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REQUIEM FOR A PARADOX: The Dubious Rise and Inevitable Fall of Hipster Antitrust

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INTRODUCTION

For antitrust practitioners, scholars, and economists—those who work with antitrust in agencies, courts, or law firms—the development of the antitrust laws over the past half century has been a remarkable and positive development for the American economy and consumers. Over the last fifty years, antitrust has developed into a coherent, principled, and workable body of law that contributes positively not only to American competitiveness and societal well-being, but also helps to export the culture of market competition around the world. Although a healthy diversity of views governs the intellectual landscape in antitrust, and there is no shortage of ideas on how to improve its performance around the margins and within the paradigm of existing doctrine, there is consensus that modern antitrust laws have the core concepts right. Most fundamentally, there is agreement that the goal of protecting consumer welfare is and should be the lodestar of modern antitrust enforcement.¹

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1. See, e.g., Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1021 (1987); J. Thomas Rosch, *Monopsony and the Meaning of Consumer Welfare: A Closer Look at Weyerhaeuser*, 2007 COLUM. BUS. L. REV. 353, 353 (2007); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013).

This has not always been the case. For much of its history, antitrust has done more harm than good. Prior to the modern “consumer-welfare” era, antitrust laws employed confused doctrines that pursued populist notions and often led to contradictory results that purported to advance a variety of social and political goals at the expense of American consumers.² Through discussion and debate among jurists, scholars, economists, and government enforcers, antitrust law adopted a tractable standard that focused on consumer welfare and which tethered antitrust analysis to economic learning and evidence. From the perspective of antitrust professionals and academics, the consumer welfare revolution in antitrust saved an incoherent doctrine from its own internal inconsistencies and saved consumers from its perverse and paradoxical results.

Outside of mainstream antitrust practice and the academy, things look quite different. There appears to be another revolution brewing. But this revolution is a blast from antitrust’s past in many ways. It calls for the return of populism in antitrust enforcement. It declares the modern antitrust era—and the consumer welfare standard itself—a failure. This new revolution lays at antitrust law’s feet a myriad of perceived socio-political problems, including, but not limited to, rising inequality, employee wage concerns, and the concentration of political power. The drumbeat for this revolution is strong and growing, with a broad range of enthusiastic participants and devotees, including public intellectuals and think tankers, as well as prominent members of Congress. Indeed, the revolution has already been a success as measured by the increasing discussion of antitrust in popular media and public discourse, and by even embedding its central ideas into the political platform of the Democratic Party and into proposed legislation.

A brief aside to discuss “Hipster Antitrust,” the name first attached to this progressive collection of proposals to revert antitrust back to its 1960 roots in order to solve social problems ranging from unemployment to income inequality and indeed to improve the functioning of democracy itself. The Hipster Antitrust label was introduced as a “lighthearted way to capture a worldview of antitrust regulation expansive enough to solve societal woes ranging from economic inequality to climate change, mixed with the kind of vintage 1960s-style ‘big-is-bad’ thinking.”³ Senator Hatch

2. See, e.g., Alan Reynolds, *The Return of Antitrust*, 41 REG. 24, 24 (2018); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 715 (2018).

3. Nitasha Tikku, *Do Not Mistake Orrin Hatch for #HipsterAntitrust*, WIRED (Aug. 3, 2017), <https://www.wired.com/story/orrin-hatch-antitrust-hipster-antitrust/> [http://perma.cc/X28T-87W9].

further embedded the label in the antitrust discourse in a speech from the floor of the Senate discussing antitrust policy during which he announced that “nobody would mistake [him] for a hipster,” and went on to criticize the movement as amounting to “little more than pseudo-economic demagoguery and anticorporate paranoia.”⁴ Even a handful of antitrust enforcers around the world made use of the Hipster Antitrust label to champion or to distinguish their agenda items. Within the progressive antitrust movement itself, reactions were mixed. Some embraced the Hipster Antitrust label; others were ambivalent; and some were even offended, insisting that the movement be called the New Brandeis School or New Progressive Antitrust Movement.⁵ With all due respect to those associated with this movement—a respect we hope we demonstrate by the seriousness with which we treat their ideas—we adopt the term Hipster Antitrust here rather than the less well-known alternatives.

The Hipster Antitrust movement is not ultimately about ideological struggles between left and right over how much antitrust intervention is optimal.⁶ At its core, the Hipster Antitrust movement calls for a total rejection of the commitment to economic methodology and evidence-based policy that lies at the heart of modern antitrust enforcement. The Hipster Antitrust movement would reject Chicago School free marketers’ approach to antitrust just as readily as it would Post-Chicago interventions.⁷

4. Press Release, Hatch Speaks on Growing Controversy over Antitrust Law in the Tech Sector (Aug. 3, 2017), <https://web.archive.org/web/20170821024829/https://www.hatch.senate.gov/public/index.cfm/releases?ID=299BA71A-9DAB-45AC-BC7C-0FABB967451C>.

5. See Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [<http://perma.cc/EE7D-BN6P>]; Daniel A. Crane, *Antitrust’s Unconventional Politics* (U. Mich. Pub. L. Research Paper No. 593, 2018), <https://ssrn.com/abstract=3149661> [<http://perma.cc/D59L-JMGP>].

6. The rise of Hipster Antitrust has created an opportunity for those who support a more aggressive antitrust enforcement regime, albeit under the current consumer welfare model, to argue cleverly that applying antitrust more aggressively to increase the number of prosecutions is the obvious compromise position. See, e.g., *Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt: Hearing Before the Subcomm. on Antitrust, Competition & Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 8 (2017), <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Moss%20Testimony.pdf> [<https://perma.cc/3DEV-H9JC>] [hereinafter *Hearing*] (statement of Diana Moss, President, American Antitrust Institute). Any changes to antitrust liability rules and enforcement posture should be driven by economic theory and empirical evidence. Study of enforcement successes and failures, and debate about the appropriate application of the consumer welfare model, are necessary to the healthy development of the antitrust laws. At this time, however, there is insufficient evidence to justify a dramatic shift in antitrust enforcement policy.

7. Stucke & Ezrachi, *supra* note 5.

We evaluate Hipster Antitrust not as a marketing tool or for its popularity, but as it deserves to be evaluated: as a set of serious policy proposals that would dramatically change the nature of antitrust enforcement and its institutions. We are clear that our presumption is that, as with previous challenges to the consumer welfare standard, those modifications supported by rigorous evidence and analysis will find their way into future antitrust institutions; those proposals that do not survive the marketplace for ideas because they lack evidence and logical support will ultimately fail.

So what proposals do we evaluate? Alongside the general grievances discussed above that the Hipster Antitrust movement lays at the feet of the allegedly lax antitrust enforcement of our times, it offers several very specific policy proposals. These include a return to “big-is-bad” antitrust enforcement based upon firm size without regard for effect on consumers, making presumptively unlawful broad categories of mergers and acquisitions outright (e.g., all mergers beyond a certain size threshold even in the absence of potential horizontal or vertical issues), and abandoning the consumer welfare standard to take into account effects on income inequality and wages. We demonstrate that, when evaluated as *evidence-based* policy proposals, the Hipster Antitrust agenda fails to substantiate its claims and promises. Sometimes the evidence underlying alleged “problems” these proposed policies will solve is simply lacking. In other instances, the Hipster Antitrust movement and its populist proponents conflate the question of whether antitrust enforcement is at the optimal level, i.e., are antitrust institutions doing everything we can and should under the current consumer welfare standard, with the very different conceptual question of whether the standard has failed to serve its purpose.

In conflating these questions and diving immediately toward aggressive conclusions, populist antitrust proponents threaten to send antitrust enforcement careening backwards in time toward a regime that harmed consumers and propped up inefficient corporations. Populist antitrust advocates ignore that antitrust law has already tried to promote the very socio-political goals they are now commending as the proper focus of the antitrust laws. This socio-political antitrust regime was roundly—and rightly—condemned for its incoherence and internal inconsistencies.⁸ It fostered corporate welfare over consumer welfare. And its incoherence significantly undermined the rule of law. Populist antitrust advocates also ignore why modern antitrust rejects a simplistic and arbitrary focus on

8. Wright & Ginsburg, *supra* note 1, at 2406.

market structure and concentration in favor of analyzing actual competitive effects. The economics underlying the earlier structuralist approach—one that led the government to challenge a merger creating a firm with a market share of eight percent⁹—has long been discarded to the dustbin of history. What the modern debate between antitrust insiders and the revolutionaries at the gate often lacks is antitrust history: the modern consumer welfare standard was an endogenous and direct response to this earlier regime. It was adopted after significant analysis and debate by leading jurists, economists, enforcers, and practitioners. The debate took place in the marketplace for ideas, in academic journals, in courts, and inside agencies. But antitrust practitioners and scholars today should not presume that the superiority of the consumer welfare standard to the conditions in the 1960s implies its permanence. Whether consumer welfare is the optimal standard is once again being tested.

In this paper, we take on the task of analyzing the theoretical and empirical foundations of the various Hipster Antitrust claims and policy proposals. The paper is organized as follows:

Part I traces the history of antitrust enforcement, examining the conflicting and contradictory results of the big-is-bad approach to antitrust and explaining the serious debate that led to the adoption of the consumer welfare standard.

Part II examines the empirical basis for the claims and specific policy proposals of the Hipster Antitrust movement, including but not limited to: a widespread rise in corporate concentration attributable to lax antitrust enforcement, a pervasive and dramatic increase in the exercise of monopoly and monopsony power to the detriment of competition and consumers, an increase in income inequality caused by lax antitrust enforcement, the prediction that a ban on vertical mergers would make consumers better off, and the claim that antitrust agencies have failed to prevent anticompetitive mergers. The empirical claims supporting the Hipster Antitrust movement do not survive closer examination, and are plagued by measurement problems, weak inference, and lack of identification.

Part III develops the benefits of the consumer welfare approach, namely offering consistency and coherence to a previously wayward area of law; linking antitrust analysis and outcomes to economics, empirics, and

9. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 272–74 (1966); John D. Harkrider, *A Return to Von's Grocery?*, A.B.A. ANTITRUST SOURCE, Oct. 2010, at 1, 1, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Harkrider10_21f.pdf [<https://perma.cc/98MW-KHD3>].

evidence; fostering the rule of law domestically and abroad; and providing a standard that evolves alongside economic developments.

Part IV articulates the serious dangers of adopting the populist antitrust approach, including reducing consumer welfare and fostering corporate welfare, while encouraging rent seeking.

Part V concludes.

I. THE ROAD TO THE CONSUMER WELFARE STANDARD

It is impossible to understand the current debate over the effectiveness and goals of U.S. antitrust laws without a working understanding of antitrust law's history over its nearly 130-year existence.¹⁰ Despite its statutory basis, the development of antitrust jurisprudence is driven primarily through a common law process. The exceptionally brief nature of the Sherman Act (and later the Robinson-Patman and Clayton Acts)¹¹ necessitates common law explication. Thus, antitrust enforcers, like the Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission (FTC) (collectively "Antitrust Agencies")—through their selection of cases—and the courts—through their decisions—have driven the development of antitrust law through the years.

Antitrust law's journey from its inception to its modern economic foundations has been a remarkable one. The Sherman Act was passed in 1890, following a rash of "great trusts" arising at the end of the nineteenth century. These trusts ranged from tobacco to beef to sugar, and a wary public perceived these trusts to be a threat to the free market system that had thus far prevailed.¹² These beginnings inform not only the passage of the Sherman Act, but also how courts and the DOJ enforced the Act in the years following—including the propensity to focus on firm size when evaluating conduct under the laws and when seeking targets for prosecution.

The results of these early efforts were roundly condemned, ultimately leading to fundamental criticisms of the antitrust laws, their intended goals,

10. See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 43–44 (2000).

11. Sherman Act, 15 U.S.C. §§ 1–7 (2018); Robinson-Patman Act, 15 U.S.C. §§ 13–13b, 21a (2018); Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (2018)).

12. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (beef); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (sugar); *United States v. E.I. Du Pont De Nemours & Co.*, 188 F. 127 (C.C. Del. 1911) (gunpowder); see also Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 ST. JOHN'S L. REV. 101, 102–03 (2015).

and the institutional competence available to achieve them.¹³ Following this critical, introspective endeavor, antitrust law embraced the consumer welfare standard now in place. Antitrust practitioners, scholars, and economists who specialize in the area today almost universally acknowledge that the adoption of the consumer welfare standard transformed antitrust law for the better. Antitrust jurisprudence went from being confused and ineffective to the modern doctrine that can—and does—effectively protect consumers and prevent anticompetitive business practices while allowing practices that are a normal part of the competitive process and benefit consumers. This Section details this evolution.

A. “Big Is Bad”: The Early Years of Antitrust

The courts’ and Antitrust Agencies’ struggles with antitrust over the last nearly 130 years have allowed for significant learning by doing. A tremendous amount of thinking has helped shape modern doctrine at every turn: substantive antitrust rules and standards, procedure, presumptions, safe harbors, and economic methods. When the Sherman Act was first passed, however, the Antitrust Agencies and courts had comparatively little to work with. They initially interpreted the antitrust laws as existing primarily to prevent “bigness,” that is, to preserve the small, localized businesses that characterized early America.¹⁴ This interpretation was understandable, given the concern over the “great trusts” that in large part precipitated the Sherman Act’s initial passage. Following this rubric, courts and enforcers treated monopoly power intentionally obtained as necessarily unlawful.¹⁵ This was true even if the monopolist earned its position by “progressively . . . embrac[ing] each new opportunity as it opened”¹⁶—i.e., by regularly and vigorously *competing* for new business.

13. See GEORGE J. STIGLER, *THE ECONOMIST AS PREACHER AND OTHER ESSAYS* 41 (1982); Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 175, 177 (2007) (describing the antitrust paradigm of the 1960s and 1970s as “standardless and unduly hostile to business” and the consumer welfare standard as “an immense improvement” over the big-is-bad era); Kovacic & Shapiro, *supra* note 10, at 44.

14. Dorsey & Jacobson, *supra* note 12, at 102–03; Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL’Y 217, 217–18 (2010) [hereinafter Ginsburg, *Originalism*]; see Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10–11 (1966); Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL’Y INT’L 225, 225 (2006).

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

16. *Id.* at 431 (“It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and

To this end, courts viewed the role of antitrust as serving various—often conflicting and even anticompetitive—socio-political goals.¹⁷ Just seven years after the Sherman Act was passed, the Supreme Court in *United States v. Trans-Missouri Freight Ass'n*, for instance, held the goal of antitrust law is to protect “small dealers and worthy men.”¹⁸ The Court, in fact, went so far as to conclude that these small dealers and worthy men should be protected even if doing so came at the expense of “[m]ere reduction in the price of the commodity.”¹⁹ In other words, the Court held antitrust laws did not protect consumers from higher prices. Rather, it protected firms from their more efficient competitors. The result of this approach was that consumers were made worse off by preventing the very competition from which they would benefit and which the competition laws were supposed to promote.

Despite the apparently contradictory outcome of competition laws protecting firms from competition, this approach persisted for several decades. In 1945, for example, the Second Circuit operating as the court of last resort issued a resounding opinion in *United States v. Aluminum Co. of America* that articulated the predominant antitrust approach of the time.²⁰ Here, Judge Learned Hand wrote that “great industrial consolidations are inherently undesirable, regardless of their economic results,” and that bigness was to be prevented owing to “the helplessness of the individual before them.”²¹ These pronouncements were consistent with the antitrust approach the courts had adopted over the last fifty years. They were, however, also at odds with an area of law designed to protect economic results. In the name of defending helpless individuals, the Court decreased the purchasing power of individual consumers—by preserving inefficient firms with higher prices and lower output—and issued opinions that explicitly chose to foster corporate welfare over consumer welfare.

The Court continued to apply this socio-political approach in varying antitrust contexts for several years. Interpreting the Robinson-Patman Act,

redoubling its capacity before others entered the field. It insists that it never excluded competitors, but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.”).

17. Ginsburg, *Originalism*, *supra* note 14, at 217–18 (“The Court had read into the Sherman Act an assortment of vague, and ironically, anti-competitive social and political goals, such as protecting small traders from their larger, impersonal (and more efficient) rivals.”).

18. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).

19. *Id.*

20. *Alcoa*, 148 F.2d at 416.

21. *Id.* at 428–29.

the Court concluded it was “an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer’s quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages”²² Similarly, well into the 1960s the Court maintained that antitrust laws should protect “viable, small, locally owned business,” even when “occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”²³

When the courts and Antitrust Agencies did focus on price effects, their analysis simplistically—and erroneously—used market structure and concentration as a proxy for predicting anticompetitive harm. The Supreme Court further established a structural presumption that permitted the government to articulate its prima facie case—though the presumption was virtually irrebuttable in practice—under Section 7 of the Clayton Act, by demonstrating a transaction would result in post-merger market shares greater than thirty percent of the market.²⁴ In 1968, the DOJ issued its first Horizontal Merger Guidelines, which outlined the standards applied by the DOJ at that time to determine whether to challenge a transaction.²⁵ Consistent with the “big-is-bad” approach to antitrust, the DOJ placed “primary significance on the size of the market share held by both the acquiring and acquired firm.”²⁶ For instance, in concentrated industries, the DOJ would challenge an acquisition of a firm with four percent market share by a firm with four percent market share.

The result of the multi-dimensional, socio-political approach to antitrust was predictable: conflicting holdings and outcomes, no consistent reasoning underlying those outcomes, and little sense that application of antitrust doctrine was achieving any of its many goals. Antitrust enforcement targeted and condemned procompetitive practices just as often as it did anticompetitive ones. Moreover, distinctions between legal and illegal conduct were often based upon formal distinctions that were irrelevant to the economic function of the conduct, such as whether a manufacturer transferred title to a dealer or retained title but implemented contractual

22. *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

23. *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962); *see also* *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 699 (1967) (“[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.”).

24. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 364 (1963); *see* Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 201, 201–02 (2015).

25. U.S. DEP’T OF JUSTICE, MERGER GUIDELINES (1968).

26. *Id.*

restraints, or whether a manufacturer unilaterally announced retail prices rather than entering into formal resale price maintenance agreements with retailers. Numerous practices were considered per se unlawful regardless of their impact upon consumers—all in the name of promoting a wide-ranging, conflicting, and sometimes anticompetitive set of socio-political goals.²⁷

As might be expected when promoting conflicting goals, promotion of other socio-political goals often came at the expense of consumers. What is more, the simultaneous pursuit of multiple objectives often failed to achieve any.²⁸ This led antitrust experts like D.C. Circuit Judge Douglas H. Ginsburg to conclude that, “[f]orty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases.”²⁹

B. Protecting Consumer Welfare: The Antitrust Revolution

The unprincipled, socio-political approach to antitrust law that prevailed through the 1960s led to fundamental questions regarding the actual goals of antitrust law and whether antitrust was, in fact, achieving those goals.³⁰ Antitrust law at this time lacked any semblance of coherence, and its reputation was fast disintegrating. In 1966, after examining antitrust case law and attempting to reach a principled decision, Justice Stewart remarked, “The sole consistency that I can find is that in litigation under § 7, the Government always wins.”³¹

22. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

28. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 7 (1978) (finding the collection of socio-political goals to be “mutually incompatible” thus requiring courts to decide which premises and goals “the law may legitimately and profitably implement”); Wright & Ginsburg, *supra* note 1, 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, such as protecting small traders from more efficient rivals. The failure of antitrust law to promote competition and further consumer welfare over this period is unsurprising and inevitable, for the courts and agencies were operating without a coherent answer to the question: ‘What are the goals of antitrust?’”).

29. Ginsburg, *Originalism*, *supra* note 14, at 217; see also Wright & Ginsburg, *supra* note 1, 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, such as protecting small traders from more efficient rivals.”).

30. See generally BORK, *supra* note 28, at 7 (describing antitrust enforcement as schizophrenic); Averitt & Lande, *supra* note 13, at 74 (describing the antitrust paradigm of the 1960s and 1970s as “standardless and unduly hostile to business” and the consumer welfare standard as “an immense improvement” over the big-is-bad era); Ginsburg, *Originalism*, *supra* note 14, at 217; Wright & Ginsburg, *supra* note 1, at 2405.

31. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

These conflicting and incoherent results troubled not only jurists concerned with the rule of law—which requires predictability of outcomes based upon substantive law and forbids ad hoc approaches that permit the government to expand or contract laws to suit its desires from case to case—but also economists who observed how these decisions were distorting markets. Aaron Director and Edward H. Levi chided the notorious *Alcoa* decision for establishing a contradictory standard that, while noting the “successful competitor, having been urged to compete, must not be turned upon when he wins,”³² promptly condemned “the successful competitor . . . because he has been told not to compete.”³³ Resolving these internal tensions within antitrust law thus became a mission attracting the attention of prominent minds of the time.

Economists and legal scholars largely but not exclusively at the University of Chicago adopted the mantle of this debate, rigorously analyzing and discussing the proper goals of antitrust law and how to construct a workable regime.³⁴ They sought—and ultimately realized—an economic grounding that would provide a principled basis for antitrust decision-making.³⁵ This endeavor began in earnest with the “*Fortune Magazine Debates*.”³⁶ Here, Robert H. Bork and Ward S. Bowman

32. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 430 (2d Cir. 1945).

33. Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 286 (1956).

34. This work was largely spearheaded by Aaron Director. RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS*, at 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 do cite, but these citations conceal Director’s seminal role in the development of the economics of competition and monopoly presented in this book.”); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 150 (2012) (“The historical accounts of the Chicago School of Antitrust uniformly agree on the central influence of Aaron Director and the Antitrust Law course he taught with Edward Levi at the University of Chicago.”).

35. See Joshua D. Wright, *Abandoning Antitrust’s Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 243–49 (2011) [hereinafter Wright, *Abandoning*]; Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL’Y INT’L 24, 33–39 (2007).

36. Here, Harlan M. Blake and William K. Jones defended various political goals of antitrust, while Robert H. Bork and Ward S. Bowman, Jr. argued antitrust laws should further economic welfare because the value of competition lies in its ability to expand output. See Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, FORTUNE, Aug. 1964, at 135, reprinted in 65 COLUM. L. REV. 377 (1965); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 422 (1965); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138, reprinted in 65 COLUM. L. REV. 363 (1965); Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L.

explained that “a fundamental and widespread misconception of the nature and virtues of the competitive process” led to misguided court decisions and agency enforcement actions, “with the result that in crucial areas the doctrines of antitrust are performing a 180-degree turn away from competition.”³⁷ They further articulated one of the first iterations of what would ultimately be accepted as the appropriate goal of antitrust law—economic (or consumer) welfare³⁸—contending the value of competition lies in its ability to “provide[] society with the maximum output that can be achieved at any given time with the resources at its command.”³⁹

Bork’s seminal book, *The Antitrust Paradox: A Policy at War with Itself*,⁴⁰ further developed these ideas. Bork expanded upon why we value competition, developing how competition leads firms to engage in conduct that benefits consumers—it drives price cuts, output expansions, research and development, and other innovative efforts. These insights led Bork to conclude the Sherman Act was intended to be a “consumer welfare prescription.”⁴¹ And it further led to the rejection of the socio-political approach courts had adopted. The socio-political approach would protect competitors from having to compete and, in doing so, would obviate the myriad benefits of that competition. A corollary of the Chicago School’s insight that antitrust is a protector of consumer welfare is, accordingly, that if firms lost customers and sales to more efficient competitors, this was ultimately a good thing—and certainly not a basis upon which to condemn that more efficient competitor. Many significant debates over appropriate rules and standards continued (and continue to this day), but eventually some unifying themes emerged from these debates.

First, both economists and courts ultimately settled upon the same basic premise that antitrust laws are designed to promote consumer welfare.⁴² The antitrust revolution sparked debates that forced scholars and courts to

REV. 401, 401 (1965); Ward S. Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417, 417 (1965).

37. Bork & Bowman, *supra* note 36, at 364.

38. The choice of “consumer welfare” or “total welfare” has caused significant debate and terminological confusion in antitrust over the years. For a discussion thereof see, for example, Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. (SPECIAL ISSUE) 19, 19 (2014). For our purposes here, the key point is that antitrust law ultimately adopted an exclusively economic welfare approach and rejected a socio-political or multi-dimensional approach.

39. Bork & Bowman, *supra* note 36, at 365.

40. BORK, *supra* note 28.

41. *Id.* at 66.

42. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (holding the Sherman Act is a “consumer welfare prescription”).

reexamine first principles and to articulate why, in the first instance, we would want to preserve competition. The principled answer that emerged was competition's ability to lower prices, increase output, enhance quality and innovation—that is, to achieve consumer benefits. As the Supreme Court articulated in *National Society of Professional Engineers v. United States*, “[t]he 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.”⁴³ Accordingly, antitrust law should endeavor to enhance consumer outcomes by permitting conduct that does not increase prices, or decrease output, quality, or innovation. This is true even if the permissible conduct harms some individual competitors.

Second, the Chicago School insights led to the conclusion that economic theory, empirical evidence, and the error-cost framework should guide antitrust enforcement decisions.⁴⁴ Legal theories of harm should align with economic theories regarding when anticompetitive outcomes are possible. This alignment provides a principled roadmap for courts to apply in analyzing legal claims and evidence.⁴⁵ Empirical evidence should then guide how courts and enforcers conceive of various behaviors. If economic theory indicates anticompetitive outcomes are possible, but empirical evidence demonstrates such undesirable outcomes are rarely observed in practice, this evidence has implications for the appropriate legal analysis.⁴⁶ For instance, it can inform the appropriate standard, any useful screens that might be applied, and what evidence should be required to establish a *prima facie* case.

Third, in assessing liability and establishing applicable standards, courts should consider error costs. As Frank Easterbrook explained, the error-cost framework informs the limits of antitrust.⁴⁷ In implementing any legal regime, courts face tradeoffs between false positives (Type I errors) and false negatives (Type II errors). In the antitrust context, false positives equate to erroneously condemning procompetitive or competitively neutral conduct. Such condemnation can, as Easterbrook recognized, have resounding chilling effects—it may not only discourage the condemned

43. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978); *accord* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990).

44. *See* Wright, *Abandoning*, *supra* note 35, at 243–49.

45. *Id.* at 262–63.

46. *Id.* at 263.

47. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15–16 (1984).

firm from engaging in similar competitively beneficial conduct, but is also likely to discourage other firms from engaging in similarly beneficial conduct. This discouragement is likely to last indefinitely—or at least until the case law is overturned, which happens only rarely—and is unlikely to experience any self-correction. False negatives, meanwhile, incorrectly allow anticompetitive conduct to persist, but are likely to experience some amount of self-correction in the long run. Anticompetitive conduct leads to monopoly profits that, in turn, attract competition from firms that could likewise benefit from such monopoly profits. That competition would eventually lower and even abolish monopoly profits. Accordingly, the error-cost framework instructs that courts and enforcers should be more wary of false positives than false negatives and condemn as anticompetitive only that conduct that we can be sure has harmed consumer welfare.⁴⁸

These combined insights provide a coherent framework for analyzing allegedly anticompetitive conduct—and specifically for distinguishing between pro- and anticompetitive conduct. While rendering these distinctions can be notoriously difficult,⁴⁹ the economically based consumer welfare standard tells us what we should be looking for—increased prices, output or quality reductions, retardation of research and development or innovation, and similar harms to consumers. Predatory pricing provides a useful example of how courts have applied this approach in practice. Prior to the antitrust revolution, courts readily accepted that predatory pricing was not only likely but something against which antitrust should actively protect.⁵⁰ Following the antitrust revolution, however, the Supreme Court adopted a new below-cost pricing test that reflected an economically grounded approach to antitrust. Economic theory suggests predatory pricing is possible under strict conditions. Specifically, it requires a firm be able to successfully charge prices below cost during an initial (potentially very prolonged) period, until all its competitors are driven out of the market.⁵¹ Then, in the subsequent period, the firm must be able to successfully raise prices significantly and prevent entry by other competitors such that it may

48. *Id.*

49. *See* United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001); Wright, *Abandoning*, *supra* note 35, at 265–66 (discussing this difficulty in the context of the DOJ’s Section 2 Hearings).

50. *See* Joshua D. Wright, *What Would Predatory Pricing Law Be Without John McGee? A Reply to Professor Leslie*, 85 S. CAL. L. REV. POSTSCRIPT 60, 63–65 (2012); *see also* Kobayashi & Muris, *supra* note 34, at 158–59.

51. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993); *see also* Wright, *supra* note 50, at 68–70.

recoup its earlier losses.⁵² Empirical evidence demonstrates that predatory pricing is rarely successful in practice. Considering the error-cost framework, we know that price cutting is a core dimension along which firms compete and goes to the very heart of what antitrust law seeks to foster.⁵³ We also know that distinguishing between pro- and anticompetitive price cutting in practice is exceptionally difficult. Accordingly, the appropriate rule would recognize the difficulty of successfully engaging in predatory pricing and be wary of chilling procompetitive price cuts. The Supreme Court thus adopted a test motivated by these insights.⁵⁴

The error-cost framework has, in fact, informed several Supreme Court decisions in recent years—particularly with respect to Section 2 monopolization claims. In *Verizon Communications v. Law Offices of Curtis V. Trinko*, for instance, the Court analyzed whether Verizon’s alleged denial of interconnection services to rivals, which constituted a breach of its duty under the Telecommunications Act of 1996⁵⁵ (1996 Act), also stated a claim under § 2 of the Sherman Act.⁵⁶ The Court rigorously evaluated the benefits of imposing potential antitrust liability in this context, noting such benefits would be slight because the 1996 Act already extensively regulated Verizon’s conduct.⁵⁷ “Against the slight benefits,” the Court explained, “must be weighed a realistic assessment of costs.”⁵⁸ The Court then explicitly stated: “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’ The cost of false positives counsels against undue expansion of § 2 liability.”⁵⁹ This statement and its

52. See *Brooke Grp. Ltd.*, 509 U.S. at 224.

53. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[C]utting prices in order to increase business often is the very essence of competition.”).

54. See *id.* at 585 n.9, 589, 591; see also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (“Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm’s costs.”); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 737(b)–(c) (3d ed. 2008) (documenting various courts’ implementation of cost-based standards and evidence).

55. Pub. L. No. 104-104, 110 Stat. 56.

56. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 399 (2004).

57. *Id.* at 413–14.

58. *Id.* at 399.

59. *Id.* (citation omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

acknowledgement of the importance of error costs to proper adjudication of the antitrust laws is consistent with many recent Supreme Court cases.⁶⁰

The courts have continued to deploy this economically grounded approach to antitrust law and consumer welfare over the last several decades. The antitrust revolution truly altered how the courts and enforcers conceive of antitrust violations, bringing coherency and consistency to this once wayward area of law.

C. *Consumer Welfare as Antitrust's Lodestar: Modern Antitrust Enforcement*

Today, there is widespread, bipartisan support for the consumer welfare standard.⁶¹ The Supreme Court has repeatedly embraced the consumer

60. See, e.g., *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451–52 (2009) (“To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low. . . . Institutional concerns also counsel against recognition of such claims. We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited ‘to act as central planners, identifying the proper price, quantity, and other terms of dealing.’” (quoting *Trinko*, 540 U.S. at 408)); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (“We also reiterated that the costs of erroneous findings of predatory-pricing liability were quite high because ‘[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition,’ and, therefore, mistaken findings of liability would ‘chill the very conduct the antitrust laws are designed to protect.’” (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993))); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136–37 (1998) (“To apply the *per se* rule here—where the buyer’s decision, though not made for competitive reasons, composes part of a regulatory fraud—would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases. And that *per se* rule would discourage firms from changing suppliers—even where the competitive process itself does not suffer harm.”); *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 456, 458 (1993) (“Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it.”); *Matsushita*, 475 U.S. at 594 (noting that incorrectly identifying conduct as predatory pricing is “especially costly, because [it] chill[s] the very conduct the antitrust laws are designed to protect”).

61. See, e.g., JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES* 1 (2015); Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361, 362–63 (2018); Deborah Garza, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks on Modernization of Antitrust Law—Private and Public Enforcement and Abuses—Europe and the U.S. (May 29, 2008), <https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and> [<https://perma.cc/2SYR-PSW4>] (“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.”).

welfare standard and the economic grounding it provides by supra-majority.⁶² Justice Kagan, for instance, recognized in her confirmation hearings, “it is clear that antitrust law needs to take account of economic theory and economic understandings.”⁶³ And it is axiomatic today that the antitrust laws exist to protect against harm to competition, which is distinct from harm to individual competitors⁶⁴—a far cry from early antitrust courts’ consistent holdings condemning efficient firms for harming individual competitors. While significant debate remains over how best to apply rules and standards to inherently fact-intensive cases, there is universal agreement that whatever specific route is taken, it must be an economically grounded one that seeks to further consumer welfare.

The recognition that antitrust should be tethered to sound economics in its efforts to foster consumer welfare has manifested in several ways. One

62. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977).

63. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Elena Kagan, nominee for Associate Justice of the Supreme Court); see, e.g., AREEDA & HOVENKAMP, *supra* note 54, at ¶ 110 (“The biggest advantages conferred by the use of relatively traditional microeconomics as the guiding principle for antitrust are two: coherence and welfare. . . . [P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a procompetitive policy framed in economic terms. . . . [I]njection of populist goals, by broadening the proscriptions of business conduct, would multiply legal uncertainties and threaten inefficiencies not easily recognized or proved. . . . [Despite some inadequacies,] economics gives a focus to antitrust interpretation and is critical to any formulation of rational rules.”); Garza, *supra* note 61.

64. *NYNEX Corp.*, 525 U.S. at 135 (“[P]laintiff . . . must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself.”); *McQuillan*, 506 U.S. at 458–59 (“The [antitrust] law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. . . . [T]his Court and other courts have been careful to avoid constructions of [Sherman Act] § 2 which might chill competition, rather than foster it.”); *Brooke Grp. Ltd.*, 509 U.S. at 224 (1993) (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured”); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (“The antitrust laws, however, were enacted for ‘the protection of competition not competitors.’ It is inimical to the purposes of these laws to award damages for the type of injury claimed here.”); *Brown Shoe Co.*, 370 U.S. at 320 (holding “the protection of *competition*, not *competitors*,” is the proper goal of the antitrust laws (emphasis added)); see also *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987) (“‘Anticompetitive’ also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods.”).

notable example is the widespread rejection of the now-debunked structure-conduct-performance (SCP) paradigm, and a corresponding decrease in reliance upon market structure, alone, in antitrust cases. The SCP paradigm posited that higher market concentration was correlated to several competitive metrics, such as prices and margins. It was largely based upon Joe Bain's famous 1951 study that purported to demonstrate the relationship between market concentration and profit rates in forty-two selected industries.⁶⁵ Bain's research, along with others', created a "growing acceptance of the market concentration doctrine" that ultimately grew to become the dominant view of economists working in the field.⁶⁶ Cases such as *Philadelphia National Bank*—which created the structural presumption for § 7 cases—and others which sought to preserve the number of competitors for multiplicity's sake, relied heavily upon the SCP paradigm.⁶⁷

However, beginning in the late 1950s and 1960s, a number of studies were published illustrating the fundamental weaknesses in Bain's findings. In 1967, for instance, economists W.S. Comanor and T.A. Wilson found that after accounting for variables such as "advertising expenditures and capital requirements, there no longer existed any correlation between market concentration and profit rates."⁶⁸ And by 1973 the tide had fully turned against the SCP paradigm, as numerous case studies demonstrated it "had theoretical flaws and lacked empirical support."⁶⁹ Indeed, as Harold Demsetz recognized, a firm can expand both its market share and market power simply by being more successful than other firms; that is, making better decisions than one's competitors can expand a firm's market share and profits without entailing any lessening of competition.⁷⁰ Today,

65. Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940*, 65 Q.J. ECON. 293, 293 (1951).

66. Harold Demsetz, *Two Systems of Belief About Monopoly*, in 4 MERGERS AND ACQUISITIONS: IMPLICATIONS FOR POLICY 167, 171 (Simon Peck & Paul Temple eds., 2002).

67. See, e.g., *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363–64, n.41 (1963); Ginsburg & Wright, *supra* note 24, at 202–03.

68. See Demsetz, *supra* note 66, at 172.

69. Timothy J. Muris, Former Chairman, Fed. Trade Comm'n, Remarks at George Mason Univ. Law Review's Winter Antitrust Symposium: Improving the Economic Foundations of Competition Policy (Jan. 15, 2003), <https://www.ftc.gov/es/public-statements/2003/01/improving-economic-foundations-competition-policy> [https://perma.cc/6NKR-BUYM] [hereinafter Muris, Remarks]; see Kobayashi & Muris, *supra* note 34, at 148–149; see also Demsetz, *supra* note 66; Timothy J. Muris, *Economics and Antitrust*, 5 GEO. MASON L. REV. 303, 303–06 (1997) (describing the role of Airlie House Conference in focusing attention on Demsetz and other researchers whose empirical work undermined assumptions of the SCP model).

70. Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 1–3 (1973).

scholars—including one co-author of this piece—have observed that, “[t]he SCP paradigm is now dead and has been for quite some time. Its intellectual influence on modern economics is nil. It is no longer taught in graduate economic courses in economics.”⁷¹

The realization that SCP lacked real empirical support and suffered from serious theoretical flaws significantly altered the antitrust landscape.⁷² The Antitrust Agencies updated their approach from one relying heavily upon market structure to one that recognized the limits of this information. The 2010 Horizontal Merger Guidelines, for instance, explain that, “[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration.”⁷³ And the Commentary on the Horizontal Merger Guidelines emphasizes that “market concentration may be unimportant under a unilateral effects theory of competitive harm.”⁷⁴ Carl Shapiro—a drafter of the Horizontal Merger Guidelines—has likewise explained that the DOJ has been moving away from using indirect evidence, like the Herfindahl-Hirschman Index, for many years.⁷⁵

Courts similarly adapted their antitrust analyses to reflect this new economic understanding. Where the structural presumption has successfully been invoked, it is now more frequently overcome. For example, in *United States v. Baker Hughes, Inc.*, the court held the DOJ had failed to demonstrate that a significant increase in post-merger market concentration would harm competition because the defendants successfully showed that

71. DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 268 (4th ed. 2005) (“[T]he criticisms of [the SCP] approach are many, but perhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct The barrage of criticism has caused most research in this area to cease.”); Ginsburg & Wright, *supra* note 24, at 207.

72. Muris, Remarks, *supra* note 69 (“This new learning fundamentally changed the antitrust community’s view about the American economy’s competitiveness. The SCP paradigm was overturned because its empirical support evaporated.”).

73. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 21 (2010) <https://www.justice.gov/atr/file/810276/download> [<https://perma.cc/P5KV-YR6X>]; see also Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers*, 10 B.E. J. THEORETICAL ECON. 1, 3 (2010), <http://faculty.haas.berkeley.edu/shapiro/alternative.pdf> [<https://perma.cc/H8R4-6WXL>].

74. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 16 (2006), <https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf> [<https://perma.cc/6XXH-TCFH>].

75. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 68–69 (2010).

competing firms could easily enter the market.⁷⁶ In that case, then-Judge Clarence Thomas—joined by then-Judge Ruth B. Ginsburg—explained that “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.”⁷⁷ The structural presumption in the courts has thus eroded significantly, and courts today place much greater significance upon updated economic tools and direct evidence of effects.

As a result of adopting the consumer welfare, economically grounded approach to antitrust, the Supreme Court has also reexamined and updated several vertical restraints precedents. The Court overturned numerous rules of per se illegality after examining the economic evidence and what it says about the impact of such behavior upon consumer welfare. Indeed, the Court has recognized in several contexts that “[e]conomics literature is replete with procompetitive justifications for” vertical restraints.⁷⁸ Because of the propensity for such conduct to enhance consumer welfare—and empirical support demonstrating the likelihood of desirable outcomes—the Court held such behavior should largely be examined under a rule of reason approach that permits a full examination of the actual effects at hand.⁷⁹

Moreover, in these contexts the Court has demonstrated the ability of the consumer welfare standard to encompass a multiplicity of factors affecting consumer welfare. The Court has recognized, for example, that vertical restraints might lead to some higher prices—but also might increase quality and services provided in connection with a product that more than offset the negative price impact.⁸⁰ This recognition reflects precisely the kinds of complex analyses lower courts and enforcers regularly conduct in antitrust cases today. This analysis includes important non-price factors like innovation. Indeed, between 2004 and 2014 the FTC challenged 164 mergers—fifty-four of which alleged harm to innovation.⁸¹

76. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990); *see also* *United States v. Syfy Enters.*, 903 F.2d 659 (9th Cir. 1990); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974) (rejecting to enjoin a merger of firms with historically high shares because those shares did not accurately reflect their competitive position going forward); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (same).

