Florida Law Review

Volume 77 | Issue 2 Article 2

May 2025

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Abstract

During the Biden Administration a form of populism staked a claim in American antitrust policy. While it never had much impact on Congress or the federal judiciary, it had a powerful presence in the antitrust enforcement agencies. This populist antimonopoly movement provided few new ideas, however. Rather, it recycled policies from a half-century or more ago. These include moving merger policy back to the 1960s, resurrecting the often-rejected idea that antitrust should be concerned about "bigness" rather than high prices, reviving the Robinson-Patman Act of the 1930s–1970s, reinstating aggressive per se rules against vertical restraints that were applied in the 1960s and 1970s, calling for breakups in concentrated industries that harken back to the "Concentrated Industries" proposals of the late 1960s, and even returning antitrust policy to some imagined earlier state that was pursued without economics.

Antitrust policy needs a new agenda. That does not mean rejecting every form of populism. On the contrary, it may mean little more than simply listening to what people want. Overwhelmingly their concerns relate to higher prices and the costs of living, housing, medical care, and life's other necessities. These are the same concerns that have guided antitrust policy since the 1890s. By and large, the public is not motivated by hostility toward big business or big tech, except to the extent they associate them with higher prices. To the extent that is true, populism is in alignment with what good antitrust policy has been doing all along.

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INTRODUCTION

During the Biden Administration, a form of populism staked a claim in American antitrust policy. While it never had much impact on Congress or the federal judiciary, it had a powerful presence in the antitrust enforcement agencies. This populist antimonopoly movement provided few new ideas, however. Rather, it recycled policies from a half-century or more ago. These included moving merger policy back to the 1960s; resurrecting the often-rejected idea that antitrust should be concerned about "bigness" rather than high prices; reviving the Robinson-Patman Act of the 1930s–1970s; renewing hostility toward vertical integration by reinstating aggressive per se rules against vertical restraints that were applied in the 1960s and 1970s; calling for breakups in concentrated industries that harken back to the "Concentrated Industries Act" proposals of the late 1960s;[1] and even returning antitrust policy to some imagined earlier state that was pursued without economics.[2] Most of these practices led to higher costs and prices, or at least did little to combat them.

Although these particular policies were counterproductive, that does not mean that antitrust should abandon every form

1. Lucile S. Keyes, *The Proposed Concentrated Industries Act: A Critique*, 15 ANTITRUST BULL. 469, 470–71 (1970). For a good historical discussion, see generally William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989).

2. *E.g.*, Daniel Hanley, *De-Economizing Antitrust Law Starts with Market Definition*, POL'Y COMMONS (Apr. 2023), https://policycommons.net/artifacts/3811947/sling/4617867/ [https://perma.cc/6FLB-BH58].

of populism. On the contrary, a meaningful populist antitrust policy may require that enforcers do only two things: first, enforcers must determine where true public interests lie and, second, they must interpret the antitrust statutes more carefully.

The evils that the antitrust statutes target align surprisingly well with the public's concerns about higher prices and the costs of living, housing, medical care, and life's other necessities. By and large, the population is not motivated by hostility toward big business or Big Tech, except to the extent that these are associated with higher prices. To this extent, populism is in alignment with what good antitrust policy should be doing—namely, pursuing competitive levels of output and price and policing any practices that harm innovation.

I. ANTITRUST ENFORCEMENT METRICS AND TRIAGE

Antitrust enforcement policy requires effective measurement tools. If its principal concerns are to offer protection from anticompetitive price increases, output reductions, or restraints on innovation, metrics are important in two different senses.

The first sense is that antitrust rules must be metered so as to yield low prices and high output. One of the biggest blind spots of the Neo-Brandeis movement was its assumption that more enforcement is always better. That might be close to true for a practice such as naked price fixing, which is virtually always harmful. More generally, however, the payoff to antitrust enforcement lies on an inverted "U." Up to a point, increasing enforcement delivers on the populist promise by reducing prices and increasing output. It can become excessive, however. The enforcement payoff line begins sloping downward. For example, merger policy is justifiable when it prevents mergers that threaten lower output, higher prices, or limitations on innovation. But excessive merger decisions like *Brown Shoe Co. v. United States*[3] had the opposite result.[4] That decision harmed consumers by insulating higher-priced or lower-quality sellers from price competition. The same thing is true of the Robinson-Patman Act,[5] which encourages higher

3. 370 U.S. 294 (1962).
4. *See id.* at 323.
5. 15 U.S.C. § 13.

prices and collusion in the name of antitrust,[6] and severe outlier cases such as *United States v. Topco Associates, Inc.*,[7] which condemned an output-increasing joint venture that enabled an association of small chain grocers with no market power to compete with larger chains. [8]

Merger policy, as discussed below, illustrates the difficulties that antitrust enforcers face in getting the metrics right. While antitrust policy condemns mergers that threaten higher prices or lower market output, predicting these effects is difficult.[9] One important broad study finds that even in concentrated markets, where most mergers are presumptively challengeable, roughly 25% lead to higher prices, another 25% lead to lower prices, and the middle half show changes that are too small to be significant.[10] This means that as much as 75% of these mergers do not produce provable competitive harm. The approach that government agencies use to evaluate mergers mainly assesses the level of market concentration and the amount by which the merger increases concentration.[11] Other studies confirm the general viability of this approach but note that the variation in price effects is very large.[12] In the words of one group of economists, "agencies have at best a noisy estimate of the impact of a merger at the time of making a decision."[13] The best approach in such situations is to keep improving measurement metrics by testing and retesting them for accuracy. While that does make merger analysis difficult, it is the best way to make antitrust policy in a difficult area. What would be wrong would be to go to either extreme: simply assuming that nearly all mergers are harmful or that nearly all are beneficial.

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6. *See* Herbert Hovenkamp, *Can the Robinson-Patman Act Be Salvaged?*, PROMARKET (Oct. 13, 2022), https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged/ [https://perma.cc/79QN-5ZBM].

7. 405 U.S. 596 (1972).

8. *Id.* at 597–600.

9. *See* Herbert Hovenkamp, *The Structure of Merger Law*, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4851593 [https://perma.cc/4R4C-ZE3E].

10. Vivek Bhattacharya, Gastón Illanes & David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from U.S. Consumer Packaged Goods* 16–19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31123, 2023), https://www.nber.org/papers/w31123/ [https://perma.cc/YAT7-SJCX]; *see* discussion *infra* notes 203–206.

11. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 12.4 (7th ed. 2024).

12. *See, e.g.*, Annika Stöhr, *Price Effects of Horizontal Mergers: A Retrospective on Retrospectives*, 20 J. COMPETITION L. & ECON. 155, 172–73 (2024).

13. Bhattacharya, Illanes & Stillerman, *supra* note 10, at 3.

The second sense in which metrics are important is that antitrust policy must continuously triage among limited resources and competing enforcement demands. Good enforcement targets are stagnant markets with slow or declining growth, lack of innovation, increasing market power, rigid prices, and little new entry. For example, while naked price fixing should be illegal in every market, it is best to focus enforcement resources on industries that are prone to collusion and characterized by a relatively small number of firms, high fixed costs, high entry barriers, and traits that make cartel cheating easy to detect and remedy.[14] That focus is most likely to yield measurable improvements in output and price.

Here, antitrust policy during the Biden Administration had a mixed record. One bright spot was its increased enforcement directed at employer-imposed restraints in labor markets, including mergers. Labor markets display a need for antitrust correction. The evidence of employer exercise of monopsony power over labor is strong.[15] The labor share of production has been falling for decades—that is, wages have not kept up with economic growth.[16] Collusion and anti-poaching agreements

14. *See, e.g.*, Robert H. Porter, *Detecting Collusion*, 26 REV. INDUS. ORG. 147, 147–64 (2005); Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 343–49 (2011); George A. Hay & Daniel Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13, 13 (1974).

15. *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 560–69 (2018); *see also* Chen Yeh, Claudia Macaluso & Brad Hershbein, *Monopsony in the U.S. Labor Market*, 112 AM. ECON. REV. 2099, 2101 (2022) (finding that most manufacturing plants operate in monopsonistic environments).

16. For various explanations and theories on the decline of labor share, see generally Drago Bergholt, Francesco Furlanetto & Nicolò Maffei-Facciol, *The Decline of the Labor Share: New Empirical Evidence*, 14 AM. ECON. J.: MACROECONOMICS 163 (2022), https://www.aeaweb.org/articles?id=10.1257/mac.20190365 [https://perma.cc/K9H9-QTJ7]; Matthias Kehrig & Nicolas Vincent, *The Micro-Level Anatomy of the Labor Share Decline*, 136 Q.J. ECON. 1031 (2021); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645 (2020); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020); Michael W. L. Elsby, Bart Hobijn & Ayşegül Şahin, *The Decline of the U.S. Labor Share*, BROOKINGS (2013), https://www.brookings.edu/wp-content/uploads/2016/07/2013b_elsby_labor_share.pdf [https://perma.cc/Q8KM-PWCX] and see also Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193 [https://perma.cc/XS2U-HCDW] (demonstrating that reduced worker power is associated with lower wages, higher profit shares, and reductions in measures of the Non-Accelerating Inflation Rate of

among employers occur frequently, and even some federal judges fail to appreciate their consequences.[17] Further, labor markets exhibit excessive use of employee mobility restraints such as non-compete agreements.[18] These are all problems for which antitrust can make a difference, and they call for increased antitrust enforcement.

Increased enforcement efforts toward Big Tech are a completely different matter. They include a major commitment of enforcement resources in pursuit of monopolization claims against Alphabet (Google), Meta (Facebook), Apple, and Amazon. eCommerce has exhibited economic growth that is much greater than the rate of the economy overall and has been one of the United States's greatest success stories.[19] The United States tech industry is the envy of the world and has expanded everywhere. While its innovation rates have slowed somewhat, Big Tech still leads the pack. The five Big Tech companies that have been frequent antitrust targets (Apple #6, Alphabet #8, Microsoft #18, Amazon #20, and Meta #95) remain near the top out of the 300 largest original patent recipients.[20] They appear to be competing rather than colluding, both among themselves and with others, and they compete aggressively when new technologies such as AI come along.

Not all government enforcement actions against Big Tech firms are bad. The claim against Google for exclusive dealing agreements in search[21] was well brought, as were the challenges to mergers between Meta and its potential

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Unemployment); David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147 (2022) (finding that employers have significant market power over labor). On relevance to antitrust policy, see Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511 (2023).

17. *See generally* United States v. DaVita, Inc., No. 21-cr-00229, 2022 WL 266759 (D. Colo. Jan. 28, 2022) (dubiously concluding that agreement between two firms not to solicit one another's employees should not be condemned under the per se rule because there is too little judicial experience with these agreements).

18. *See generally* Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53 (2021) (examining the use and implementation of non-compete agreements and the employee outcomes associated with them).

19. *See* HERBERT HOVENKAMP, TECH MONOPOLY xvii (2024).

20. *2024 Patent 300 List*, HARRITY, https://harrityllp.com/patent300/ [https://perma.cc/F9XY-4DAQ].

21. United States v. Google, LLC, No. 20-cv-03010, 2024 WL 3647498, at *3–4 (D.D.C. Aug. 5, 2024).

competitors Instagram and WhatsApp.[22] But these were all well within the range of cases that the government routinely brings. More problematic are antitrust challenges to Apple's product designs[23] as well as those to certain Amazon[24] practices that are unlawful only in the presence of market power that Amazon very likely does not have.[25]

The important takeaway is that antitrust violations can occur in any market, but some markets are more prone to violations than others and require closer attention. Further, reasonably provable price, output, or innovation effects provide the best metric.

To pursue antitrust practices effectively, antitrust policymakers must know three things: how a particular practice is causing harm, who the victims are, and how the harm can be remedied. Well-brought cases should have a clear theory of harm and, thus, a defensible idea about the remedy. For labor, we can readily see the harms: wages and salaries that are too low and impaired worker mobility. As a result, we can also formulate remedies that produce greater worker participation in the returns to production. Injunctions against anti-poaching agreements or harmful non-competes will translate into higher wages, improved working conditions, and greater employee mobility. That same thing is true of enjoining mergers that threaten to increase employer power over workers.

