
ANTITRUST REFORM AND THE NIRVANA FALLACY: THE CASE AGAINST A NEW SHERMAN ACT

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Demands for major antitrust reform are coming from all directions: politicians, industrial organization (IO) economists, and antitrust lawyers. While the political, legal, and economic debates vary in important ways, they all boil down to a single question: Do we need a “New” Sherman Act? Progressive IO economists argue that a “crisis” of competition in markets—evidenced by increasing levels of aggregate industry concentration—has resulted in systematic market power across the economy, and that a crisis of institutional credibility in the courts has biased antitrust law in favor of defendants. However, as this Article illustrates, the economic and empirical evidence support neither proffer. Rather than reform based on upon evidence of market failure or a failure of antitrust institutions, Progressive IO economists call for reform based upon the nirvana fallacy—a comparison of the today’s institutions with an imaginary set of perfect institutions guided by omniscient and well-intending economists. But economics is not on the agenda of current proposals for antitrust reform and calls for a “New” Sherman Act threaten to upend the long-standing partnership between law and economics on which the consumer welfare standard is predicated. Without such a partnership, antitrust institutions will struggle to achieve their objective of promoting competition on behalf of Americans.

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I. INTRODUCTION

Demands for major antitrust reforms are coming from all directions. In the political world, a subset of conservative Republicans skeptical of “Big Tech” pushes antitrust reform to bludgeon a group of firms it views as having too much

political influence.¹ On the progressive left, Senator Elizabeth Warren and others expound progressive values seeking ever-more aggressive antitrust enforcement.² The antitrust reform debate has spilled over from the political world into the antitrust community of lawyers and economists.³

Some progressive reformers⁴ embrace the existing consumer welfare standard and argue for more active antitrust policy through the application of what they view as updated learning in industrial organization (IO) economics.⁵ For example, progressives have endorsed legislative proposals that would create rebuttable presumptions favoring antitrust

¹ See, e.g., Press Release, Jim Jordan, Rep., The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), <https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf> [<https://perma.cc/5J4Z-JETN>]; Press Release, Mike Lee, Sen., Sens. Lee, Grassley Introduce TEAM Act To Reform Antitrust Law (June 14, 2021), <https://www.lee.senate.gov/2021/6/sens-lee-grassley-introduce-team-act-to-reform-antitrust-law> [<https://perma.cc/7FVW-8KC2>]; Joshua D. Wright & Jan M. Rybnicek, *A Time for Choosing: The Conservative Case Against Weaponizing Antitrust*, NAT'L AFFS. (2020), <https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust> [<https://perma.cc/K63K-FNFV>].

² See, e.g., Press Release, Amy Klobuchar, Sen., Senator Klobuchar Introduces Sweeping Bill To Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement> [<https://perma.cc/B3M2-5ER4>]; Elizabeth Warren, *Here's How We Can Breakup Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [<https://perma.cc/42DV-BW6V>]; Wright & Rybnicek, *supra* note 1.

³ See generally Wright & Rybnicek, *supra* note 1.

⁴ “Progressive reformers,” “progressives,” and “reformers” are used interchangeably throughout.

⁵ William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, ANTITRUST, Summer 2021, at 46, 47 (calling this group of individuals “expansionists”); see also Carl Shapiro, *Antitrust: What Went Wrong and How To Fix It*, ANTITRUST, Summer 2021, at 33, 33–34 (calling this group of individuals “modernists”).

plaintiffs, often grounding their support in economics,⁶ and proposals that would overrule what progressives view as “faulty, pro-defendant Supreme Court cases involving conduct by large firms.”⁷ By comparison, Neo-Brandeisians view the consumer welfare standard as “fundamentally flawed” and reject economics and evidence-based policy as a foundation for antitrust enforcement.⁸ Instead, New Brandeisians support “bright-line rules” to delineate anticompetitive conduct without regard to whether that conduct harms consumers.⁹

The political, legal, and economic debates vary in important ways but boil down to an obvious question: Do we need a “New” Sherman Act? The answer crucially depends on an accurate depiction and understanding of the current antitrust laws, how those laws are performing, and why those

⁶ Shapiro, *supra* note 5, at 34 (“[T]he necessary changes [to antitrust] could be accomplished by creating a number of rebuttable presumptions that would allow antitrust plaintiffs to shift the burden of proof to defendants.”); *see also* JONATHAN B. BAKER ET AL., JOINT RESPONSE TO THE HOUSE JUDICIARY COMMITTEE ON THE STATE OF ANTITRUST LAW AND IMPLICATIONS FOR PROTECTING COMPETITION IN DIGITAL MARKETS 1 (2020), https://judiciary.house.gov/uploadedfiles/joint_submission_from_michael_kades_and_antitrust_expert_coalition.pdf [<https://perma.cc/CHF6-R5T4>] (suggesting that “Congress should update the antitrust laws to . . . [i]ncorporate presumptions that better reflect the likelihood that certain practices harm competition”); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burden of Proof*, 127 YALE L.J. 1996, 2018 (2018) (discussing the economic rationale for the use of structural presumptions in horizontal merger enforcement).

⁷ Shapiro, *supra* note 5, at 41; *see also* Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1851, 1872, 1878 (2020) (criticizing Supreme Court decisions on antitrust law, including, but not limited to *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015) and *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018)).

⁸ Shapiro, *supra* note 5, at 34 (calling this group of individuals “populists”); *see* Kovacic, *supra* note 5, at 47 (calling this group of individuals “transformationalists”); Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 293, 295 (2019) (associating this group of individuals with the “Hipster Antitrust movement”).

⁹ Shapiro, *supra* note 5, at 34; *see* Wright et al., *supra* note 8, at 296 (discussing the various proposals proffered by Neo-Brandeisians).

laws perform as they do. That information is necessary to evaluate not only the modern antitrust laws—and the consumer welfare standard upon which the laws have been grounded and applied since 1977—but also the various reforms that have been proposed to recalibrate, or in some cases, upend the antitrust laws.

Progressive reformers claim we need a “New” Sherman Act because the modern antitrust laws have given rise to two failures: (1) a crisis of competition in markets that has given rise to systematic market power across the economy; and (2) a crisis of institutional credibility in the courts because antitrust law itself is biased in favor of defendants.¹⁰ These simultaneous and symbiotic crises are the foundation of the case for radical antitrust reform. In markets, progressives insist that rising market concentration—despite ample economic and empirical learning for a half century to the contrary¹¹—necessarily leads to a decline in economic performance.¹² They posit that lax antitrust policy has resulted in systematic and widespread increases in the levels of concentration across the U.S. economy, which have caused an increase in market power, which has, in turn, lead to higher corporate profits, higher prices, reduced output, less innovation, and lower quality.¹³ Consumers, workers, and

¹⁰ See *infra* Parts I–II.

¹¹ See *infra* Part II.

¹² See, e.g., FIONA M. SCOTT MORTON, WASH. CTR. FOR EQUITABLE GROWTH, MODERN U.S. ANTITRUST THEORY AND EVIDENCE AMID RISING CONCERNS OF MARKET POWER AND ITS EFFECTS 24 (2019), <https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/> [<https://perma.cc/RLD9-9ZBN>]; see also Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, at 1–2, OECD Doc. DAF/COMP/WD(2018)69 (June 7, 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) [<https://perma.cc/6NFG-FT8E>] (“[T]he fact that the signature outcome from a rise in market power—the simultaneous increase in prices and decrease in output—is missing, gives one serious pause in interpreting the evidence in favor of the view that economic performance in the United States has declined as a result a rise in market power.”).

¹³ See, e.g., SCOTT MORTON, *supra* note 12, at 26–27; see also Wright, *supra* note 12, at 2 (summarizing the progressives’ argument).

other “exploited suppliers” are the perceived “victims” of this market failure story.¹⁴ Moreover, progressives assert that courts have contributed to this systematic increase in market power by underestimating the likelihood that conduct is anticompetitive and harms consumers.¹⁵ Progressives argue that courts have “fail[ed] to keep up with developments in economics” and have limited the scope of antitrust law.¹⁶ Courts, they contend, have overly relied on an error-cost framework that depends on the “economically naïve” assumption that markets “tend toward competition” and thus markets will correct any anticompetitive conduct not blocked by courts.¹⁷ Furthermore, by systematically lowering the burden on defendants, courts have created a defendant-friendly atmosphere that makes it difficult for plaintiffs to win.¹⁸ With no hope of winning all but the easiest of cases in court, antitrust enforcement has become “insufficiently aggressive.”¹⁹ While progressives’ story is attractive in its

¹⁴ BAKER ET AL., *supra* note 6, at 2; *see also* Fiona M. Scott Morton, *Why You Should Care About Antitrust*, YALE INSIGHTS (Oct. 20, 2020), <https://insights.som.yale.edu/insights/why-you-should-care-about-antitrust> [<https://perma.cc/7NYE-34ZG>] (“[W]hen you don’t enforce the antitrust laws, and you allow monopolies, you’re transferring money from consumers to the holders of corporations[.]”).

¹⁵ BAKER ET AL., *supra* note 6, at 4–5.

¹⁶ Hovenkamp & Scott Morton, *supra* note 7, at 1851, 1872–73 (describing the Supreme Court’s decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) as “a clear assault on economics”); *see also* BAKER ET AL., *supra* note 6, at 1 (“Courts have contributed to increased monopoly power through decisions that have weakened the prohibitions against anticompetitive exclusionary conduct and anticompetitive mergers.”).

¹⁷ Hovenkamp & Scott Morton, *supra* note 7, at 1870–71; *see also* BAKER ET AL., *supra* note 6, at 4–5.

¹⁸ BAKER ET AL., *supra* note 6, at 6 (“The courts nonetheless have thrown up inappropriate hurdles that limit the practical scope of the antitrust laws’ application to anticompetitive exclusionary conduct, including monopolization, and to anticompetitive mergers.”); *see also* Shapiro, *supra* note 5, at 37–38 (“[P]laintiffs in antitrust cases now face undue burdens in many cases as a result of Chicago School arguments that have been deeply embedded into the case law[.]”).

¹⁹ BAKER ET AL., *supra* note 6, at 1.

simplicity, it is incorrect as a matter of IO economics and, as we will show, inconsistent with the data.

The case for radical reform is simple. It is also wrong. The data do not support claims of either systematic market failure or institutional failure in the courts. The progressive case for a “New” Sherman Act also advances by comparing the performance of the existing antitrust laws to theoretical, imaginary alternatives envisioned by their authors, as executed by omniscient legislators and regulators that perfectly distinguish anticompetitive behavior from procompetitive behavior. This is a form of what UCLA economist Harold Demsetz famously described as the “nirvana fallacy.”²⁰ Fortunately, we need not rely on a comparison of real-world markets and real-world institutions to imaginary ones implemented by experts without error. Any “New” Sherman Act would be created by a real-world Congress, enforced by plaintiffs’ lawyers and regulators at the FTC and DOJ, and interpreted by actual Article III judges capable of error in complex cases.