77. *Baker Hughes*, 908 F.2d at 984.

78. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

79. *Id.* at 898–99; *see also* *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55–57 (1977).

80. *Leegin Creative Leather Prods.*, 551 U.S. at 895–96; *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 728 (1988); *GTE Sylvania*, 433 U.S. at 55–57.

81. Joshua D. Wright, *Antitrust Provides a More Reasonable Regulatory Framework Than Net Neutrality* 11 (Geo. Mason L. & Econ. Research Paper No. 17-35, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020068 [<https://perma.cc/3ZX8-JW89>].

Of course, ascertaining a conduct's effect upon consumer welfare is not always easy or straightforward. But the economic framework antitrust law has embraced provides critical insights and guideposts. Scholars, economists, jurists, and practitioners continue to rigorously investigate and debate how best to evaluate competitive effects. As a result, courts and enforcers have many more sophisticated tools today than ever before.⁸²

Recent “hipster” criticisms of modern antitrust largely ignore antitrust's long enforcement history. They fail to acknowledge the widespread and bipartisan support for the consumer welfare standard. They likewise fail to recognize that antitrust did, for several decades, endeavor to further precisely the types of socio-political goals the hipster movement supports. These decades of applying well-intentioned but misguided goals led to an internally inconsistent and incoherent regime that fostered corporate welfare over consumer welfare. And it led directly to the adoption of the consumer welfare standard. This is a standard that benefits all Americans—who are all consumers—rather than a select group of the chosen corporate interests the socio-political antitrust regime favored.

II. EMPIRICAL EVIDENCE REJECTS HIPSTERS' CLAIMS THAT ANTITRUST ENFORCEMENT UNDER THE CONSUMER WELFARE STANDARD HAS FAILED

We evaluate the Hipster Antitrust movement's empirical claims against the available data. That evidence offers little to no support for Hipster Antitrust's claims because each is undermined by problems relating to measurement, weak inference, and a lack of identification. Most fundamentally, and as industrial organization economists have long understood, cross-sectional price- or profit-concentration studies like those that make up a significant portion of the available data relied upon by the Hipster Antitrust movement are plagued by endogeneity and often have little to do with competitive dynamics in markets as opposed to broadly defined sectors. Industrial organization economists have long been skeptical

See generally Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1 (2012).

82. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 73, at 8–12 (identifying tools such as the significant and non-transitory increase in price (SSNIP) and the hypothetical monopolist test (HMT) and their potential uses); Serge Moresi, *The Use of Upward Price Pressure Indices in Merger Analysis*, A.B.A. ANTITRUST SOURCE, Feb. 2010, at 1, 6, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_FullSource2_25.pdf [<https://perma.cc/L9ZW-KL34>] (describing the gross upward price pressure index (GUPPI)).

of claims of causal inference arising from cross-sectional studies for precisely these reasons.⁸³ Aggregate price-concentration studies are simply not adequate to generate reliable inferences about the intensity of competition or the desirability of changes in antitrust policy.

A. Hipster Antitrust's Empirical Claims

Proponents of the Hipster Antitrust movement make a number of provocative proposals for changes to the current antitrust regime—most notably, the rejection of the consumer welfare standard. These proposals have in common a number of empirical claims and assumptions. The claim that the consumer welfare standard has failed due to lax antitrust enforcement is based largely upon evidence that purports to describe increasing industrial concentration. In a similar vein, the Hipster Antitrust movement argues that this purported increase in concentration also led to higher prices and lower output for consumers.⁸⁴ Some have pointed specifically to merger policy as the culprit for this increase in concentration and reduction in competition, claiming that the Antitrust Agencies have permitted a series of anticompetitive mergers, and concluding the current antitrust enforcement regime is ineffectual.⁸⁵ Others argue that lax antitrust enforcement contributes to increasing levels of economic inequality in our nation.⁸⁶

We discuss each of these claims and assumptions in turn below, and conclude that empirical evidence offers little to no support. Despite the lack of any empirical foundation, the provocative claim that antitrust enforcement under the consumer welfare standard has failed has resulted in

83. *E.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 73; T.F. Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011 (Richard Schmalensee & Robert Willig eds., 1989); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra*, at 951; William N. Evans et al., *Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431, 431 (1993).

84. *See generally* Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017) <https://www.nber.org/papers/w23687.pdf> [<https://perma.cc/BD29-DJKR>].

85. KWOKA, *supra* note 61, at 12–13.

86. *See, e.g.*, Jason Furman & Peter Orszag, A Firm-Level Perspective on the Role of Rents in the Rise in Inequality, Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz at Columbia University (Oct. 16, 2015), <http://gabriel-zucman.eu/files/teaching/FurmanOrszag15.pdf> [<https://perma.cc/5XB5-B3FW>].

several pieces of proposed legislation and specific policy proposals.⁸⁷ For example, the Hipster Antitrust movement has called for complete bans on vertical integration,⁸⁸ and a reorientation of antitrust enforcement efforts toward labor markets to combat a perceived widespread increase in monopsony power.⁸⁹

B. *Did Lax Antitrust Result in Greater Concentration?*

In their 2015 paper, Jason Furman and Peter Orszag among other things, argue that consolidation may be contributing to the changing distribution of capital returns and an increased number of firms with supra-normal returns.⁹⁰ Furman and Orszag's paper is commonly cited for the propositions that: (1) industrial concentration is increasing in the United States at a dramatic rate; (2) that the increase in concentration has resulted in less desirable outcomes for consumers; and (3) that it is the result of lax or ineffective antitrust enforcement.⁹¹

In particular, Furman and Orszag point to the Census Bureau's data on market consolidation, which they argue shows a clear trend of consolidation in the nonfarm business sector.⁹² Furman and Orszag then outline that in seventy-five percent of the "broad sectors for which Census Bureau data is available, the fifty largest firms gained revenue share between 1997 and

87. See Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong.; *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, BETTER DEAL, <http://abetterdeal.democraticleader.gov/wp-content/uploads/2017/10/A-Better-Deal-on-Competition-and-Costs.pdf> [<https://perma.cc/J8CL-XJQL>] (last visited Mar. 17, 2019).

88. See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 731–37 (2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 279 (2017).

89. See David Autor et al., *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. (PAPERS & PROC.) 180, 180–81 (2017).

90. Furman & Orszag, *supra* note 86, at 11.

91. 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/?agreed=1&agreed=1> [<https://perma.cc/2PT9-BCBX>] ("Explosive inequality in America is linked to increasing rents, or "beyond-normal profits," of top firms. . . . [Furman & Orszag, *supra* note 86] show that these returns accrue disproportionately to already well-off firms."); Eduardo Porter, *With Competition in Tatters, the Rip of Inequality Widens*, N.Y. TIMES, July 12, 2016 ("There is plenty of evidence that corporate concentration is on the rise. . . . [Furman & Orszag, *supra* note 86] 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.").

92. Furman & Orszag, *supra* note 86, at 11.

2007.”⁹³ For example, during a ten-year period, between 1997 and 2007, the fifty largest firms in the Transportation and Warehousing Industry, the industry that purportedly has suffered the most consolidation, gained twelve percentage points in revenue shares, while the fifty largest firms in the Retail Trade Industry gained 7.6 percentage points.⁹⁴

To begin with, it is unclear why evidence describing the activity of the fifty largest firms in a given industry can support claims of problematic industrial concentration. In short, the ability to sum the market shares of the top fifty firms within an industry suggests, by definition, that there are at least fifty competing firms. Furman and Orszag, without more, merely show that the largest fifty firms of the industries, as defined by the Census Bureau, are in the aggregate more successful at what they do, and captured higher revenue shares, in 2007 as opposed to 1997. At best, Furman and Orszag are able to show that the aggregate shares of the top fifty firms have increased in some industries. But they do not show that the number of firms has fallen, or that competitive constraints within these industries have been relaxed as a result of consolidation.

The latter point—that Furman and Orszag do not provide evidence that competitive constraints within any industry have changed over time—is an important one. Furman and Orszag’s evidence on purported industry consolidation is based upon broad industry definitions from the Census Bureau, not antitrust markets.⁹⁵ Modern industrial organization economics uses standard methodology to identify firms that impose significant competitive pressure upon one another to define a relevant product and geographic market. Without a market definition to focus on firms that are actually competitively relevant to one another, market share statistics are meaningless and certainly cannot be used to make inferences about the intensity or level of competition. Furman and Orszag’s broad industry definitions do not satisfy this basic requirement. There are many reasons for changes in revenue share of the top fifty firms in a broadly defined industry group. The paper, and similar follow-on studies,⁹⁶ do not attempt to

93. *Id.*

94. *Id.*

95. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 73, at 10–18; Carl Shapiro, Deputy Assistant Attorney Gen. for Econ., Antitrust Div., Dep’t of Justice, Remarks as Prepared for the American Bar Association Section of Antitrust Law Fall Forum: Update from the Antitrust Division (Nov. 18, 2010), <http://www.justice.gov/atr/public/speeches/264295.pdf> [<https://perma.cc/ZN78-D83S>] (discussing necessity of proper antitrust market definitions).

96. *The Economist* also used highly aggregate concentration levels to describe changes in concentration in the United States, calculating the CR4 using 4-digit NAICS categorization. *Business in America: Too Much of a Good Thing*, *ECONOMIST* (Mar. 26, 2016),

distinguish any of these explanations and cannot be properly used to support the inference that lack of competition, or lax antitrust enforcement, is to blame.⁹⁷ Interestingly, in March 2017 at the Stigler Center conference *Is There a Concentration Problem in America*, Carl Shapiro recounted that the CEA “somewhat embarrassingly . . . looked at the 50 firm concentration ratio in two digit industries” and explained that he was uncertain as to what “IO [industrial organization] economist would find that informative regarding market power.”⁹⁸

The gap between aggregate concentration measures and actual product markets is not just a theoretical issue, but is quite important in practice. In a recent paper, Gregory Werden and Luke Froeb document the excessive aggregation in United States Census data and show how such aggregation masks changes in market concentration.⁹⁹ First, Werden and Froeb demonstrate how “even the least aggregated Census data can be over a hundred times too aggregated.”¹⁰⁰ The authors compare North American Industry Classification System (NAICS) six-digit industries to markets by calculating the Commerce Quotients¹⁰¹ for the relevant markets alleged in mergers complaints filed by the Justice Department from 2013 to 2015, omitting certain markets.¹⁰² Werden and Froeb go on to conduct a thought experiment that shows how such excessive aggregation can render observed

<https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing> [<https://perma.cc/FSE4-9X9A>].

97. Furman and Orszag also appear to suggest that the trend of significantly higher return on invested capital is a consequence of industry consolidations. Furman & Orszag, *supra* note 86, at 9–10. Since the 1980s, the return on invested capital for publicly traded nonfinancial firms in the U.S. has increased dramatically. *Id.* at 10. However, we have observed a decrease in the manufacturing sector and a shift toward economic activity involving firms that develop innovations. In other words, we have observed compositional shifts in the economy that tend to require substantially less investment in productive capital such as production facilities and equipment. Furman and Orszag do not address how this shift alone may have contributed to the increasing trend of the return on invested capital that they point out.

98. Asher Schechter, *Economists: “Totality of Evidence” Underscores Concentration Problem in the U.S.*, STIGLER CTR. UNIV. CHI. BOOTH SCHOOL OF BUS.: PROMARKET (Mar. 31, 2017) <https://promarket.org/economists-totality-evidence-underscores-concentration-problem-u-s/> [<https://perma.cc/6KUL-7K4T>] (quoting Carl Shapiro).

99. Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST MAG., no. 1, 2018, at 74, 76–77.

100. *Id.* at 74.

101. *Id.* (“defined as the annual volume of commerce of the alleged relevant market . . . divided by the value of industry shipments in the corresponding SIC [Standard Industrial Classification] 4-digit industry”).

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

concentration trends meaningless¹⁰³ and can lead to fallacies associated with averaging.¹⁰⁴ The authors conclude that increasing market concentration does not indicate whether antitrust reform is needed.¹⁰⁵

To his credit, Furman himself recognized these results must be interpreted carefully. During his 2016 Keynote Address at the Searle Center Conference on Antitrust Economics and Competition Policy, Furman acknowledged that diagnosing appropriate policy change in this area requires careful consideration of the causes of any increases in concentration.¹⁰⁶ As discussed, an increase in concentration alone might be the result of more competition, less competition, or the product of factors completely unrelated to competition in the economy.

We applaud Furman's effort to understand the causes and consequences of the purported increase in concentration. While we understand the importance of doing so, the evidence Furman and Orszag have presented does not appear to address the causes or the consequences of the increase in concentration he refers to. Again, the studies that Furman cites are largely based upon the concentration measures involving broad industry definitions, not proper antitrust relevant markets that capture competitive rivalry among firms.

C. Did Lax Antitrust Result in Lower Prices and Output?

A second key empirical premise underlying Hipster Antitrust policy proposals is that not only has concentration increased—a dubious premise, as discussed above—but also that the increase in concentration has resulted in harm to consumers. In particular, the Hipster policy proposals claim that lax antitrust has resulted in an increase in monopoly power throughout the economy, which can be felt in the form of higher prices and reduced output. Recall that the exercise of monopoly power, by definition, requires a reduction of market output and an increase in market prices.

103. The authors show that even though horizontal and vertical mergers have completely *different* effects on market concentration, they might have exactly the same effect on NAICS subsectors and industries. *Id.* at 76.

104. *Id.* at 77 (“Subsector concentration can increase even if the concentration of every market in a subsector decreases.”).

105. *Id.* at 78.

106. Jason Furman, Chairman, Council of Econ. Advisors, Keynote Address at the Searle Center Conference on Antitrust Economics and Competition Policy (Sept. 16, 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf [<https://perma.cc/QPU6-CMS5>].

In their 2017 paper, Jan De Loecker and Jan Eeckhout purport to show that markups have risen since 1980, and interpret this finding as suggestive that there has been a rise in market power.¹⁰⁷ De Loecker and Eeckhout have been commonly cited for the proposition that the measured increase in markups gives reason to believe that antitrust enforcement has failed to protect consumers from monopoly power in the United States.¹⁰⁸

De Loecker and Eeckhout use firm-level output and input data for firms across the U.S. economy since the 1950s, as collected from Compustat, to measure firm-level markups.¹⁰⁹ The Compustat data set tracks publicly traded firms in the private sector from 1950 to 2014 and contains firm-level balance sheet information. Based on the Compustat data set, De Loecker and Eeckhout rely upon a so-called “production approach” to measuring markups and market power.¹¹⁰ This method was proposed and more extensively described in De Loecker and Warzynski.¹¹¹ Specifically, De Loecker and Eeckhout observe measures of sales, input expenditure, capital stock information, industry activity classifications, and accounting data measuring profitability and stock market performance. The accounting data is used to verify whether their measures of markups are at all correlated to the overall evaluation of the market.

There are numerous problems associated with the methodology employed by De Loecker and Eeckhout when it is applied for assessing the presence of monopoly power in specific industries. The first is fundamental. De Loecker and Eeckhout interpret an increase in the calculated markups as evidence of an increase in market power. It has been well established in the industrial organization economics literature that profit margins alone are not reliable evidence of market power.¹¹²

Also, De Loecker and Eeckhout show that markups have increased, but do not tie the increase in markups to increase in prices. An increase in

107. De Loecker & Eeckhout, *supra* note 84, at 2.

108. See, e.g., Matthew Yglesias, *Booker Calls on Antitrust Regulators to Start Paying Attention to Workers*, VOX (Nov. 1, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/11/1/16571992/booker-antitrust-letter> [<https://perma.cc/845Z-8V7H>] (“[T]he wage share of the overall economy is declining because companies are increasingly able to charge high markups for the goods and services they sell. Declining competition isn’t the only possible explanation for rising markups, but it’s certainly an obvious contender. And paired with the observation about growing revenue concentration, it paints a fairly persuasive picture.”).

109. De Loecker & Eeckhout, *supra* note 84, at 5.

110. *Id.*

111. Jan De Loecker & Frederic Warzynski, *Markups and Firm-Level Export Status*, 102 AM. ECON. REV. 2437, 2437 (2012).

112. See, e.g., Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. COMPETITION L. & ECON. 511, 512 (2013).

markups might imply an increase in prices if marginal costs are constant, but De Loecker and Eeckhout do not provide any evidence on marginal costs.¹¹³ Thus, without more, we are left without an explanation of why measured markups increased. An increase in market power is one possible explanation, but there are many others. For example, one plausible explanation for an increase in markups over time is a compositional shift in the economy toward more innovation-oriented firms, services, and intellectual property-intensive activities with greater margins.

Importantly, De Loecker and Eeckhout acknowledge that higher markups do not necessarily imply firms are making higher profits.¹¹⁴ This is particularly the case if the “source of the increase in markups is technological change that reduces variable costs, and the same technological change increases the fixed costs.”¹¹⁵ In addition, a high-tech firm that invests substantially in R&D to produce innovative products will need to cover its upfront R&D costs, and markups will reflect the need to cover those costs. Thus, higher markups could also reflect higher investments into R&D efforts, and the need to recoup those upfront investments.

De Loecker and Eeckhout use two measures to estimate profits, in order to determine whether firms are making higher profits. One measure is dividends, and the other is market value/capitalization. Both measures have their problems as reliable measures of firms’ profits.¹¹⁶ As De Loecker and Eeckhout acknowledge, dividends may vary for reasons that are unrelated to the actual flow of profits, such as the investment opportunities that the firm confronts and other factors that may vary from industry to industry and firm to firm.¹¹⁷ Market value, on the other hand, is highly susceptible to market whims and changes in expectations about the future of the firm. For example, market capitalization for a high-tech firm or a set of firms might be high because of investors’ beliefs that high-tech firms will succeed in the future. Averaging across a long horizon is unlikely to fix that, and

113. Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity* 1 (Ctr. For Econ. Studies, Working Paper No. 18-48, 2018), <https://www2.census.gov/ces/wp/2018/CES-WP-18-48.pdf> [<https://perma.cc/2KDN-6VAZ>], (previously circulated as Sharat Ganapati, *Oligopolies, Prices and Quantities: Has Industry Concentration Increased Price and Restricted Output?* (Sept. 11, 2017) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966).

114. De Loecker & Eeckhout, *supra* note 84, at 14. De Loecker & Eeckhout also use four-digit industry level codes as a proxy for market definition. For reasons discussed above, these crude proxies do not accurately or meaningfully identify the firms that actually compete with one another.

115. *Id.*

116. *Id.* at 14–15.

117. *Id.*

averaging across large numbers of firms would work only if for some firms, investors' expectations about the future of the firm are undervalued. De Loecker and Eeckhout indicate that over a large number of firms and over a long enough horizon, this wouldn't be an issue,¹¹⁸ but it is not clear that averaging across large number of firms or over a long horizon would resolve the issue, or whether over and under-valued firms would balance out to be at just the right value.

Recall that in order to identify an increase in the exercise of monopoly power over time, one needs some evidence of an increase in price that corresponds with a decrease in market output. De Loecker and Eeckhout provide some evidence of a change in margins over time. However, their analysis raises the question of identifying the cause of that change. Ganapati's recent analysis addresses this issue, analyzing how measured concentration increases are correlated with prices, output and other outcome variables such as productivity.¹¹⁹ Using data from 1972 through 2012, Ganapati examines market shares by industry for both manufacturing and non-manufacturing sectors and finds mixed evidence with respect to the relationship between concentration and prices and output.¹²⁰ Overall, the evidence does not support the conclusion that the purported concentration increases in this country have led to negative effects on the consumer surplus. To the contrary, Ganapati demonstrates that industry concentration is positively correlated with productivity and real output but is unrelated with price changes.¹²¹

In the manufacturing sector, increasing concentration is associated with price increases that are generally statistically significant, but the quantity decreases are not statistically significant. In particular, Ganapati finds that when market shares of the largest four firms are doubled, prices increase by five percent with no significant decline in real output.¹²² Moreover, when increases in productivity in highly concentrated industries are taken into account, the relationship between concentration and prices is significantly reduced. When it comes to non-manufacturing sectors, Ganapati finds no consistent relationship between market concentration and prices, and, in general, increasing market concentration is associated with statistically significant increases in output. In particular, when market shares of the largest four firms are doubled, for example, there is no associated

118. *Id.* at 15.

119. *See* Ganapati, *supra* note 113, at 1, 13.

120. *Id.* at 2.