By contrast, the possibility of beneficial remedies in Big Tech is less clear, particularly for structural remedies. Not only is it more difficult to create them but it is even harder to identify the phenomena in need of correction. Who exactly is Big Tech harming? Competing businesses? And how? Remedies might benefit small business, but very likely only at consumers'

22. Jody Godoy, *Meta Faces April Trial in FTC Case Seeking to Unwind Instagram Merger*, REUTERS (Nov. 25, 2024, 4:36 PM), https://www.reuters.com/technology/meta-faces-april-trial-ftc-case-seeking-unwind-instagram-merger-2024-11-25/ [https://perma.cc/6XDP-NJLB].

23. Press Release, U.S. Dep't of Just., Justice Department Sues Apple for Monopolizing Smartphone Markets (Mar. 21, 2024), https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets [https://perma.cc/8C93-3FV9].

24. Press Release, Fed. Trade Comm'n, FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power [https://perma.cc/948R-5U24].

25. *See generally* Herbert Hovenkamp, *Antitrust and eMarkets*, 36 STAN. L. & POL'Y REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4962651 [https://perma.cc/5PFE-4VK9] (analyzing competition in digital markets).

expense. We might want to use a remedy to stimulate more innovation, but coming up with a particular remedy that does that is highly uncertain. High prices are much less frequently the problem.

This suggests a couple of things. First, appropriately tailored injunctions limiting specific competitive harms can be quite defensible. For example, an injunction against Google's large payments to make Google Search the default on various devices could benefit consumers.[26] It would also free up firms to make different investments that could even improve the quality of search. Second, however, structural remedies that redesign firms in markets that are already performing well are hazardous at best and could be a real disaster, particularly when they break apart complementary components in a firm's output.

II. ANTITRUST POPULISM AND PROGRESSIVISM IN HISTORY

Unease about business today invites comparisons with the Gilded Age and the early twentieth century. During that period, populism and progressivism were two ways that Americans responded to unsettling changes in society and the economy.[27] The movement toward progressivism reflected the shift from a rural to a more urban population; the swift rise of new technologies and the corresponding growth of large firms, changing employment relationships and wealth distribution; and expanding demands for technical and scientific training.

Although their political and intellectual ideas often overlapped, populists and progressives were also notable for their differences. Populism became a prominent force in Gilded Age political movements, confronting railroads and other institutions of big business and finance.[28] Its roots were agrarian, heavily driven by a romanticized vision of the past.[29] Progressivism was demographically more urban.[30] Populism could be strongly anti-intellectual, and it exhibited a tendency

26. *See* discussion *infra* notes 222–226 and accompanying text.

27. On populism, see FEDERICO FINCHELSTEIN, FROM FASCISM TO POPULISM IN HISTORY 107 (2017) (tracing the movement's roots). On progressivism, see generally RONALD J. PESTRITTO, AMERICA TRANSFORMED: THE RISE AND LEGACY OF AMERICAN PROGRESSIVISM (2021) (doing the same for the progressive movement).

28. *See* LAWRENCE GOODWYN, THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA 101 (1978) (juxtaposing the agrarian roots of populism against the urban roots of progressivism).

29. *See id.* at 99.

30. *See id.* at 100.

toward demagoguery. Progressivism was more prominent among better educated Americans and claimed a strong presence in American universities. It was more forward looking than enamored with the past. And its focusing on the future, rather than attempting to recover the past, was its most durable characteristic.

A good illustration of the divide between populists and progressives in the early twentieth century was the Darwinian theory of evolution. In the often-storied "monkey trial" of 1925, high school teacher John T. Scopes was indicted for teaching evolution in violation of the Butler Act, a Tennessee statute that forbade it.[31] Populist politician William Jennings Bryan joined the prosecution and argued what he believed to be the biblical view that people were created by God as a species, identical to the human beings of the present day.[32] The testimony involved many exchanges over the meaning and truth of the King James Bible and the question of whether evolution was consistent with it.[33] Against Bryan was defense attorney and progressive Clarence Darrow, defending evolution.[34] Darrow lost the case[35] but ultimately won the war. The anti-evolution movement in education eventually sputtered.[36] In 1968, the Supreme Court held that state statutes prohibiting the teaching of evolution in public schools violated the First Amendment.[37]

Two powerful themes in populist thought were reaction bias and anti-expert bias. For the numerous Christian populists of the 1920s, this presented as a strong form of Biblical literalism, or the idea that an ancient text should take precedence over anything that science might produce.

In sharp contrast to the populists, the progressives gave us three forward-looking scientific methodologies that have proven to be durable to this day.[38] Two were tools that redefined

31. Scopes v. State, 289 S.W. 363, 363 (Tenn. 1927).

32. *See* EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION 116, 171–72 (1997).

33. *See id.* at 171–72, 218.

34. *Id.* at 218–19.

35. *Scopes*, 289 S.W. at 367.

36. *See generally* Ferenc M. Szasz, *The Scopes Trial in Perspective*, 30 TENN. HIST. Q. 288 (1971) (discussing the fallout of the *Scopes* trial and the remains of the anti-evolution crusade).

37. Epperson v. Arkansas, 393 U.S. 97, 107–09 (1968).

38. *See* Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947, 994–98 (cultural relativism), 998–1003 (behaviorism), 974–77 (marginalism) (2017).

the social sciences. The first tool was "cultural relativism," or rejection of the anthropological idea that humanity existed in a hierarchy with Caucasians at the top.[39] Cultural relativism progressed slowly and with difficulty through American social science, resisting strongly racist elements in both populist and progressive thought.[40] The second tool was behaviorism, or the idea that human response is driven by the environment and must be understood by reference to observable and testable behavior, not by unverifiable assumptions about human nature.[41]

The third tool, and most relevant to antitrust policy, was marginalism in economics. Progressives embraced it with enthusiasm, whether or not they can legitimately claim to have invented it.[42] Marginalism's most visible American promoter in the early twentieth century was progressive economist and antirust writer John Bates Clark of Columbia University.[43]

Marginalism transformed economics from a backward-looking to a forward-looking discipline. Value inhered not in averages taken from the past, but rather in human anticipation for the future. The marginalist revolution was so pervasive that even today the vast majority of economists, right, center, and left, adhere to some form of marginalist analysis. Those who reject marginalism have been relegated to isolated niches.

The differences between classical and marginalist economics were prominently displayed in economic disputes about labor and wages. Traditional political economists adhered to the backward-looking "wage-fund" theory, which stated that wages were dictated by a firm's previously earned surplus, which had to be divided among workers.[44] Progressives, by contrast, believed that the rate of wages should be based on a worker's

39. FRANZ BOAS, THE MIND OF PRIMITIVE MAN 4–5 (1911); *see* Georgia F. Crowe, *An Interpretation of Franz Boas' Contributions to Anthropology and Scientific Antiracism*, *in* PERSON-CENTERED STUDIES IN PSYCHOLOGY OF SCIENCE: EXAMINING THE ACTIVE PERSON 113–15 (Lisa M. Osbeck & Stephen L. Antczak, eds., 2023).

40. Hovenkamp, *supra* note 38, at 994–98.

41. JOHN B. WATSON, BEHAVIORISM (1924); JOHN B. WATSON, PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST 1, 8–9 (1919).

42. HERBERT HOVENKAMP, *Social Value, Taxation, and Public Finance*, *in* THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970, at 92–100 (2015).

43. *John Bates Clark, 1847–1938*, LIB. OF ECON. & LIBERTY, https://www.econlib.org/library/enc/bios/clark.html [https://perma.cc/9SCZ-BKK2].

44. *See* HOVENKAMP, *supra* note 42, at 273–74; *see also* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 431–35 (1988).

"marginal contribution," or the anticipated amount that a worker contributed to the value of the enterprise.[45] The classical theory of wages tended to drive rates toward subsistence, while the marginalist theory focused on anticipated value, which could be much greater. Marginalism led progressives such as Clark to support labor unions and collective bargaining, even though they understood them to be a form of collusion.[46]

Marginalism was the most important contribution to economic thought since Adam Smith, and the budding antitrust movement was quick to take advantage. Clark had begun writing on the "trust problem" before the turn of the century.[47] He was one of the more prominent economist contributors to the framing of the Clayton Antitrust Act,[48] a statute that the populists could never have invented.

The Clayton Act, with its "where the effect may be" or "tend to create a monopoly" language, invited probability and prediction into the assessment of the conduct that it prohibited.[49] It also departed from common law approaches by assessing harm in terms of effects rather than intentions.[50] The results were profound. The statute increased the demand for economic expertise in antitrust enforcement, where it remains to this day. The ability to incorporate economic modeling tools to make predictions about competitive effects represented a significant movement away from the Sherman Act's view of trusts and monopoly. It also integrated antitrust enforcement more firmly into national economic policy.

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45. *E.g.*, John Bates Clark, *Wages and Interest as Determined by Marginal Productivity*, 10 J. POL. ECON 105, 109 (1901); *see also* Fred W. Taussig, *Outlines of a Theory of Wages*, 11 AMER. ECON. ASSOC. Q. 136, 142 (1910); Thomas N. Carver, *The Marginal Theory of Distribution*, 13 J. POL. ECON. 257, 263 (1905).

46. John Bates Clark, *The Theory of Collective Bargaining*, 10 AM. ECON. ASSOC. Q. 24, 25 (1909).

47. *E.g.*, John Bates Clark, *The "Trust": A New Agent for Doing an Old Work, or Freedom Doing the Work of Monopoly*, 16 NEW ENGLANDER & YALE REV. 223, 223 (1890); John Bates Clark, *Disarming the Trusts*, ATL. MONTHLY, Jan. 1900, at 47, 47–48 (1900); JOHN BATES CLARK, THE CONTROL OF TRUSTS: AN ARGUMENT IN FAVOR OF CURBING THE POWER OF MONOPOLY BY A NATURAL METHOD (1901).

48. 15 U.S.C. §§ 12–27.

49. Luca Fiorito, *When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation*, 25 REV. POL. ECON. 139, 159–60 (2013); Samuel Evan Milner, *The Clayton Act Cipher: Text as an Antitrust Strategy*, 77 FLA. L. REV. 279, 300 (2025) ("[T]he full context of the Clayton Act supports the historic majority position that it . . . signals probability.").

50. Fiorito, *supra* note 49.

Applying these new methods required technical training. While populists were deeply suspicious of experts, progressives embraced them. Progressivism was popular in American universities. The rise of the social sciences as a university discipline was a progressive phenomenon.[51] So was the development of "economics," which replaced "political economy," a staunchly laissez-faire discipline taught by everyone from clergymen to philosophers in nineteenth-century schools and colleges.[52] Also important was the rise of scientific management, or the technical study of how to make business firms, and particularly their employees, able to produce greater amounts with less effort.[53] Justice Louis Brandeis was a fervent disciple and defended its status as a science.[54]

Once the dominant ideology, Progessivism, had rid itself of excessive nostalgia for the past, it was capable of real accomplishment. While the progressive legacy became more controversial in the 1950s and after, few doubt the importance or durability of its principal contributions.

In antitrust, the antimonopoly, or neo-Brandeis, movement has been variously described as "populist" and "progressive."[55] In fact, the movement is decidedly populist, reactionary, and backward-looking. This became clear when the antimonopoly-dominated antitrust enforcement agencies delivered their draft Merger Guidelines in early 2023.[56] That document ranks as one of the most backward-focused statements of antitrust policy in the history of antitrust enforcement. The source it cited most frequently (seventeen times) was the Supreme Court's 1962 *Brown Shoe Co. v. United States* merger decision, as if it were the gospel for merger law. The draft Guidelines largely ignored

51. DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 390–91 (1991); MARY O. FURNER, ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905, at 95–96 (1975).

