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/>

(“[F]irm concentration in product markets (or monopoly power) . . . [Leads to] few[er] buyers of labor and a lack of credible competition from new entrants . . . [Which results in] employer concentration in labor markets (or monopsony power)”). But see Hsieh & Rossi-Hansberg, *supra* note 183, at 4 n.3.

208. Hsieh & Rossi-Hansberg, *supra* note 183, at 9–10.

209. *Id.*

market power over labor, but instead to more competition among firms for labor.<sup>210</sup>

In summation, market concentration can be viewed as an *outcome* of the competitive process.<sup>211</sup> While market concentration may indicate the type or nature of competition that exists in an industry, it is equally possible that the type of competition can generate the market concentration. This is why the U.S. deliberately opted to foster a free-market economy and not to outlaw monopolies *per se*.<sup>212</sup> 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.<sup>213</sup> Counting firms and calculating concentration cannot by itself distinguish 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 in any way 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.<sup>214</sup>

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210. See generally *id.* at 4 n.3, 9–10 (“Firms throughout the size distribution increase employment in sectors with increasing concentration, not only the top 10% firms in the industry, although by definition the increase is larger among the top firms.”).

211. *Id.* at 4–5.

212. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (“The offense of monopoly 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*.”).

213. *Verizon*, 540 U.S. 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, 1223 (10th Cir. 2009) (quoting same).

214. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (sitting as the court of last resort, the Second Circuit explained, “[t]he successful competitor, having been urged to

*B. Faulty Claim 2: 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.<sup>215</sup> 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 Jan De Loecker and Jan Eeckhout, for instance, purports to demonstrate an increase in markups since 1980, which they argue indicates market power has increased over this period.<sup>216</sup> 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.<sup>217</sup>

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.<sup>218</sup> Fundamentally, industrial organization economics literature has clearly established that profit margins, alone, are not reliable evidence of market power.<sup>219</sup> 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.<sup>220</sup> If, for example, marginal costs decreased, markups could increase even if prices remained the same; indeed, depending upon how much marginal costs

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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, “[p]erhaps, then the successful competitor can be turned upon when he wins, because he has been told not to compete.”).

215. *See* Director & Levi, *supra* note 214, at 290.

216. Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications 2* (Nat’l Bureau of Econ. Research, Working Paper No. 23687, 2017), <https://www.nber.org/papers/w23687>.

217. *See id.* at 3–4.

218. *See id.* at 14 (“Markups tell us that the margin of revenue over variable costs has increased. That does not necessarily imply that firms are making higher profits.”).

219. *See, e.g.*, Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. COMPETITION L. & ECON. 511, 511–12 (2013).

220. *See* Ganapati, *supra* note 197, at 2–3; *see also* Wright et al., *supra* note 91, at 320–22.

decreased, margins could increase even while prices decreased.<sup>221</sup> Moreover, a trend toward higher markups does not necessarily indicate firm profits are likewise trending higher, as De Loecker and Eeckhout acknowledge.<sup>222</sup> As they explain, a “technological change that reduces variable costs . . . [but] increases fixed costs[,]” might result in increased markups but not increased profits.<sup>223</sup>

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.<sup>224</sup> 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 (whose pioneering work in this area essentially created the field), finds no relationship between large-firm concentration and market power: “There is no cross-sectional support for the hypothesis of higher markup ratios in sectors with more very large firms and thus more concentration in the product markets contained in those sectors[,]” and “no evidence that mega-firm-intensive sectors have higher price/marginal cost markups.”<sup>225</sup> Notably, while he finds no real evidence of increasing markups in less regulated sectors like Manufacturing or Transportation and Warehousing, Hall does find a fairly

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221. See Bork & Sidak, *supra* note 219, at 518.

222. Loecker & Eeckhout, *supra* note 216, at 14.

223. *Id.*

224. See Hsieh & Rossi-Hansberg, *supra* note 183, at 36.

225. Robert E. Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the US Economy* 1, 16 (2018), at <https://web.stanford.edu/~rehall/Evidence%20on%20markup%202018> [hereinafter Hall, *New Evidence*]. Note that he does find “some evidence that markups grew in sectors with rising mega-firm intensity.” *Id.* at 1. See generally Robert E. Hall, *The Relation Between Price and Marginal Cost in U.S. Industry*, 96 J. POL. ECON. 921 (1988) (explaining a “new method for estimating the ratio of price to marginal cost”).