121. *Id.*

122. *See id.* at 15 tbl. 1.

measurable change in prices, but it is associated with a twenty percent increase in output.¹²³

Much of the perception of an increase in concentration in the United States is focused upon a handful of large firms. Hall tests this view and finds no evidence that mega-firm-intensive sectors have higher price/marginal cost markups.¹²⁴ In fact, Hall presents evidence that while there is no real trend in markups for manufacturing, there is a strong trend of growing markups in the Finance and Insurance and the Health Care and Social Assistance Industries—both of which are heavily regulated.¹²⁵

Economists have also focused on measurement issues with markup studies. Traina argues that De Loecker and Eeckhout focus only on the cost of goods sold (COGS) component of firms' operating expense (OPEX), ignoring the selling, general, and administrative expenses (SGA) component. "COGS measures direct inputs to production, such as materials and most of labor. SGA measures indirect inputs to production and mostly consists of marketing and management."¹²⁶ Traina demonstrates that SGA is an increasingly important share of variable costs for firms in the United States economy.¹²⁷ When the SGA (e.g., marketing and management) is included in De Loecker and Eeckhout's measure of variable cost (i.e., total operating expense is used as a measure of variable cost rather than COGS) market power is shown to either remain flat or decline.¹²⁸

123. *See id.*

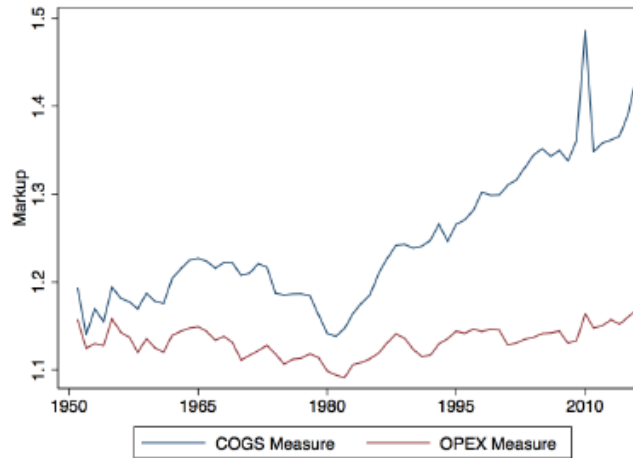
124. Though he does find some evidence that markups grew in sectors with rising mega-firm intensity. Robert E. Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the U.S. Economy* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 24574, 2018), <https://web.stanford.edu/~rehall/Evidence%20on%20markup%202018> [<https://perma.cc/H32B-72RW>].

125. *Id.* at 15.

126. James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* 7 (Stigler Ctr. for the Study of the Econ. & the State, Working Paper No. 17, 2018), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/workingpapers/17isaggregatemarketpowerincreasing.pdf?la=en&hash=FB051A5CA5C6E30A277318B456EBF0E493A92EB3> [<https://perma.cc/PR3K-JPG2>].

127. *Id.* at 9.

128. *Id.* at 7.

Figure 1: COGS vs. OPEX Markups¹²⁹

Taken together, these results suggest that the trends in concentration could be related to changes in economies of scale and corresponding improvements in productivity, as many economists recognize, rather than a consequence of a desire to accumulate and exercise market power.¹³⁰ Moreover, it is unclear whether the small price increase in the manufacturing sector that Ganapati found reflects true, quality-adjusted price increases that are more relevant and directly tied to welfare measures. Although the price regressions include fixed effects and sectoral trends to account for overall macroeconomic inflation and growth, it does not account for quality changes over time. Measurement of prices over a long horizon (fifty years) tend to necessarily hold quality of the products or services constant, rather than adjust to any changes in product or service quality, which is an important element when trying to understand trends in consumer surplus.

As with Furman and Orszag and De Loecker and Eeckhout, Ganapati uses standard industry classifications in this paper to define concentration rather than a more appropriate antitrust relevant market definition, so his results too should be interpreted with extreme caution. In sum, the evidence relied upon most significantly to support claims that industry-level concentration has increased, and that this increase represents a decrease in

129. *Id.* at 7 fig. 2.

130. See, e.g., Michael D. Winston, *Antitrust Police Toward Horizontal Mergers*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2369, 2433 (Mark Armstrong & Robert H. Porter eds., 2007); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 18–21 (1988).

competition that has harmed consumers in the form of higher prices and reduced output, does not substantiate those claims. To be fair, we should acknowledge that the most provocative claims regarding the policy implications of these analyses come not from their authors, but from those in the Hipster Antitrust movement and elsewhere. Much more evidence is needed to support the provocative policy claims when it comes to concentration, prices, and output. Indeed, taking the evidence at face value, it does not make economic sense to conclude that higher margins and *increased* output are consistent with a systematic increase in the exercise of monopoly power over time.

D. Have the Antitrust Agencies Been Asleep Behind the Wheel When It Comes to Merger Control?

In *Mergers, Merger Control, and Remedies*, Kwoka conducts a meta-analysis of retrospective studies of consummated mergers, joint ventures, and other horizontal arrangements.¹³¹ Professor Kwoka's analysis has been cited by many in support of the notion that modern antitrust enforcement has failed to prohibit mergers that reduce consumer welfare.¹³²

Kwoka conducts a meta-analysis of databases which purportedly consists of sixty or so studies covering more than 3000 mergers.¹³³ Using these databases, 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.¹³⁴ Kwoka's key finding is that for all mergers studied in his sample, the average price effect is a 7.22% increase.¹³⁵ Based upon this finding, Kwoka concludes that recent merger control has not been aggressive enough in challenging mergers, has allowed

131. KWOKA, *supra* note 61, at 4–5.

132. See Shapiro, *supra* note 2, at 738 (referencing Kwoka, “evidence from U.S. merger retrospectives supports a shift to a moderately stricter merger enforcement policy”); Markus Dertwinkel-Kalt & Christian Wey, *Evidence Production in Merger Control: The Role of Remedies* 5 (Düsseldorf Inst. Competition Econ., Discussion Paper No. 217, 2016), <http://hdl.handle.net/10419/130192> [<https://perma.cc/J4AY-VFFW>] (“Kwoka . . . present[s] empirical evidence for the EU and the US which questions whether remedies effectively counter anti-competitive merger effects.”) (parenthetical omitted); F. David Osinski & Jeremy A. Sandford, *Merger Remedies: A Retrospective Analysis of Pinnacle/Ameristar 4* (May 18, 2018), <https://ssrn.com/abstract=3008770> [<https://perma.cc/N4CA-DKN3>] (“Kwoka . . . provides an extensive summary of agency enforcement actions, finding that remedies imposed are generally inadequate in preserving competition.”) (parenthetical omitted)).

133. KWOKA, *supra* note 61, at 83.

134. *Id.* at 6–8.

135. *Id.* at 110.

mergers that increase prices on average, and that challenged mergers are subject to remedies that fail to prevent post-merger price increases.¹³⁶

Michael Vita and David Osinski, two experienced antitrust economists of the Bureau of Economics at the FTC, offered a critical review of Kwoka.¹³⁷ Vita and Osinski raise several objections to Kwoka's methodology. For example, Kwoka's analysis does not use standard meta-analytic techniques for computing average price effects and standard errors of the studies in the sample.¹³⁸ The observations are not weighted by their estimated variances, which leads to all price effects estimates being treated equally regardless of the precision (i.e., certainty) of the estimates.¹³⁹ The estimated average price effects reported also appeared to lack standard errors, which made it impossible to evaluate whether the average estimated price effects are statistically different from zero.¹⁴⁰ This methodological objection is central to the critique of Kwoka's work—as it prevents the estimation of an average price effect in the meta-analysis.¹⁴¹

While Kwoka should be applauded for contributing important data into the policy discussion over merger policy, it is important to note that Kwoka himself does not reject the consumer welfare standard. Rather, Kwoka contends that the Antitrust Agencies should be more aggressive under existing law.¹⁴² Whether or not the Antitrust Agencies are systematically failing to prevent anticompetitive mergers is a broader question, and one that Kwoka's analysis does not itself answer satisfactorily in light of Vita and Osinski's critiques. While much more work in the area of merger retrospectives is likely to further illuminate the aggregate effects of merger policy, Kwoka's analysis cannot bear the burden of the broader proposition it is invoked in support of—that modern merger policy has failed.

136. *Id.* at 110–12.

137. *See generally* Vita & Osinski, *supra* note 61.

138. *Id.* at 363.

139. *Id.*

140. *Id.*

141. *See id.* Kwoka responds to Vita and Osinski's review with another paper, explaining and responding to these two FTC economists' critiques. Kwoka contends that the critiques are based on a misreading, and selective reading of his work. Kwoka acknowledges that an oversight has that led to a classification error and affected one of his conclusions. John Kwoka, Mergers, Merger Control, and Remedies: A Response to the FTC Critique 1 (Mar. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947814 [<https://perma.cc/G6KW-G8HL>].

142. *Id.* at 2.

*E. Is Lax Antitrust Causing Economic Inequality?*¹⁴³

The Hipster Antitrust movement has also attributed increasing economic inequality to a supposed trend of lax antitrust enforcement. Such weak application of the antitrust laws has allegedly allowed an abundance of anticompetitive mergers, monopolistic conduct, and other exclusionary and collusive behavior. In turn, that has contributed to the stratification of wealth toward the corporate shareholders and executives and away from lower socio-economic levels of society. Many proponents of the Hipster Antitrust movement have suggested that non-conduct-specific factors such as implications of effects on economic inequality should be considered in antitrust analysis.

For example, Lina Khan provides some observations of the potential redistributive effects of increasing concentration in emerging multi-sided platform markets.¹⁴⁴ Khan suggests that Amazon's market power, which she purports to be almost fifty percent of all e-commerce, allows the company to squeeze suppliers and potentially cause instability in the economy.¹⁴⁵ Although it seems as though Amazon could benefit consumers by lowering prices, predatory pricing concerns loom large in her analysis. In a paper proffering similar arguments, Khan and Sandeep Vaheesan argue that market power contributes to economic inequality, economic power often translates into political power, the scope of the antitrust law became narrower during the Reagan Administration that permitted large corporations to dominate, and that antitrust laws can be utilized to fix economic inequality.¹⁴⁶

Concerns about inequality have prompted policy suggestions across a multitude of policy areas.¹⁴⁷ In these discussions, adjustments to antitrust policy have been raised as a mode to combat increasing economic inequality. Even though explicit goals aimed at economic redistribution have not been a primary motivation in the development of U.S. competition law, there is some evidence that distributional concerns play a role in antitrust analysis. For example, the Horizontal Merger Guidelines explain

143. This section relies upon the analysis in Jonathan Klick & Joshua D. Wright, *Antitrust Enforcement and Inequality*, in WHO WINS, WHO LOSES: INEQUALITY AND THE DISTRIBUTION OF REGULATORY IMPACTS (Cary Coglianese ed., Brookings Institution Press) (forthcoming).

144. See Khan, *supra* note 88, at 731–36.

145. See *id.* at 712, 743.

146. Khan & Vaheesan, *supra* note 88, at 236–37.

147. See, e.g., Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 24 (2015) (“[A]ntitrust law and regulatory agencies could address inequality more broadly by treating the reduction of inequality as an explicit antitrust goal.”).

that the Antitrust Agencies are willing to give weight to arguments provided by merging parties that a merger will reduce costs and result in higher output only to the extent those gains are passed on to final consumers and result in an increase in producer surplus.¹⁴⁸ As opposed to competition law in many other countries, a non-existent institutional preference for more firms as opposed to fewer does imply that distribution among producers is not among the concerns in U.S. antitrust law.

Indeed, antitrust's history includes a significant period of time in which the goals of the enterprise were considered significantly broader than economic welfare, including protection of "small dealers and worthy men," and expressed an explicit preference for smaller firms.¹⁴⁹ Critics of the current welfare-based approach to antitrust law are calling for antitrust to return to this earlier era and explicitly take into account distributional concerns.¹⁵⁰

1. Explicit and Implicit Empirical Claims About Antitrust and Inequality

Even though the relationship between antitrust enforcement and increasing economic inequality has not been definitively established, a number of economics and legal scholars have pointed to increased antitrust enforcement as a way to ameliorate increasing economic inequality. For example, Jonathan Baker writes,

The exercise of market power also probably contributes to economy-wide inequality because the returns from market power go disproportionately to the wealthy. Increases in producer surplus from the exercise of market power (the wealth transfer) accrue primarily to a firm's shareholders and its top executives, who are wealthier on average than the median consumer. In a recent year, the top 1 percent of the wealth distribution held half of stock and mutual fund assets, and the top 10 percent held more than 90 percent of those assets. Unionized workers in the past may have been able to appropriate some of the profits from the exercise of

148. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 73, at 3.

149. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).

150. *See, e.g.*, MARC JARSULIC ET AL., CTR. FOR AM. PROGRESS, REVIVING ANTITRUST 1–2 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/06/28143212/RevivingAntitrust.pdf> [<https://perma.cc/J882-29MV>]; Baker & Salop, *supra* note 147, at 1–4.

market power, but with the decline of private-sector unionization, this possibility now has limited practical importance.¹⁵¹

Baker overstates his empirical case somewhat with respect to the effects of increased market power on wealth inequality because the empirical results he cites carve out pension and retirement accounts (which presumably benefit from increased firm profits) and life insurance (the value of which will improve as investment performance improves, at least in the case of whole life insurance). These excluded categories are more broadly held than stock and non-retirement mutual fund assets. Nevertheless, Baker's argument largely stands, though his assertion that increased antitrust enforcement would combat increasing economic inequality is asserted without any empirical support. At a minimum, for example, Baker's point relies on the Panglossian assumption that antitrust enforcement is accurately targeted at firms with market power, which is a questionable assumption. There is significant historical evidence that antitrust enforcement in practice includes false positives—that is, enforcement resulting in prohibiting conduct that does not involve the anticompetitive exercise or acquisition of market power.¹⁵² Antitrust enforcement can also be used as a tool by firms with market power to entrench it by disadvantaging rivals.¹⁵³

As discussed, Furman and Orszag take a more empirical approach, arguing that

a rising share of firms are earning super-normal returns on capital[,] . . . workers at those firms are both producing and sharing in those super-normal returns, driving up wage inequality[, and] . . . the high returns to labor and capital at those firms reduces labor mobility by discouraging workers from leaving firms that earn higher rents.¹⁵⁴

In support, Furman and Orszag provide evidence that returns of S&P 500 firms have become more skewed over time.¹⁵⁵ Furman and Orszag also outline that the return on invested capital has also become highly skewed at

151. JONATHAN B. BAKER, WASH. CTR. FOR EQUITABLE GROWTH, MARKET POWER IN THE U.S. ECONOMY TODAY 10–11 (2017) (footnote omitted), <https://equitablegrowth.org/market-power-in-the-u-s-economy-today/> [<https://perma.cc/QV49-E3T2>].

152. See e.g., Kovacic & Shapiro, *supra* note 10.

153. See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 247 (1985); see also Easterbrook, *supra* note 47, at 19–20.

154. Furman & Orszag, *supra* note 86, at 2.

155. *Id.* at 9.

least since the 1990s.¹⁵⁶ While such evidence suggests some implications, there is no implication of antitrust concerns because these results could be indicative of firms engaging in greater risk-taking or the presence of superior products.¹⁵⁷ Furman and Orszag use metrics that bear little resemblance to actual antitrust markets, and do not provide any evidence that increases in antitrust enforcement would actually reduce these metrics, much less have any discernable effect on levels of economic inequality.

Marc Jarsulic et al. also point out that income inequality is rising. They argue that firms with “dominant market power” raise prices and earn supra-normal economic rents while simultaneously lowering the real incomes of consumers.¹⁵⁸ Jarsulic et al. argue that rent extraction in the U.S. economy is on the rise because of “unchallenged market power.”¹⁵⁹ Jarsulic et al. outline other undesirable results, including higher barriers to entry for new firms, stifled innovation, degraded product quality, reduced prices paid to workers and suppliers, and increased influence with government officials.¹⁶⁰ To reverse these effects, the authors argue that the antitrust laws can be employed, but have not been deployed vigorously enough over the last few decades.

Sean F. Ennis, Pedro Gonzaga, and Chris Pike take a calibration approach to examine the effect of increasing concentration on inequality.¹⁶¹ Their calibration model makes the following assumptions: (1) “Market power for each country can be approximated by the difference between the average mark-up (across all sectors) in the country and a minimum mark-up that reflects the best-practices of most competitive economies”; (2) “The marginal propensity to save . . . from increased income arising from lower prices is constant across wealth groups.”¹⁶² The authors assert that “this assumption simplifies the solution to the model, but does not prevent the average saving rate from varying across wealth groups”; (3) “Market power gains are distributed in proportion to the current net wealth distribution . . .” According to Ennis, Gonzaga, and Pike, “this reflects the observations that corporate income and capital gains are distributed via

156. *Id.* at 2.

157. See Harold Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164, 176–77 (Harvey J. Goldschmid et al. eds., 1974).

158. JARSULIC ET AL., *supra* note 150, at 1.

159. *Id.* at 2.

160. *Id.*

161. SEAN ENNIS, PEDRO GONZAGA & CHRIS PIKE, *ORG. FOR ECON. CO-OPERATION & DEV., INEQUALITY: A HIDDEN COST OF MARKET POWER* 8–9 (2017), <http://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf> [<https://perma.cc/8G6B-R3V3>].

162. *Id.* at 11.

business ownership, so that those with the largest wealth shares . . . will, in proportion, receive the largest share of the profits”; and (4) “The price of different baskets of goods will be inflated by market power in an equal percentage.”¹⁶³ According to the authors, “this implies that product for the poor and products for the wealthy will be equally affected by market power. To the extent that the poor are more exposed to monopolization, the model provides conservative, lower-bound estimates.”¹⁶⁴

Based on their study, Ennis, Gonzaga, and Pike conclude that market power may contribute significantly to economic inequality; “violations of competition law, government-created barriers to entry or natural monopolies may be significant sources of market power”; the authors “do not suggest that competition law and policy should specifically target inequality”; instead they “suggest that reduced inequality is a beneficial by-product of government actions and policies to reduce illegitimate market power.”¹⁶⁵

Although these commentators uniformly suggest that increased antitrust enforcement could have beneficial effects on inequality, none directly examine this proposition using empirical data. The underlying economic logic of the claims that lax antitrust has resulted in increased inequality is fairly simple. In the absence of antitrust enforcement, firms gain market power, reduce output, raise prices, and generate monopoly profits, which enrich shareholders. Because shareholders tend to live in the top end of the wealth and income distributions, inequality increases. Further, because of rising prices, those in the lower end of the distributions (where a greater fraction of income and wealth are devoted to consumption) are made relatively worse off, increasing welfare inequality as well.

The question is whether this simple account of the problem is correct. There is little systematic empirical evidence of a link between antitrust enforcement and inequality. Below are some preliminary empirical analyses of the effect of antitrust enforcement on measures of inequality. Regardless of whether we examine income, wealth, or (in our view, the more relevant) consumption distribution, there is no evidence that metrics of enforcement are related to inequality. While these results do not guarantee that increased antitrust enforcement could not affect inequality, they do suggest that proposals for increased enforcement to address inequality concerns are premature and potentially misguided.

163. *Id.*

164. *Id.* (footnote omitted).

165. *Id.* at 23.