52. Hovenkamp, *supra* note 44, at 399.

53. FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 9 (1911).

54. On Justice Brandeis and "Taylorism," see COMM'N ON INDUST. RELS., 64TH CONG., FINAL REPORT AND TESTIMONY: EFFICIENCY SYSTEMS AND LABOR 991–1011 (Apr. 28, 1916), discussed in Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. PUB. POL'Y 705, 730–33 (2023).

55. *E.g.*, A. Douglas Melamed, *Antitrust Law and its Critics*, 83 ANTITRUST L.J. 269, 270 (2020) (populist); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 745 (2018) (populist); Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1642 (2022) (progressive).

56. *See* JUST. DEP'T & FED. TRADE COMM'N, 2023 DRAFT MERGER GUIDELINES [hereinafter 2023 DRAFT MERGER GUIDELINES] https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf [https://perma.cc/Q99P-PLG7].

that the Supreme Court itself had corrected most of *Brown Shoe*'s worst features.[57] *Brown Shoe* became to antitrust policy what the evangelical Bible had been for populists of the 1920s.

The final version of the Merger Guidelines, issued later in 2023, hosed down the draft's most extreme features[58]—signaling the agencies' realization that not all winds were blowing in the same direction. *Brown Shoe* retained a prominent spot, but the revised Guidelines reintroduced more responsibility in economics; a saner approach to market definition; and greater recognition of the fact that merger law is properly focused on the exercise of market power, at least when manifested by higher prices, lower output, and restraints on innovation.[59]

III. INTELLECTUAL FOUNDATIONS

One shortcoming of the neo-Brandeis movement is its lack of an intellectual foundation. While both the Harvard and Chicago Schools of antitrust are part of our past, they contributed ideas about competition and industry that were highly innovative at the time and that have remained durable in antitrust thought.

The Harvard School provided an economic reformulation of oligopoly theory,[60] the introduction of monopolistic competition,[61] and a much more sophisticated understanding of

57. *See* Herbert Hovenkamp, *Did the Supreme Court Fix Brown Shoe?*, PROMARKET (May 12, 2023), https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe/ [https://perma.cc/TD6H-36S3].

58. JUST. DEP'T & FED. TRADE COMM'N, 2023 MERGER GUIDELINES [hereinafter 2023 MERGER GUIDELINES], https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/34WH-SUCU].

59. *See* Herbert Hovenkamp, *The 2023 Merger Guidelines: Law, Fact, and Method*, 65 REV. INDUS. ORG. 39, 44, 76 (2024).

60. *E.g.*, Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 656, 671–73 (1962) (addressing the issue of "oligopoly pricing"); *see also* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 260–65 (1959) (recommending a prohibition "against unreasonable market power"); Joe S. Bain, *Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence*, 40 AM. ECON. REV. 35, 45–46 (1950) (contending that an oligopoly is not a workable market structure). A good collection is READINGS IN INDUSTRIAL ORGANIZATION AND PUBLIC POLICY (Richard B. Heflebower & George W. Stocking, eds., 1948).

61. *See generally* EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933) (discussing how monopolistic competition differs from both pure monopoly and pure competition structures).

the barriers that limit new competition.[62] Members of the School did considerable empirical work, and their scholarship integrated the theory with case law.[63] While the theory's structuralism later appeared excessive, its way of thinking about competition remains durable to this day. For example, structural determinants of the effects of mergers have been a centerpiece of every edition of the government's Merger Guidelines, from 1968 to 2023.[64]

The Harvard School provided tools for evaluating industries dominated by large or medium-size firms and with significant amounts of product differentiation.[65] The basic tenets of structuralism remain robust in antitrust policy. Many tenets, although not all, have survived the Chicago School critique.[66]

The Chicago School pushed back on structuralism, led primarily by George Stigler's harsh attacks on oligopoly theory[67] and Stigler's and Milton Friedman's equally aggressive critiques of monopolistic competition.[68] Equally or even more significant was a substantial rewriting of the economics of vertical integration and vertical contracting inspired by Ronald Coase.[69] His work, which focused on transaction costs and complementary relationships, led to a complete reversal in several antitrust rules about vertical practices, including

62. *See generally* JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956) (illustrating common barriers to entry such as economies of scale, product differentiation, and absolute cost).

63. *See generally* Turner, *supra* note 60 (noting cases involving "conscious parallelism"); Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965) (recognizing the lack of legal standards in the area of conglomerate mergers).

64. Carl Shapiro, *Evolution of the Merger Guidelines: Is This Fox Too Clever by Half?*, 65 REV. INDUS. ORG. 147, 154 (2024).

65. *See, e.g.*, BAIN, *supra* note 62, at 114–43, 250–62.

66. *See* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1998 (2018); Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32762, 2024), https://www.nber.org/papers/w32762 [https://perma.cc/K66M-47TU].

67. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 44 (1964) (hypothesizing that "oligopolists wish to collude to maximize joint profits").

68. George J. Stigler, *Monopolistic Competition in Retrospect*, *in* FIVE LECTURES ON ECONOMIC PROBLEMS 12, 23–24 (1949); *see also* Milton Friedman, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 15, 38–39 (1953) (providing a harsh critique of monopolistic competition).

69. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388–89 (1937). On Coase and the influence of this article, see generally Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499 (2011).

rejection of per se rules against vertical nonprice restraints[70] and both maximum and minimum resale price maintenance (RPM).[71]

The neo-Brandeis movement has nothing to compare. It did revitalize interest in worker wages, which is a good thing. Most of its other efforts, however, such as revival of the Robinson-Patman Act[72] or several long-cast-off merger doctrines,[73] offer nothing new. In fact, it is hard to come up with an idea generated by the movement that is not a relic from a half-century or more ago.

The discussion that follows provides a brief plan for channeling antitrust in realistic pro-enforcement ways that focus on problems of market power and consumer and labor harm. The plan is not "populist" in the sense that it seeks to exhume the antimonopoly movement or even the populists of the Gilded Age. But it is populist in a more important sense: it aligns well with what most Americans today see as the country's most pressing economic problems.

IV. THE CASE FOR POPULIST ANTITRUST

In one important way, popular sentiment today is quite consistent with core historical principles of antitrust. Neither the framers of the antitrust laws nor the courts that enforced them had developed ideas about economic "welfare"—a term that does not appear in any antitrust statute and that was not used in antitrust cases prior to the 1970s.[74] Consistently, however, they expressed antitrust's principal concerns as high prices and low output. Whether the legislative history of the Sherman Act was dominated by these concerns has been a

70. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977) (overruling the per se rule against vertical nonprice restraints).

71. State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (overruling the per se rule against maximum RPM); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887, 907 (2007) (overruling the per se rule against minimum RPM).

72. JAY SYKES, CONG. RSCH. SERV., LSB11257, FTC REVIVES ENFORCEMENT OF THE ROBINSON-PATMAN ACT (2025), https://crsreports.congress.gov/product/pdf/LSB/LSB11257 [https://perma.cc/9C6N-NY8U]; *see, e.g.*, *FTC Sues Southern Glazer's for Illegal Price Discrimination*, FED. TRADE COMM'N (Dec. 12, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-sues-southern-glazers-illegal-price-discrimination [https://perma.cc/EE2H-DEV9].

73. *See* Hovenkamp, *supra* note 59, at 40.

74. The Supreme Court first used the term "consumer welfare" in an antitrust case in *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)).

matter of dispute.[75] However, the courts were consistently clear.

The early decisions interpreting the Sherman Act were not writing on a clean slate. The common law closely identified contracts in restraint of trade with higher prices or lower market output.[76] In fact, the meaning of a "restraint on trade" was a reduction in the flow of commerce.[77] In 1837, more than fifty years before the Sherman Act was passed, the Supreme Judicial Court of Massachusetts stated that agreements in restraint of trade were bad because they "prevent competition and enhance prices."[78] An 1871 decision of the Pennsylvania Supreme Court condemned a cartel whose members "could limit the supply below the demand in order to enhance the price."[79] An 1881 decision by the New York Court of Appeals concluded that "[c]ombinations between producers to limit production and to enhance prices, are or may be unlawful."[80]

Early Sherman Act decisions also condemned price-fixing. In 1899, the Supreme Court concluded that a cartel's "higher price would operate as a direct restraint upon the trade."[81] In 1906, Justice Oliver Wendell Holmes, Jr., concluded that antitrust damages for unlawful price-fixing should be measured by the excessive price—"the difference between the price paid and the market or fair price."[82] To this day, that remains the way purchaser damages are assessed. The Sherman Act indictment in what became the influential *United States v. Standard Oil Co.*[83] decision of 1911 charged that the defendants "limited the production, output, and markets" for petroleum products.[84] A half-century later in *United States v. Continental Can Co.*[85] the

75. Robert H. Bork, *Legislative Intent and The Policy of The Sherman Act*, 9 J.L. & ECON. 7, 12, 26–27 (1966) (arguing that Congress's goals were economic efficiency); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93–96 (1982) (contending that Congress's goals were to arrest wealth transfers away from consumers).

76. Herbert Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1076 (2024).

77. *Id.* at 1076–77.

78. Alger v. Thacher, 36 Mass. (1 Pick.) 51, 54 (1837).

79. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 183 (1871).

80. Diamond Match Co. v. Roeber, 13 N.E. 419, 422 (N.Y. 1887).

81. Addyston Pipe & Steel Co. v. United States 175 U.S. 211, 245 (1899).

82. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 395–96 (1906).

83. 221 U.S. 1 (1911).

84. United States v. Standard Oil Co., 173 F. 177, 190 (E.D. Mo. 1909), *aff'd*, 221 U.S. 1 (1911).

85. 378 U.S. 441 (1964).

Supreme Court condemned a merger because it enabled the participants "to reap the possible benefits of their position by raising prices above the competitive level."[86] And most recently in *National Collegiate Athletic Ass'n v. Alston*,[87] the Court held that antitrust law's inquiries are aimed at assessing a restraint's "'actual effect on competition'—especially its capacity to reduce output and increase price."[88]

While the details of antitrust technique and metrics changed a great deal over this 125-year enforcement period, the Supreme Court and lower federal courts stated and restated antitrust goals hundreds of times, with only a few outliers.[89] While they have occasionally used the phrase "consumer welfare" since 1979, they have consistently interpreted antitrust law to be focused on protecting competitive output and prices. The inauguration of "consumer welfare" as an antitrust concern did nothing to change the basic antitrust goals, which are to challenge anticompetitive output reductions and price increases.[90]

U.S. public opinion polling also indicates a dominant concern with high prices and other issues related to financial well-being and relatively little concern with big business or industrial concentration for their own sake. Gallup has been polling people's principal economic concerns for two decades. The rankings change a little from time to time, but the top-listed concerns nearly always focus on high prices and the cost of living.[91] Business concentration or firm size do not even appear in the rankings.[92] In fact, an antitrust policy that promotes low

86. *Id.* at 465–66.

87. 594 U.S. 69 (2021).

88. *Id.* at 88 (quoting Ohio v. Am. Express, 585 U.S. 529, 541 (2018)).

89. *See* Herbert Hovenkamp, Antitrust's Goals in the Federal Courts 1 (May 28, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4519993 [https://perma.cc/3RDF-UN4H]; Hovenkamp, *supra* note 76, at 1076, 1085.

90. On whether adoption of a "consumer welfare" articulation of goals changed antitrust, see Herbert Hovenkamp, *Did "Consumer Welfare" Change Antitrust?*, 105 B.U. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5117989 [https://perma.cc/SBJ5-YVAF].

91. *E.g.*, Jeffrey M. Jones, *Americans Continue to Name Inflation as Top Financial Problem*, GALLUP (May 2, 2024), https://news.gallup.com/poll/644690/americans-continue-name-inflation-top-financial-problem.aspx [https://perma.cc/QXB7-VNS6] (ranking as #1, "High cost of living/Inflation"; as #2, "Cost of owning/renting a home"; as #3, "Too much debt/Not enough money to pay debts"; as #4, "Healthcare costs"; as #5, "Lack of money/Low wages"; and as #6, "Energy costs/Oil and gas prices").