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.<sup>226</sup>

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, finding that whatever increasing concentration there is, is not correlated with increased market power:

[P]ublic-firm market power has not substantially increased in recent decades. . . . [M]arkups for the universe of non-utility, non-financial US public firms. . . . [I]ncreased only modestly since the 1980s. Moreover, this increase is within historical variation—measured markups have increased from 1980–2010 as much as they have decreased from 1950–1980.<sup>227</sup>

Traina’s study attempts 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.<sup>228</sup> 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).<sup>229</sup> As Traina notes:

The closest paper to this one is De Loecker and Eeckhout (2017). . . . While they use similar data sources and methods, a key difference is this paper uses a better accounting measure of variable cost, which includes important components of costs omitted by earlier work. Specifically, this measure includes indirect costs of production such as marketing and management, which are an increasingly vital share of variable costs for firms. Neglecting these costs meaningfully overstates both the level and growth in markups. A

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226. See Hall, *New Evidence*, *supra* note 225, at 15.

227. James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements 1–2* (Stigler Ctr. For the Study of the Econ. And the St. U. of Chi. Sch. Of Bus., New Working Paper Series No. 17, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3120849](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849).

228. See *id.* at 7 (explaining that because De Loecker and Eeckhout exclude SGA, they report a large increase in markups that would not be there if SGA was included).

229. *Id.* at 6–10.



significant contribution of this paper is to inform the debate on aggregate market power by offering a starkly different conclusion from the main empirical result of De Loecker and Eeckhout (2017).<sup>230</sup>

Similarly, Ganapati examines data from 1972–2012, and finds concentration issues do not lead to higher prices, but in fact correspond with increased output.<sup>231</sup> He concludes that the concentrated industries he analyzes are concentrated not due to anticompetitive behavior, but “likely due to technical innovation or scale economies.”<sup>232</sup> His findings are consistent with other work that finds that the trends in concentration populists condemn may, in fact, be related to changes in economies of scale and to their corresponding productivity improvements.<sup>233</sup>

Other studies upon which populist antitrust proponents rely purport to identify higher prices using different metrics.<sup>234</sup> One such regularly-cited study is John Kwoka’s meta-analysis of retrospective studies of mergers, joint ventures, and other horizontal arrangements.<sup>235</sup> Here, Kwoka compiles data covering more than 3,000 mergers and concludes the average price effect for the studied mergers is a 7.22% increase.<sup>236</sup> 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.<sup>237</sup> 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

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230. *Id.* at 2.

231. Ganapati, *supra* note 197, at 13.

232. *Id.*

233. See, e.g., 2 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra* note 171; TIROLE, *supra* note 197.

234. John Kwoka, *The Changing Nature of Efficiencies in Mergers and in Merger Analysis*, 60 ANTITRUST BULL. 231, 233 (2015).

235. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 4–5 (2015).

236. *Id.* at 110–12.

237. Michael Vita & F. David Osinski, *John Kwoka’s Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361, 361–63 (2018).

effects.<sup>238</sup>

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.<sup>239</sup> 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.<sup>240</sup>

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.<sup>241</sup> And lower prices, higher output, and product improvements would not have the trump card in the analysis they do today.<sup>242</sup> Similarly, if

238. *Id.* at 363–64.

239. *Id.* at 361–63.

240. Thus, a host of papers find a wide range of results inconsistent with the populist narrative. *See e.g.*, Loukas Karabarounis & Brent Neiman, *Accounting for Factorless Income* 4 (Nat'l Bureau of Econ. Res., Working Paper No. 24404, 2018), <https://www.nber.org/papers/w24404> (finding that profits have increased but are still within their historical range); Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* 3 (Ctr. Admin. Rec. Res. and Applications, U.S. Census Bureau, Working Paper No. 2018–10, 2018), <https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-10.pdf> (showing decreased wages in concentrated markets but also points out that local concentration has been *decreasing* over the relevant time period); Hugo Hopenhayn, Julian Neira, & Rish Singhania, *From Population Growth to Firm Demographics: Implications for Concentration, Entrepreneurship and the Labor Share*, 4–5 (Nat'l Bureau of Econ. Res., Working Paper No. 25382, 2018), <https://www.nber.org/papers/w25382> (finding that increased average firm age is due to an aging labor force, not anticompetitive market distortions); James Bessen, *Information Technology and Industry Concentration* 2 (B. U. Sch. L., L & Econ. Paper Series No. 17–41, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3044730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044730); John Van Reenen, *Increasing Differences Between Firms: Market Power and the Macro-Economy* 21–23 (Fed. Res. Bank Kan. City 2018), [https://www.kansascityfed.org/~media/files/publicat/sympos/2018/papersandhandouts/jh%20john%20van%20reenen%20version%202020.pdf](https://www.kansascityfed.org/~/media/files/publicat/sympos/2018/papersandhandouts/jh%20john%20van%20reenen%20version%202020.pdf) (showing that a rise in fixed costs due to investments in proprietary information technology—and not necessarily any anticompetitive conduct—correlates with increased concentration).