2. The Empirical Evidence: Is Inequality Really Growing?

All of the papers discussed above assume that inequality has increased in recent years. This view is fairly common among economists and would seem to be borne out as seen in Figure 2 below, which presents the Gini coefficient for U.S. incomes for the last fifty years.¹⁶⁶

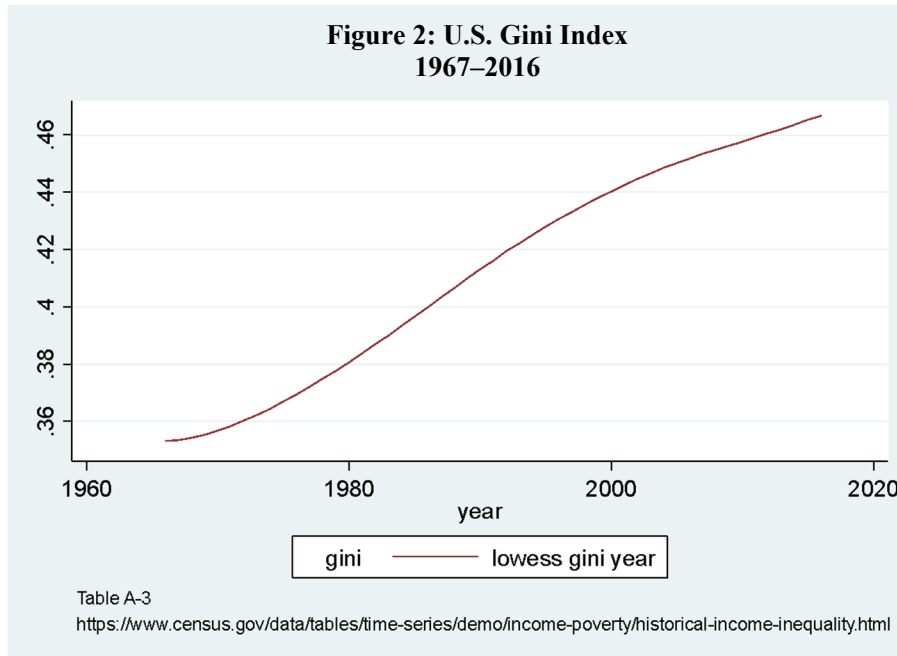
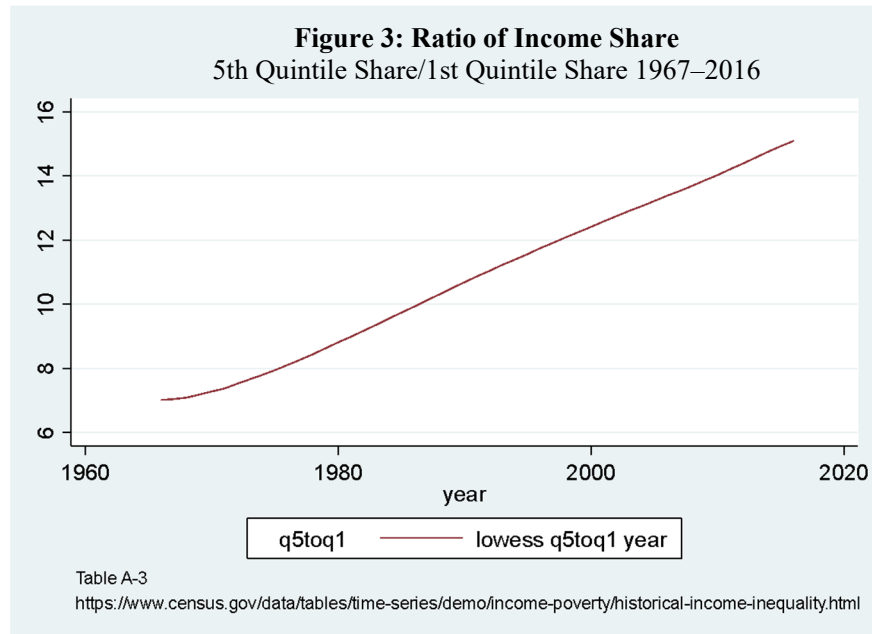


Figure 3, which plots the ratio of the share of US income among the fifth quintile of income-earning households to the share among the first quintile of households¹⁶⁷ tells a similar story.

166. *Historical Income Tables: Income Inequality*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-inequality.html> [<https://perma.cc/RP2Z-TZ8R>] (last updated Sept. 12, 2018) (follow “Selected Measures of Equivalence-Adjusted Income Dispersion: 1967 to 2017”).

167. *Id.*



Robert Kaestner and Darren Lubotsky underscore the point that inequality measures can be significantly affected by a failure to account for government transfers and employee benefits that presumably substitute for cash income.¹⁶⁸ Given that healthcare costs have grown faster than inflation in recent years, a failure to account for health insurance benefits could significantly affect economic inequality measures. Reviewing estimates from the literature, Kaestner and Lubotsky find that including health insurance substantially reduces the gap between incomes at the high end of the distribution and those at the low end.¹⁶⁹ Interestingly, however, the authors find that there is still an upward trend in inequality over time when the cash equivalent of health insurance and government transfers are included.¹⁷⁰ The trend, however, is substantially muted.¹⁷¹ Specifically, including government transfers and the imputed value of employer subsidized health insurance, Kaestner and Lubotsky indicate that the ratio of income between households at the ninetieth percentile and the tenth

168. Robert Kaestner & Darren Lubotsky, *Health Insurance and Income Inequality*, 30 J. ECON. PERSP. 53, 53–54 (2016).

169. *Id.* at 55.

170. *Id.* at 56.

171. *Id.*

percentile was about five in 1995, growing to 5.2 in 2004 and to 5.6 in 2012.¹⁷²

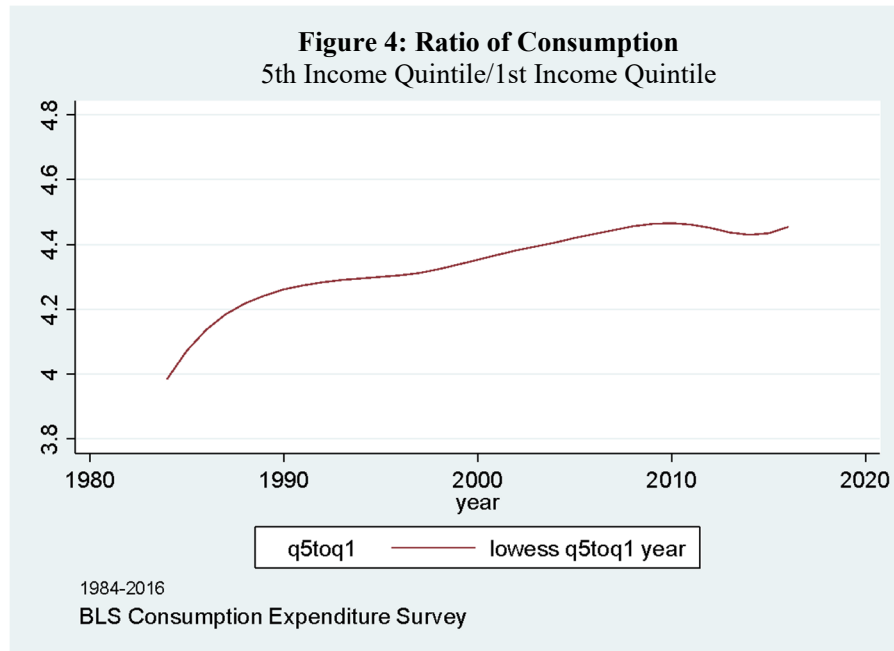
Although yearly estimates of this more complete measure of income inequality are not available, and the time series span is somewhat limited, another approach might be to examine consumption inequality since consumption will be a function of effective income, and consumption data are more readily available. Also, consumption might be a better measure of welfare as argued by Bruce Meyer and James Sullivan.¹⁷³ When determining the desirability of antitrust enforcement to address economic inequality, presumably one not only wants to examine the indirect effects on people's incomes and wealth, but also the direct effect on consumer welfare, for which consumption might be a useful proxy.

Considering the arguments raised above regarding the desirability of using antitrust to fight inequality, one might reason that higher prices coming from increased concentration make both the well-off investors and executives and the lowly consumer worse off, but the investors and executives are compensated through high incomes due to their monopoly profits. Under these arguments, we should see an upward trend in the consumption ratio between the haves and the have-nots. Figure 4, which uses data on average consumption by households in the various income quintiles from the Bureau of Labor Statistics Consumer Expenditure Survey,¹⁷⁴ shows that while the ratio has grown over time, the growth is much smaller than that found for income itself. Further, unlike income, the growth is not nearly as consistent with periods of increasing inequality and decreasing inequality alike.

172. *Id.* at 64.

173. Bruce D. Meyer & James X. Sullivan, *Identifying the Disadvantaged: Official Poverty, Consumption Poverty, and the New Supplemental Poverty Measure*, 26 J. ECON. PERSP. 111, 112 (2012); Bruce D. Meyer & James X. Sullivan, *Measuring the Well-Being of the Poor Using Income and Consumption*, 38 J. HUM. RESOURCES 1180, 1181 (2003).

174. *CE Tables*, BUREAU LAB. STAT., <https://www.bls.gov/cex/tables.htm> [<https://perma.cc/WD4N-T2ED>] (last updated Sept. 11, 2018).



Based on potentially better (i.e., more complete) measures of income and better metrics of welfare (i.e., consumption), perhaps the concerns raised in the papers discussed above are a little overblown. If so, perhaps the calls for a ramp-up of antitrust enforcement are not justified (at least on inequality grounds). That said, even by these measures, it appears inequality is growing, albeit slightly; therefore, it is worth discussing whether there is any association between antitrust enforcement and inequality.

3. Does Antitrust Enforcement Affect Inequality?

The papers advocating for increased enforcement do not provide evidence that enforcement is, in fact, related to reductions in inequality. What follows is our preliminary attempt to make progress in this regard. We approach this task descriptively, since strong research designs are elusive here given the national nature of enforcement. Left without a plausible comparator, we present time series regressions relating measures of inequality to antitrust enforcement measures. For all of the standard

reasons,¹⁷⁵ what follows cannot isolate causation with any confidence, but it is a useful first step to see if there appears to be any association between antitrust enforcement and inequality measures.

For enforcement measures, we use DOJ investigation data, which are available for the period 1984 to 2016 and are broken down by § 1 investigations, § 2 investigations, merger investigations, and other investigations.¹⁷⁶ We initially focus on consumption for our outcome measures for the reasons discussed above.

In Table 1 below, we focus on merger investigations, given the focus on increasing market concentration in the papers calling for increased antitrust enforcement. Again, the enforcement data determine our sample period which covers 1984 through 2016. Our outcome variable is the ratio of average consumption expenditures among those in the fifth income quintile to the consumption expenditures of those in the first income quintile.¹⁷⁷ This ratio appears to be AR(1) so we allow for a one period autoregressive term in each of the regressions.¹⁷⁸ Presumably past enforcement is as important or more important than current enforcement, so we provide distributed lag specifications.¹⁷⁹

Table 1			
Relationship Between 5th Quintile Consumption/1st Quintile Consumption and DOJ Merger Investigations			
ln (merger investigations)	-0.07 (0.19)	-0.07 (0.19)	-0.08 (0.19)
ln (t-1 merger investigations)		-0.05 (0.18)	-0.03 (0.22)
ln (t-2 merger investigations)			-0.04 (0.17)

175. For a more complete discussion of empirical research designs in law and economics, see Jonah B. Gelbach & Jonathan Klick, *Empirical Law and Economics*, in 1 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 30 (Francesco Parisi ed., 2017).

176. *Historic Workload Statistics*, U.S. DEP'T JUST.: ANTITRUST DIVISION, <https://www.justice.gov/atr/division-operations> [<https://perma.cc/GYQ2-LADJ>] (last visited Jan. 23, 2019).

177. *CE Tables*, *supra* note 174.

178. For a discussion of autoregressive models in general and first order autoregressive (i.e., AR(1)) models in particular, see JAMES H. STOCK & MARK W. WATSON, INTRODUCTION TO ECONOMETRICS 535–39 (2d ed. 2007).

179. See WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 712–23 (4th ed. 2000).

Although the merger investigations are uniformly negative, in no case are they statistically significant (individually or jointly).

In Table 2, we control separately for a linear trend to account for non-enforcement factors involved in pushing inequality up over the period.

Table 2			
Relationship Between 5th Quintile Consumption/1st Quintile Consumption and DOJ Merger Investigations			
ln (merger investigations)	-0.02 (0.15)	-0.03 (0.17)	-0.05 (0.17)
ln (t-1 merger investigations)		-0.04 (0.16)	-0.02 (0.22)
ln (t-2 merger investigations)			-0.04 (0.17)
Linear Trend	0.012** (0.006)	0.009 (0.006)	0.006 (0.006)

We repeat these exercises using total investigations to allow for a more general measure of enforcement.

Table 3			
Relationship Between 5th Quintile Consumption/1st Quintile Consumption and total DOJ Investigations			
ln (total investigations)	-0.20 (0.20)	-0.24 (0.19)	-0.21 (0.17)
ln (t-1 total investigations)		0.09 (0.16)	0.14 (0.17)
ln (t-2 total investigations)			-0.09 (0.19)

Table 4			
Relationship Between 5th Quintile Consumption/1st Quintile Consumption and total DOJ Investigations			
ln (total investigations)	-0.09 (0.22)	-0.17 (0.20)	-0.18 (0.20)
ln (t-1 total investigations)		0.14 (0.15)	0.16 (0.16)
ln (t-2 total investigations)			-0.08 (0.20)
Linear Trend	0.010 (0.007)	0.009 (0.007)	0.005 (0.007)

Distinct from the merger investigation results, which were uniformly negative though insignificant, in the specifications using total investigations the sign of the effect of investigations on the ratio of quintile five consumption to quintile one consumption switches from lag to lag.

To unpack these results, Table 5 presents the effect of investigations on real average consumption expenditures for the first and fifth quintile households by income. For brevity, we only present the specifications with two lags and the time trend.

Table 5				
Effect of Investigations on Real Consumption Expenditures				
	1st Quintile		5th Quintile	
ln (merger investigations)	0.01 (0.03)		0.02 (0.02)	
ln (t-1 merger investigations)	-0.00 (0.06)		-0.01 (0.02)	
ln (t-2 merger investigations)	0.04 (0.04)		0.02 (0.02)	
ln (total investigations)		0.07 (0.05)		0.04 (0.03)
ln (t-1 total investigations)		-0.04 (0.05)		-0.01 (0.02)
ln (t-2 total investigations)		0.04 (0.04)		0.01 (0.02)
Linear Trend	0.002*** (0.001)	0.003** (0.001)	0.004** (0.002)	0.004** (0.002)

On the whole, the relationship between the enforcement metrics and consumption is comparable for the households in both the first and fifth income quintiles. There is not much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality. And certainly not evidence significant enough to justify the aggressive policy proposals recently injected into discussion of competition policy.

Stepping away from this aggregate analysis for a moment, it is interesting to note that the new (-old) focus on “big is bad” when it comes to inequality ignores an impressive literature on the effects of one of the biggest players in the US in recent decades—Walmart. Work by Jerry Hausman and Ephraim Leibtag shows that when Walmart Supercenters enter a market, food prices paid by consumers in the market drop by about three percent, and because they have detailed longitudinal data on

household expenditures, they are able to estimate household welfare effects due to this price decrease. They find that the welfare effects are substantial and they are most pronounced for those at the lower end of the socio-economic spectrum.¹⁸⁰ In addition to this price effect, David Matsa shows that Wal-Mart's entry into a market induces competitor supermarkets to improve the quality of their service so as to avoid losing even more business to Wal-Mart and its lower prices.¹⁸¹ Thus, in the posterchild case for big is bad, the behemoth Wal-Mart would appear to improve inequality by its very existence.

Although we believe consumption is the most relevant measure for assessing the welfare effects (in absolute or, as here, in relative terms) of antitrust policy, we provide similar analyses of income and wealth. Using Census data,¹⁸² in Table 6, we again provide estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

180. Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. APPLIED ECONOMETRICS, 1157, 1157–58 (2007). Interestingly, this Wal-Mart effect is so important, in subsequent work the authors show that if the Bureau of Labor Statistics accurately accounted for the price effects created by Wal-Mart, the Consumer Price Index (CPI) would be proportionately lower by about 15 percent per year. See Jerry Hausman & Ephraim Leibtag, *CPI Bias from Supercenters: Does the BLS Know That Wal-Mart Exists?*, in PRICE INDEX CONCEPTS AND MEASUREMENT 203, 225–26 (W. Erwin Diewert, John Greenlees & Charles Hulten eds., 2009). Because relatively poorer people are more likely to shop at Wal-Mart and are more likely to spend larger shares of their income on food, where the largest Wal-Mart cost savings come from, this CPI effect disproportionately benefits lower income individuals. *Id.*

181. David A. Matsa, *Competition and Product Quality in the Supermarket Industry*, 126 Q.J. ECON. 1539, 1542 (2011).

182. *Historical Income Tables: Income Inequality*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-inequality.html> [https://perma.cc/KS4N-S7N5] (Click Table H-2) (last visited Jan. 25, 2019).

Table 6				
Effect of Investigations on Income Shares				
	1st Quintile		5th Quintile	
ln (merger investigations)	-0.10 (0.13)		0.78 (0.76)	
ln (t-1 merger investigations)	0.09 (0.08)		-0.10 (0.60)	
ln (t-2 merger investigations)	0.08 (0.09)		0.22 (0.59)	
ln (total investigations)		-0.08 (0.10)		1.23* (0.73)
ln (t-1 total investigations)		0.09 (0.14)		0.00 (0.67)
ln (t-2 total investigations)		0.11 (0.10)		0.04 (0.55)
Linear Trend	-0.04*** (0.00)	-0.03*** (0.01)	0.21*** (0.03)	0.23*** (0.04)

As with consumption measures, there is generally no statistically significant effect (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the income shares of those at the bottom or the top of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the opposite effect. Further, many of the investigation coefficients are positive for the fifth quintile income share as well. If we examine combined ratios of the shares as we did with the consumption data, we still find no support for the assumption that an increase in antitrust enforcement has any systematic effect on inequality.¹⁸³

Lastly, in Table 7, we examine similar relationships using wealth data in case the relevant effect of antitrust enforcement on inequality operates on a stock measure of welfare rather than on flows like consumption or income. Using data collected by Emmanuel Saez and Gabriel Zucman who examined wealth inequality since the beginning of the Twentieth Century,¹⁸⁴

183. These results, not reported here, are available in Klick & Wright, *supra* note 143.

184. See Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 519–78 (2016).

we again examine the period beginning in 1984 due to the limitations in our enforcement data, but we are required to stop the sample in 2012 since that is the final year of data provided by Saez and Zucman.¹⁸⁵

Table 7						
Effect of Investigations on Wealth Shares						
Wealth Share	0–90th Percentile		95+ Percentile		99+ Percentile	
ln (merger investigations)	0.01 (0.01)		-0.01 (0.01)		-0.01 (0.01)	
ln (t-1 merger investigations)	-0.01 (0.01)		0.01 (0.01)		0.01 (0.01)	
ln (t-2 merger investigations)	0.00 (0.01)		-0.00 (0.01)		-0.00 (0.01)	
ln (total investigations)		0.01 (0.01)		-0.01 (0.01)		-0.01 (0.01)
ln (t-1 total investigations)		-0.01 (0.01)		0.01 (0.01)		0.01 (0.01)
ln (t-2 total investigations)		0.00 (0.01)		0.00 (0.01)		0.01 (0.01)
Linear Trend	-0.005*** (0.001)	-0.005*** (0.001)	0.01*** (0.00)	0.01*** (0.00)	0.01*** (0.00)	0.01*** (0.00)

Again, in addition to finding no statistically significant effects (individually or jointly) from any of the enforcement variables (i.e., current year or lagged enforcement; merger-specific or total), even the signs are inconsistent with a simple story that more enforcement leads to more equality.

Further, to the extent there is a subset of antitrust enforcement likely to unequivocally raise income for households in the lower quintiles of the income distribution, it is enforcement aimed at public restraints and government-imposed barriers to entry at the state and local level. For example, antitrust enforcement efforts and competition advocacy have been influential in targeting anticompetitive occupational licensure schemes. For example, the FTC has recently focused upon occupational licensing reform

185. Data are available via download at Gabriel Zucman, *Wealth Inequality in the United States Since 1913, Main Data*, <http://gabriel-zucman.eu/files/SaezZucman2015MainData.xlsx> [<https://perma.cc/G9TP-R2MW>] (last visited Jan. 25, 2019).

in an effort to inform and assist state legislators when making decisions on licensing requirements to avoid unnecessary restrictions on competition.¹⁸⁶ Thus, regulations promulgated at the state level that are often anticompetitive may be contributing to increasing economic inequality, not lax antitrust enforcement.¹⁸⁷

F. Would a Ban on Vertical Integration Improve Consumer Welfare?

The Hipster Antitrust movement has also targeted vertical integration, which has been traditionally viewed as being procompetitive. Thus, the broad attack on vertical integration can be viewed as a symptom of a general hostility to firm size regardless of its actual impact on competition or consumer welfare. Consistent with this hostility, several scholars and commentators have suggested a more restrictive treatment of vertical integration.