92. *Id.*

prices *is* the populist position—at least if the opinions of actual people have anything to do with it. The one thing policymaking does not need is self-proclaimed populists substituting their own judgment rather than actually listening to public opinion.

To be sure, polling does not indicate that the public expresses equal concern about all three legs of the antitrust stool—low prices, high output, and unrestrained innovation. People respond to what they themselves experience in the short run, and that is usually prices. For example, people (other than economists) do not typically complain that "the output of milk is too low." Rather, they say that "the price of milk is too high." Those two sentences mean the same thing in nearly every setting, and one of the ways that antitrust policy combats high prices is by policing output restrictions. The same thing is true for restraints on innovation, which are more often seen by experts than by laypersons.

Polling also reveals some dissatisfaction with big business, but it is less consistent and people seem to have very different ideas about it. For example, in one Gallup survey respondents were asked whether they were satisfied with "the size and influence of major corporations."[93] 20% said they were "Somewhat satisfied," 30% said that they were "Somewhat dissatisfied," and 42% were "Very dissatisfied."[94] However, 18% wanted more regulation of big business, while 27% wanted less.[95] This mixture of opinions is much harder to evaluate.

Polling also reveals a concern about threats to democracy, but these threats are viewed as coming largely from political ideologues. The one business source identified as a threat to democracy is social media.[96] That puts a focus on Meta (Facebook), as well as X (Twitter), TikTok, and others. In any

93. *Big Business*, GALLUP, https://news.gallup.com/poll/5248/big-business.aspx [https://perma.cc/6H33-QS5L].

94. *Id.*

95. *Id.*

96. *See New Poll: 81% of Voters Believe Democracy is Threatened*, GEO. INST. POL. & PUB. SERV. (Mar. 21, 2024), https://politics.georgetown.edu/2024/03/21/new-poll-81-of-voters-believe-democracy-is-threatened/ [https://perma.cc/RXC9-TV7T] (ranking threats to democracy as President Donald Trump (51%), "MAGA Republicans" (49%), "major news organizations" (47%), and social media (43%)); *see also New Research Suggests That Concerns About Threats to Democracy Match the Economy and Immigration As Issues Shaping the 2024 Election*, IPSOS (Mar. 1, 2024), https://www.ipsos.com/en-us/new-research-suggests-concerns-about-threats-democracy-match-economy-and-immigration-issues-shaping [https://perma.cc/UT7L-XDX8] (revealing that forty percent of Americans view political extremism and threats to democracy as the nation's top concerns, along with the economy and immigration, in shaping the 2024 election).

event, it is difficult to see how antitrust law could offer a solution to these challenges to democracy. While it may be a popular concern, it is not one that is addressed in the text of any antitrust law. More specific forms of regulation are more promising, and the legal system has other tools for regulating the democratic process that expressly embrace those concerns.

One problem with antitrust populism during the Biden Administration is that, at least in merger policy, the agencies aligned themselves with the outliers rather than the dominant history of antitrust policy. In the process, it wandered away from the true populist concern about high prices.

For example, the 2023 Merger Guidelines repeatedly relied on the *Brown Shoe* decision, a severe outlier that contradicted more than a half-century of antitrust policy by permitting the government to sue firms whose mergers led to lower prices or better products.[97] The Guidelines compounded this error by adding other *Brown Shoe* factors, such as a "trend" toward vertical integration, that either made no sense or were simple attacks on practices that reduced costs.[98] Further, the Guidelines ignored the extent to which the Supreme Court itself had corrected *Brown Shoe*'s worst mistakes.[99]

Acceptance of the public's concerns hardly means that antitrust policy must reject economics or other technical rules that inform antitrust decisions. What the public wants informs the result but not necessarily the methodology for getting there. As in many areas of policymaking, that is a task that requires technique and experts.

V. ECONOMICS AND EXPERTISE

Populists often express resentment of elites or experts. It appears to be motivated by a belief that, for all their expressions of regard for the public interest, most are self-serving,[100] or that there are alternative, nonexpert sources of knowledge.[101] Experts are thought to remove policymaking from the people. A reflection of this in the antimonopoly literature is its belief that

97. Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962).

98. *Id.* at 332.

99. *See supra* note 57 and accompanying text.

100. *See* JEAN-MICHEL PAUL, THE ECONOMICS OF DISCONTENT: FROM FAILING ELITES TO THE RISE OF POPULISM 10 (2019).

101. Allan Hazlett, *Populism, Expertise, and Intellectual Autonomy*, *in* ENGAGING POPULISM: DEMOCRACY AND THE INTELLECTUAL VIRTUES 89 (Gregory Peterson, Michael C. Berhow & George Tsakiridis eds., 2022).

antitrust has been thrown off track by excessive reliance on economics or, for some, any reliance on economics at all.[102]

That position is inconsistent with the history of antitrust, which, from early on, has engaged economics in policymaking and litigation.[103] Economists had a significant role in fashioning both the original Clayton Act in 1914 and its 1950 amendments.[104] As noted above, even the Sherman Act, since its passage, was focused on practices that threatened to reduce output ("restrain trade") and raise prices, goals that remain equally central today.[105] A 1963 dissent, joined by *Brown Shoe*'s author Chief Justice Earl Warren, described the Sherman Act as embodying "perhaps the most basic economic policy of our society."[106]

The *Brown Shoe* era, which has become canonical for anti-monopolists, provides no support for an anti-economic vision of antitrust. Whatever one might think about *Brown Shoe*'s own economics, the Supreme Court's *United States v. Philadelphia National Bank*[107] opinion one year later cited no fewer than five economists—more than any Supreme Court antitrust decision at that time—for its best-known presumption that a merger is unlawful if it creates a firm with a market share exceeding

102. *E.g.*, Hanley, *supra* note 2; *see* Daniel A. Crane, *How Much Brandeis Do The Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531, 538 (2019).

103. *See* Federico Ciliberto, Kenneth G. Elzinga & D. Daniel Sokol, *Economic Analysis in Antitrust Litigation: Empirical Evidence from the Courts, 1890-2018*, at 2, 8 (Univ. S. Cal. Ctr. for Law & Soc. Sci. Working Paper, Paper No. 24-22, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4809691 [https://perma.cc/W8SD-X855] (tracing the use of economists back to *United States v. U.S. Steel Co.*, 251 U.S. 417 (1920)). On the influence of economists in developing antitrust doctrine in the early twentieth century, see Herbert Hovenkamp, *The Invention of Antitrust*, 96 S. CAL. L. REV. 129, 131–32 (2022).

104. *See* Fiorito, *supra* note 49, at 139–40 (describing how economists affected the Clayton Act and its amendments); Luca Fiorito & John F. Henry, *John Bates Clark on Trusts: New Light from the Columbia Archives*, 29 J. HIST. ECON. THOUGHT 229, 229 (2007) (discussing how economists participated in the debate over the passage of the Federal Trade Commission Act and the Clayton Act). A classic expression, focused on the 1950 amendments to the Clayton Act, is Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 226–28 (1960).

105. *See* Hovenkamp, *supra* note 76, at 1071–72 ("Numerous Sherman Act decisions used phrases such as 'restrict output,' 'limit output,' or 'restraining the output or quantity' of a product or service.").

106. Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 324 (1963) (Brennan, J., dissenting, joined by Warren, C.J.) (describing how the Sherman Act represented the country's hatred for monopolies).

107. 374 U.S. 321 (1963).

thirty percent, the opinion cited four economists.[108] All of them would have adopted stricter standards than the Court did.[109]

The *Philadelphia Bank* case institutionalized a way of thinking about mergers that was driven by the dominant economic concerns of its time, reflected mainly in Harvard School structuralism.[110] Justice William J. Brennan's opinion spoke of competition under antitrust laws as a part of "our fundamental national economic policy" and a necessary alternative to "cartelization or governmental regimentation of large portions of the economy."[111] While the economics of 1960s-era antitrust decisions differed in important ways from industrial economics today, to say that the 1960s era did not embrace economics is nonsense.

Four things seem to account for the anti-monopolist hostility toward economics. *First* is nostalgia for a falsely imagined past that was free of economics. Except for an occasional outlier,[112] the Supreme Court has almost never repudiated the use of economics in antitrust.

Second is a belief that antitrust policy should be more concerned with equal distribution. This concern was reflected strongly during the great Depression, although it reappeared briefly in the 1960s. For example, the Robinson-Patman Act (1936) was part of a vehement anti–chain store movement concerned mainly with protecting smaller retailers at the expense of larger ones that consumers preferred.[113] That is, while the concern was with distribution, small retailers, not consumers, were the beneficiaries.[114] Representative Wright Patman went on a few years later to co-sponsor "death sentence" legislation that would have taxed chain stores out of

108. *Id.* at 364 & n.41.

109. *Id.* at 364 n.41 (1963) (citing CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: A LEGAL AND ECONOMIC ANALYSIS 133 (1959) (suggesting a 20% minimum); George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955) (suggesting 20%); Jesse Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 521–22 (1957) (suggesting 25%)).

110. On structuralism in antitrust during this period, written by a supporter, see Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1104–05 (1979).

111. *Phila. Nat'l Bank*, 374 U.S. at 372.

112. One outlier is Justice Thurgood Marshall in *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972) (objecting to antitrust rules that would "leave courts free to ramble through the wilds of economic theory").

113. *See* Hovenkamp, *supra* note 6.

114. *See* 15 U.S.C. § 13.

business to protect single-store operations.[115] The Supreme Court's *Brown Shoe* jurisprudence in the 1960s condemned mergers because they led to better products, services, or lower costs, all to protect smaller competing sellers.[116] This concern to protect businesses that customers might find less desirable is manifested in calls to return to greater Robinson-Patman Act enforcement[117] and infatuation with *Brown Shoe* today.[118] Both amount to an imagined leveling of the playing field at consumers' expense.

In retrospect, the anti–chain store movement is a sad example of a kind of fake populism that often passes for the real thing. Congress listened to well-organized trade associations of small grocers, ignoring the interests of the much larger numbers of suffering consumers. Particularly during the Great Depression, consumers wanted lower prices, and, compared to the number of trade associations, there were many more consumers.

Why an increased concern with distribution should require abandonment of economics in antitrust is not entirely clear. Professor Jonathan Baker believes that anti-monopolists typically see a "bifurcated choice" between all-out regulation or extreme laissez-faire.[119] That observation is consistent with a populist perspective that sees everything in extremes. However, there are intermediate positions. For example, a "consumer welfare" principle targeting high prices or restraints on innovation supports both efficient use of resources and broad distribution. That is certainly true in comparison with the Borkean doctrine, which tolerates lower output and higher

115. *See* 80 CONG. REC. 8133 (1936); *Excise Tax On Retail Stores: Hearings on H.R. 1 Before the H. Ways & Means Comm.*, 76th Cong. 2409 (1940). The episode is discussed in Frederick John Harper, The Anti-Chain Store Movement in the United States, 1927–1940 at 421–22 (July 1981) (Ph.D. thesis, University of Warwick) (on file with the University of Warwick Department of Social History).

116. *See* Herbert Hovenkamp, *Brown Shoe Merger Policy and the Glorification of Waste*, 2 COMPETITION POL'Y INT'L ANTITRUST CHRON. 2, 4 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575870 [https://perma.cc/4RMH-KZ8T].

117. *E.g.*, Mark W. Poe, *The Critics Are Wrong: How The Robinson-Patman Act Has Been Misunderstood by Its Detractors*, 38 ANTITRUST 23, 23 (2024); Daniel Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, 52 HOFSTRA L. REV. 313, 316–17 (2024). In December 2024, the Federal Trade Commission (FTC) filed its first Robinson-Patman Act complaint in decades. *See FTC Sues Southern Glazer's*, *supra* note 72.

118. Hanley, *supra* note 2.

119. *See* Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705, 734 (2022).

prices while mainly protecting producers.[120] Here, the antimonopoly position offers nothing new but simply chooses sides in a decades old controversy about antitrust goals.