241. *See* Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 UC IRVINE L. REV. 885, 885–86 (2012).

242. *See* Ginsburg, *supra* note 128, at 219.

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 anticompetitive outcomes—i.e., higher prices or lower output—result only rarely.<sup>243</sup> Consequently, it would 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.<sup>244</sup>

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.<sup>245</sup> 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. *Faulty Claim 3: 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

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243. See James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference* 14 (Vanderbit U. Law Sch. Law & Econ., Working Paper No. 05-12, 2005), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=699601&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=699601&download=yes) (“[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 THE 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. . . . [T]hese practices are unlikely to be anti-competitive in most cases.”); see also Wright et al., *supra* note 91, at 343–45 (summarizing and citing the literature).

244. See Cooper et al., *supra* note 243, at 8 (explaining that vertical integration may increase consumer surplus).

245. See Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2652 (2013).

lax antitrust enforcement is (to varying degrees) to blame.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup>

Imbedded in this theory are a couple of key assumptions, both of which can be empirically tested. First, that inequality is increasing.<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup> Populist claims regarding increasing inequality largely rely upon analysis of the Gini coefficient for United States incomes over the last 50 years, which appears to show a steep increase in inequality.<sup>252</sup> Examining the ratio of the share of United States income among the 5th quintile of income-earning households to the

246. 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*, CTR. FOR AM. PROGRESS 1–2 (June 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/06/28143212/RevivingAntitrust.htm>.

247. Baker & Salop, *supra* note 246, at 11–12; Jarsulic et al., *supra* note 246, at 1–3; see Khan, *supra* note 107, at 743.

248. See Jonathan B. Baker, *Market power in the U.S. economy today*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 20, 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 (2017), <http://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf> (“Market power may contribute substantially to wealth inequality . . . . Policies that enhance competition . . . can therefore help reduce inequality.”); 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 91, at 327–30.

249. Wright et al., *supra* note 91, at 327–30.

250. Baker & Salop, *supra* note 246, at 14.

251. Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1174 (2016) (arguing that “[i]t is virtually impossible to calculate the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement.”).

252. Baker & Salop, *supra* note 246, 1–3.

share among the 1st quintile of households likewise seems to show increasing inequality.<sup>253</sup>

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.<sup>254</sup> 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.<sup>255</sup> They find the ratio of income between households at the 90th percentile and the 10th percentile to be approximately 5.0 in 1995, 5.2 in 2004, and 5.6 in 2012.<sup>256</sup> 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.”<sup>257</sup> 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.<sup>258</sup> So, the first assumption in this particular populist theory appears to be valid, if often

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253. *Historical Income Tables: Income Inequality*, U.S. CENSUS BUREAU (last updated Aug. 27, 2019), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-inequality.html>.

254. Robert Kaestner & Darren Lubotsky, *Health Insurance and Income Inequality*, 30 J. ECON. PERSP. 53, 66–67 (2016).

255. *Id.* at 55.

256. *Id.* at 64–65.

257. Bruce D. Meyer & James X. Sullivan, *Measuring the Well-Being of the Poor Using Income and Consumption*, 38 J. HUM. RES. 1180, 1180–81 (2003).

258. Wright et al., *supra* note 91, at 334; Crane, *supra* note 251, at 1174.

overstated.<sup>259</sup> 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.<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup> Their results do not offer “much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality.”<sup>264</sup>

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.

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259. Wright et al., *supra* note 91, at 334. See generally James David, *Here's Why Income Inequality is Grossly Exaggerated*, FISCAL TIMES (Jan. 13, 2016), <https://www.thefiscaltimes.com/Columns/2016/01/13/Here-s-Why-Income-Inequality-Grossly-Exaggerated> (explaining that the increase of “middle-age and old people” in the population, who have worked and accumulated a large amount of income, contributes to why the “income inequality appears to be exploding”).