In this Article, we answer in the negative the question “Do we need a ‘New’ Sherman Act?” In Parts II and III, we explore the reformers’ claim that both markets and courts are in crisis. We evaluate those arguments considering the empirical evidence and find them lacking. In Part IV, we examine the various, actual proposals for a “New” Sherman Act. We demonstrate that these proposals—the ones receiving political traction and attention inside the antitrust agencies—are not coming from the minds of progressive IO economists and experts calling for greater integration of economic expertise into antitrust decision-making. Rather, the reform proposals contemplated by Congress and the agencies almost uniformly call for less economic analysis, less expertise, and generally substitute political judgment for economic.

²⁰ Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 3 (1969).

II. THERE IS NO “CRISIS” OF COMPETITION THAT SUPPORTS THE PROGRESSIVES’ DEMAND FOR A “NEW” SHERMAN ACT

Progressives’ claims of a “crisis” of competition entirely depend on three pieces of evidence: (1) increased levels of industry concentration over time; (2) increased aggregate markups over time; and (3) an inference that increased concentration has resulted in decreased competition. While progressives’ simple explanation of support for their radical reform proposals is attractive on its face, it is economically and factually incorrect. IO economists have repeatedly established that reliable inferences about the competitive dynamics in antitrust markets cannot be derived from measures of concentration.²¹ Moreover, while studies show that *aggregate* measures of concentration and markups have increased, actual evidence on *market* concentration levels show concentration levels falling and an increase in firm efficiency over time.²² The difference in results is worthy of pause: Antitrust analysis is predicated on *markets*, which captures the universe of firms that compete with one another over a product and geographic space. The concept of a relevant market in antitrust is based upon this foundation as well. The important point is that when making inferences about the intensity of competition—whether using concentration or some other measure of competitive intensity—it is a good idea to begin the analysis with firms that compete with one another. Broad sector groupings—as those relied upon by the aggregate concentration and markup studies that progressives and reformers cite to support the claim that competition has decreased²³—do not and cannot account for this competition. Sector level evidence is simply too aggregated to be useful for this purpose. Even focusing upon markets, as we discuss below, progressives’ claims that one can infer changes in competition from changes in

²¹ Wright et al., *supra* note 8, at 313–14, 314 n.83 (collecting sources).

²² See *infra* Section II.B.

²³ See *infra* Section II.A.1–2

concentration are also based upon a false premise.²⁴ Most problematic for the reformers' case for a "New" Sherman Act, contradictory evidence shows that markets appear to be getting more competitive, not less.²⁵

A. Relying on Studies Illustrating Aggregate Increases in Concentration Levels and Markups to Make Inferences About Market Failure and Antitrust Reform Is Improper

1. Studies Illustrating Aggregate Economy-Wide Increases in Concentration Levels

A 2015 paper written by Jason Furman and Peter Orszag²⁶ has inspired progressives' current market-failure narrative.²⁷ Furman and Orszag proffer that the increase in firm concentration *may* have contributed to changes in the "distribution of capital returns . . . and increased share of firms with apparently supernormal returns."²⁸ Furman and Orszag's work has been cited to support the narrative that (1) industry concentration throughout the United States is increasing; (2) consumers have been harmed as a result of this increasing concentration; and (3) lax and ineffective antitrust policy is to blame for the raise in national concentration

²⁴ See *infra* Section II.A.1.

²⁵ See *infra* Section II.B.

²⁶ Jason Furman & Peter Orszag, Presentation at Columbia University "A Just Society" Centennial Event in Honor of Joseph Stiglitz: A Firm-Level Perspective on the Role of Rents in the Rise of Inequality (Oct. 16, 2015), <http://gabriel-zucman.eu/files/teaching/FurmanOrszag15.pdf> [<https://perma.cc/MXN8-CMB8>]. The paper was subsequently published as a book chapter. See Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise of Inequality*, in TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS (Martin Guzman ed., 2018) [hereinafter Furman & Orszag, Chapter].

²⁷ See Wright, *supra* note 12, at 4 (discussing other aggregate concentration studies).

²⁸ Furman & Orszag, Chapter, *supra* note 26, at 33.

levels.²⁹ But the composition of Furman and Orszag's analysis limits the conclusions that can be drawn from their work.

Furman and Orszag use census data to calculate the percentage change in the combined market share of the fifty largest firms in nonfarm business sectors.³⁰ The authors rely on census data on revenue for the fifty largest firms for each two-digit sector of the North American Industrial Classification System (NAICS).³¹ The NAICS divides the economy into 20 two-digit sectors (e.g., "Transportation and Warehousing"), which are further divided into 96 three-digit subsectors, 308 four-digit industry groups, 689 five-digit industries, and 1,012 six-digit industries.³² Furman and Orszag use the census data to calculate the aggregate fifty-firm share (CR50³³) of revenue from 1997 and 2007 for each nonfarm business sector.³⁴

Overall, their results show a moderate increase in concentration levels between 1997 and 2007 for the top fifty

²⁹ See, e.g., Amanda Novello & Jeff Madrick, Commentary, *Government Fails To Adequately Address Industry Concentration*, CENTURY FOUND. (Oct. 27, 2017), <https://tcf.org/content/commentary/government-fails-adequately-address-industry-concentration/> [<https://perma.cc/EAX4-25JH>] ("Explosive inequality in America is linked to increasing rents, or 'beyond-normal profits,' of top firms. . . . [Furman & Orszag] show that these returns accrue disproportionately to already well-off firms."); Eduardo Porter, *With Competition in Tatters, the Tip of Inequality Widens*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html> [<https://perma.cc/YA7M-KJ9V>] ("There is plenty of evidence that corporate concentration is on the rise. . . . [Furman & Orszag] report that between 1997 and 2007 the market share of the 50 largest companies increased in three-fourths of the broad industry sectors followed by the census."); see also Wright et al., *supra* note 8, at 315.

³⁰ Furman & Orszag, Chapter, *supra* note 26, at 33.

³¹ *Id.* at 34 tbl.1.1.

³² OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM 22 (2022).

³³ Concentration ratios (CR) convey the combined market share of the nth largest firms in a market, industry, or economy. Wright, *supra* note 12, at 4 n.5. For example, the CR5 would convey the combined market share of the five largest firms.

³⁴ Furman & Orszag, Chapter, *supra* note 26, at 33.

firms in most nonfarm sectors.³⁵ Furman and Orszag conclude “in nearly all of the industries for which data are available, the fifty largest firms gained revenue share between 1997 and 2012.”³⁶ For example, in the “Transportation and Warehousing” sector, the authors estimate that the concentration of the fifty largest firms increased by approximately eleven percentage points, while the concentration of the fifty largest firms in the “Health Care and Social Assistance” sector, decreased by approximately two percentage points.³⁷ Their results are presented in Table 1.³⁸

Table 1: Furman & Orszag—Change in Concentration by Industry³⁹

Industry	Percentage Point Change in Revenue Share Earned by the Fifty Largest Firms
Transportation and warehousing	11.4
Retail trade	11.2
Finance and insurance	9.9
Wholesale trade	7.3
Real estate rental and leasing	5.4
Utilities	4.6
Educational services	3.1
Professional, scientific, and technical services	2.6
Administrative/support	1.6
Accommodation and food services	0.1
Other services, nonpublic admin	-1.9
Arts, entertainment, and recreation	-2.2
Health care and assistance	-1.6

Note: Concentration ratio data is displayed for all North American Industry Classification System (NAICS) sectors for which data are available from 1997 to 2012.

Sources: Economic Census (1997 and 2012), Census Bureau.

³⁵ *Id.* at 33–34 & 34 tbl.1.1.

³⁶ *Id.* at 33.

³⁷ *Id.* at 34 tbl.1.1.

³⁸ *Id.*

³⁹ *Id.*

Subsequent articles reached similar conclusions. In 2016, an article in *The Economist* employed census data to calculate the CR4 for 893 sectors of the economy using four-digit NAICS codes.⁴⁰ The article found that the CR4 across those 893 sectors had increased from 26% in 1997 to 32% in 2012.⁴¹ More recently, a 2020 study by David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen calculated concentration levels using a slightly different approach.⁴² Autor et al. calculated (1) the change in CR4 and CR20 concentration levels between 1982 and 2012 across 676 industries in the U.S. economy using four-digit Standard Industrial Classification (SIC) codes and (2) the change in the Herfindahl Hirschman Index (HHI) for each of the 676 industries.⁴³ The authors found that “according to all measures of sales concentration, industries have become more concentrated on average.”⁴⁴

As discussed in Section II.A.3, progressives can draw few economic inferences from these results showing increased levels of aggregate concentration. Professor Carl Shapiro acknowledged the limitations of analyses—like that of Furman and Orszag—that rely on industry level concentration rather than focus on markets as the unit of analysis:

Somewhat embarrassingly, [Furman and Orszag] looked at the 50-firm concentration ratio in two-digit industries. I don’t know any Industrial Organization economist who thinks that’s very informative regarding market power. At some broad level, larger

⁴⁰ *Business in America: Too Much of a Good Thing*, ECONOMIST (Mar. 31, 2016), <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing> [<https://perma.cc/KK3Q-LDC7>] [hereinafter *Business in America*]; see also Wright, *supra* note 12, at 5 (discussing *Business in America, supra*).

⁴¹ *Business in America, supra* note 40; see also Wright, *supra* note 12, at 5.

⁴² David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645, 645 (2020).

⁴³ *Id.* at 657, 663–64. The authors discuss the results of their HHI analysis but do not report those results in their paper.

⁴⁴ *Id.* at 663.

firms are having a larger share of economic activity—I think that’s true, but that doesn’t directly tell us about competition or concentration in markets where market power can be exercised[.]⁴⁵

To his credit, Furman concedes that his results require careful interpretation. During his 2016 Keynote Address at the Searle Center Conference on Antitrust Economics and Competition Policy, Furman verified that a careful consideration of the causes for any increases in concentration is required to diagnose the appropriate policy change(s).⁴⁶

2. Studies Illustrating Aggregate Economy-Wide Increases in Markups

The second proposition underlying the progressives’ demand for antitrust reform is that the increase in U.S. concentration combined with lax antitrust enforcement has caused an economy-wide increase in market power, resulting in persistent harm to consumers through lower output and higher prices.⁴⁷ The support for this proposition are studies that analyze firm markups—price relative to marginal cost—over time. One commonly cited example of these is a 2020

⁴⁵ Asher Schechter, *Economists: “Totality of Evidence” Underscores Concentration Problem in the U.S.*, PROMARKET (Mar. 31, 2017), <https://promarket.org/2017/03/31/economists-totality-evidence-underscores-concentration-problem-u-s/> [https://perma.cc/42UW-X8YG] (quoting Carl Shapiro); see also Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 721–31 (2018) (discussing proffered evidence about concentration and competition).