In any event, if antitrust policymakers sincerely wished to give the public what it wanted, they would strive to move prices down to the competitive level. Low prices and high output have been the goals of antitrust policy since antitrust's inception. Concerns about wealth distribution are a critical component of government economic policy, but antitrust law is hardly the only body of law we have for addressing them. Neither its statutory language nor its case law provide any warrant for doing so. When antitrust law makes such attempts, as with *Brown Shoe*-inspired merger policies favoring small business and higher prices, it results in harmful doctrine forcing people to buy at small, expensive stores to keep them in business. In markets, that should be a choice, not an obligation.

Third, is the idea that economic expertise should be subordinated to popular opinion. That rapidly becomes a recipe for demagoguery—an all too common feature of populism, because public opinion is easily manipulated.[121] A more defensible view is that enforcers should use economics where it is beneficial and then take on the often-difficult task of explaining it to the public. That is more like the model we follow in, say, medicine or chemistry. Public opinion does not determine the roles of genetic testing in medical diagnosis or of vaccination in disease prevention. In a democratic society, however, those employing the policies are obliged to explain their importance in understandable language. The general public is entitled to know the nature, likely consequences, and justifications of policy decisions that affect their lives.

Antitrust economics has become moderately technical in some areas, such as the analysis of mergers and the measurement of market power, causation, and damages. The techniques used there may be out of reach of the average layperson. In most cases, the economics used in litigation is not particularly cutting edge, although it does demand some

120. As defended in Oliver E. Williamson, *Economies As An Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 23 (1968), and later by ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 106 (1978). *See* Hovenkamp, *supra* note 54, at 751–60.

121. Patricia Roberts-Miller, *Democracy, Demagoguery, and Critical Rhetoric*, 8 RHETORIC & PUB. AFFS. 459, 462, 472 (2005).

technical proficiency.[122] The academic literature ranges much further. These facts do not distinguish antitrust from, say, medicine, psychology, or engineering. We want experts to serve their markets and make products and services better. We also want them to do research at the outer boundaries of their discipline. That hardly entails getting rid of them.

Economics in antitrust is a forensic tool, enabling enforcers and courts to identify violations and optimal remedies. For example, the Sherman Act proscribes practices that "restrain trade," which means that they predictably reduce market output and lead to higher prices. The law of monopolization and mergers addresses the same concerns. Economics provides methodologies for assessing such claims, just as DNA or ballistics may be forensic tools for inquiries in criminal law.[123] Whether a merger or joint venture leads to higher prices or reduced quality is an empirical question, and it often requires expertise to provide the answer.

One other important function of economics in antitrust is to prevent people from making dumb mistakes. Economic ignorance is a far more serious threat to competitive markets than economics itself. For example, one consequence of economic ignorance is that many anti-monopolists do not appreciate the link between product output and the demand for labor. With some qualifications, consumers and labor are in the same boat. On one hand, a healthy economy with competitive product prices and high output benefits both.[124] On the other hand, if one ignores the product market and treats output as a constant, then it becomes easy to see consumers and labor as playing against each other in a zero-sum game.

Hostility toward economics at least partly explains the antimonopoly movement's rejection of consumer welfare.[125]

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122. For a good basic introduction, see ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 1–2 (2d ed. 2008).

123. *See* Hovenkamp, *Antitrust Text*, *supra* note 76, at 1076–77.

124. *See* Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 J. POL. ECON. 561, 611 (2020) ("An increase in markups implies a decrease in aggregate output produced, whenever demand is not perfectly inelastic. Lower output produced then implies lower demand for labor. This results in both lower labor force participation and lower wages. Even if supply is perfectly elastic, real wages decrease with market power because the price of the output good has increased.").

125. *See, e.g.*, Zephyr Teachout, *The Death of the Consumer Welfare Standard*, PROMARKET (Nov. 7, 2023), https://www.promarket.org/2023/11/07/zephyr-teachout-the-death-of-the-consumer-welfare-standard/ [https://perma.cc/Y9D4-S2ZL]; Mark

Consumer welfare is measured by lower prices, higher output, and increased innovation—phenomena that are inconsistent with *Brown Shoe*'s way of looking at the business world.[126] The fact is, however, that consumer welfare is what actual consumers want. Nonetheless, populist antitrust must confront the political reaction to policies that result in higher prices, lower output, or reduced innovation.

The *fourth* likely reason for populist hostility to antitrust economics is a belief that economics is little more than a brief for defendants. This belief mainly reflects an unhealthy obsession with the Chicago School.[127] In fact, economics can point antitrust in both pro- and anti-enforcement directions. During the marginalist heyday when the Clayton Act was passed, economics was decidedly pro-enforcement, as it was under the structuralist school that dominated antitrust policy at the time of *Philadelphia Bank*.[128] Today, empirical economic testing of merger policy has contribted greatly to the heightened scrutiny reflected in the 2023 Merger Guidelines.[129]

The opposition to economics in antimonopoly circles is also reactionary and counterproductive. Populists oppose economics instinctively, even when it can help them. Consider anti-monopolists' harsh treatment of the widely used "hypothetical monopolist test" (HMT) for a relevant antitrust market.[130] The HMT rests on the eminently sensible proposition that if the target of antitrust is monopoly, then we should have a test that identifies markets vulnerable to being monopolized. The HMT often, although not invariably, defines smaller markets than

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Glick & Darren Bush, *Breaking Up Consumer Welfare's Antitrust Policy Monopoly*, 56 SUFFOLK U. L. REV. 201, 264 (2023).

126. *E.g.*, Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 352 (2010).

127. *See, e.g.*, Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495, 495 (2019). On the obsession, see generally William E. Kovacic, *The Chicago Obsession in the Interpretation of U.S. Antitrust History*, 87 U. CHI. L. REV. 459 (2020) (highlighting the significant yet overlooked contributions of the Harvard School and advocating for a more nuanced understanding of the factors shaping modern U.S. antitrust law).

128. *See supra* notes 110–111 and accompanying text.

129. *See* Hovenkamp, *supra* note 59, at 52.

130. *See, e.g.*, Daniel Hanley, *Redefining the Relevant Market: Abandonment or Return to Brown Shoe*, 129 DICK. L. REV. (forthcoming 2025) (manuscript at 29–33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404081 [https://perma.cc/7W8H-Y2DU].

alternatives.[131] Smaller markets are generally pro-enforcement because they yield bigger market shares. As a result, the agencies continue to use smaller markets, no matter the antimonopoly rhetoric.[132] The HMT is the principal approach to market definition even in the relatively anti-monopolist 2023 Merger Guidelines.[133] During the Biden Administration, government agencies successfully used the HMT against mergers, notwithstanding the neo-Brandeis rhetoric.[134]

Anti-monopolists would prefer to define markets by reference to what are sometimes called the "*Brown Shoe* factors," reflecting their ideological enslavement to that decision.[135] The main thing that can be said for the *Brown Shoe* factors is that the Supreme Court embraced them in 1962.[136] Those factors are neither articulated in any antitrust statute nor defined in the legislative history. For the most part, they represent a layperson's casual imagination of what a "market" should look like. Many of them are flat wrong.

One *Brown Shoe* factor is "reasonable interchangeability," without reference to the margins at which interchangeability occurs.[137] That is an example of what is commonly known as the *Cellophane* fallacy: if you see people switching between wax paper and cellophane to wrap their peanut butter sandwiches, then the two must be in the same market.[138] Never mind that cellophane is being sold at a monopoly price while wax paper is competitive. That is to say, monopoly *creates* interchangeability because the monopolist's high prices force people to look for alternatives. As a result, "reasonable interchangeability" as *Brown Shoe* defined it, plays right into the monopolist's hands.

131. *See e.g.*, FTC v. Tapestry, Inc., No. 24-cv-03109, 2024 WL 4647809, at *34 (S.D.N.Y. Nov. 1, 2024) (using the HMT to define the market for luxury handbags).

132. *See* Herbert Hovenkamp, *Antitrust Market Definition: The Hypothetical Monopolist and Brown Shoe*, NETWORK L. REV. (forthcoming 2025) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746039 [https://perma.cc/UL2B-YKAK].

133. 2023 MERGER GUIDELINES, *supra* note 58, at 41–42.

134. *E.g.*, *Tapestry, Inc.*, 2024 WL 4647809, at *34; FTC v. Kroger Co., No. 24-cv-00347, 2024 WL 5053016, at *13–15 (D. Or. Dec. 10, 2024) (using the HMT to define relevant markets in a merger case).

135. *See, e.g.*, Hanley, *supra* note 130, at 36–39.

136. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

137. *Id.*

138. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956) (holding that cellophane is not a monopoly because it is interchangeable with wax paper, tin foil, and other flexible wrapping materials).

Another *Brown Shoe* factor, that a market is distinguished by "unique production facilities,"[139] is wrong more often than it is right. Most often a single product is manufactured in numerous production facilities owned by one or many firms, which sometimes even use different technologies. That was true in the *Brown Shoe* case itself, where Brown's national market share was only seven percent.[140] On one side, many other plants owned by other firms produced products in the same market. On the other side, a single production facility often produces many noncompeting products. So the approach is both over-inclusive and under-inclusive.

Two other *Brown Shoe* factors, "specialized vendors"[141] and "distinct customers,"[142] are also wrong more often than they are right. The collection of things that a specialized vendor normally sells are complements, not principally substitutes. For example, a specialized medical vendor such as McKesson[143] sells catheters, bandages, surgical clamps, and blood pressure monitors, but that does not mean that these products are in the same market. Similarly, McKesson's distinct customers, such as hospitals and pharmacies, normally purchase those products as complements, not substitutes.

In sum, the *Brown Shoe* factors are a set of criteria that we would do well to ignore, particularly because nothing in the antitrust statute supports them. The *Brown Shoe* factors are perpetuated by populist bias, economic ignorance, and slavish endorsement of old precedent.

However, there is another, more fundamental reason why courts should abandon the *Brown Shoe* factors for defining markets: the *Brown Shoe* decision never intended to use market definition as a tool for identifying monopoly. The decision never stated the goals of merger policy in terms of prohibiting mergers threatening reduced output and higher prices. Rather, the Court concluded that mergers should be condemned because they produce *lower* prices rather than higher ones. The Court said:

> A . . . significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets

139. *Brown Shoe Co.*, 370 U.S. at 325.
140. *Id.* at 345.
141. *Id.* at 325.
142. *Id.*
143. *See Our Business Segments*, MCKESSON, https://www.mckesson.com/about-mckesson/businesses/ [https://perma.cc/CPY6-2M3X].

> of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we 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.[144]

Whatever the purpose market definition might have under such analysis, it would clearly *not* be to identify a grouping of firms capable of sustaining monopoly prices. The fact that *Brown Shoe*'s concern was with lower prices rather than higher ones means that its approach to market definition was entirely inconsistent with the approach merger law takes today.

The exercise of market power, or the ability to raise market prices, requires a certain minimum position in a market. By contrast, gains from lower costs or improved products are entirely internal to a firm. Even two small corn farmers in a market of thousands might merge to use heavy equipment, an irrigation pond, or labor more effectively. That merger might reduce their costs and thereby potentially increase their output. But the firm's market share or market power has nothing to do with the potential for these efficiency gains, which are specific to the firm.

By contrast, the HMT for a relevant market simply asks "is this group of products capable of being monopolized."[145] Using the HMT does require some knowledge of costs, margins, and market participants' rates of substitution (elasticities). For example, "automobiles" is likely a relevant market under the HMT because most non-automobile substitutes are not sufficiently close to hold automobiles to their cost. However, a

144. *Brown Shoe Co.*, 370 U.S. at 344.

145. *See* Malcolm B. Coate & Jeffrey H. Fischer, *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*, 4 J. COMPETITION L. & ECON. 1031, 1033 (2008).

subset of electric vehicles (EVs) might also be a relevant market if gasoline vehicles are not close enough competitors to hold EV prices close to their costs.[146] Rowboats are probably not in the same market, assuming that the price of cars would have to rise considerably before many people would switch to them. The relevant market is the *smallest* grouping of sales that meets the HMT test.[147] These are all empirical questions well within the reach of economics when the data are available. Laypersons may be challenged by the technical metrics, but understanding the principles is not all that difficult. In most cases, a good expert can explain them to a lay jury.