260. Baker & Salop, *supra* note 246, at 1–4 (utilizing statistics to show that “inequality in the United States has been growing since the 1980s”).

261. Wright et al., *supra* note 91, at 331–41.

262. *Id.* at 301–02, 337–38.

263. *Id.* at 335–41.

264. *Id.* at 337.

## V. 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 United States Supreme Court has repeatedly recognized the limitations courts face in distinguishing between pro- and anti-competitive conduct in antitrust cases, particularly the risk of false positives in monopolization cases.<sup>265</sup>

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.”<sup>266</sup>

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.<sup>267</sup>

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?

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265. See *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 451 (2009); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 271–72 (2007); *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 406 (2004).

266. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

267. Kennedy, *supra* note 112, at 2.

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.<sup>268</sup> While there are plenty of views on this, the arguments that the market has failed us *in ways that more antitrust regulations 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. 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 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 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.<sup>269</sup>

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.<sup>270</sup> There is even *less* support for claims that concentration leads to the range of social ills

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268. Manne & Hurwitz, *supra* note 4, at 6.

269. Wright et al., *supra* note 91, at 296–97.

270. See, e.g., Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST MAGAZINE 10–11 (Apr. 5, 2018), <https://ssrn.com/abstract=3156912>, and papers cited therein.

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.

*Id.*; see also Wright et al., *supra* note 91, at 323.



advocates of populist antitrust ascribe to it.<sup>271</sup> 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.

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 prices, increasing demand by inducing greater supply of promotional services, and 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: "[I]t 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."<sup>272</sup> A host of other studies corroborate this assessment.<sup>273</sup> As one of these notes, "[s]ome studies find evidence consistent with both pro- and anti-competitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition."<sup>274</sup> Similarly, "[i]n most of the empirical studies reviewed, vertical practices are found to have significant procompetitive effects."<sup>275</sup>

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

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271. Kennedy, *supra* note 112, at 11 (explaining that empirical evidence regarding claims that concentration leads to a range of social ills, such as less innovation, is debatable and sometimes lacking).

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

273. See, e.g., O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *supra* note 243, at 72–76 (“[Vertical restraints] are unlikely to be anticompetitive in most cases.”); Cooper, et al., *supra* note 243, at 18 (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, 481 (2009); Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMPETITION. L. & ECON. 707, 710 (2005).

274. Cooper et al., *supra* note 243, at 18.

275. *Id.* at 4.

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.<sup>276</sup> 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.<sup>277</sup> 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 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.<sup>278</sup> As discussed above, United States antitrust struggled to incorporate a wide variety of often conflicting values throughout the early and mid-twentieth century—and it was anything but successful.<sup>279</sup>

Despite our nation's negative experiences with politicized antitrust, many modern populist antitrust calls sound remarkably similar to earlier ones.<sup>280</sup> 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-

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276. See Gilbert, *supra* note 173, at 206.

277. See Asher Schechter, *Is There A Case to be Made for Political Antitrust?*, PRO MARKET (Apr. 28, 2017), <https://promarket.org/case-made-political-antitrust/>.

278. See *supra* Part II.A.

279. See *supra* Part II.A.

280. See Client Memo, *supra* note 4, at 1–2.

discredited<sup>281</sup> structure-conduct-performance (SCP) paradigm.<sup>282</sup>

Such calls are in vogue today, but it is far from the first time.<sup>283</sup> In 1973, for instance, “Michigan Senator Philip Hart introduced Senate Bill 1167, the Industrial Reorganization Act [(IRA)],<sup>284</sup> in order to address perceived problems arising from industrial concentration.”<sup>285</sup> Among other things,<sup>286</sup> the bill would have required the creation of an “Industrial Reorganization Commission” to “study the structure, performance, and control” of seven “[p]riority” industries,<sup>287</sup> and, for each, to “develop a plan of reorganization . . . whether or not any corporation [was determined to possess monopoly power].”<sup>288</sup> “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.”<sup>289</sup> That sentiment has “resurfaced today as the asserted justification for similar . . . anti-trust” reform legislation.<sup>290</sup> But as discussed, the populist movement fundamentally fails to grapple with the reality that “constraining firm size in an effort to promote the political and economic power” of consumers (or of

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281. See Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J. L. & ECON. 229, 262–63 (1977); Yale Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST L.J. 826, 829–31 (1977). See generally INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston, eds., 1974); Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION, *supra*, at 164–84.