⁴⁶ Jason Furman, Chairman, Council of Econ. Advisors, Keynote Address at the Searle Center Conference on Antitrust Economics and Competition Policy: Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth at 2–3 (Sept. 16, 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf [https://perma.cc/A89V-X7H8] (“Of course, an increase in revenue concentration at the national industry level is neither necessary nor sufficient to indicate increases in market power: the sectors listed here are much larger than the relevant markets, whether in terms of sub-sectors or geography, and 50 firms is likely well above the number that would mark an industry as competitive.”).

⁴⁷ SCOTT MORTON, *supra* note 12, at 26–27.

paper by Jan De Loecker, Jan Eeckhout, and Gabriel Unger.⁴⁸ In that paper, the authors showed that aggregate firm markups have risen since 1980.⁴⁹

De Loecker et al. rely on firm-level accounting data for publicly traded firms from 1950 to 2014.⁵⁰ Specifically, the authors observe “measures of sales, input expenditure, capital stock information, . . . detailed industry activity classifications. . . [, and] direct accounting information of profitability and stock market performance.”⁵¹ They conclude that aggregate firm markups have risen since 1980—from twenty-one percent over marginal cost in 1980 to sixty-one percent in 2016.⁵² Figure 1 shows their results.⁵³

⁴⁸ Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. Econ. 561, 562 (2020); see also Scott Morton, *supra* note 12, at 26 (citing De Loecker et al., *supra*).

⁴⁹ De Loecker et al., *supra* note 48, at 562.

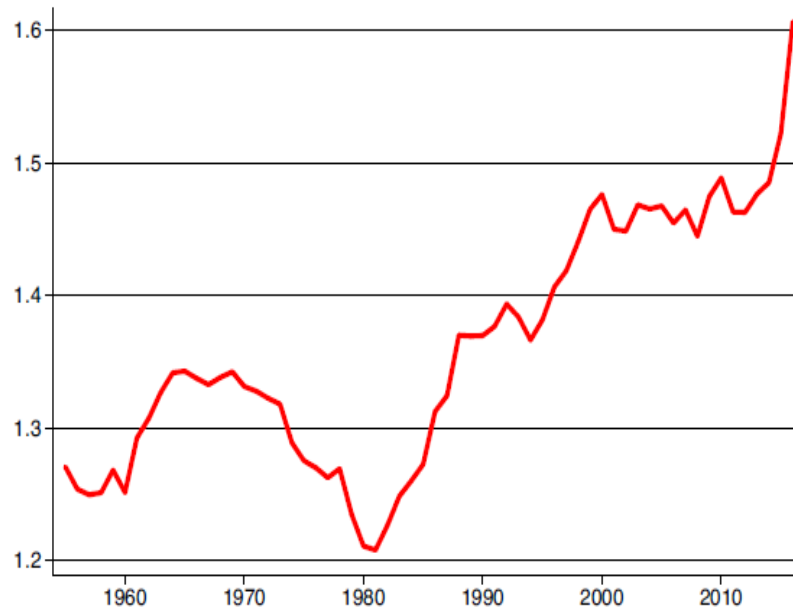
⁵⁰ *Id.* at 564–65. This discussion of De Loecker and Eeckhout’s work is taken from Wright, *supra* note 12, at 12 (citing an earlier version of De Loecker et al., *supra* note 48).

⁵¹ De Loecker et al., *supra* note 48, at 573. For a more detailed discussion De Loecker, Eeckhout & Unger’s work, see Wright et al., *supra* note 8, at 319–21.

⁵² De Loecker et al., *supra* note 48, at 575.

⁵³ *Id.* at 575 fig. 1.

Figure 1: De Loecker et al.—Annual Aggregated Revenue-Weighted Markup⁵⁴



The authors interpret this increase in their calculated markups as evidence of an economy-wide increase in market power.⁵⁵ But as discussed in the next Section, IO economists agree that an increase in markups alone is not sufficient to identify increased market power.⁵⁶

⁵⁴ *Id.*

⁵⁵ *Id.* at 626 (“All this indicates that the rise in markups is evidence of a rise in market power.”).

⁵⁶ Franklin M. Fisher, *Diagnosing Monopoly*, 19 Q. REV. ECON. & BUS. 7, 18–19 (1979); see also Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins To Infer Market Power*, 9 J. COMPETITION L. & ECON. 511, 512 (2013) (“In contrast, evidence related to firm characteristics, such as the size of the firm or the firm’s profit margins, plays a limited role in evaluating market power. Significant concerns attend the use of a firm’s profit margin to infer its market power. Neither economic theory nor empirical evidence indicates a dispositive relationship between profit margins and the

3. Economics Has Established that Relying upon Aggregate Measures of Concentration and Markups To Make Inferences About the Intensity of Competition Is Incorrect and Misleading

Progressive reformers argue that increases in national concentration levels have *caused* an increase in market power throughout the United States. But IO economists—including progressives like Professors Carl Shapiro and Fiona Scott Morton—have known for decades that increased concentration could indicate a reduction in competition, or it could equally reflect competitive forces at work, with more efficient firms enjoying greater success.⁵⁷ One of the principal takeaways of the structural debates of the 1970s and 1980s in IO economics was that competition and concentration are separate concepts and must be measured differently.⁵⁸ Thus,

possession of market power.” (citations and footnotes omitted); De Loecker et al., *supra* note 48, *supra* note 48, at 592 (“The documented rise in markups does not necessarily imply that firms have more market power and therefore higher economic profits.”).

⁵⁷ See, e.g., Schechter, *supra* note 45 (quoting Carl Shapiro); SCOTT MORTON, *supra* note 12, at 26 (“[I]t is widely understood that either vigorous competition could cause concentration to increase or increased concentration could reduce competition.”); see also HAROLD DEMSETZ, *THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES* 137, 140–41 (1995) (“Once perfect knowledge of technology and price is abandoned, market quantity may increase, decrease, or remain unchanged as the number of firms in the market is increased . . . [I]t is presumptuous to conclude . . . that markets populated by fewer firms perform less well or offer competition that is less intense.”).

⁵⁸ Wright, *supra* note 12, at 3; see, e.g., Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 *GEO. MASON. L. REV.* 1, 9–10 (2003) (“[A]lthough some industries appeared to have market structures favorable for the existence and exercise of substantial market power, the industries were, nonetheless, quite competitive. This research made clear that sound theory *plus* the details of markets and institutional factors are necessary to understand competition.”); Nathan Miller et al., *On the Misuse of Price on the HHI in Merger Review*, 2 (Geo. McDonough Sch. of Bus., Rsch. Paper No. 3974267, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974267 (on file with the Columbia Business Law Review) (“[R]egressions of price on the HHI

IO economists—like Scott Morton—caution that presumptions about market power from measures of concentration provide little useful guidance on antitrust policy: “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.”⁵⁹ But progressives’ claims about the relationship between national concentration levels and market power fail for what is arguably an even simpler reason: competition does not take place in broad industry or sector groupings, but rather within local markets.⁶⁰

Antitrust analysis depends on a relevant *market*, which identifies the groups of firms that compete over a product and geographic space⁶¹: “The purpose of defining a market is to help frame the analysis of competitive interaction, gauge a firm’s power over price and output, and measure market

should not be interpreted as establishing causation. That is, they do not inform how a change in concentration from a merger would affect prices. Empirical analyses based on such regressions of price on the HHI are uninformative about the likelihood of any adverse competitive effects from a merger. Courts and other policy-makers therefore should not rely on regressions of price on the HHI for the purposes of antitrust merger review.”).

⁵⁹ Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, J. ECON. PERSPS., Summer 2019, at 44, 48.

⁶⁰ See, e.g., Email from Geoffrey A. Manne, President, Int’l Ctr. for L. & Econ., to David Cicilline, Chairman, Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. of the Judiciary, & F. James Sensenbrenner, Jr., Ranking Member, Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. of the Judiciary 17 (Apr. 17, 2020), https://judiciary.house.gov/uploadedfiles/submission_from_geoffrey_manne.pdf [https://perma.cc/4BHM-KJTM] [hereinafter Manne Email] (“By way of illustration, it hardly matters to a shopper in, say, Portland, OR, that there may be fewer grocery store chains nationally if she has *more* stores to choose from within a short walk or drive from her home. If you’re trying to connect the competitiveness of a market and the level of concentration, the relevant market to consider is *local*.”).

⁶¹ U.S. DEP’T OF JUST. & FED. TRADE. COMM’N, HORIZONTAL MERGER GUIDELINES § 4 (2010).

concentration.”⁶² However, broad sectors and industry groupings, by definition, do not depend on identifying the universe of firms that compete and impose a competitive constraint on each other.⁶³ Instead, while broad industry classifications describe national sectors (e.g., “Health Care and Social Assistance”⁶⁴), an antitrust product and geographic market is narrowly and locally defined depending on the universe of firms that compete against one another (e.g., inpatient general acute care hospital services in the Darlington County area of South Carolina).⁶⁵ Without defining the universe of firms competitively relevant to one another, market share statistics and measures of concentration are meaningless.⁶⁶

The difference between actual product markets and aggregate concentration measures is significant in theory and practice.⁶⁷ In a 2018 paper, Gregory Werden and Luke Froeb demonstrate how the excessive aggregation in U.S. census data can mask changes in market concentration.⁶⁸ Werden and Froeb compare NAICS six-digit industries to markets by calculating the Commerce Quotients⁶⁹ for the relevant markets alleged in merger challenges filed by the Department

⁶² Serge Moresi, Steven C. Salop & John R. Woodbury, *Market Definition and Multi-Product Firms in Merger Analysis*, in 1 ANTITRUST ECONOMICS FOR LAWYERS § 1.01 (LexisNexis, 2021).

⁶³ Wright et al., *supra* note 8, at 316.

⁶⁴ Furman & Orszag, Chapter, *supra* note 26, at 34.

⁶⁵ Cmty. Health Sys., Inc., 157 F.T.C. 933, 935–36 (Jan. 21, 2014) (complaint).

⁶⁶ See Moresi, *supra* note 62, at § 1.01; see also Shapiro, *supra* note 45, at 722 (“In my view, no high-level look at the American economy can substitute for detailed studies of specific markets when it comes to assessing market power.”).

⁶⁷ Wright et al., *supra* note 8, at 317.

⁶⁸ Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 74, 76–77.