To illustrate, several decisions have held that while a pioneer drug and its generic equivalents (chemically identical) are in the same market, other drugs do not share a market simply because they treat the same condition.[148] The HMT limits markets for these pharmaceuticals to the pioneer drug and its chemically identical equivalents. Under the *Brown Shoe* "reasonable interchangeability rule," chemically dissimilar medications such as acetaminophen ("Tylenol") or aspirin would be in the same market as Ibuprofen. Under the HMT, they would not be. That result is about as pro-enforcement a position as one can find in pharmaceutical antitrust, and it comes from ignoring rather than following the *Brown Shoe* market definition factors.

Perhaps in a misguided effort to appeal to the general population, anti-monopolists discard fairly simple economic methodologies in other ways. For example, it is common knowledge that firms compete along many avenues, including price, quality, innovation, working conditions, among others. The focus of measurement, however, has been set heavily on prices. For example, the traditional "SSNIP" test for market definition queries how firms would respond to a "small but significant and non-transitory increase in price" charged by rivals.[149] The 2023 Merger Guidelines would rebrand this to

146. *See, e.g.*, FTC v. Tapestry, Inc., No. 24-cv-03109, 2024 WL 4647809, at *8 (S.D.N.Y. Nov. 1, 2024) (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 929d (4th ed. 2024)).

147. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (1997) [hereinafter 1997 HORIZONTAL MERGER GUIDELINES] .

148. *See, e.g.*, FTC v. Abbvie Inc., 329 F. Supp. 3d 98, 130 (E.D. Pa. 2018), *rev'd on other grounds*, 976 F.3d 327 (3d Cir. 2020); *In re* Suboxone Antitrust Litigation, No. 13-md-02445, 2023 WL 5617784, *1, *12 (E.D. Pa. 2023) (finding that the HMT indicated that a pioneer drug and its generic equivalents were the relevant market).

149. 1997 HORIZONTAL MERGER GUIDELINES, *supra* note 147.

SSNIPT to reference both prices and other terms, such as "more attractive features."[150]

But there are good, enforcement-based reasons for the methodological limitation to prices. Not only are data for pricing far easier to obtain, but also, as people doing the science have known for generations, often a streamlined model that does not attempt to take every variable into account makes more useful predictions than a more "realistic" model that attempts to include everything.[151] Managing of merger analysis under the multiple factors described by the Merger Guidelines is likely to be much more cumbersome. As a result, those factors could actually reduce rather than increase enforcement. More likely, economists at the agencies will attempt to reduce all of these factors to their cash value or perhaps ignore them altogether. The 2023 Guidelines serve to turn a straightforward, manageable, and quite pro-enforcement query into something much more complex and indeterminate. As a result, one can surmise that they will not long survive the post-Biden era. One merger decision in 2024, which the government won, concluded that there is "no relevant analytical difference" between using the SSNIP or SSNIPT.[152] When the 2023 Merger Guidelines are replaced, "SSNIPT" will very likely be retired.

VI. MAKING ANTITRUST MORE EFFECTIVE

Ideologies are judged by their records. A truly populist antitrust policy should have enforcement that targets high prices, reduced output, or restraints on innovation. Effective enforcement entails not only the identification of desirable outcomes but also development of the best rules for achieving them given the information and resources available.

150. 2023 MERGER GUIDELINES, *supra* note 58, at § 2.2.

151. *See* Friedman, *supra* note 68, at 3, 39–43. For an application across the sciences, see generally Elisabeth A. Lloyd, *Model Robustness as a Confirmatory Virtue: The Case of Climate Science*, 49 STUD. IN HIST. & PHIL. SCI. 58 (2015). For a discussion of the value of reductionism in law and economics, see generally Avery Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229 (1996).

152. FTC v. Tapestry, Inc., No. 24-cv-03109, 2024 WL 4647809, at *8 n.4 (S.D.N.Y. Nov. 1, 2024).

A. *Sherman Act Restraints and the Rule of Reason*

Antitrust's rule of reason has become too cumbersome, to the point that it undermines effective enforcement.[153] This is largely the fault of the Supreme Court, which has had a difficult time dealing with the series of presumptions that form rule of reason analysis. Under the rule of reason, a plaintiff must show market power plus an allegation and some evidence that the defendant's conduct is causing competitive harm. Having shown that, the burden shifts to the defendant to explain that the conduct is harmless. Then, if needed, the burden shifts back to the plaintiff to show that similar effects could have been achieved by a less restrictive alternative.[154]

Conceptually, the amount of proof needed to trigger the first presumption should be relatively small—a sufficiently robust showing of market power plus the rough equivalent of the "probable cause" necessary for a police search. Most of the evidence is in the defendant's control, so the plaintiff's evidence need not be detailed, but it should create an inference of an anticompetitive act. With power and reasonable suspicion established, the defendant should have the principal obligation to produce justifications for its conduct that do not depend on a reduction in competition.

The Supreme Court has articulated this framework but has never seriously embraced it. Instead, the Court wants to see virtually the full case established right at the beginning, before the burden can shift.[155] The most troublesome decision was *California Dental Ass'n v. Federal Trade Commission*,[156] which held that the FTC's showing of market power plus a highly suspicious set of restraints on dentists' advertising was insufficient to shift the burden of proof because there might be alternative explanations.[157] The Court effectively transformed the plaintiff's response to the defendant's explanations into the plaintiff's initial burden of proof. The result is that a plaintiff must prove practically its entire case just to get past what should be a relatively simple presumption. Indeed, the only time that the Supreme Court supported condemnation under

153. For an empirical study on the effectiveness of the rule of reason, see Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1265–69. For my own recent views, see 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ch. 15 (5th ed. 2023).

154. *Id.* ¶ 1507.

155. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 108 (2018).

156. 526 U.S. 758 (1999).

157. *Id.* at 759.

the rule of reason was when the challenged conduct amounted to a naked restraint, as it was in the *National Collegiate Athletic Ass'n v. Alston* athlete compensation case.[158]

The solution to this problem is to reform the rule of reason so that judicial practice conforms more closely. Manifestly, the solution is not to revive a bunch of half-century-old per se rules for practices that are anticompetitive only a small percentage of the time. For example, some in the antimonopoly movement call for the revival of a per se rule against tying arrangements.[159] Per se tying rules, if taken seriously, would have prevented the laptop computer from ever being invented, because its technology is a tie of components that previously were provided separately by different companies. This would also be true of the installation of digital cameras on smartphones, which have seriously harmed the digital camera industry, though consumers today find them virtually indispensable.[160]

The arguments for a per se tying rule rely mainly on citations to cases from the 1940s through the 1960s.[161] An important source is Justice Felix Frankfurter's unsupported and unbriefed dicta in *United States v. Standard Oil Co.* (California), an exclusive dealing case, that "tying agreements serve hardly any purpose beyond the suppression of competition."[162] Justice Frankfurter was responding to the position in the Government's own brief arguing that tying was *less* exclusionary than exclusive dealing because dealers were

158. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 87 (2021). For more on *Alston*'s use of the rule of reason, see generally Herbert Hovenkamp, *A Miser's Rule of Reason: The Supreme Court and Antitrust Limits on Student Athlete Compensation*, 78 N.Y.U. ANN. SURV. AM. L. 1 (2022).

159. *E.g.*, Brief of *Amicus Curiae* Open Markets Institute in Support of Neither Party at 13–16, Shah v. VHS San Antonio Partners, L.L.C., 985 F.3d 450 (2021) (No. 20-50394), 2020 WL 5984593, at *13–16.

160. *See* Felix Richter, *How Smartphones Devastated the Camera Industry*, WORLD ECON. F. (Sept. 23, 2019), https://www.weforum.org/agenda/2019/09/impact-smartphones-had-camera-industry/ [http://perma.cc/KH4J=SDHS]; Felix Richter, *Digital Camera Sales Dropped 87% Since 2010*, STATISTA (Feb. 7, 2020), https://www.statista.com/chart/5782/digital-camera-shipments/ [http://perma.cc/DN28-66SF].

161. *See, e.g.*, Daniel A. Hanley, *In Praise of Rules-Based Antitrust*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Jan. 29, 2024), https://www.pymnts.com/cpi-posts/in-praise-of-rules-based-antitrust/ [https://perma.cc/A4XY-X5D6] [hereinafter Hanley, *In Praise*]; Daniel A. Hanley, *Per Se Illegality of Exclusive Deals and Tying as Fair Competition*, 37 BERKELEY TECH L.J. 1057, 1068 (2022).

162. Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1949).

free to have additional untied gasoline pumps.[163] Tying could not happen under the exclusive dealing agreements being challenged because they prevented stations from selling any gasoline except Standard Oil's.[164]

Most ties are either procompetitive or competitively harmless. First, many are imposed by firms that lack any significant market power. Second, most remaining ties have perfectly sound justifications. One of the biggest generators of "tying" is technological change. For example, Apple created the iPhone by tying a cellular phone and a computer, and it ties cameras by installing one in the iPhone. Franchises and other suppliers tie because tying becomes a mechanism for computing franchise royalties or assuring quality control of ingredients. IP licensors bundle because bundles both substantially reduce transaction costs and limit the need for infringement suits. The standard should be that a tie cannot be condemned unless it is shown to reduce output and increase the price of the tied-up bundle.[165] A small minority of ties would be condemned under such a test, but that is no justification for a per se rule.

For some practices, such as maximum price fixing, anti-monopolists rely on old Supreme Court decisions even while acknowledging that those cases have been overruled.[166] A per se rule against maximum RPM protects price-gouging dealers. Under maximum RPM, output goes up and consumers are better off; competitive dealers are not affected. In short, the old per se rule against maximum price fixing harmed just about everyone antitrust might wish to protect, while protecting the price gouging of isolated dealers. All that can be said for it is that the Supreme Court stated it in 1968 but changed its mind in 1997. Arguments such as the one favoring maximum RPM cannot be explained as anything other than a romanticized attachment to the past.

One bright spot in recent reform of the rule of reason is the First Circuit's *United States v. American Airlines Group*[167] joint

163. *See* Brief for the United States at 47, Standard Oil Co. v. United States, 337 U.S. 293 (1949) (No. 279).

164. *Id.* at 44–48.

165. *See, e.g.*, Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925, 954 (2010) (arguing that the standard should not be an increase in the price of the tied product because any offsetting price reduction in the tying product must also be considered).

166. *See, e.g.*, Hanley, *In Praise*, *supra* note 161, at n.24. This footnote cites *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which was overruled by *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

167. 121 F.4th 209 (1st Cir. 2024).

venture decision, which involved American Airlines's "alliance" with JetBlue to coordinate the two firm's operations in the northeastern part of the United States.[168] The alliance accomplished a number of things, including the coordination of connecting flights and rebooking one another's passengers.[169] However, it also limited flight frequencies and inaugurated a revenue sharing arrangement that reduced the firms' incentives to compete with one another.[170] The court then applied the three-step burden-shifting process outlined above and concluded that the defendants had failed to provide a pro-competitive rationale for most of the venture's restraints.[171] The court also held that most of the venture's "benefits could have been achieved through less restrictive alternatives."[172]

The *American Airlines* case represents one situation in which the plaintiff won a rule of reason case that was not, as the *NCAA* cases were, little more than a naked cartel. This decision was an important step because it used the rule of reason effectively to condemn a restraint that was competitively harmful on balance, but that also had redeeming qualities that made rule of reason treatment appropriate. Hopefully it will pave the way for future, similar decisions.

B. *Merger Efficiencies*

Another instance of harmful anti-monopolist populism is the idea that mergers never produce cost savings or efficiencies.[173] This principle can be used to support extremely harsh rules toward mergers, but it has no empirical foundation. Rather, it is a reaction to previous unsupported assumptions in the other direction—namely, that merger efficiencies dominate transactions even when efficiencies cannot be proven.[174]

Questions about the effects of mergers are heavily empirical. Economic studies of post-merger prices have made significant strides in recent years, enabling better predictions that

168. *Id.* at 215.