282. See JOE BAIN, INDUSTRIAL ORGANIZATION 372–468 (1968).

283. See Industrial Reorganization Act, S. 1167 93d Cong., 1st Sess. (1973) (introduced).

284. *Id.*

285. Manne & Manne, *supra* note 164, at 3.

286. See Philip A. Hart, *Restructuring the Oligopoly Sector: The Case for a New ‘Industrial Reorganization Act’*, 5 ANTITRUST L. & ECON. REV. 35, 37 (1972). Hart asserted that the bill to create a federal Industrial Reorganization Commission was offered as “an alternative to government regulation and control.” *Id.* (reprinting 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).

287. *Id.* at 54 (Title I, § 203(a)(1)).

288. *Id.* at 54 (Title I, § 203(a)(2)).

289. Manne & Manne, *supra* note 164, at 3; Hart, *supra* note 286, at 50 (“[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 . . .”).

290. Manne & Manne, *supra* note 164, at 3; see, e.g., Consolidation Prevention and Competition Promotion Act, S. 1812, 115th Cong., 1st Sess. (2017).

avored businesses) “may actually have the *opposite* of its intended effect.”<sup>291</sup>

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.<sup>292</sup> But this purported causal relationship has already been rejected as having no basis in reality; and no new evidence suggests otherwise.<sup>293</sup> 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

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291. Manne & Manne, *supra* note 164 at 10; see Robert Pitofsky, *The Political Content of Antitrust*, 127 PENN. LAW. REV. 1051, 1058 (1979). 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. *Id.* 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”—yet both are constituent parts of the populist antitrust resurgence. *Id.*; see, e.g., Senate Democrats, “A Better Deal: Cracking Down on Corporate Monopolies” (July 2017), <https://www.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.

292. Kennedy, *supra* note 112, at 2–3.

293. See Manne & Manne, *supra* note 164, at 19–20.

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.<sup>294</sup>

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 often succeed in theirs.<sup>295</sup> 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 “imbue[d] . . . with an ill-defined set of vague [socio-]political objectives,” antitrust becomes a sort of “meta-legislation.”<sup>296</sup> “As a result, the return on influencing a handful of government appoint[ees] with authority over antitrust becomes huge . . . [thereby] increasing [significantly] . . . the incentive[s] to do so.”<sup>297</sup>

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294. *Id.* (emphasis added).

295. See Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PENN. L. REV. 1191, 1198 n.26 (1977). No doubt, at the margin, “small or medium size companies can rarely match the resources of a corporate leviathan in seeking government bestowed advantages.” *Id.* But there are a lot of “corporate leviathans.” *Id.* 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.

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

297. *Id.*

As Baumol and Ordover observe, antitrust law is inherently prone to rent-seeking, especially protectionism.<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup> 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.<sup>302</sup>

The economically grounded consumer welfare standard helped substantially to cabin such harms and align enforcement with consumer interests.<sup>303</sup> 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.

Moreover, as discussed, when antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions.<sup>304</sup> Perhaps most critically, attempting to promote socio-political goals

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298. See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON 247, 250–52 (1985).

299. *Id.* at 250–51.

300. See 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 3–5 (April 2018).

301. See, e.g., *id.* at 5–6.

302. See *id.*

303. See *supra* Part III.

304. See Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 96 NOTRE DAME L. REV. 583, 585 (2018) ("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

through competition laws tends to undermine competition itself.<sup>305</sup> 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.<sup>306</sup> 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 policies at the very *expense* of competition.

“[F]inally, 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?”<sup>307</sup> 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<sup>308</sup>)] would] be greatly enhanced.”<sup>309</sup> The end result could “even be more concentration . . . [as the] exceptions could subsume the rules.”<sup>310</sup>

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.”*<sup>311</sup>

## VI. 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:

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goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed.”).

305. See *supra* Part V.

306. See *supra* Section III.B.

307. Geoffrey Manne, *The illiberal vision of neo-Brandesian antitrust*, TRUTH ON MARKET (Apr. 16, 2018), <https://truthonthemarket.com/2018/04/16/the-illiberal-vision-of-neo-brandesian-antitrust/>.

308. See *generally* ANTITRUST MODERNIZATION COMM’N REPORT AND RECOMMENDATIONS, Chap. IV.B 333–342 (2007), [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

309. See *supra* note 73 and accompanying text.

310. Manne, *supra* note 307.

311. *Id.*; see also David Polk & Wardwell LLP, *supra* note 4.

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 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 law over the last several decades. This includes acknowledging its limitations and focusing upon 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.



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