⁶⁹ *Id.* at 75. “Commerce Quotients’ [are] defined as the annual volume of commerce of the alleged relevant market . . . divided by the value of industry shipments in the corresponding [Standard Industrial Classification] 4-digit industry[.]” *Id.* at 74.

of Justice between 2013 and 2015, omitting certain markets.⁷⁰ The authors find that the larger calculated Commerce Quotients are affiliated with alleged national markets, but are still relatively low because they reflect only a small fraction of the corresponding six-digit NAICS industries.⁷¹ By comparison, smaller Commerce Quotients are affiliated with single-locality relevant markets in the United States, while the NAICS data cover the entirety of the United States.⁷²

Werden and Froeb then conduct a thought experiment that illustrates how excessive aggregation can render observations of concentration trends meaningless and can lead to fallacies associated with averaging: “Even the least aggregated census data can be over a hundred times too aggregated.”⁷³ The authors warn that the data used to derive national concentration measures “are apt to mask any actual changes in the concentration of markets, which can remain the same or decline despite increasing concentration for broad aggregations of economic activity.”⁷⁴ The authors conclude that increasing aggregate industry market concentration thus does not indicate whether antitrust reform is needed.⁷⁵

To cure the inherent deficiencies in aggregate industry concentration studies, progressives point to a handful of anecdotes and single-industry studies.⁷⁶ But these studies do little to bolster the progressives’ argument for radical reform, which depends not on a single industry concentration problem, but on a *systematic and market wide* increase in

⁷⁰ *Id.* at 75 (omitting relevant markets where the Department of Justice’s “investigation did not determine the volume of commerce or because alleged lessening of competition was on the buying side of the market”).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 74, 76.

⁷⁴ Werden & Froeb, *supra* note 68, at 74.

⁷⁵ *Id.* at 78.

⁷⁶ See, e.g., BAKER ET AL., *supra* note 6, at 2–3 & nn.5–7 (discussing studies involving increased concentration levels in airlines, brewing, and hospitals); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 18 (2015) (discussing increasing concentration in certain industries).

aggregate industry concentration levels.⁷⁷ Nonetheless, recent empirical studies—discussed in Section II.B—demonstrate that concentration levels, when calculated at the local level, have been *decreasing* over time, providing further evidence that national measures of concentration do not reflect the competitive market conditions relevant for a proper assessment of antitrust outcomes or policy.⁷⁸

Progressives' frequent reliance upon an alleged relationship between aggregate economy-wide markups and market power as a basis for radical antitrust reform fares no better under the magnifying glass of well-established principles of IO economics. For decades, IO economists have agreed that an increase in markups alone is not sufficient to identify increased market power.⁷⁹ Even De Loecker et al. acknowledge that higher markups do not necessarily mean firms are making higher profits, because higher markups can result for “reasons that are not associated with a decline in aggregate welfare.”⁸⁰ Moreover, De Loecker et al. do not establish that the increase in markups results from a decrease in quantity and corresponding increase in price.⁸¹ Recall that the exercise of market power, by definition, requires a reduction in market output and higher prices. A higher markup may imply increasing prices if marginal cost is constant, but De Loecker et al. provide no evidence of marginal costs.⁸² Without more, it is impossible to draw any conclusion regarding *why* measured aggregate markups

⁷⁷ This is true even for progressives' specific claims regarding digital markets. *See generally* BAKER ET AL., *supra* note 6, at 4.

⁷⁸ *See infra* Section II.B.

⁷⁹ Bork & Sidak, *supra* note 56, at 512; *see also* De Loecker et al., *supra* note 48, at 592 (“The documented rise in markups does not necessarily imply that firms have more market power and therefore higher economic profits.”).

⁸⁰ De Loecker et al., *supra* note 48, *supra* note 48, at 592.

⁸¹ Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AM. ECON. J.: MICROECONOMICS 309, 311 (2021) (citing De Loecker et al., *supra* note 48, *supra* note 48).

⁸² De Loecker et al., *supra* note 48, *supra* note 48, at 564 (discussing the measure of markup “as the wedge between a variable input’s expenditure share in revenue . . . and that input’s output elasticity”).

increased.⁸³ An increase in market power may be the reason, but other reasons are also possible, such as increased fixed costs, increased product differentiation, or an economy-wide change to products or services with lower marginal costs.⁸⁴ The antitrust-relevant question is whether the increase in markups is caused by an increase in market power, a change in consumer preference, or a decrease in market power. Only the first suggests the possibility that antitrust reform might improve matters.

The evidence offered by progressives to justify radical antitrust reform faces a grave deficit. That evidence belies decades of empirical economic learning that warns against drawing conclusions about changes in competition and market power from aggregated measures of concentration and markups. Moreover, the progressives' argument crumbles under the weight of recent empirical studies that focus upon firms competing with one another in *markets*. As discussed in Section II.B., those studies show concentration *decreasing* and firm efficiency *increasing*. Neither of these outcomes—both achieved within the existing Sherman Act framework—is consistent with progressives' story of market failure. Without establishing their market failure story, progressives are unable to defend their petitions for a radical "New" Sherman Act.

⁸³ Berry et al., *supra* note 59, at 49 (discussing the work of De Loecker, Eekhout & Unger, among others, and concluding that there are "open questions remain about the magnitude and causes of the [increases in markups.]").

⁸⁴ See e.g., De Loecker et al., *supra* note 48, at 592 ("In fact, increasing markups can come from a variety of reasons that are not associated with a decline in aggregate welfare. For example, a decrease in marginal costs, an increase in fixed costs or innovation, an increase in demand or in its elasticity, a change in the market structure, or new product varieties all lead to increasing markups without necessarily implying higher profits." (footnote omitted)); Kenneth G. Elzinga & David E. Mills, *The Lerner Index of Monopoly Power: Origins and Uses*, 101 AM. ECON. REV. 558, 561 (2011) ("Economists generally agree that . . . a relatively high Lerner Index may reveal nothing more than the necessity of covering fixed costs."); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 109 (2d Cir. 1995) ("Certain deviations between marginal cost and price, such as those resulting from high fixed costs, are not evidence of market power." (citation omitted)).

B. Recent Empirical Studies Show No Systematic Increase in Market Power in the U.S. and that Consumers Have Been Harmed

Economists have recently continued their work evaluating the state of competition in the American economy. One important improvement of this recent work is to focus on markets rather than sectors for the reasons discussed above. Other improvements have tried to address whether aggregate markups have increased because of an increase in market power or a reduction in marginal costs. We discuss this recent evidence below. While empirical evaluation of these questions continues apace, the best interpretation of this evidence does not support progressive reformers' view that there has been a systematic increase in market power in the United States, much less that one has occurred as a result of lax antitrust enforcement. The premise of the reformers' call for a "New" Sherman Act is not supported by the evidence.

A 2020 paper by Esteban Rossi-Hansberg, Pierre-Daniel Sarte, and Nicholas Trachter shows that concentration, when measured at local market levels, decreased between 1990 and 2014.⁸⁵ The authors use National Establishment Time Series (NETS) data set to document national and local concentration in the U.S. economy between 1990 and 2014.⁸⁶ Rossi-Hansberg et al. compare local levels of concentration measured at the core-based statistical area (CBSA), county, or zip code level to national levels of concentration across all industries and also separately at the eight-digit SIC code level.⁸⁷ Figure 2 depicts their results.⁸⁸ The authors find that while national levels of concentration has been increasing, the same is not true for local levels of concentration: "[T]he more geographically disaggregated the measure of concentration,

⁸⁵ Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, 35 NBER MACROECONOMICS ANN. 115, 116 (2020).

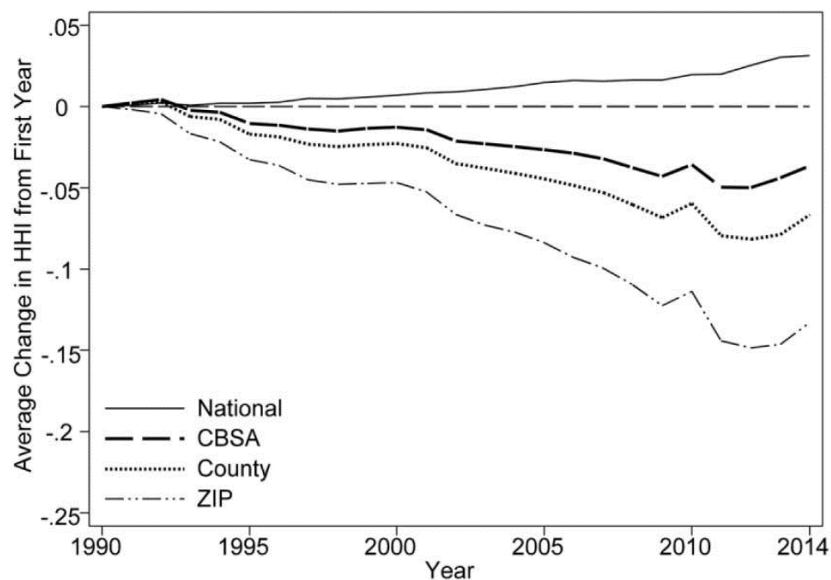
⁸⁶ *Id.*

⁸⁷ *Id.* at 116, 119–21.

⁸⁸ *Id.* at 123 fig.1.

the more pronounced its downward trend over the last two and a half decades.”⁸⁹

Figure 2: Rossi-Hansberg et al.—National and Local Concentration Trends⁹⁰



Rossi-Hansberg et al. obtain similar results looking at the change in concentration across SIC-industry and geography pairs, as shown in Figure 3.⁹¹ The authors observe that “although increasing market concentration at the national level holds broadly across all divisions, it is equally the case that concentration has steadily fallen at the ZIP code level in these divisions.”⁹²

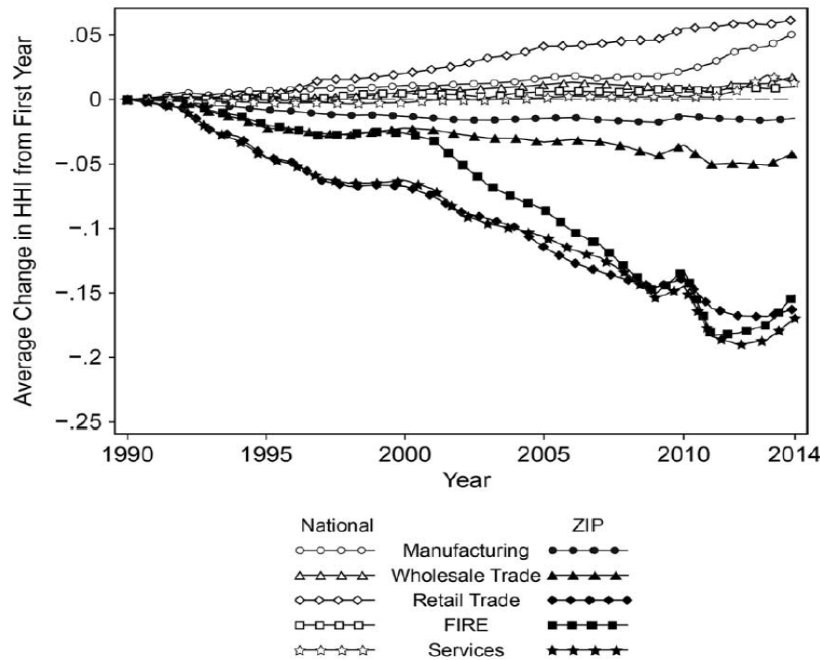
⁸⁹ *Id.* at 123–24.