169. *Id.* at 216.

170. *Id.* at 217; *see also id.* at 219 (finding "decreased capacity, lower frequencies, or reduced consumer choice on many routes").

171. *Id.* at 220–22.

172. *Id.* at 220.

173. *See* Justin Lindeboom, *Two Challenges for Neo-Brandeisian Antitrust*, 68 THE ANTITRUST BULL. 392, 395–96 n.22 (2023); *see also* Mark Glick, Gabriel Lozada, Pavitra Govindan & Darren Bush, *The Horizontal Merger Efficiency Fallacy* 24 (Inst. for New Econ. Thinking, Working Paper No. 212, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4566274 [https://perma.cc/BCY9-AHWP].

174. *E.g.*, BORK, *supra* note 120, at 107–33.

associate market concentration levels or competitiveness with price changes. Some object that price and efficiency are not the same thing, which is true. But the merger statute does not target efficiencies. It targets monopoly or harm to competition, and for these, price effects are central.[175] Studies of the effects of mergers on pricing go to the heart of antitrust law's concern and necessarily take both anticompetitive effects and efficiencies into account. A merger that increases the post-merger firm's market power without reducing costs will predictably result in higher prices. If the merger also reduces costs, however, then the higher prices may not materialize. Even in highly concentrated markets, roughly a quarter of mergers lead to lower prices and an additional half lead to prices that are not shown to be higher.[176]

A smaller but growing body of literature also addresses nonprice results in things such as operating efficiency or quality. These studies are harder to conduct because fewer data are available. Further, cost and performance changes are more specific to particular technologies or even to particular firms.[177] In all events, both the price and the nonprice studies show that mergers improve price or performance a significant percentage of the time. That effect includes reduced prices, improved product quality, increased positive network effects, and unhindered innovation.

The difficult trick for merger policy is coming up with a metric that distinguishes harmful from beneficial mergers with tolerable accuracy. Such a metric must avoid both the extreme Borkean position that mergers nearly always produce significant efficiency gains and the neo-Brandeis position that they never do. While all types of price and performance data can be relevant, at this point in time post-merger pricing is the most visible and the easiest data to gather, particularly for

175. *See* 15 U.S.C. § 18 (condemning mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly").

176. *See supra* note 10 and accompanying text; *see also* Hovenkamp, *supra* note 9 (manuscript at 6).

177. *See generally* Mert Demirer & Omer Kiaraduman, *Do Mergers and Acquisitions Improve Efficiency? Evidence from Power Plants* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32727, 2024), https://www.nber.org/papers/w32727 [https://perma.cc/C9F5-ANCS] (finding substantial gains among mergers of power generation facilities); Yanyou Chen, Network Structure and Efficiency Gains from Mergers: Evidence from U.S. Freight Railroads (Mar. 29, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4742990 [https://perma.cc/NG R5-6FWF] (finding similar substantial gains among mergers of railroad companies); *see also* Shapiro & Yurukoglu, *supra* note 66.

large groups of mergers. Further, post-merger pricing is the data most relevant to merger policy's concern with price-increasing mergers.

The Supreme Court itself has recognized the likelihood of product improvements or price or cost reductions in at least three merger cases. One of them was *Brown Shoe*, where the Court affirmed a district court conclusion that the merger would lead to lower prices or higher quality for the same price, but it then condemned the merger on the ground that it would injure smaller competitors.[178] Then in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[179] the Supreme Court rejected a competitor's antitrust claim based on the theory that a bowling alley merger would lead Brunswick, the acquiring firm, to remodel and rehabilitate faltering bowling alleys, making it more competitive with the plaintiff.[180] The Court held that condemning a merger on the theory that it led to a better product that might harm competitors such as the plaintiff would be "inimical" to the purpose of antitrust law.[181]

Finally, in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[182] the Court effectively overruled *Brown Shoe* on this issue, rejecting the plaintiff's claim that a merger was unlawful because the merging firm would take advantage of post-merger efficiencies to lower its prices, thus making it more difficult for the plaintiff competitor to compete.[183] The Court quoted *Brunswick*'s "inimical" language, noting the implication that it could turn the ability to deliver lower prices into an antitrust violation.[184]

The authors of *Brunswick* and *Cargill* were, respectively, Justices Marshall and Brennan, two Supreme Court liberals who would never be associated with the Chicago School. This fact illustrates how deep and broad-based the view is that a central antitrust concern is keeping markups (prices) lower. It also emphasizes the importance of getting enforcement policy right. Too little antitrust enforcement is a bad thing, but so is

178. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

179. 429 U.S. 477 (1977).

180. *Id.* at 490.

181. *Id.* at 488.

182. 479 U.S. 103 (1986).

183. *Id.* at 116–17.

184. *Id.* at 116 ("To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'" (citations omitted)).

too much. One of the most damaging features of reliance on *Brown Shoe* is the idea that, in merger policy, more is always better. More should be better only when it leads to higher output, lower prices, more innovation, or some other serious indicator of consumer benefit.

The idea that mergers categorically never lead to lower prices or to better products is thoroughly *anti*-populist. It substitutes blind ideology for fact, to the detriment of consumers, labor, and others. The fact that these effects must actually be assessed rather than merely assumed categorically does serve to make merger policy more difficult. However, this is only because of the need for accuracy. The easy choices would be just to condemn more and more mergers or, at the other extreme, to condemn fewer and fewer of them. The difficult task is identifying that spot somewhere in the middle where the line between harm and benefit is located.

Price effects of mergers are generally determined by two things: the increase in market power and, offsetting this, any decrease in costs or increase in quality.[185] By itself, an observed price change does not tell us what part of the change is attributable to one thing or the other. For example, an observed ten percent price reduction following a merger could result from a merger that did not increase market power at all but that reduced costs enough to generate a ten percent reduction. The reduction, however, could also be a consequence of a merger that increased market power but produced even larger offsetting cost reductions so that the net price reduction was ten percent. Distinguishing these situations might be important for some purposes, but the outcome itself is antitrust law's concern, as defined by the statutes. Neither of these mergers "lessens competition" if the metric is price effects.

The metrics that government agencies use to assess mergers have improved over time. Nevertheless, for concentration-increasing mergers those metrics provide fairly rough predictions. They ask two questions: first, what is the degree of market concentration following a merger, and, second, how much did the merger increase concentration?[186] The premise of

185. Or in some cases involving vertical mergers or other mergers of complement, the elimination of double marginalization. *See* Hovenkamp, *supra* note 9 (manuscript at 3, 61).

186. *See* 2023 MERGER GUIDELINES, *supra* note 58, at § 2.1; *see also* Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915, 1940 (2022) (noting technical correlation between increases in the HHI and in welfare).

these questions is that a useful correlation exists between effects on concentration and effects on price.[187] Concentration is measured by the Herfindahl-Hirschmann Index (HHI), which is the sum of the squares of the market shares of each firm in a well-defined market.[188] An HHI of 1,800, which the 2023 Merger Guidelines identify with a highly concentrated market, is equal to a market with, say, six firms with markets shares of 20%, 20%, 20%, 20%, 10%, and 10%.[189] However, an infinite number of combinations could yield the same result. In addition to a post-merger HHI exceeding 1,800, a challengeable merger must also have an HHI increase of at least 100.[190] In that case, a merger of any two firms in the illustrated group would be challengeable.[191] Even at low concentration levels, the requisite HHI increase of 100 makes the 2023 Guidelines quite aggressive. For example, a merger of two firms with market shares of 7% and 8% would increase the HHI by 112,[192] which is over the threshold. Merger enforcement in this range could result in many more challenges, although that would also require substantially greater enforcement agency funding.

For mergers that create firms with market shares exceeding 30%, one obstacle, which is a bigger concern for backward-looking populists than it is for economists, is that the Guidelines's trigger of a 100-point HHI increase significantly exceeds even the 1960s case law. The one Supreme Court decision that discussed the importance of a significant increase in post-merger market share was *Philadelphia Bank*, which came a year after *Brown Shoe*.[193] However, in *Philadelphia*

187. Hovenkamp & Shapiro, *supra* note 66, at 2004.

188. *Herfindahl–Hirschman Index*, U.S. DEP'T OF JUST. (Jan. 17, 2024), https://www.justice.gov/atr/herfindahl-hirschman-index [https://perma.cc/9NE4-CUR7].

189. 2023 MERGER GUIDELINES, *supra* note 58, § 2.1.

190. *Id.*

191. Under the previous 2010 Guidelines, a merger of the two 10% firms would very likely not be challenged because neither the post-merger HHI nor the HHI increase would be sufficient. *See* ANTITRUST DIV., U.S. DEP'T OF JUST., 2010 HORIZONTAL MERGER GUIDELINES § 5.3.

192. The increase in HHI is double the product of the market shares of the two firms. Prior to a merger of firms A & B, their contribution to the HHI was A2 + B2. After the merger, it is (A + B)2, which is A2 + 2AB + B2. The 2AB is the increment.

193. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) ("Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.").

Bank the increase in HHI was 660 points, not the 100 advocated in the 2023 Merger Guidelines.[194] If the 2023 Merger Guidelines survive for several years, this will likely become a litigation issue. The 100 standard reaches mergers that are in fact quite small. For example, the merger of a 28% firm and a 2% firm has an HHI increase of 112, making it presumptively unlawful under *Philadelphia Bank*. In *Tapestry*, the court relied on this presumption, but the HHI increase was 1,449, well over the *Philadelphia Bank* standard.[195]

Merger outcomes are also extremely heterogeneous. Different mergers that exhibit similar market structures and shares can affect prices very differently. Retrospective studies reveal that a set of HHI index numbers indicating concern in one market may not work in a completely different market using different technologies.[196] Indeed, index numbers may not even work for two different mergers within the same market.

One reason for this heterogeneity is that, even among mergers classified as "horizontal," or mergers among competitors, merging firms almost always have complementary relationships.[197] For example, two hospitals might merge because one of them has a much stronger oncology department, or two airlines may have many overlapping routes but also many connecting routes. Eliminating competition tends to increase prices depending on concentration levels, but uniting complements tends to reduce prices and improve performance. So the airline merger is likely to yield higher prices on city-pair routes where the two are dominant and direct competitors, but lower prices on routes where they offer only connecting flights. Complementary relationships are much more common than the merger case law generally acknowledges. Further, they vary widely in nature and intensity. This variance is undoubtedly a factor in the heterogeneity of merger outcomes.

Large, high-quality studies of pricing following the mergers of competitors in concentrated industries, such as a recent one published by the National Bureau of Economic Research (NBER), illustrate both the usefulness of HHI data and the

194. *See* United States v. Phila. Nat'l Bank, 201 F. Supp. 348, 354 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963) (noting that Phlipadelphia National Bank's premerger share was 22% and Girard's was approximately 15%). As noted earlier, the increase in the HHI is double the product of the individual market shares of the merging firms—in this case, 22 X 15 X 2, or 660.

195. *E.g.*, FTC v. Tapestry, Inc., No. 24-cv-03109, 2024 WL 4647809, at *39 (S.D.N.Y. Nov. 1, 2024).

196. *See* Shapiro & Yurukoglu, *supra* note 66, at 26–27.

197. *See* Hovenkamp, *supra* note 9 (manuscript at 6–7).

heterogeneity in results.[198] The NBER study indicated a roughly even division between mergers that raised prices in the following years and mergers that reduced them, although the price increases were somewhat larger than the decreases.[199] Notably, almost all of the markets in which these mergers were tested were "highly concentrated" under the 2023 Merger Guidelines standard (HHI>1,800).[200] Post-merger HHIs in the sample ranged from 2,000–4,000 with some reaching as high as 6,000.[201] A selection of mergers in the 1,000–2,000 HHI range would almost certainly yield significantly fewer price-increasing mergers, although nothing indicates that these increases would produce fewer efficiencies. Indeed, the less likely that market power is to explain the anticipated gains from a merger, the more likely that efficiencies play a role. It bears repeating that a merger's ability to create efficiencies has nothing to do with the level of market concentration or the market shares of the firms.[202] Efficiencies are the result of productivity changes that are internal to the firms.