Some members of the Hipster Antitrust movement have even proposed completely banning vertical integration, including Matt Stoller and Lina Khan, who have called for outright bans of this generally procompetitive business conduct. In an article featured in *The New Republic* discussing monopoly power, the Trump Administration, and why Democrats need to return to their “trust-busting roots,” Stoller outlines several calls to action for the current Democratic party, including what amounts to a sector-specific ban on vertical integration.¹⁸⁸ Stoller argues that:

A content distributor like AT&T should not be allowed to buy a content provider like Time Warner. Online ad companies should be barred from owning browsers and ad blockers. And Amazon should not operate as both a marketplace and a competitor within that marketplace. It’s one thing, say, to run a big trucking

186. See Press Release, Fed. Trade Comm’n, FTC Launches New Website Dedicated to Economic Liberty (Mar. 16, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-launches-new-website-dedicated-economic-liberty> [<https://perma.cc/B6ZP-P343>].

187. See James C. Cooper, Koren W. Wong-Ervin & Joshua D. Wright, *Occupational Licensing Hinders the American Dream*, REALCLEAR POLICY (July 10, 2017), http://www.realclearpolicy.com/articles/2017/07/10/occupational_licensing_hinders_the_american_dream_110293.html [<https://perma.cc/6TQS-C29W>] (“The simplest and best approach is for states to engage in smarter lawmaking and regulation by declining to adopt new licensing requirements and revising or abandoning existing laws to reduce barriers to entry.”).

188. Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC (July 13, 2017), <https://newrepublic.com/article/143595/return-monopoly-amazon-rise-business-tycoon-white-house-democrats-return-party-trust-busting-roots> [<https://perma.cc/6MJT-RE3M>].

company—but if you’re allowed to own the highway itself, other truckers won’t stand a chance.¹⁸⁹

Stoller proposes these changes to enable the Democrats to go after monopolies, which he declares as “not compatible with democracy.”¹⁹⁰

In her article in the *Yale Law Journal*, Lina Khan’s solution for alleged harms stemming from Amazon’s business activity and similarly situated tech giants has multiple parts, including a ban on vertical integration for dominant platforms.¹⁹¹ According to Khan, the ban on vertical integration for these dominant platforms would prevent some of the competitive concerns—mainly harm to other retailers—and consumer harms posed by Amazon and other tech giants.¹⁹²

In a slightly less radical fashion, the Democratic Party has proposed legislation that includes new and stronger presumptions in merger enforcement. As a part of their “Better Deal”, the Democratic Party included “new merger standards that require a broader, longer-term view and strong presumptions that market concentration can result in anticompetitive conduct.”¹⁹³ Large mergers receive an even stronger condemnation in the Better Deal, with Democrats proposing that “the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal.”¹⁹⁴ Rather than completely banning vertical mergers, the Democrats instead call for a stronger structural presumption and a fundamental shift in presumptions and burdens of proof for companies involved in large mergers. These changes, Democrats believe, will allow the enforcement agencies to successfully challenge more mergers and “will also incentivize companies to be better corporate citizens.”¹⁹⁵

Finally, some scholars are instead making more “modest” calls for increased or reinvigorated vertical merger enforcement, within the

189. *Id.*

190. *See id.*

191. Khan, *supra* note 88, at 792–97. Though not her main solution, which is regulating tech giants like public utilities or essential facilities, a ban on vertical integration is one of the proposed solutions. *Id.*

192. *Id.* at 797 (“History suggests that allowing a single actor to set the terms of the marketplace, largely unchecked, can pose serious hazards. Limiting Amazon’s reach through prophylactic bans on vertical integration—and thereby forcing it to split up its retail and [m]arketplace operation, for example—would help mitigate this concern.”).

193. *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, *supra* note 87, at 2.

194. *Id.*

195. *Id.*

consumer welfare framework. Steven Salop provides a list of proposals revolving around a central tenet of strengthening antitrust enforcement.¹⁹⁶ Carl Shapiro also calls for stronger vertical merger enforcement. Shapiro recognizes the difficulty in challenging vertical mergers, as it is hard to show “that such a merger would significantly increase concentration in a well-defined market, which is normally a key element of the government’s case.”¹⁹⁷ However, even with these difficulties, Shapiro suggests that “there would be a big payoff in terms of competition and innovation if the DOJ and FTC could selectively prevent mergers that serve to solidify the positions of leading incumbent firms, including dominant technology firms, by eliminating future challengers.”¹⁹⁸ As a stepping stone to realizing this payoff, Shapiro argues that the Antitrust Agencies should “tolerate some false positives—blocking mergers involving targets, only to find that they do not grow to challenge the incumbent—in order to avoid some false negatives—allowing mergers that eliminate targets that would indeed have grown to challenge the dominant incumbent.”¹⁹⁹

1. Does the Empirical Evidence Support the Claim That a Ban on Vertical Integration Would Make Consumers Better off?

Since Ronald Coase’s initial intellectual foray into the boundaries of the firm, the causes and consequences of vertical integration have been one of the most empirically studied economic phenomena in industrial organization economics.²⁰⁰ Three leading empirical literature surveys summarize the results of these studies. It is notable that these surveys are not only authored by well-established and industrial organization economists, but also that the authors span the ideological spectrum, and have significant experience in enforcement agencies. What do these

196. See Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1963–66 (2018).

197. Shapiro, *supra* note 2 at, 740.

198. *Id.* at 741.

199. *Id.*

200. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); see also OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Benjamin Klein, *Vertical Integration as Organizational Ownership: The Fisher Body-General Motors Relationship Revisited*, 4 J.L. ECON. & ORG. 199 (1988); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Benjamin Klein & Kevin M. Murphy, *Vertical Integration as a Self-Enforcing Contractual Arrangement*, 87 AM. ECON. REV. 415 (1997).

literature surveys find? In sum, each author accepts the well-known theoretical result that vertical integration might harm competition, but each study finds that vertical integration is overwhelmingly procompetitive in practice.

In two separate papers, Francine Lafontaine and Margaret Slade reviewed the available empirical evidence and examined the effects of vertical integration and vertical restraints on consumers.²⁰¹ In a 2005 paper on exclusive dealing and other vertical restraints, Lafontaine and Slade concluded that:

In general, [then,] the empirical evidence leads one to conclude that consumer well-being tends to be congruent with manufacturer profits, at least with respect to the voluntary adoption of vertical restraints. When the government intervenes and forces firms to adopt (or discontinue the use of) vertical restraints, [in contrast,] it tends to make consumers worse off.²⁰²

In 2007, Lafontaine and Slade discuss vertical integration specifically.²⁰³ After reviewing the evidence, the authors again found that “under most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms’ but also from the consumers’ point of view. Although there are isolated studies that contradict this claim, the vast majority support it. Moreover, even in industries that are highly concentrated so that horizontal considerations assume substantial importance, the net effect of vertical integration appears to be positive in many instances.”²⁰⁴

Current and former enforcement agency economists—including the former Chief Economist for the DOJ’s Antitrust Division, Luke Froeb—conducted a study of the same literature on vertical restraints and vertical integration. Froeb et al. reach similar conclusions, finding, “there is a paucity of support for the proposition that vertical restraints [or] vertical integration are likely to harm consumers.”²⁰⁵ Finally, former FTC and DOJ

201. See Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008) [hereinafter Lafontaine & Slade, *Exclusive Contracts*]; Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629 (2007) [hereinafter Lafontaine & Slade, *Vertical Integration*].

202. Lafontaine & Slade, *Exclusive Contracts*, *supra* note 201, at 408.

203. Lafontaine & Slade, *Vertical Integration*, *supra* note 201.

204. *Id.* at 680.

205. James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 648 (2005).

economist Daniel O'Brien conducted a similar in-depth study of the literature on vertical restraints and integration, and reached the same conclusion: that "[t]he theoretical literature on [vertical agreements] implies a largely benign view of the effects of vertical restraints/integration," and that "[w]ith few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons."²⁰⁶

None of the papers go so far as to say that vertical mergers or restraints should be per se legal. However, the consistency of results across these literature surveys is clear: vertical integration, in general, benefits consumers. The obvious and direct effect of adopting the Hipster Antitrust proposal to ban vertical integration would be to dramatically and reliably decrease consumer welfare.

G. Has Lax Antitrust Resulted in an Increase in Monopsony Power?

Several recent studies coming out of the Hipster Antitrust movement have also focused on the role of industry concentration in connection with the decrease in the share of national income captured by labor.²⁰⁷ These studies argue that as product markets become more concentrated, the opportunities for job mobility within the industry are restricted, thus permitting the largest firms to exercise buying (or "monopsony") power within the labor markets.²⁰⁸ The Hipster Antitrust movement argues that the rise of harmful monopsony power is another symptom of lax antitrust enforcement and can be corrected by including assessments of impacts on wage and employment of proposed mergers and other corporate conduct.²⁰⁹

However, the Hipster Antitrust movement fails to justify an expansion of antitrust as they downplay the existing antitrust enforcement in labor markets, rely on ambiguous theoretical and empirical foundations, and disregard other explanatory variables.

206. Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in *THE PROS AND CONS OF VERTICAL RESTRAINTS* 40, 76–81 (Konkurrensverket Swedish Competition Authority ed., 2008) <http://www.konkurrensverket.se/globalassets/english/research/report-the-pros-and-cons-of-vertical-restraints-18mb.pdf> [<https://perma.cc/L3KS-FC2V>].

207. See Hal Singer, *While Trump Blames Immigrants for Low Wages, an Alternative Theory Gains Traction Among Economists*, *FORBES* (Feb. 1, 2018, 9:30 AM), <https://www.forbes.com/sites/washingtonbytes/2018/02/01/while-trump-blames-immigrants> [<https://perma.cc/V5RW-HFXA>].

208. *Id.*

209. *See id.*

In a 2017 study on the decreases in the United States labor share, David Autor and his co-authors attempted to explain variations in the share of revenues captured by workers across different sectors of the economy.²¹⁰ Using sales as a measure of market concentration, the authors purported to find that the concentration of the largest firms in an industry has risen from 1982 to 2012 in each of the six major sectors covered by the U.S. economic census.²¹¹ Ultimately, the study established a significant inverse relationship between concentration and the labor share after controlling for other factors that may impact labor shares.²¹² According to the authors, each percentage point increase in an industry's concentration index among its twenty largest firms predicted a 0.4 percentage point fall in its labor share.²¹³ The authors attempted to establish causation by stating that the decrease in labor share was primarily the result of the labor supply moving into larger and more productive (“superstar”) firms with “lower (and declining) labor shares” as opposed to a widespread decline in labor shares across most firms.²¹⁴ However, the authors left the actual reasons for this phenomenon and its efficiency analysis as an open question for future research.²¹⁵

In a more recent article, economist Marshall Steinbaum and his co-authors attempted to explain the decrease in labor share by analyzing movements in wage levels according to posted job listings on CareerBuilder.com.²¹⁶ The authors found that the absence of robust antitrust enforcement allowed the nation's local labor markets to become highly concentrated.²¹⁷ The authors attempted to show that employers tend to offer lower pay in cities, towns, and occupations where fewer businesses were posting jobs.²¹⁸ Ultimately, the study estimated that moving from the twenty-fifth percentile of labor market concentration to the seventy-fifth percentile would lower (advertised) pay level in a metro area by seventeen percent.²¹⁹ According to the authors, mergers could potentially increase labor market power and decrease wage levels—creating such a risk of

210. See Autor et al., *supra* note 89.

211. *Id.* at 181–82, 184.

212. *Id.* at 184.

213. *Id.* at 183–84.

214. *Id.* at 185.

215. See *id.* at 184.

216. See José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017), <https://www.nber.org/papers/w24147.pdf> [<https://perma.cc/958T-JPWG>].

217. *Id.* at 1, 18.

218. *Id.* at 2.

219. *Id.*

monopsony power in labor markets that the DOJ and FTC should include a labor monopsony factor in the analyses of anticompetitive effects.²²⁰

Similar to the Autor study, the Steinbaum study also identified a correlation between increases in labor market concentration and the widespread decreases in labor shares.²²¹ However, unlike Autor, the Steinbaum study identified the lack of robust antitrust enforcement in labor markets as a causal factor in the widespread decrease in labor share and labeled the phenomenon as presumptively harmful to competition.²²²

While documenting potential changes in monopsony power over time and across markets is an important research project, and these economists should be applauded for contributing to our knowledge of an understudied phenomena, there is a substantial gap between our current state of knowledge and substantiating a belief that dramatic antitrust policy change would improve welfare. Several pieces of evidence render it difficult to conclude that lax antitrust enforcement has allowed labor market concentration and an anticompetitive increase of monopsony power. The claim and its underlying arguments are not compelling because they do not appropriately consider the level of current antitrust enforcement in labor markets, the theory and empirics supporting the claim are ambiguous, and even if an increase in monopsony power is assumed, it is unlikely (and certainly not established) that lax antitrust enforcement played a causal role.²²³

The first piece of evidence opposing the Hipster Antitrust claim is the existing presence of antitrust enforcement in labor markets. The DOJ has issued several high-profile complaints against companies using “no-poaching” agreements to decrease labor competition.²²⁴ For example, in *United States v. Adobe*, the DOJ filed a complaint alleging that major technology firms (Adobe, Apple, Google, Intel, Intuit and Bixer) anticompetitively agreed to not pursue each other’s highly trained

220. *Id.* at 1, 18.

221. *Id.* at 1.

222. *Id.* “Concerns about a lack of competition in the labor market have also reached the policy debate.” *Id.*

223. See *Hearing, supra* note 6, <https://www.judiciary.senate.gov/imo/media/doc/Wright%20Responses%20to%20QFRs1.pdf> [<https://perma.cc/3VR3-2CF8>] (statement of Joshua D. Wright); Daniel A. Crane & Thibault Schrepel, *The Democrats’ “Better Deal” Is Neither Better nor a Deal*, N.Y.U. J.L.B. ONLINE (Dec. 18, 2017), <https://www.nyujlb.org/jlbonline/date/2017-12> [<https://perma.cc/MJ4E-JVVZ>]; Loukas Karabarounis & Brent Neiman, *Trends in Factor Shares: Facts and Implications*, NBER REP., Dec. 2017, at 19, 19–22, <https://www.econstor.eu/bitstream/10419/178760/1/2017-no4-5.pdf> [<https://perma.cc/5S7B-AD2D>].

224. See, e.g., *United States v. Lucasfilm Ltd.*, 2011 WL 2636850 (D.D.C. June 3, 2011); *United States v. Adobe Sys. Inc.*, 2011 WL 10883994 (D.D.C. Mar. 18, 2011).

technology employees.²²⁵ That same year, the DOJ also successfully enjoined similar no-poaching agreements in the motion picture film industry.²²⁶ Antitrust enforcement involving no-poaching agreements has not tapered in recent years. The DOJ issued joint guidance with the FTC in October 2016 warning that naked no-poach agreements would be treated as price fixing, and Assistant Attorney General for Antitrust Makan Delrahim recently signaled the potential for forthcoming criminal cases on no-poach agreements among employers.²²⁷

The FTC also recently enjoined the American Guild of Organists from restricting any members' ability to solicit or accept work from any "consumer" who was currently utilizing another member.²²⁸ The FTC challenged this no-poaching arrangement under § 5 of the FTC Act as a method of unfair competition that increased prices for consumers.²²⁹ However, apart from federal enforcement, employers restricting labor competition has also been the subject of private antitrust class action litigation.²³⁰ A recent class action filed against Carl's Jr. Restaurants, LLC alleged that Carl's and its independent franchises used "no-hire agreements" to collude and prohibit competitive franchisees from hiring employees from other franchisees.²³¹

The claim that modern antitrust ignores labor markets is certainly incorrect. That said, no credible attempt has been made to systematically measure antitrust enforcement activity as it relates to labor markets and its potential effects on monopsony power. Given the recent series of antitrust cases involving labor claims, it is difficult to view the recent antitrust enforcement in labor markets as a gaping hole in antitrust enforcement that invites anticompetitive abuses. If concentration in labor markets has awarded corporations with the monopsony power to suppress labor shares, it would be unwise to conclude without more evidence that antitrust enforcement's presence or lack thereof in labor markets is the cause.

225. *See Adobe Sys. Inc.*, 2011 WL 10883994, at *2–4.

226. *Lucasfilm Ltd.*, 2011 WL 2636850, at *1.

227. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, (2016), 3–4, <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/3382-2XZ2>]; Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are in the Works*, LAW360 (Jan. 19, 2018), <https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works> [<https://perma.cc/JH94-HQ6J>].

228. American Guild of Organists, 82 Fed. Reg. 17263 (Fed. Trade Comm'n Apr. 10, 2017) (proposed consent agreement).

229. *Id.*

230. Class Action Complaint, *Bautista v. Carl Karcher Enters.*, 2017 WL 525938 (Cal. Super. Ct. Feb. 8, 2017) (No. BC649777).

231. *Id.*

A second piece of evidence undermining the Hipster Antitrust position concerning monopsony power is potentially even more fundamental—it is not clear that monopsony power is, in fact, increasing. The most cited-to-stylized fact in support of the conclusion that monopsony power is widespread and increasing in the United States economy is that the labor share is decreasing.²³² There are, of course, many reasons why one might observe a decrease in the labor share. Lax antitrust allowing the creation of monopsony power is one hypothesis. Though the theoretical effects of a massive increase in monopoly and monopsony power through generally lax antitrust enforcement are ambiguous. Indeed, some studies have found a positive relationship between employer size and wages (i.e. bigger employers pay larger wages).²³³ It is also unsettled whether employers with more market power pay lower wages.²³⁴ Neither economic theory nor empirical evidence paint a clear picture that an increase in antitrust activity in labor markets would result in a reduction of monopsony power or upward pressure on wages.²³⁵

Finally, even if the increase in monopsony power were empirically assumed to be present, the available evidence does not suggest that consumer welfare focused antitrust enforcement played any meaningful role in that change.²³⁶ Consider the figure below:

232. See Karabarounis & Neiman, *supra* note 223, at 19–20.

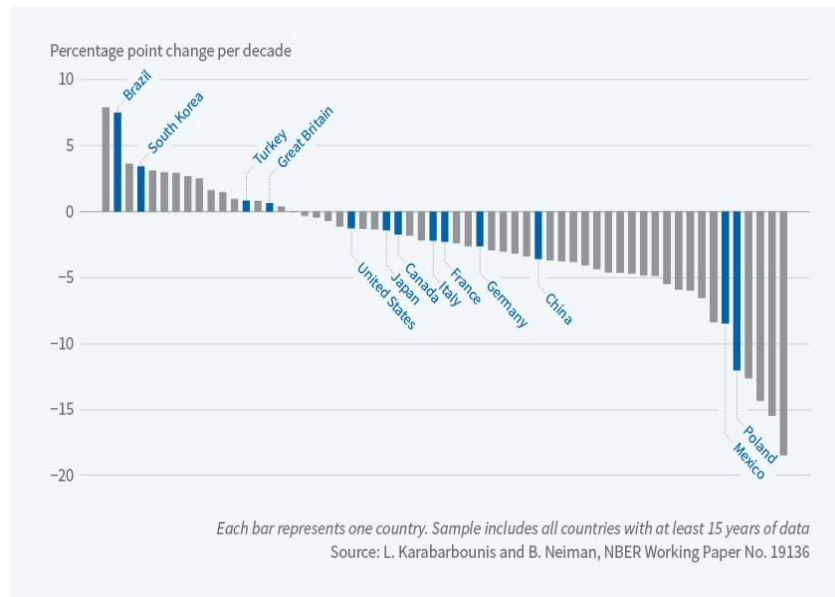
233. See, e.g., Charles Brown & James Medoff, *The Employer Size-Wage Effect*, 97 J. POL. ECON. 1027, 1027–29 (1989); Thierry Lallemand & François Rycx, *Employer Size and the Structure of Wages: A Critical Survey*, 46 REFLETS ET PERSP. DE LA VIE ÉCONOMIQUE 75, 76 (2007).

234. See Daniel A. Crane, *Antitrust & Wealth Inequality*, 101 CORNELL L. REV. 1171, 1192–94 (2016).

235. A relevant antitrust market would focus on jobs that are functionally interchangeable (jobs simply requiring a level of education) versus jobs that are not (jobs requiring specific degrees, licensing, or experience), rather than simply aggregating locations and industries as in the Steinbaum study. See Azar, Marinescu & Steinbaum, *supra* note 216, at 1–2.