⁹⁰ *Id.* at 123 fig.1.

⁹¹ Rossi-Hansberg et al., *supra* note 85, at 124 fig.2.

⁹² *Id.* at 124.

Figure 3: Rossi-Hansberg et al.—Trends in SIC-Level Concentration⁹³



A 2021 paper by C. Lanier Benkard, Ali Yurukoglu, and Anthony Lee Zhang shows similar results.⁹⁴ The authors use MRI-Simmons’s “Survey of the American Consumer,” which collected from consumers brand purchase data for 337 products from 1994 to 2019.⁹⁵ For example, in the 2006 survey, the MRI data show that consumers purchased twenty-four different brands of “Motor oil”—Valvoline, Castrol, Amoco, Havoline, Chevron, and “Other.”⁹⁶ The survey also

⁹³ *Id.* at 124 fig.2.

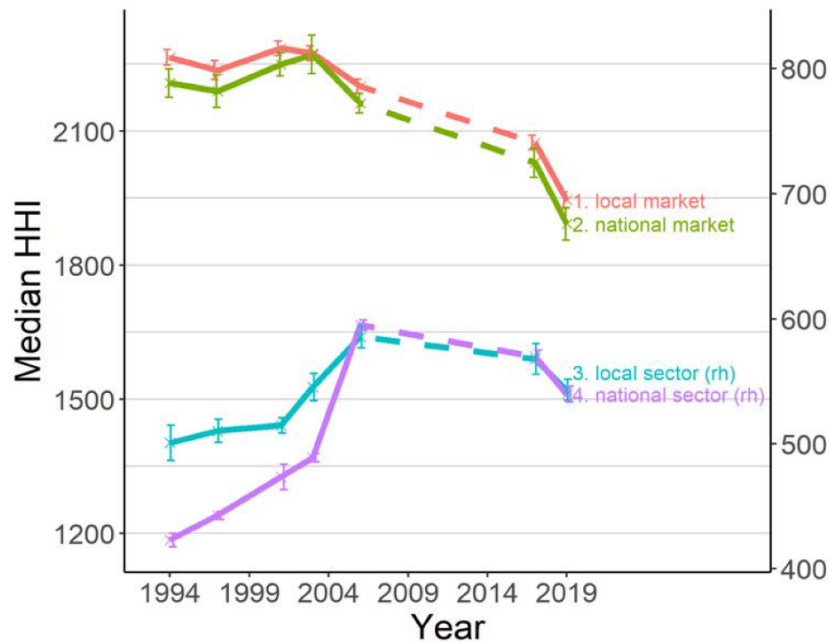
⁹⁴ C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets* (Nat’l Bureau of Econ. Rsch., Working Paper, No. 28745, 2021), https://www.nber.org/system/files/working_papers/w28745/w28745.pdf [<https://perma.cc/7K28-PDJL>].

⁹⁵ *Id.* at 8.

⁹⁶ *Id.*

includes demographic information, such as the state in which the consumer lives.⁹⁷ In addition to the individual 337 product markets, Benkard et al. roll up those product markets into seventeen broader groups, called “sectors” (e.g., “Airlines”, “Home Products–Food”).⁹⁸ Benkard et al.’s sector definition is similar to the aggregation of Furman and Orszag’s industry level definition.⁹⁹ Benkard et al. then employ the data to estimate the median HHI by (i) product, and (ii) sector, separately for both local and national markets. Figure 4 depicts their results.¹⁰⁰

Figure 4: Benkard et al.—Median HHI Over Time, by Market Definition¹⁰¹



⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See *supra* Section II.A.1.

¹⁰⁰ Benkard et al., *supra* note 94, at 4 fig.1.

¹⁰¹ *Id.*

Benkard et al. find that national and local concentration at the product level has been *declining* since 1994—a result that is inconsistent with the aggregate concentration levels on which progressives rely.¹⁰² It is only when the changes in concentration are considered at the aggregate level by sector that increases are observed.¹⁰³ Thus, the actual market-level evidence is inconsistent with the reformers’ narrative of increasing concentration. Even more telling is the authors’ proffered explanation for the observed decrease in product concentration levels: As “the costs of a firm supplying adjacent geographic or product markets falls over time[,] . . . efficient firms enter each other[’s] home product markets.”¹⁰⁴ This increase in efficiency attributable to geographic expansion by firms into new product and geographic markets—that is, increased competition in new geographies and new markets—is plainly inconsistent with any market failure story.

A recent paper by Hendrik Döpfer, Alexander MacKay, Nathan H. Miller, and Joel Stiebale¹⁰⁵ addresses exactly this question. Döpfer et al. challenges De Loecker et al.’s conclusion regarding a systematic increase in market power as the reason for higher markups.¹⁰⁶ Döpfer et al.’s examination of the data from a market-based perspective,¹⁰⁷ rather than a sectoral lens, attempts to pinpoint to what extent rising prices or falling marginal costs are responsible for any changes in aggregate markups.

Döpfer et al. employ Nielsen scanner data to estimate marginal costs and markups between 2006 and 2019 for hundreds of consumer product categories—e.g., beer, bottled water, ready-to-eat cereal, etc.¹⁰⁸ The authors find that

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 6.

¹⁰⁵ Hendrik Döpfer et al., *Rising Markups and the Role of Consumer Preferences* (Harv. Bus. Sch. Working Paper No. 22-025, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939126 (on file with the Columbia Business Law Review).

¹⁰⁶ *Id.* at 26.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.* at 1–2, 9–10.

average markups increased by twenty-five between 2006 and 2019.¹⁰⁹ With the understanding that these increases in markups can be driven by either price increases or marginal cost reductions, Döpfer et al. compute real prices and marginal cost between 2006 to 2019.¹¹⁰ The authors find that between 2006 and 2012, “real prices increased by seven percent on average, but by 2019, average real prices are only 2% higher than in 2006.”¹¹¹ Döpfer et al. observe that while price increases partially explained higher markups initially, marginal cost *reductions* accounted for the trend in aggregate markups.¹¹² The authors estimate that marginal costs declined by 1.3% per year on average and that 63% of the within-product changes in markups are explained entirely by reductions in marginal costs.¹¹³ In other words, the authors show that increases in markups are largely attributable to firms getting more efficient over time rather than increasing market power. Consistent with Rossi-Hansberg et al. and Benkard et al., these results suggest that large firms are expanding into new geographic and product markets over time. This is a result consistent with more competition, not less. Why weren’t these marginal cost reductions passed on to consumers in the form of lower prices? Döpfer et al. estimated that consumers became twenty-five percent less price sensitive between 2006 and 2019.¹¹⁴ Figure 5 depicts their results.¹¹⁵

¹⁰⁹ *Id.* at 1, 17.

¹¹⁰ *Id.* at 2.

¹¹¹ Döpfer et al., *supra* note 105, at 2.

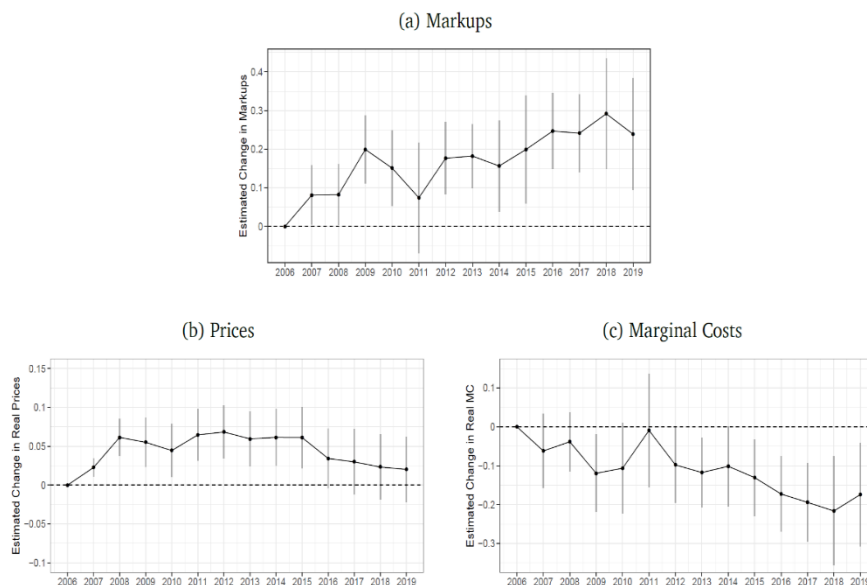
¹¹² *Id.*

¹¹³ *Id.* at 18, 21.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 18 fig.3.

Figure 5: Döpfer et al—Product-Level Changes in Markups, Prices, and Marginal Costs¹¹⁶



The authors calculate a sixteen percent increase in consumer surplus per capita.¹¹⁷ These results are inconsistent with the story that the U.S. economy has experience a persistent and systematic increase in market power that has resulted in increased prices to consumers.

Moreover, Sharat Ganapati demonstrates that industry concentration is positively correlated with productivity and real output, but industry concentration is uncorrelated with price changes.¹¹⁸ Figure 6 shows Ganapati's results.¹¹⁹

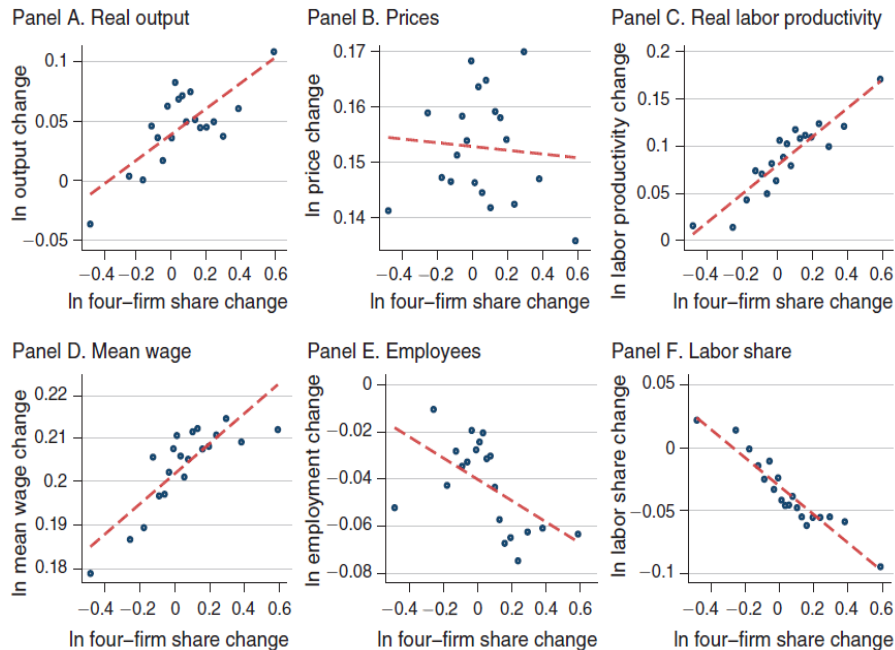
¹¹⁶ *Id.*

¹¹⁷ Döpfer et al., *supra* note 105, at 2.