236. See Karabarounis & Neiman, *supra* note 223, at 19–21.

**Figure 5: Labor Share Trends, Percentage Points Per 10 Years
1975–2012²³⁷**



The decrease in labor share has been a worldwide phenomenon—with the United States experiencing a comparatively modest drop. However, if the U.S. drop in labor share is indeed attributed to the lax antitrust enforcement of regulatory regimes shackled to consumer welfare, it becomes difficult to explain the global phenomenon (surely the ghost of Robert Bork has not infiltrated each competition authority around the globe). Instead, the global statistics suggest that there are other explanatory variables external to antitrust enforcement that help to explain the recent decrease in labor share. As long as the Hipster Antitrust movement remains transfixed on antitrust enforcement as the cause and solution to decreasing labor shares, it will represent time lost—failing to identify the true causes and most prudent solutions.

The Hipster Antitrust movement has suggested a series of provocative policy proposals. The empirical support for those proposals involves important and interesting work by economists that, at times, reveals some interesting information and raises important questions. But the connection between the available empirical evidence and the Hipster Antitrust

237. See Loukas Karabarbounis & Brent Neiman, *The Global Decline of the Labor Share* 37 fig. 3 (Nat'l Bureau of Econ. Research, Working Paper No. 19136, 2013).

movement's key propositions, are tenuous at best. The existing empirical evidence simply does not support the conclusion that (1) there is a meaningful concentration problem in the modern United States economy; (2) assuming such a problem, it is caused by a reduction in competition and a corresponding increase in monopoly power that has resulted in harm to consumers; and (3) again assuming such a problem, that lax antitrust enforcement is to blame, as it is for other social effects, including an increase in economic inequality.

III. BENEFITS OF THE CONSUMER WELFARE STANDARD

The adoption of the consumer welfare standard as antitrust's lodestar has come with numerous benefits that have reoriented antitrust jurisprudence over the last fifty years to more effectively protect competition. At its core, the consumer welfare standard provides a coherent, workable, and objective framework to replace the multiple, and often contradictory, vague social and political goals that governed antitrust prior to the modern era. By providing a disciplined framework for antitrust analysis, unified under a singular objective, the consumer welfare model fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions. Similarly, promoting the use of the consumer welfare approach by competition authorities worldwide reduces the opportunity for enforcers to use their domestic competition laws to pursue non-economic objectives, including a protectionist agenda that targets U.S. and other foreign businesses.²³⁸

But if clarity and consistency were the only virtues offered by the consumer welfare standard we could identify any number of plausible alternatives. The most significant feature of the consumer welfare standard thus is that it tethers competition analysis, and therefore the outcome in any particular antitrust case, to modern economic learning and evidence. In doing so, the consumer welfare approach rejects the simplistic focus on market structure and concentration as a proxy for identifying anticompetitive effects. Indeed, courts and enforcers today use a broad set of economic tools to examine a variety of factors in assessing whether a specific transaction or business arrangement is likely to harm consumers. Despite claims by opponents to the contrary, consumer welfare analysis is robust and scrutinizes market factors beyond just a narrow focus on short-

238. 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 ANTITRUST CHRON., Apr. 2018, at 21, 22.

term price effects, including quality and innovation. The consumer welfare model also has the added benefit of allowing antitrust analysis to evolve alongside developments in economics to address new types of business models and emerging industries. As our understanding of the economics of a business arrangement improves, so too does the antitrust analysis.

By realigning antitrust under a singular objective grounded in economics, the consumer welfare standard heralded the advent of the modern antitrust revolution that squarely rejects populist desires to balance multiple non-economic factors in favor of a consistent and coherent framework focused on the straightforward, but elegant, question of whether a transaction or commercial arrangement makes consumers better off. The virtues that originally motivated the adoption of the consumer welfare standard remain its most salient features and the reason why it continues to be the best model for antitrust analysis.

A. Creating a Coherent and Consistent Framework for Antitrust Law

It is widely acknowledged by commentators across the political spectrum that prior to the antitrust revolution, antitrust jurisprudence was an incoherent and unpredictable body of law that frequently showed hostility to business.²³⁹ Before the adoption of the consumer welfare standard, courts would attempt to weigh an array of social and political goals that often were at odds with one another and also with modern economics.²⁴⁰ This paradoxical approach weaponized the antitrust laws *against* the competitive process and, as a result, antitrust doctrine was internally inconsistent and counterproductive. Antitrust not only failed to promote competition, but it

239. See, e.g., BORK *supra* note 28; Averitt & Lande, *supra* note 13, at 178; Ginsburg, *Originalism*, *supra* note 14, at 217.

240. See, e.g., Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 699–700 (1967) (“[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.”); Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962) (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”); United States v. Aluminum Co. of Am., 148 F.2d 416, 428–29 (2d Cir. 1945) (“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.”).

actively dissuaded competitors from becoming more efficient and bringing consumers lower prices, greater innovation, and other benefits.

The consumer welfare standard offered antitrust a way out of this quagmire. Today, the consumer welfare standard provides antitrust jurisprudence a disciplined method of analyzing competition that starts and ends with the straightforward question: “Is the challenged conduct likely to make consumers better or worse off?” Rather than issuing decisions that may hinge upon any number of socio-political goals, courts today predictably answer—and their analyses turns solely upon—this question in every antitrust case. This singular focus avoids the internal inconsistencies of the socio-political approach to antitrust, within which various courts would condemn both procompetitive and anticompetitive conduct depending upon the discrete social or political end the court sought to foster in a given case and not based upon whether the conduct actually promoted competition.

Multi-prong approaches often elevate the welfare of competitors or other social and political goals above consumers, and perversely can lead to results in which prices go up, output goes down, or innovation is slowed, but yet the conduct is not condemned because some other social end is achieved. The consumer welfare model instead provides a concrete framework for evaluating allegedly anticompetitive behaviors based on tradeoffs tied to the health of the competitive process as measured by whether consumers are better or worse off. Critically, the consumer welfare standard allows antitrust to funnel earlier questions about the ability of less efficient rivals to compete, the viability of small and independent competitors, and the size and influence of firms back to a singular inquiry about whether consumers are harmed. As a result, non-economic social and political objective no longer serve as a distraction and antitrust can contribute positively to society.

Today, courts, enforcers, and businesses have in the consumer welfare standard a consistent and predictable methodology for assessing whether conduct is permissible under the antitrust laws. With the Supreme Court embracing the central role of the consumer welfare standard to modern antitrust analysis, the contemporary debate largely has shifted to identifying appropriate liability rules and economic evidence for assessing whether specific transactions and business arrangements is likely to harm consumers.²⁴¹

241. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”).

B. Tethering Antitrust Outcomes to Modern Economic Learning and Evidence

The adoption of consumer welfare as the singular focus of the antitrust laws was a significant step toward institutionalizing the economic approach to competition law and policy in the U.S. The consumer welfare standard took the vague concept of “protecting competition” embodied in the antitrust laws and for the first-time breathed meaning into it through the common language of economics. By tethering antitrust outcomes tightly to modern economics, the consumer welfare standard created an objective, evidence-based framework for identifying when conduct is likely to harm consumers.²⁴² Although the consumer welfare standard offers concrete guidance and a tractable framework for assessing harm to competition, it also is flexible enough to allow antitrust jurisprudence to evolve alongside developments in economic theory and empirical evidence. Importantly, the consumer welfare model thus can keep up with new business practices and emerging industries that never could have been envisioned by the drafters of the antitrust laws.

The consumer welfare standard is tethered to economics in two significant ways. First, the goal of promoting consumer welfare ultimately informs what type of liability rules a court should apply in any particular cases depending on the specific conduct at issue.²⁴³ By harnessing current 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 judicial errors and increase the probability that antitrust outcomes maximize the benefit to consumers. Second, in cases requiring a more detailed assessment, the goal of promoting consumer welfare influences the factors a court will examine and how those factors are weighed against each other. The emergence of the consumer welfare standard has driven significant advances in antitrust economics, and spurred debate about economic theories, empirical research, and the sufficient conditions for concluding the presence of anticompetitive conduct.²⁴⁴ This

242. Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 COMPETITION POL'Y INT'L 1, 179 (2009) (essay collection review).

243. See Easterbrook, *supra* note 47, at 15–16.

244. See, e.g., David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325 (2003); Lafontaine & Slade, *Exclusive Contracts*, *supra* note 201; Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163 (2012).

economic learning has in turn been adopted by the courts in assessing the persuasiveness of the evidence in a case.

1. Incorporating Economic Learning into Antitrust Rules through the Error-Cost Framework

Commentators across the political spectrum have recognized that the consumer welfare standard intuitively is closely tied to a decision theoretic or “error-cost” approach to structuring antitrust liability rules because commercial conduct can have both procompetitive and anticompetitive welfare effects.²⁴⁵ To identify the appropriate liability rules that maximize consumer welfare, the error-cost framework considers three factors: (1) the probability that the challenged conduct is anticompetitive, (2) the costs associated with any errors in assessing liability (because legal rules inevitably will result in some errors), and (3) the administrative rules associated with selecting between different legal rules (for example, the costs of a bright line versus the costs of a more qualitative rule).²⁴⁶ Key to the error-cost approach to animating the consumer welfare model is the use of economic theory and empirical evidence to determine the appropriate presumptions and filters to apply with respect to specific types of commercial arrangements and transactions. The economic evidence allows courts to evaluate the probability that the challenged conduct is anticompetitive and informs our understanding of the likelihood of false positives and false negatives.²⁴⁷ In the end, by using the latest economic learning inform liability standards, courts reduce the risk of error and increase the likelihood of welfare maximizing outcomes.

For instance, in the case of a price-fixing agreements and other naked restraints, the consumer welfare model relies on the vast body of economic literature that observes that such conduct rarely produces consumer benefits and in an overwhelming number of cases (although not necessarily all) is likely to cause competitive harm, most typically in the form of reduced output and increased prices. As a result, an error-cost approach that seeks to

245. See, e.g., C. Frederick Beckner, III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); Cooper et al., *supra* note 205; David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 98 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

246. See Wright, *Abandoning*, *supra* note 35, at 248–49, 51.

247. *Id.*

maximize consumer welfare in the context of naked restraints would advise that courts apply a per se prohibition condemning all forms of such conduct without requiring the expenditure of resources to evaluate the actual underlying competitive effects on a case-by-case basis.²⁴⁸ This approach may condemn some small number procompetitive restraints, but in exchange it efficiently dispatches with the overwhelming majority of restraints that are anticompetitive and sends businesses a clear signal the illegality of such restraints.

Conversely, in the case of vertical restraints, such as exclusive dealing arrangements, loyalty discounts, or resale price maintenance, the economic literature strongly supports the conclusion that such arrangements more often than not are procompetitive and are unlikely to result in harm to consumers.²⁴⁹ The consumer welfare model calls on courts to rely on such economic evidence to inform their approach to structuring liability for a case involving vertical arrangements. Unlike in the case of naked restraints, to increase the consumer welfare in the context of vertical restraints, the court will want to employ a “rule of reason” analysis that calls for a case-by-case assessment of the potential procompetitive and anticompetitive effects of the challenged business transaction.²⁵⁰ This approach maximizes consumer welfare because it permits the vast majority of vertical arrangements that are unlikely to harm consumers while creating a mechanism for identifying those vertical restraints that actually are anticompetitive. Employing a per se rule, or even a rule of presumptive illegality, would condemn all or nearly all vertical arrangements and deprive consumers of their procompetitive benefits. As new economic evidence is developed, the courts can update the applicable rules in response

248. See, e.g., BORK, *supra* note 28, at 263 (observing that as a result of the per se prohibition against naked price-fixing “thousands of cartels have been made less effective and other thousands have never been broached because of the overhanging threat of this rule” and concluding that “[i]ts contributions to consumer welfare over the decades have been enormous”); see also Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL’Y INT’L, Autumn 2010, at 3.

249. See, e.g., Lafontaine & Slade, *Exclusive Contracts*, *supra* note 201, at 404–08; James Cooper et al., *Vertical Restrictions and Antitrust Policy: What About the Evidence?*, COMPETITION POL’Y INT’L, Autumn 2005, at 45, 45–63.

250. See O’Brien, *supra* note 206, at 40–41 (“Without this discussion, practitioners motivated by private or political objectives can select from a long menu of economic models the one that supports their position, and these positions may or may not be consistent with social objectives. The applicability vacuum also leaves well-intentioned practitioners little basis for determining how and when to intervene to achieve their objectives.”); Joanna Goyder, *Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 167, 171 (Arvid Fredenberg ed., 2008).

to the new economic learning. Indeed, most vertical restraints were at one type treated under the per se approach currently employed for price-fixing agreements and other naked restraints. As economic theory and evidence began to provide a sound basis to believe that vertical restraints often are efficiency enhancing, the courts relaxed the liability rules to allow for a rule of reason analysis.

2. Analyzing a Robust Array of Economic Evidence to Assess Effects

In cases where economic theory and empirical evidence call for the application of some form of rule of reason, thereby necessitating a more detailed examination of competitive effects, courts, enforcers, and private parties have numerous, sophisticated economic tools to evaluate whether the challenged conduct harms consumers.²⁵¹ At its core, the rule of reason calls for weighing the potential anticompetitive effects associated with conduct against its procompetitive benefits to determine whether, on balance, the conduct increases or decreases consumer welfare.²⁵² Antitrust employs a wide range of economic tools, including, for example, upward pricing pressure, critical loss analysis, merger simulations, and price-cost tests, to determine the likelihood of competitive harm. In employing these tools, antitrust examines multiple types of economic evidence, including prices, margins, foreclosure potential, costs imposed on rivals, ability for entry and repositioning, cost savings and other expected synergies, strategic plans and other internal documents, and testimony. Through these tools and evidence, courts and enforcer can assess whether the conduct at issue will result in harm to the competitive process that would harm competitors and whether there are countervailing efficiency justifications.

Many of the opponents of the consumer welfare approach base their criticism on a misguided belief that the consumer welfare standard is narrowly focused only on short-term price or output effects to the exclusion of all other factors.²⁵³ These critics conclude that reductions in quality,

251. See, e.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 73.

252. Wright & Ginsburg, *supra* note 1, at 2417–18; see also *NCAA v. Bd. of Regents*, 468 U.S. 85, 106–08 (1984); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342–43 (1979).

253. See, e.g., K. Sabeel Rahman & Lina Khan, *Restoring Competition in the U.S. Economy*, in *UNTAMED: HOW TO CHECK CORPORATE FINANCIAL MONOPOLY POWER* 18, 18–25 (Roosevelt Inst. et al. eds., 2016); Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 *LOY. CONSUMER L. REV.* 44 (1998).

variety, or incentives to innovate fall outside of the consumer welfare model and cannot be meaningfully captured by current antitrust law.²⁵⁴ They claim that the consumer welfare standard has gapping loopholes that miss critical factors for analyzing competition, particularly with respect to emerging industries and new forms of business arrangements. As a result, opponents of the consumer welfare model propose a variety of purported solutions aimed at expanding the scope of antitrust enforcement. For instance, critics argue that we should impose new restrictions on conduct involving firms of a certain size (e.g., transaction increasing market share beyond twenty percent) to avoid missing harms that are likely inherent to large firms. They also advocate for abandoning the consumer welfare standard completely and replacing it with a new framework such as a broader “public interest” or “citizen interest” standard that captures a broader range of concerns.

These critics reveal a profound lack of understanding of the consumer welfare model and the rule of reason framework. In reality, the consumer welfare approach to antitrust analysis already considers a variety of factors including, quality, variety, and innovation.

For example, the consumer welfare standard can and does evaluate quality by measuring quality-adjusted price, which has been a part of the industrial organization toolkit for many decades and has frequently been employed by the Bureau of Labor Statistics.²⁵⁵ More importantly, quality-adjusted price analysis has been studied closely by the antitrust enforcement agencies and often features as a basis for enforcement actions.²⁵⁶ In particular, the FTC frequently analyzes quality effects in hospital merger and physician group acquisitions to determine whether a transaction would reduce the quality of services and amenities that will be offered by the combined hospital. In 2008, the FTC challenged the proposed merge between Innova Health Systems and Prince William County Health Systems based, in part, on perceived reductions in the quality of service and amenities that would be offered by the parties after completing the

254. See, e.g., Rahman & Khan, *supra* note 253, at 18–25.

255. PRICE STATISTICS REVIEW COMM’N, THE PRICE STATISTICS OF THE FEDERAL GOVERNMENT (1961), <http://papers.nber.org/books/rep061-1> [<https://perma.cc/4AKA-BDRH>]; FREDERICK V. WAUGH, QUALITY AS A DETERMINANT OF VEGETABLE PRICES 47 (1929) (“By making an adjustment to allow for the variation in these quality factors, the following estimate was made of the average price . . .”).

256. See, e.g., David J. Balan & George Deltas, *Better Product at Same Cost, Lower Sales and Lower Welfare* (FTC Bureau of Econ., Working Paper No. 312, 2012), <http://www.ftc.gov/be/workpapers/wp312.pdf> [<https://perma.cc/2492-3ZME>]; Daniel P. Kessler, *Can Ranking Hospitals on the Basis of Patients’ Travel Distances Improve Quality of Care?* (Nat’l Bureau of Econ. Research, Working Paper No. 11419, 2005), <http://www.nber.org/papers/w11419.pdf> [<https://perma.cc/W34J-VEUC>].

transaction.²⁵⁷ Similarly, in the FTC's 2013 challenge of St. Luke's Healthcare System's acquisition of the Saltzer Medical Group, the agency alleged that the acquisition "will dampen the combined entity's incentive to improve or continue offering high quality services" and that the combined firm "will have reduced incentives to improve or continue offering high quality services because of the limited [primary care physician] competition remaining and its unduly high market share."²⁵⁸ In these and other cases,²⁵⁹ the agencies have demonstrated that the consumer welfare standard can and does incorporate quality as a factor of determining harm to competition.

Innovation also is a well-accepted factor in consumer welfare analysis. There has been considerable work done to understand the affect competition has on innovation. Although the empirical evidence remains sufficiently ambiguous to preclude any presumptions to short cut the analysis, the courts and agencies have proven ready to apply the facts of specific cases to evaluate whether consumers may be harmed by a reduction in innovation.²⁶⁰ Indeed, the 2010 Horizontal Merger Guidelines include new language making it clear that the FTC and DOJ will evaluate a transaction's effect on innovation as part of their competitive assessment.²⁶¹ Moreover, the Antitrust Agencies have not hesitated to use the consumer welfare model to identify harm to innovation. For instance, the FTC regularly challenges transactions in the pharmaceutical industry that propose to combine firms with competing pipeline programs and thus that may face a diminished

257. See, e.g., Complaint at 2–4, Inova Health Sys. Found., 145 F.T.C. 367 (2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/05/080509admincomplaint.pdf> [<https://perma.cc/F68P-9QAU>] ("Unless prevented, the combination of these two financially sound, high-quality hospitals will reduce competition and result in significantly higher prices and reduced non-price competition for hospital services and amenities provided to health care consumers.").

258. Complaint for Permanent Injunction at 21, FTC v. St. Luke's Health Sys., No. 13-cv-116-BLW (D. Idaho filed Mar. 26, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf> [<https://perma.cc/XK24-LTGE>].

259. The DOJ also has alleged reductions in quality as evidence of harm to competition. See, e.g., Complaint at 23, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), <https://www.justice.gov/atr/case-document/file/492256/download> [<https://perma.cc/UGJ6-MPJY>].

260. See, e.g., Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, in THE RATE AND DIRECTION OF INITIATIVE ACTIVITY REVISITED 361 (Josh Lerner & Scott Stern eds., 2012); Richard J. Gilbert & Willard K. Tom, *Is Innovation King at the Antitrust Agencies? The Intellectual Property Guidelines Five Years Later*, 69 ANTITRUST L.J. 43, 44 (2001); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 1 (2007).

261. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 73, at 23; see also Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931–32 (2015).

incentive to innovate should the transaction close.²⁶² Even more dramatically, the Antitrust Agencies also have alleged harm to innovation where the market did not yet exist.²⁶³ In the FTC's 2014 challenge of Nielsen's proposed acquisition of Arbitron, the agency sought a remedy to resolve competitive concerns relate to the sale of "nationally syndicated cross-platform audience measurement services" based on evidence that the Commission believed showed that both parties were developing potentially competing products.²⁶⁴ Moreover, the Antitrust Agencies also have brought cases alleging harm to innovation outside of the merger context, including in the landmark case of *United States v. Microsoft*, in which the federal court concluded that Microsoft's conduct harmed competition and consumers in part by reducing innovation.²⁶⁵ As a result, any claims that the consumer welfare standard contains large gaps that allow harms to innovation that ultimately harms competition to go unchallenged is belied by the cases.

Through the adoption of the consumer welfare standard the antitrust revolution that began in the 1970s also ushered in an economic revolution that tethered antitrust analysis tightly to economic theory and empirical

262. See, e.g., Complaint at 3, Novartis AG, No. C-4510 (F.T.C. filed Feb. 20, 2015), https://www.ftc.gov/system/files/documents/cases/complaint_0.pdf [https://perma.cc/5YPB-W5S6]; Betsy Lordan, *FTC Puts Conditions on Novartis AG's Proposed Acquisition of GlaxoSmithKline's Oncology Drugs*, FED. TRADE COMMISSION (Feb. 23, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition> [https://perma.cc/B7F7-ZVVD] (explaining that the proposed acquisition could potentially deprive consumers of "superior products"); see also Mitchell J. Katz, *FTC Approves Final Order Settling Charges That Actavis, Inc.'s Acquisition of Warner Chilcott PLC Would Be Anticompetitive in Four Current and Future Drug Markets*, FED. TRADE COMMISSION (Dec. 11, 2013), <https://www.ftc.gov/news-events/press-releases/2013/12/ftc-approves-final-order-settling-charges-actavis-incs> [https://perma.cc/SMJ4-3BLZ].

263. See Mitchell J. Katz, *FTC Approves Nielson Holdings N.V. and Nielson Audio, Inc.'s Application to Sell Its LinkMeter Technology and Related Assets to ComScore, Inc.*, FED. TRADE COMMISSION (Apr. 2, 2014), <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-approves-nielsen-holdings-nv-nielsen-audio-incs-application> [https://perma.cc/9PDL-NAGA]. But see *FTC Closes Its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc.*, FED. TRADE COMMISSION (Jan. 13, 2004), <https://www.ftc.gov/news-events/press-releases/2004/01/ftc-closes-its-investigation-genzyme-corporations-2001> [https://perma.cc/3REE-DAAY] (closing the investigation because there was insufficient evidence to show that there would be harm to the innovation of therapies of Pompe disease).

264. See Katz, *supra* note 263. But see Nielsen Holdings N.V., No. 131-0058 (F.T.C. Sept. 20, 2013) (Wright, Comm'r, dissenting), <https://www.ftc.gov/system/files/documents/cases/140228nielsenholdingwrightstatement.pdf> [https://perma.cc/37VB-8EQ3] (arguing that the evidence was too speculative to reasonably identify the likely future market, its contours, and the likely relevant customers and competitors).

265. *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

evidence. The Hipster Antitrust movement is decidedly anti-economics and intends to unwind the benefits gained by linking antitrust outcomes to an evidence-based approach to antitrust grounded in modern economics. The consumer welfare standard remains the superior model for antitrust analysis, in part, because its reliance on modern economics has allowed courts and enforcers to evaluate conduct through a robust set of factors beyond mere short-term price while reducing judicial errors and maximized the probability of outcomes that make consumers better off.

*C. Creating an Objective Framework That Limits Protectionism
Abroad*

Identifying an objective, economics-based standard for antitrust analysis also generates benefits abroad. Over the last several decades the number competition regimes worldwide have grown considerably. Today there are over 130 jurisdictions with active competition laws.²⁶⁶ Some of these jurisdictions are mature and have had several decades of competition enforcement experience. These jurisdictions may have well-developed and sophisticated institutional structures and enforcement guidelines. Other jurisdictions are relatively young and may only be in the early stages of creating their enforcement agencies and competition enforcement standards.

There is significant pressure in jurisdictions worldwide, especially in emerging competition regimes, to use antitrust enforcement to further broader non-economic objectives, including wealth distribution, vague notions of fairness, and to protect domestic industries against foreign competitors. The use of multi-dimensional standards in competition analysis create the opportunity for foreign regimes to pursue enforcement policies that ultimately harm competition and promote protections agendas, including potentially against U.S. companies. Indeed, both in Europe and Asia, numerous major U.S. companies are under investigation (and in some cases have received significant fines) for intellectual property rights violations and for abuse of dominance in high tech industries based on dubious theories of harm that appear more focused on protecting local competitors and targeting successful enterprise than protecting competition.²⁶⁷

266. ELEANOR M. FOX & DANIEL A. CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW 1 (2d ed. 2017).

267. See Guy Chazan, *German Antitrust Watchdog Warns Facebook over Data Collection*, FIN. TIMES (Dec. 19, 2017), <https://www.ft.com/content/35e4dbfc-e4ad-11e7-97e2-916d4fbac0da>; Don Clark, *Qualcomm To Pay \$975 Million Antitrust Fine to China*, WALL

However, the consumer welfare standard imposes significant limits on competition agencies that may seek to pursue enforcement on non-economic grounds. In order to credibly argue that foreign jurisdictions should avoid employing non-economic standards because doing so would undermine local competition laws and ultimately harm competition by turning the focus away from consumer welfare, it is important that the U.S. courts and enforcement agencies reaffirm their commitment to the consumer welfare standard as the lodestar of the antitrust laws and hold out the American experience prior to the modern antitrust revolution as a lesson in why employing standards that elevate the well-being of rivals or vague notions of economic or political power that are not tied to theory or evidence is dangerous policy.

IV. DANGERS OF ABANDONING THE CONSUMER WELFARE STANDARD AND EMBRACING THE HIPSTER ANTITRUST MOVEMENT

Opponents of the modern approach to antitrust law and policy have called for nothing less than the complete dismantling of the consumer welfare standard and the consensus that has been built over the last nearly fifty years through vigorous debate among antitrust practitioners, enforcers, and academics from across the political spectrum about how best to promote competition. It is no exaggeration to say that what these critics desire is an anti-economics revolution that untethers the antitrust laws from a coherent and consistent framework and replaces consumer welfare with

STREET J. (Feb. 10, 2015, 4:37 AM), <https://www.wsj.com/articles/qualcomm-settles-china-probe-1423518143> [<https://perma.cc/V4BP-ZPZT>]; James Kanter & Amie Tsang, *Intel's \$1.3 Billion Fine in Europe Requires Review, Court Says*, N.Y. TIMES (Sept. 6, 2017) <https://www.nytimes.com/2017/09/06/business/intel-eu-antitrust-fine.html> [<https://perma.cc/XCL7-C6RF>]; Sam Schechner & Natalia Drozdiak, *Google Appeals Record \$2.9 Billion EU Antitrust Fine*, WALL STREET J. (Sept. 11, 2017, 12:12 PM), <https://www.wsj.com/articles/google-appeals-record-eu-antitrust-fine-1505137493> [<https://perma.cc/U8EL-NHYF>]. And phenomena of this type are observed by both sides of the political spectrum. See Interview by Kara Swisher with President Barack Obama, in Stanford, Cal. (Feb. 15, 2015), <https://www.recode.net/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher> [<https://perma.cc/V9JD-JCVE>] (in discussing data privacy in the United States as compared to Europe, particularly with regard to the EU's investigations into Google and Facebook, President Obama stated “[i]n defense of Google and Facebook, sometimes the European response here is more commercially driven than anything else . . . sometimes their vendors—their service providers who, you know, can’t compete with ours—are essentially trying to set up some roadblocks for our companies to operate effectively there”).

vague social and political standards that ultimately would once again plunge antitrust into crisis.²⁶⁸

In the current debate about the appropriate framework for antitrust analysis, the most often cited replacement for the consumer welfare model is either the “public interest” or “citizen interest” standard.²⁶⁹ The “public” and “citizen” interest standards would purportedly capture a much broader range of potential effects emanating from a challenged transaction or business practice, including: the availability of services, the openness of markets, the stability of global supply chains and financial systems, and the ability of rivals to compete.²⁷⁰ Of course, there is reason to believe that any new antitrust standard might also be broad enough to capture other non-competition factors touted by proponents of consumer welfare reform, such as income inequality,²⁷¹ undue political influence, and perceived conflicts of interest between firms in a vertical relationship.

Abandoning the consumer welfare standard and embracing the “public” or “citizen” interest standard (or a similar approach) would have significant adverse costs on competition policy. It would again force antitrust to serve multiple masters, many of which have inconsistent interests. The inevitable confusion and lack of unified approach also would create uncertainty in the business community that ultimately would have a chilling effect on procompetitive conduct and encourage new efforts by firms to influence antitrust outcomes through political pressure and agency rent-seeking. This is not mere speculation. Indeed, the history of the Federal Communication Commission (FCC), which employs a similar public interest standard, serves as a prime example of the deleterious effects of vague enforcement standards that are not rooted in economic evidence.²⁷²

268. See, e.g., Bork & Bowman, *supra* note 36, at 366.

269. See Rahman & Khan, *supra* note 253, at 20–21; *Hearing, supra* note 6, <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf> [<https://perma.cc/8B88-TL7Z>] (statement of Barry C. Lynn, Executive Director, Open Markets Institute); Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America’s Open Markets Program Event (June 29, 2016). There have been numerous other alternatives proposed to replace the consumer welfare standard, including the “consumer choice” standard. See Averitt & Lande, *supra* note 13, at 177; see also Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 624 (2012).

270. Rahman & Khan, *supra* note 253, at 20–21.

271. See Baker & Salop, *supra* note 147, at 24 (“[A]ntitrust law and regulatory agencies could address inequality more broadly by treating the reduction of inequality as an explicit antitrust goal. . . . Conduct might be considered anti-competitive if it harms middle- and lower-income consumers.”).

272. Chairman Ajit Pai has taken important steps to try to tether the FCC’s public interest standard to economics in an explicit effort to align the agency’s enforcement framework more towards a cost-benefit analysis resembling the approach used in antitrust. Most significantly, on

A. Replacing Consumer Welfare with an Incoherent and Inconsistent Approach

Replacing the well-established consumer welfare standard would necessarily require courts to trade off some amount of consumer welfare for some other set of values, thereby throwing open the door to uncertainty and to exploitative behavior. As has been discussed above, decades of debate and case law has worked to refine the precise contours of the consumer welfare standard and to bring consensus about the types of evidence that are indicative of harm to competition and consumers.²⁷³ The consumer welfare standard employs a variety of economic tools to evaluate the effect transactions and business practices may have on consumers in the form of increased prices, reduced output, reduced innovation. By using current economic theory and empirical evidence as the starting point for creating liability rules and subsequently conducting an evidence-based inquiry into the welfare effects of a particular practice, the consumer welfare model offers a tractable method for weighing procompetitive and anticompetitive effects.

If consumer welfare were to be replaced by some other set of values, the result explicitly would be for courts and enforcers to elevate other factors above consumer welfare and to reach different conclusions about liability. Under a “public interest” or “citizen interest” approach, a transaction that would reduce prices to consumer, increase output, or spur innovation may be prohibited under the antitrust laws for failing to satisfy any number of other vague factors, including failing to leave some arbitrary number of competing firms in the market despite the clear presence of competition or create a more efficient albeit consolidated supply chain. Even more dramatically, a new standard also may result in a transaction that increases prices, reduces output, or stifles innovation to not necessarily run afoul of the antitrust laws if a court concludes that such consumer harm can be tolerated to satisfy other aspects of the multidimensional standard, such as income equality. In light of these very real concerns, a subjective, multi-prong antitrust standard untethered from economics offers nothing beyond speculative benefits. Accordingly, it would be imprudent to abandon the consumer welfare standard.

January 30, 2018, the FCC created a new Office of Economics and Analysis to achieve a more systematic and regular vetting of proposed policies and rules. *See, e.g.*, Establishment of the Office of Econ. & Analytics, 33 FCC Red. 1539 (2018).

273. *See supra* Section I.C.

The same is true of proposals by some Hipster Antitrust advocates who seek not to implement a new public or citizen interest standard, but rather wish to see the Antitrust Agencies and courts return to the DOJ's 1968 Horizontal Merger Guidelines and a focus on market structure and concentration. These critics of the consumer welfare standard argue that modern antitrust has become far too complicated and, as a result, defendants all too frequently are capable of avoiding liability. To increase the probability of success under the antitrust law, they argue for a return to the days where an eight percent combined market share was sufficient grounds on which to block a transaction. Although this new structuralist approach has the benefit of clarity that the multi-dimensional public and citizen welfare tests lack, it is no better a replacement for the consumer welfare standard because it sacrifices accuracy for administrative simplicity. Although the economic foundation of the structuralist approach of the pre-modern era were robust, it has since been debunked and today no longer is treated credibly by industrial organization economics. Therefore, although replacing the consumer welfare standard with the 1968 structuralist approach may yield faster answers that are more frequently favorable to plaintiffs, the probability that those antitrust outcomes are in line with the actual competitive realities of whatever market is being examined is low.

B. Encouraging Corporate Welfare, Rent Seeking, and Political Influence

Replacing the well-defined consumer welfare model with a vague, new standard that has no unifying objective based in objective economic evidence would dramatically increase the ability and likelihood of interested industry participants to engage in rent seeking when appearing before the federal antitrust authorities.²⁷⁴ Today, the well-established definitions and boundaries of the consumer welfare standard allow courts to hold enforcers (and private parties) accountable and prevent misuse of the antitrust laws and political influence in antitrust enforcement decisions. Unlike sister agencies prone to capture, the FTC and DOJ are relatively well insulated from such influence by the need to apply objective economic principles to a clearly articulate consumer welfare standard.

A new "public interest" or "citizen interest" standard would take years to deploy and even longer before meaningful guidance could be issued similar to that which the consumer welfare standard offers today. In the meantime,

274. See Dorsey, Rybnicek & Wright, *supra* note 238, at 22.

firms could use the new standard as leverage over the Antitrust Agencies—something that is not possible today because the consumer welfare standard offers a well-defined framework. By substituting in a vague new standard, Hipster Antitrust proponents ironically would grant large, powerful corporations with the ability to exert undue influence over the Antitrust Agencies’ decision-making process. Moreover, once allowed to influence agency enforcement practices during the initial period when no framework exists, it will be difficult to establish guidelines that do not leave room for such manipulation to continue.

Calls to abandon the consumer welfare framework thus would exacerbate concerns about corporate influence by providing firms with a new ill-defined standard to manipulate. As a result, contrary to the purported objectives of consumer welfare critics, abandoning the consumer welfare model would revert the antitrust laws to a rent-seeking regime that increases—rather than reduces—corporate welfare.

C. *The Failed Experience with the Public Interest Standard at the FCC*

Lending further credibility to concerns that abandoning the consumer welfare model in favor of a vague new standard is the FCC’s dismal history attempting to employ the public interest approach. In stark contrast to formal guidelines issued by the DOJ and FTC explaining that, in determining whether a transaction violates the antitrust laws, the agencies will examine whether a merger will “raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction,” or diminish innovation²⁷⁵—all metrics used to measure whether a merger increases or decreases consumer welfare—the FCC has unbounded authority to review transactions within its purview based simply on whether they serve “the public interest, convenience, and necessity.”²⁷⁶ In the absence of a clearly articulated framework that outlines the contours of the public interest standard, the FCC is thus able to apply the public interest broadly to evaluate multidimensional set of factors in order to reach almost any result desired in a particular case.²⁷⁷ In doing so, the public

275. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 73, at 4 (2010).

276. 47 U.S.C. §§ 214(a), 310(d) (2018); *see also* Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 ADMIN. L. REV. 895, 898 (2008).

277. *See* Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), <https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation> [<https://perma.cc/CA27-5LTD>]; Jon Sallet, *FCC Transactional Review: Competition*

interest standard leaves firms contemplating a merger unable to predict whether a transaction will be challenged or approved, and therefore necessarily chills some deals.

The opaqueness of the public interest standard is not the only downside to the FCC's merger review framework. By giving the FCC unbound flexibility to identify potential problems with a transaction, the public interest standard allows the FCC to use its merger review power to impose "one-off company-specific restrictions that the FCC could not impose through ordinary regulatory processes."²⁷⁸ For example, when the FCC approved AT&T's acquisition of MediaOne in 2000, the agency declined to condition the merger on an agreement to provide access to proprietary content, instead claiming that an aggrieved party should seek relief "through the generally applicable program access rules."²⁷⁹ But, four years later when reviewing NewsCorp's acquisition of DirecTV, the FCC required the merged firm to comply with conditions that were more stringent than were required by the program access rules.²⁸⁰ These restrictions had no apparent connection to the transaction or enhancing consumer welfare, and instead

and the Public Interest, FED. COMM. COMMISSION: FCC BLOG, (Aug. 12, 2014, 12:39 PM), <https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest> [<https://perma.cc/ZX5F-6FKN>]. Sallet notes:

the "public interest" standard is not limited to purely economic outcomes. It necessarily encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.

Id. (footnotes omitted).

278. Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 REV. INDUS. ORG. 295, 310 (2014).

279. *Id.* at 312; see also Brent Skorup & Christopher Koopman, *How FCC Transaction Reviews Threaten Rule of Law and the First Amendment* 15 (Mercatus Ctr. at George Mason Univ., Working Paper, 2016), <https://www.mercatus.org/system/files/Skorup-FCC-Transaction-Reviews-v1.pdf> [<https://perma.cc/FC5W-GWVC>]. The FCC was also able to cap a cable company's market share at thirty percent by making that a condition of this merger. This regulation was later struck down. *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1128 (D.C. Cir. 2001).

280. See Yoo, *supra* note 278, at 312.

amounted to a cheap consent easily obtainable by the FCC as a result of the legitimate threat of block the transaction.²⁸¹

More significantly, the public interest standard's lack of a consumer welfare focus, and a concomitant requirement to conduct a competitive effects analysis, also can result in the FCC blessing anticompetitive mergers because on the surface it appears to promote a vague notion of public interest. In the Sirius-XM merger, the FCC allowed a two-to-one merger to monopoly between satellite radio companies because the FCC determined that monopoly ownership of satellite radio would be in the public's interest.²⁸² The FCC brokered an agreement that required Sirius-XM not to increase the price on the basic subscription package for three years.²⁸³ However, Sirius-XM responded a year later by raising price twenty-eight percent on customers with multiple accounts, and adding a new three-dollar per-month charge for the online version of satellite radio, which was formerly free.²⁸⁴ It is unclear what level of effects analysis the FCC conducted to conclude that a monopoly satellite radio company would sufficiently compete with traditional radio such that consumers would not be harmed, but absence of rigorous analytical framework grounded in modern economics appears to have made consumers worse off.²⁸⁵

The FCC's experience with a broad public interest standard that allows for a multi-prong analysis and assessment of a variety of economic and non-economic factors historically has significantly reduced the agency's ability to effectively pursue its mission. It would be imprudent at best and reckless at worst to believe that a shift to a similarly undisciplined "public" or "citizen" interest standard in antitrust jurisprudence would result in anything other than similarly incoherent results that leave firms unable to plan their commercial strategies for fear that the FTC or DOJ could raise any number of objections to a transaction that are unrelated to whether the deal harms competition.

281. *Id.*

282. Order Approving Siruis-XM Merger, 73 Fed. Reg. 52,047 (FCC Aug. 5, 2008).

283. Franklin Paul, *Sirius XM To Raise Some Prices as Debt Looms*, REUTERS (Jan. 21, 2009, 1:13 PM), <http://www.reuters.com/article/technologyNews/idUSTRE50K63V20090121> [<https://perma.cc/AWX6-FW7A>].

284. *Id.*

285. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 73, at 4.

V. CONCLUSION

Over the last fifty years, antitrust has developed into a coherent, principled, and workable body of law that contributes positively to American competitiveness and societal well-being. This has not always been the case. There was a period during which antitrust did more harm than good. Prior to the modern era, the antitrust laws employed confused doctrines that pursued populist notions and often led to contradictory results that advanced social and political goals at the expense of American consumers. Through discussion and debate among jurists, scholars, economists, and government enforcers from across the political spectrum, antitrust law adopted a tractable standard that focused on consumer welfare and that tethered antitrust analysis to economic learning and evidence. That paradigm is now under assault by fresh calls for the return of populism in antitrust enforcement. The rise of the Hipster Antitrust movement advocates an anti-economic approach to antitrust that explicitly rejects the progress made through developments in modern economics in order to advance a litany of grievances against the perceived consolidation of economic and political power to the detriment of competition. Hipster Antitrust proponents threaten to send antitrust enforcement careening backwards in time toward a regime that harmed consumers and propped up inefficient corporations. We believe that the foundations of the evidence-based approach to antitrust are strong, and that through superior performance, the consumer welfare standard will weather this test and retain its rightful place as the lodestar of antitrust.