¹¹⁸ Ganapati, *supra* note 81, at 317. For a more detailed discussion of Ganapati's study, see Wright et al., *supra* note 8, at 321–22.

¹¹⁹ Ganapati, *supra* note 81, at 318 fig.3.

Figure 6: Ganapati—Correlation of Economic Outcomes to Market Concentration¹²⁰



While relying upon such aggregate measures of concentration and performance to make inferences about competitive intensity warrants considerable caution, Ganapati's results are telling in that they establish the absence of a signature outcome from a rise in market power: a simultaneous increase in price and decrease in output. It is—put simply—hard to tell a story of systematic increase in market power across the economy with marginal cost and market concentration falling while consumer surplus and output are increasing. There is no reliable empirical basis to support the inference that the U.S. economy has experienced a systematic and persistent increase in market power.

¹²⁰ *Id.*

To justify radical antitrust reform, progressives proffer a simple, albeit incorrect, story of market failure: increased aggregate national concentration levels have resulted in a systematic increase in U.S. market power causing higher prices and reduced output to the detriment of consumers. However, empirical evidence of concentration levels in local markets that more closely resemble antitrust markets show decreasing concentration over time. Moreover, the empirical evidence establishes that the observed increase in markups—to which progressives cling—is not the result of increased prices and reduced output. Rather, higher markups are the result of *decreases* in marginal costs and the efficient expansion of firms into new markets and geographic areas, resulting in higher consumer surplus. And output—rather than decreasing—has actually increased. Even accepting progressives’ fallacy of a relationship between concentration levels and market power, the empirical evidence does not support a systematic increase in market power. Of course, the absence of a systematic increase in market power does not exclude the possibility of concerns about market power in individual markets. But those individual case-by-case concerns are comparable to those that the existing Sherman Act has successfully addressed. If there is new economic learning that can be brought to bear in those markets, then enforcers already have the right tools to incorporate that learning. The consumer welfare standard has consistently proven its flexibility to adapt to changes in economic learning. Simply put, the evidence does not support progressives’ proffer of a systematic failure of competition in markets warranting a “New” Sherman Act.

III. THERE IS NO “CRISIS” IN THE COURTS THAT SUPPORTS A “NEW” SHERMAN ACT

Without evidence of a systematic failure of competition in markets, progressives assert that antitrust enforcement is broken, “in large part because of the courts,” which “have contributed to increased monopoly power through decisions that have weakened the prohibitions against anticompetitive

exclusionary conduct and anticompetitive mergers.”¹²¹ Professors Herbert Hovenkamp and Scott Morton go even further to make the extreme suggestion that the courts have stopped following antitrust doctrine altogether: “Recent decisions . . . suggest that at least some Supreme Court Justices, unable to find coherent economic rationales for their positions, have abandoned antitrust economics altogether.”¹²²

The crisis in courts, the progressives contend, has resulted in lax antitrust enforcement, agencies that simply cannot win cases in front of federal judges, and widespread failure to prevent anticompetitive mergers and conduct. To support their conclusions, progressives rely upon three pieces of evidence: (1) a study summarizing and averaging the results of various merger retrospectives published by Professor John Kwoka¹²³ that progressives contend confirms that lax antitrust policy has resulted in the approval of anticompetitive mergers;¹²⁴ (2) the enforcement activity level of the antitrust agencies, as measured by the number of merger challenges brought by the agencies;¹²⁵ and (3) anecdotal evidence that the agencies lost particular merger or conduct challenges because of the “crisis” in the courts.¹²⁶ Progressives’ argument is that because courts are broken, the agencies and other antitrust plaintiffs are unable to win in court and that alleged limitation handicaps the agencies’ ability to deter anticompetitive conduct: “The agencies can

¹²¹ BAKER ET AL., *supra* note 6, at 1–2.

¹²² Hovenkamp & Scott Morton, *supra* note 7, at 1878.

¹²³ KWOKA, *supra* note 76.

¹²⁴ *See, e.g.*, Hovenkamp & Shapiro, *supra* note 6, at 2006–07 (discussing John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837–72 (2017)); Shapiro, *supra* note 45, at 738 (discussing that merger retrospectives support “a shift to a moderately stricter merger enforcement policy”).

¹²⁵ *See, e.g.*, KWOKA, *supra* note 76, at 42–46; BAKER ET AL., *supra* note 6, at 7–11 (laying out a laundry lists of things that courts have allegedly failed to do or have mistakenly done).

¹²⁶ *See, e.g.*, Shapiro, *supra* note 5, at 39–40.

only bring absolutely slam dunk cases and even then they sometimes don't win given pro-defendant courts."¹²⁷

A. Professor Kwoka's Analysis Does Not Support Progressives' Demands for a "New" Sherman Act

Progressives point to Kwoka's study of merger retrospectives as evidence of lax antitrust enforcement policy that has resulted in a reduction in consumer welfare. In his 2015 study, Kwoka conducts a meta-analysis of retrospective studies of consummated mergers, joint ventures, and other horizontal agreements.¹²⁸ Using data that covers 3,000 mergers, Kwoka analyzes four major topics: agency decisions to challenge a merger; the price effects of mergers; the overall effectiveness of merger control policy; and the effect of merger remedies.¹²⁹ For the mergers studied in his sample, Kwoka finds an average price increase of 7.22%.¹³⁰ Kwoka concludes that recent merger enforcement has not been aggressive enough and asserts that enforcement agencies have allowed anticompetitive mergers and accepted inadequate remedies that fail to prevent post-merger price increases.¹³¹

A closer inspection of Kwoka's evidence reveals that it cannot bear the burden that progressives assign to it. Michael Vita and David Osinski, two experienced antitrust economists in the FTC Bureau of Economics, raise several critical objections to Kwoka's analysis.¹³² Vita and Osinski explain that Kwoka's calculations of average price effects do not employ standard meta-analytic techniques, which give less weight to studies that generate less precise estimates of the

¹²⁷ Florian Ederer (@florianederer), TWITTER (Nov. 10, 2021, 7:12 AM), <https://twitter.com/florianederer/status/1458407175513116673> [<https://perma.cc/HJM6-2BMM>].

¹²⁸ KWOKA, *supra* note 76, at 4–5; This discussion of Kwoka's analysis was initially published in Wright et al., *supra* note 8, at 324–25.

¹²⁹ KWOKA, *supra* note 76, at 6–8.

¹³⁰ *Id.* at 110.

¹³¹ *Id.* at 126.

¹³² See Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018).

price effect of a merger.¹³³ Specifically, Kwoka does not weight the observations by the inverse of an individual study's variance, which results in equal treatment of all price effects regardless of the precision of those estimates.¹³⁴ Moreover, Kwoka does not report the standard error of his unweighted average treatment effect—that is, the average price effect across the studies he focused upon—which makes it impossible to determine whether his estimated price effects are statistically different from zero.¹³⁵ This methodological flaw is fatal to claims relying upon Kwoka's work to assert lax antitrust enforcement.¹³⁶ The so-called price effect is key to Kwoka's own conclusion that antitrust enforcement has been lax, but he cannot reject the hypothesis that the average price effect across the studied mergers is zero.¹³⁷ Without a price effect distinguishable from zero using conventional statistical standards, progressives cannot employ Kwoka's analysis as support for the contention that agencies are systematically underenforcing antitrust and failing to prevent anticompetitive mergers.¹³⁸ Consequently, Kwoka's analysis cannot support the conclusion that modern merger policy has failed.¹³⁹

¹³³ *Id.* at 363.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ KWOKA, *supra* note 76, at 110–12.

¹³⁸ Wright et al, *supra* note 8, at 325.

¹³⁹ There are other serious methodological issues with relying upon Kwoka's analysis to identify optimal merger policy. One is that selection issues also plague Kwoka's meta-analysis of retrospectives. Retrospective analyses only occur when the merger is consummated—that is, we do not observe mergers that were challenged and in particular those that were wrongly challenged. Analyses based upon only consummated transactions do not represent a random selection of mergers and lack a credible control group. For these reasons, it is well understood that “retrospective studies that ask whether prices went up post-merger are surprisingly poor guides for analyzing merger policy.” Dennis W. Carlton, *Why We Need To Measure the Effect of Merger Policy and How To Do It*, COMP. POL'Y INT'L, Spring 2019, at 77, 78. For a discussion of selection issues in merger retrospective studies, see Luke M. Froeb, Bruce H. Kobayashi & John M. Yun,

B. Progressives Cannot Use the Number of Antitrust Challenges Brought by the Agencies To Conclude that Antitrust Enforcement Has Been Lax

Progressives also assert that the “crisis” in the courts is evident from the number of merger enforcement actions brought by the agencies. Agencies, they argue, face defendant-favorable courts where the plaintiff cannot win under existing burdens.¹⁴⁰ This allegedly results in lax antitrust enforcement with the agencies bringing fewer merger cases.¹⁴¹ But there is no evidence that U.S. antitrust enforcement has been lax. Progressives can conclude little by merely counting the number of enforcement actions brought by U.S. antitrust agencies.¹⁴² In fact, progressive economist Scott Morton points out that the number of cases is not of significance to making decisions on antitrust reform.¹⁴³

But outside of Kwoka’s meta-analysis and its defects, progressives offer little in the way of evidence that agencies would bring more merger challenges but for some “crisis” in the courts. Indeed, a 2019 study by Jeffrey Macher and John Mayo analyzing merger enforcement data from 1979 to 2017 suggests that enforcers are *more likely* to bring merger challenges today: “[C]ontrary to the popular narrative, the Agencies have become more likely to challenge proposed mergers. . . . Controlling for the number of merger proposals submitted under [HSR], we find that the likelihood of a merger challenge has more than doubled” from 1979 through 2017.¹⁴⁴ The FTC has acknowledged the agency’s increasing merger enforcement. In the FTC and DOJ’s *Hart-Scott-Rodino Annual Report* for fiscal year 2020, the FTC reported bringing

Organizational Form and Enforcement Innovation, ANTITRUST L.J. (forthcoming 2022).

¹⁴⁰ See, e.g., Shapiro, *supra* note 5, at 39–40.

¹⁴¹ KWOKA, *supra* note 76, at 42–46.

¹⁴² Manne Email, *supra* note 60, at 12.

¹⁴³ SCOTT MORTON, *supra* note 12, at 10 (“[T]he issue is not whether there are more or fewer enforcement actions[.]”).

¹⁴⁴ Jeffrey T. Macher & John W. Mayo, *The Evolution of Merger Enforcement Intensity: What Do the Data Show?*, 17 J. COMP. L. & ECON. 708, 709 (2021).

twenty-eight merger enforcement challenges, which it declared to be “the highest number of FTC merger enforcement actions in a single year since fiscal year 2001.”¹⁴⁵ Moreover, of the seven mergers since 2000 that Kwoka identifies as having gone erroneously unchallenged by U.S. antitrust agencies, Vita and Osinski’s analysis shows that only one of those challenges—Whirlpool/Maytag—has exhibited post-merger declines in competition.¹⁴⁶ Progressives simply cannot establish a systematic relationship between the number of enforcement cases brought by agencies, the aggressiveness of antitrust enforcement, and the alleged necessity of antitrust reform.

C. The Handful of Cases that Progressives Believe Plaintiffs “Should” Have Won Is Not Systematic Evidence of a “Crisis”

To substantiate their claims of a “crisis” in the courts, progressives point to cases like *Ohio v. American Express Co.*¹⁴⁷ and *FTC v. Qualcomm Inc.*,¹⁴⁸ and a handful of cases where they believe plaintiffs should have won.¹⁴⁹ Of course, these anecdotes are not systematic evidence that progressives’ claims justify their calls for radical antitrust reform.¹⁵⁰ Moreover, reasonable minds can and do disagree about the appropriateness of the outcomes of these anecdotal cases. For example, while Hovenkamp and Scott Morton argue that the Court’s decision in *American Express* was devoid of “sound economic analysis,” one of the authors of this Article, in

¹⁴⁵ FED. TRADE COMM’N & DEP’T OF JUSTICE, ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2020, at 2 (2021), https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf [<https://perma.cc/VF2M-NMXE>] [hereinafter HSR ANNUAL REPORT].

¹⁴⁶ Vita & Osinski, *supra* note 132, at 385; *see also* Wright, *supra* note 12, at 16.

¹⁴⁷ 138 S. Ct. 2274 (2018).

¹⁴⁸ 969 F.3d 979 (9th Cir. 2020).

¹⁴⁹ *See, e.g.*, Shapiro, *supra* note 5, at 39–40; Hovenkamp & Scott Morton, *supra* note 7, at 1872–75.

¹⁵⁰ Wright et al, *supra* note 8, at 325.

conjunction with Professor John Yun, argues the Court's application of economics was "right" and consistent with "fundamental antitrust principles."¹⁵¹ Similarly, Shapiro proffers that the Ninth Circuit's reversal of the district court's decision in *Qualcomm* was incorrect and that the "appeals court had difficulty understanding the economic effects of Qualcomm's [conduct], so it defaulted in favor of the defense."¹⁵² But one of the authors of this Article in conjunction with Douglas Ginsburg, a senior judge of the U.S. Court of Appeals for the D.C. Circuit, and Lindsey Edwards, find differently: "The district court decision [in *Qualcomm*] is fraught with legal and economic error."¹⁵³ Richard Epstein called the district court's decision "one of the most . . . devastatingly misguided . . . decisions in the annals of antitrust law."¹⁵⁴ And in an amicus curiae brief submitted to the Ninth Circuit, a group of legal and economic scholars described the district court's decision as

untethered from sound economics. . . . The district court's decision is disconnected from the underlying economics of the case. It improperly applied antitrust doctrine to the facts, and the result subverts the economic rationale guiding monopolization jurisprudence. The decision—if it stands—will

¹⁵¹ Hovenkamp & Scott Morton, *supra* note 7, at 1874, 1878 ("Recent decisions such as *AmEx* . . . suggest that at least some Supreme Court Justices, unable to find coherent economic rationales for their positions, have abandoned antitrust economics altogether."); Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express*, 54 REV. INDUS. ORG. 717, 721 (2019).

¹⁵² Shapiro, *supra* note 5, at 40.

¹⁵³ Douglas H. Ginsburg, Joshua D. Wright & Lindsey M. Edwards, *Section 2 Mangled: FTC v. Qualcomm on The Duty To Deal, Price Squeezes, and Exclusive Dealing*, 8 J. ANTITRUST ENFT 335, 352 (2020).

¹⁵⁴ Richard A. Epstein, *Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Authority*, 98 NEB. L. REV. 241, 242 (2019).

undercut the competitive values antitrust law was designed to protect.¹⁵⁵

No doubt every antitrust practitioner, scholar, and economist has a list of cases they believe should have come out differently. Claims that any of these cases mean the proverbial antitrust sky is falling should be read skeptically. That exceptional progressive antitrust scholars like Hovenkamp, Scott Morton, and Shapiro disagree with other antitrust scholars and economists—and in this case, with federal judges—about how to best interpret evidence in an individual case is notable, interesting, and worthy of discussion and debate. But it is not evidence of a systematic crisis of credibility in the judicial branch.

For every case where progressives argue plaintiffs should have won, there are anecdotes of *weak* cases brought by agencies that defendants *lose*. For example, in *McWane*, the FTC alleged that McWane unlawfully monopolized the market for domestic ductile iron pipe fittings by colluding with competitors to stabilize and raise prices and by other unilateral conduct designed to exclude entrants and other firms from competing.¹⁵⁶ Despite alleging past misconduct, the FTC offered no evidence of harm to competition.¹⁵⁷ And yet despite offering no evidence of harm to competition, the FTC was able to win its case in front of an administrative law judge,¹⁵⁸ in front of the Commissioners on appeal,¹⁵⁹ and in front of the Eleventh Circuit.¹⁶⁰ There are no shortages of anecdotes and debates over individual cases in all directions. But anecdotal examples and war stories are not sufficient evidence to substantiate progressives' claim of a "crisis" in the courts.

¹⁵⁵ Brief of Amici Curiae International Center for Law & Economics and Scholars of Law and Economics in Support of Appellant and Reversal at 2, *FTC v. Qualcomm Inc.*, 935 F.3d 752 (9th Cir. 2019) (No. 19-16122).

¹⁵⁶ *McWane, Inc.*, 153 F.T.C. 829, 834–43 (Jan. 4, 2012) (complaint).

¹⁵⁷ *McWane, Inc.*, 157 F.T.C. 176, 179 (Feb. 6, 2014) (dissenting statement Comm'r Joshua D. Wright).

¹⁵⁸ *McWane, Inc.*, 155 F.T.C. 903 (May 8, 2013) (initial decision).

¹⁵⁹ *McWane, Inc.*, 157 F.T.C. 107 (Jan. 30, 2014).

¹⁶⁰ *McWane, Inc. v. FTC*, 783 F. 3d 814, 842 (11th Cir. 2015).

To the contrary, when moving from anecdote to systematic data of agencies' success rate in actual cases, the data show that the agencies are quite successful. Over the last twenty years, the government has prevailed in an impressive eighty-five percent of its merger challenges.¹⁶¹ More recent challenges suggest an even higher win-rate.¹⁶² The agencies' win-rate principally shows that the agencies win when the agencies have the evidence to win. The evidence also casts substantial doubt over progressives' claims that the agencies can only win "slam dunk" cases. Indeed, often the agencies are able to thwart deals in the shadow of the law by merely threatening litigation: "[A]fter the DOJ or FTC challenge a merger, companies more often than not abandon their deal before trial because the legal standard is so favorable to the government."¹⁶³ In fiscal year 2020, out of the forty-three merger challenges brought by the agencies, approximately one-third were abandoned by the parties in response to agency challenges without any need to litigate.¹⁶⁴ A significant rate of abandonment of merger deals in the face of agency scrutiny is inconsistent with case law and courts that favor defendants.¹⁶⁵ Of course, selection effects imply that the agencies' win rate is not informative about the underlying distribution of cases.¹⁶⁶ But that is not the point here. The

¹⁶¹ Jan Rybnicek, Opinion, *Recent Antitrust Proposals Could "Throw Sand in the Gears" of Economic Recovery by Stalling M&A*, CNBC (Feb. 12, 2021, 3:07 PM), <https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html> [https://perma.cc/J9KY-GZQJ].

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ HSR ANNUAL REPORT, *supra* note 145, at 2–3, 10.

¹⁶⁵ A. Douglas Melamed, *Antitrust Laws and Its Critics*, 83 ANTITRUST L.J. 269, 285 (2020) (arguing that antitrust law's "principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law").

¹⁶⁶ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. L. STUD. 1, 19 (1984) (concluding that "there will be a tendency toward a plaintiff's success rate in litigated cases of 50 percent

point here is far simpler—the agencies can and do win enforcement actions. Claims that agencies can only win “slam dunk” cases and that the law is a significant impediment to deterring anticompetitive mergers are inconsistent with what is happening in litigated merger cases.

Progressives’ claims of a “crisis” in the courts cannot be sustained in the face of the available data. Antitrust agencies win cases when they have the evidence to win cases. While the courts can make mistakes from time-to-time, the agencies’ win rate and the defendants’ reactions to the threat of litigation from the agencies suggest that courts can and do stand ready to suppress conduct that is anticompetitive.

IV. THE ACTUAL PROPOSED “IMPROVEMENTS” TO THE SHERMAN ACT ARE RETROGRESSIONS

Progressive IO economists argue for a return to the “neutral tool” of economics in antitrust enforcement.¹⁶⁷ They call for reforming antitrust institutions with greater deference to economic expertise.¹⁶⁸ These economists point to the time prior to the consumer welfare standard where enforcement was “excessively interventionist” and where courts used “no economics or poor economics to make decisions.”¹⁶⁹ But the consumer welfare standard, these economists point out, is correct in its approach to using economics as a basis for antitrust analysis: “The attractive feature . . . [is] the idea of using economics to analyze business conduct in an effort to maximize social welfare.”¹⁷⁰ Their distress thus rests not with economics per se, but with what they argue has been the absence of new developments in IO economics in judicial

which will be unrelated to the position of the decision standard or to the shape of the distribution of disputes”).

¹⁶⁷ Hovenkamp & Scott Morton, *supra* note 7, at 1853.

¹⁶⁸ SCOTT MORTON, *supra* note 12, at 6–7 (discussing a database of research papers cataloging “the economic literature bearing on antitrust enforcement); *see also* Shapiro, *supra* note 5, at 39–40 (discussing four cases that he proffers “would have been decided in a more plaintiff-friendly manner had the courts properly used economic theory and evidence”).

¹⁶⁹ Hovenkamp & Scott Morton, *supra* note 7, at 1848.

¹⁷⁰ *Id.*

decision making.¹⁷¹ That is, courts have been “steadily dialing back antitrust enforcement . . . through economic assumptions built in to jurisprudence.”¹⁷²

Progressive IO economists argue that academic studies over the last twenty years show a disconnect between judicial opinions and “the rigorous use of modern economics to advance consumer welfare.”¹⁷³ The goal of these economists is for the antitrust agencies to “bring meritorious cases backed by rigorous economics.”¹⁷⁴ The ideal institutional design, the basis of their call for a “New” Sherman Act, envisions deference to a particular set of economic experts. The progressive call for reform is based not upon evidence of market failure, or a failure of antitrust institutions, but upon the nirvana fallacy—a comparison of the today’s institutions with an imaginary set of perfect institutions guided by omniscient and well-intending economists.¹⁷⁵ But economics is not on the agenda of the current proposals for antitrust reform. And today’s proposed reforms are those designed by politicians, not economists. Matthew Stoller differentiates the Neo-Brandeisians proposals for antitrust reform from proposals by progressive IO economists like Shapiro and Scott Morton: The IO economists “want to have economics run everything. They just want different economists’ But economics is an ‘elitist language to exclude normal people from politics.’”¹⁷⁶ More fundamentally, according to Stoller, economics is not a “science” designed to “ascertain truthful views about the world” [W]e can conclude that uncovering truth may be an incidental outcome of the practice of

¹⁷¹ *Id.* at 1849.

¹⁷² Berry et al., *supra* note 59, at 59.

¹⁷³ SCOTT MORTON, *supra* note 12, at 7.

¹⁷⁴ *Id.* at 8.

¹⁷⁵ See Demsetz, *supra* note 20, at 3 (explaining the nirvana fallacy).

¹⁷⁶ Leah Nylen, *The New Rules of Monopoly*, POLITICO (Dec. 27, 2021, 5:28 PM), <https://www.politico.com/news/2021/12/27/monopoly-antitrust-new-rules-tech-525161> [<https://perma.cc/9BNY-EGST>] (quoting Matt Stoller, Dir. of Rsch., Am. Econ. Liberties Project).

economics, but it is certainly not the goal of the discipline.”¹⁷⁷ And in terms of economics in antitrust, Stoller calls that a “smokescreen for replacing the rule of law with the rule of economists.”¹⁷⁸

The contents of the reform proposals introduced by Neo Brandeisians echo Stoller’s commentary—pitting the ideal reforms contemplated by leading progressive economists—like Scott Morton and Shapiro—against the actual reforms preferred by the Neo Brandeisians. For example, consider a proposed bill in Congress sponsored by Senator Amy Klobuchar.¹⁷⁹ Among other reform proposals, Senator Klobuchar proposes certain structural presumptions, such as a presumption of illegality for acquisitions by an entity with greater than fifty percent market share without concern for whether the merger results in harm to consumers;¹⁸⁰ or a presumption of illegality for certain broad categories of mergers (e.g., all mergers where the acquiring company is worth or has annual sales of \$100 billion and the acquiring company is worth \$50 million or more would be presumptively illegal).¹⁸¹ Lina Khan, Chair of the FTC, has signaled her support for structural presumptions and rules prohibiting conduct regardless of its impact on consumers: “[B]right-line rules focus judicial attention on readily observable market characteristics rather than complex economic modeling and self-interested testimony about future business plans.”¹⁸² But

¹⁷⁷ Matt Stoller, *What Is the Point of Economics*, SUBSTACK (Jan. 10, 2020), <https://mattstoller.substack.com/p/what-is-the-point-of-economics> [<https://perma.cc/X7GX-TL2Y>].

¹⁷⁸ *Id.*

¹⁷⁹ Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021).

¹⁸⁰ *Id.* § 4(b)(2)(A).

¹⁸¹ *Id.* § 4(b)5(B)(ii)(I)–(II).

¹⁸² Press Release, Lina M. Khan, Chair, Fed. Trade Comm’n, Rohit Chopra, Comm’r, Fed. Trade Comm’n & Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Commission File No. P810034 (Sept. 15, 2012), https://www.ftc.gov/system/files/documents/public_statements/1596396/sta

these proposals are grounded in political populism, not economics. They ignore the economic learning that has been incorporated into antitrust analysis over the last 130 years.¹⁸³ Their acceptance would mean a return to the “big-is-bad” approach used during the Sherman Act’s first fifty years of enforcement, where the “promotion of” conflicting “socio-political goals often came at the expense of consumers” and antitrust “often failed to achieve” any of its objectives.¹⁸⁴ Economics and the consumer welfare standard were a direct response employed by courts and regulators to *fix* the “conflicting and incoherent results” of then-antitrust enforcement.¹⁸⁵ And courts today employ that fix by placing a greater emphasis on economic tools and credible evidence of anticompetitive effects, rather than bright-line rules and presumptions.¹⁸⁶ Senator Klobuchar’s proposal is merely a call to return to an era of antitrust enforcement devoid of economics.

Consider another proposal to resurrect the Robinson-Patman Act (the “RPA”).¹⁸⁷ The RPA prohibits certain forms of price discrimination.¹⁸⁸ Professor William Kovacic observes that the RPA “statute and its enforcement have attracted greater hostile commentary than any other substantive

tement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf [https://perma.cc/7N24-8EPC]; see also Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1087 (2019).

¹⁸³ Wright et al., *supra* note 8, at 297, 299.

¹⁸⁴ *Id.* at 299–302; see also *id.* at 302–08 (discussing the adoption of economics and the consumer welfare standard).

¹⁸⁵ *Id.* at 303.

¹⁸⁶ *Id.* at 312.

¹⁸⁷ Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. §§ 13–13b, 21a); see, e.g., KRISTA BROWN ET AL., THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH 63–64 (2021), https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf [https://perma.cc/884W-ZHGP].

¹⁸⁸ 15 U.S.C. §§ 13–13(a) (2018).

command in the U.S. competition policy system.”¹⁸⁹ Neither the DOJ or the FTC has brought a single RPA case since 1992.¹⁹⁰ And there is a simple reason for that. The RPA has long been described as a law that protects competitors not consumers: “[T]he RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage.”¹⁹¹ While its goal was to protect small businesses from larger business, the RPA was ineffective at achieving those results.¹⁹² In 2007, having classified the Act as “antithetical to core antitrust principles,” the Antitrust Modernization Commission urged Congress to officially repeal the law:

The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.¹⁹³

Almost fifteen years later, however, there has been a call for an encore of the RPA. And in Chair Lina Khan, the Neo-Brandeisians have a fellow traveler and sympathetic supporter. Khan has signaled an appreciation for the RPA,¹⁹⁴ and the FTC’s recent rescission of the FTC’s 2015 “Statement

¹⁸⁹ William Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 410 (2003).

¹⁹⁰ BROWN ET AL., *supra* note 187, at 63; *see also* Kovacic, *supra* note 189, at 410–11.

¹⁹¹ ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, at iii (2007).

¹⁹² *Id.* at 311 (“The [RPA] generally appears to have failed in achieving its main objective.”).

¹⁹³ *Id.* at iii, 312.

¹⁹⁴ *See, e.g.*, Lina Khan, Opinion, *A Remedy for Amazon-Hachette Fight?*, CNN, (May 30, 2014, 1:41 PM), <https://www.cnn.com/2014/05/30/opinion/khan-amazon-hachette-antitrust/index.html> [<https://perma.cc/G6RC-KZ42>]; Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 727 (2017).

of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” may be a signal that Khan is considering resurrecting enforcement of the statute.¹⁹⁵ But this is not economics; economics tells us that the RPA *cannot* and *has not* achieved its goals of making consumers better off.

Progressives view the Neo-Brandeisian success and influence as a vehicle to advance their antitrust goals. But the progressive “New” Sherman Act is not on the table. Even that, as we discuss here, would be unwise antitrust policy and inconsistent with the evidence. But the *actual* antitrust proposals advanced by the Neo-Brandeisians are not economically sophisticated. Indeed, many of these reformers are outright hostile to economics and economists. And here is where some of even the most exceptional progressive antitrust thinkers succumb to the nirvana fallacy—comparing an idealized, blackboard version of the “New” Sherman Act with the current system. The actual antitrust proposals being discussed inside the agencies and in Congress do not reflect any ideal institutional design where antitrust enforcement is characterized by deference to a particular set of economic experts adhering to a particular set of economic models and learning. The current proposals envision an insignificant role for economists and economics, if any role at all. In fact, some proposals work to explicitly *exclude* economists, as is the case for the progressives’ proposal to restart enforcement of the RPA. Progressives like Stoller and Khan have all but shut the “neutral tool” of economics out of the debate. For those progressive antitrust thinkers supporting these radical reforms in the hopes that the debate will ultimately settle on an approach friendlier to rigorous economic thinking: *caveat emptor*.

¹⁹⁵ Press Release, Fed. Trade Comm’n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under> [https://perma.cc/FJL8-4CW2].

V. CONCLUSION

Over the last several decades, antitrust laws have evolved to incorporate established economic learning and have proved enormously flexible.¹⁹⁶ And the work of IO economists over the last twenty years has, once again, resulted in the generation of models capable of predicting “a need for greater enforcement in some areas but less in others.”¹⁹⁷ And while progressive IO economists embrace the role of economics in antitrust reform, the proposals currently being offered by progressives consider economics the problem, not the solution. The proposed reforms merely demand that antitrust enforcement return to that of the 1960s—where judicial decisions, devoid of economic thinking, generated conflicting outcomes that distorted markets and failed at achieving antitrust’s then-objective. But we have seen that movie—and we know where it ends.

This is not to say that there are no improvements to be made to antitrust enforcement. The appropriation of additional funds by Congress to the agencies would allow the agencies to compete for talent and continue their rigorous enforcement. The completion of merger retrospectives using the economic learning over the last two decades could provide the necessary evidence to determine where more robust antitrust enforcement might be needed. Empirical studies of labor markets and monopsony power can be employed by agencies to focus enforcement efforts on labor markets where anticompetitive conduct is uncovered. But all these improvements can be achieved using the existing Sherman Act toolkit. Whether antitrust policy can meet the challenges of today rests not on what is wrong with the Sherman Act, but rather upon what is right:

My hope is that the disciplines of law and economics will work hand in hand as partners to restore sound antitrust enforcement. The partnership I have in

¹⁹⁶ See generally Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court 1967 to 2007*, COMPETITION POL’Y INT’L, Autumn 2007, at 1, 1.

¹⁹⁷ Hovenkamp & Scott Morton, *supra* note 7, at 1853.

mind is simple and powerful: IO Economics, motivated in part by important issues in antitrust policy, advances our understanding of market structure, market power, and various business practices, both in general and in specific cases. Then lawyers and judges rely upon those findings, together with other evidence, to effectuate the intent of Congress that our antitrust laws promote and protect competition by building sound economics into our legal standards.¹⁹⁸

The modern consumer welfare-oriented antitrust paradigm is predicated on exactly such a partnership between law and economics. A “New” Sherman Act threatens to terminate that partnership. Antitrust institutions will better achieve their objective of promoting competition on behalf of Americans by working to strengthen, not weaken, the partnership between antitrust law and economics.

¹⁹⁸ Shapiro, *supra* note 5, at 34.