Even within this highly concentrated range, approximately 25% of the mergers resulted in lower prices.[203] The NBER study also indicated that in another 50% of cases price changes were too small to be deemed significant.[204] In sum, the mergers showed actual (*ex post* as opposed to probable) competitive harm as measured by higher prices in roughly 25% of cases.[205]

As a group, these retrospective studies suggest several things. First, the structural standards in the 2023 Guidelines are an improvement over those in the 2010 Merger Guidelines, which had set the standard at HHI>2,500. Second, merger price effects is an area that requires ongoing study and reassessment. Any antitrust regime that is truly interested in getting merger policy right will want to test continuously while improving measurement techniques. Manifestly, one thing an

198. *See* Bhattacharya, Illanes & Stillerman, *supra* note 10, at 22. Largely in accord is Stöhr, *supra* note 12, at 169–70.

199. Bhattacharya, Illanes & Stillerman, *supra* note 10, at 9–10.

200. *Id.* at 9.

201. *Id.*

202. One exception is the elimination of double marginalization (EDM), which occurs only if two firms with complementary products both have some market power. *See* Hovenkamp, *supra* note 9 (manuscript at 61–64).

203. Bhattacharya, Illanes & Stillerman, *supra* note 10, at 44 (explaining that 25% of the mergers in the study lowered prices by more than 2.3%, while another 25% increased prices by more than 5.3%).

204. *Id.* at 19.

205. *Id.* at 27.

antitrust regime would *not* do is rely on standards simply because they were stated in 1960s Supreme Court case law. Finally, we need better tools for explaining and assessing heterogeneity in outcomes, and nothing as crude and hostile toward mergers as the current efficiency defense.

Merger outcomes are also affected by the "single market" rule, which states that a merger can be condemned if it is anticompetitive in any market without balancing offsetting gains in other markets.[206] The effect is to increase merger enforcement in cases where a merger is efficient "on balance" but not efficient everywhere. One example is 2024's *United States v. JetBlue Airways Corp.*,[207] in which the court found "strong evidence that the combined, post-merger airline would result in substantial benefits for consumers."[208] However, there were a few markets (city-pairs) in which the merger lessened competition, and the court entered an injunction on the basis of those.[209] In such cases, one solution is for the firms to "fix" the bad markets, usually by selling assets there to a third party. However, one thing that is clear is that even a merger that produces substantial efficiencies overall—which the merger at the heart of *JetBlue* very likely did—can still be unlawful. Based on overall effects on competition, the *JetBlue* merger probably should not have been challenged, although the court did read the case law correctly.

Such outcomes should warrant rethinking whether the single-market rule is too harsh and should be relaxed. Failing to condemn a price-increasing merger is socially costly, but condemning a price-reducing merger is costly as well.[210] At the same time, there are defensible administrative reasons for adhering to some version of the single-market rule. Under it, the government need only identify a single market in which competition is harmed; it doesn't need to quantify the harm. By contrast, "netting out" costs and benefits in multiple markets requires a more elaborate inquiry, and the measure must be cardinal rather than ordinal. That is, before we can balance we must be able to quantify the losses and gains in different

206. The rule originated in the Supreme Court's decision in *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963). *See* HOVENKAMP, *supra* note 11, § 12.2b5.

207. 712 F. Supp. 3d 109 (D. Mass. 2024), *appeal dismissed*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024).

208. *Id.* at 161.

209. *Id.* at 163.

210. *See* Herbert Hovenkamp, *Structural Antitrust Relief Against Digital Platforms*, 7 J.L. & INNOVATION 58, 59–60 (2024).

markets. In all events, one thing that should be clear is that the recent movement of merger policy toward greater enforcement is a consequence of better economics, not of abandonment of economics.[211]

One thing that would improve results is more effective use of prosecutorial discretion. The single-market rule permits merger actions against mergers that are harmful even in a single market, although they are beneficial on balance.[212] If a merger's benefit on balance is clear at the time of evaluation, then the best course for the government is not to bring the case or else to be flexible about permitting corrective divestitures. That is, the standard for bringing actions should not be simply whether the government can win, but whether enforcement provides a public benefit.

C. *Employee Non-competes*

A final example of substantive overreach is the FTC's position during the Biden Administration that employee non-compete agreements should be unlawful with nearly no exceptions.[213] The prevailing antitrust rules governing non-competes are underdeterrent.[214] Many non-competes are harmful even in the absence of significant market power. But this does not mean that all of them are anticompetitive. They can perform a useful function when they are imposed on employees who have access to trade secrets or who have received significant training or expertise from their employers. Without a non-compete, other firms could take advantage by

211. *See* Shapiro & Yurukoglu, *supra* note 66, at 34.

212. *See* HOVENKAMP, *supra* note 11, § 12.2b5.

213. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910). At this writing, one federal district court has enjoined enforcement of the rule, finding it probable that the rule exceeds the FTC's regulatory authority. Ryan LLC v. FTC, No. 24-cv-00986, 2024 WL 3297524, at *5 (N.D. Tex. July 3, 2024). Another district court has approved it. ATS Tree Servs., LLC v. FTC, No. 24-cv-01743, 2024 WL 3511630, at *1 (E.D. Pa. July 23, 2024). It also remains to be seen how the non-compete ban will fare under the Supreme Court's decision in *Loper Bright Enterprises, Inc. v. Raimondo*, 603 U.S. 369 (2024), *overruling* Chevron, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *See* Props. of the Vills., Inc. v. FTC, No. 24-cv-00316, 2024 WL 3870380, at *3 (M.D. Fla. Aug. 15, 2024) (relying on *Loper Bright* and enjoining the enforcement of the non-compete ban).

214. *See* Deslandes v. McDonald's, LLC, 81 F.4th 699, 702–04 (7th Cir. 2023), *cert. denied*, 144 S.Ct. 1057 (2024) (finding inadequate market power under a rule of reason challenge to a purely vertical employee non-compete covenant while also finding the possibility of per se illegality to the extent that a horizontal agreement among McDonald's own restaurants and its franchisees may have existed).

free riding on the first employer's training or information. The FTC's non-compete rule condemns bad and good alike.

An effective antitrust policy in this area would condemn non-competes presumptively but then switch the burden of proof. Employers could defend their non-competes by showing that justifying conditions obtain and that the challenged covenant is proportional to the need for protection. If the rest of the courts disapprove the FTC's virtual per se ban, sensible reform would have to await changes in the rule of reason.[215] The FTC would do better to challenge non-competes under its own power to enforce the Federal Trade Commission Act. In the process, the FTC might be able to obtain a more aggressive rule governing non-competes while still falling short of illegality per se.

VII. PROSECUTORIAL DISCRETION AND SCAPEGOATING

One common characteristic of populism is the creation of scapegoats and the resulting mistargeting of harm. At various times in history, Jews, Muslims, immigrants, intellectual elites, homosexuals, chain stores, and Big Tech have all been populist targets.[216] Often, scapegoats are identified by their success in certain areas when their success displaces or threatens incumbent groups whose interests lie in the status quo.[217]

Big Tech is a case in point. It is targeted not because it is an underperforming industry prone to anticompetitive practice but for precisely the opposite reason. It performs better than nearly any sector of the economy.[218] Most of the opposition comes from competitors.

Further, many cases against Big Tech are very costly to bring and hard to win. For example, the government's disastrous lawsuit against IBM, which had many features resembling some of the current actions against Big Tech, was the government's most expensive litigation ever by the time of its voluntary dismissal in 1982.[219] At the same time, other areas

215. *See supra* note 159 and accompanying text.

216. *See* DENIS MULLER, JOURNALISM AND THE FUTURE OF DEMOCRACY 34 (2021).

217. *See id.*

218. *See* Soulaima Gourani, *How the FTC's Ban on Noncompetes Will Transform the Tech Industry*, FORBES (Apr. 25, 2024, 6:13 PM), https://www.forbes.com/sites/soulaimagourani/2024/04/25/how-the-ftcs-ban-on-noncompetes-will-transform-the-tech-industry/ [https://perma.cc/EZF5-3PRY].

219. *See* Randal C. Picker, *The Arc of Monopoly: A Case Study in Computing*, 87 U. CHI. L. REV. 523, 535 (2020); *see also In re* IBM Corp., 618 F.2d 923, 925 (2d Cir. 1980) ("To the best of our knowedge no litigation has taken so much time and involved such expense."). *See generally* United States' Memorandum on the 1969

of antitrust, such as mergers of competitors, call for greater resources than are currently employed.[220]

Big Tech platforms do engage in anticompetitive practices, but a draconian structural approach is not the best answer. Better to preserve the many things that make Big Tech among the most valuable contributors to the American economy and society and then identify and ferret out anticompetitive practices.[221] For example, a court's recent decision in *United States v. Google, LLC*,[222] a search case, condemned Google's large payments to device and browser makers to install Google Search as their exclusive default search engine.[223] The court also refused to force Google to share SA360, a digital tool that permits ads to be placed simultaneously on different platforms.[224] Both decisions seem quite correct. While no remedy has been announced at this writing, the one that is granted will not likely upend the platform market—nor should it.

Whatever one might think of it as antitrust policy, scapegoating of successful industries is also bad industrial policy.[225] Leave aside the question whether the United States should have an industrial policy at all or instead simply rely on the market to select its winners: the fact is that Big Tech is a distinctly American invention and a highly productive one. Big Tech has been exported globally with great success. We should either be promoting it or letting it be, rather than looking for ways to undo its benefits. The war on Big Tech is flatly inconsistent with the welfare of consumers and labor, which emphasizes low prices, high output, and unrestrained innovation.

After a flirtation with rejecting consumer welfare,[226] the Justice Department appears once again to have embraced it. Its 2024 complaint against Apple alleges that Apple's practices

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Case, United States v. IMB Corp., No. 72-334 (S.D.N.Y. filed Oct. 5, 1995), https://www.justice.gov/atr/case-document/united-states-memorandum-1969-case [https://perma.cc/4B5D-9SAK] (distinguishing the 1969 case from other antitrust litigation engaged in by the United States).

220. *See generally* Hovenkamp, *supra* note 59 (discussing the need for more resources in mergers enforcement).

221. *See* HOVENKAMP, *supra* note 19.

222. 747 F. Supp. 3d 1 (D.D.C. 2024).

223. *Id.* at 187.

224. *Id.* at 181–85.

225. *See* Reka Juhasz, Nathan J. Lane & Dani Rodrik, *The New Economics of Industrial Policy* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31538, 2023).

226. *See* discussion *supra* notes 124–128.

have "not resulted in lower prices, higher output, improved innovation, or a better user experience."[227] Later that year when Johnathan Kantor, head of the Antitrust Division during most of the Biden Administration, gave his farewell speech, he summarized the goals of antitrust laws this way:

> [W]hy do we enforce the antitrust laws? Here is what I know about the answer to that essential question:
>
> - Antitrust enforcement lowers prices by limiting the market power and resulting taxes businesses can impose on customers. But it's not just about that.
> - Antitrust enforcement increases innovation, economic growth, and prosperity by limiting the private regulation that saps entrepreneurs of opportunity. But it's not just about that.
> - Antitrust enforcement leads to greater mobility and higher wages for workers by limiting the monopsony power tax businesses can impose on their employees. But it's not just about that.
>
> Antitrust enforcement and competition policy have always been about restoring a healthy, fair and free economy and society that benefits all Americans and makes our lives better.[228]

That is about as orthodox a statement of consumer welfare as one can find anywhere.

Consumer welfare is one area where the populist version of antimonopoly antitrust has done a great deal of affirmative harm—through such ventures as targeting "bigness" rather than true monopoly, signaling out innovative industries for scrutiny, or promoting harsh rules toward vertical integration that more often than not reduce costs or improve product quality. True monopoly produces lower output, higher prices, and harm to both consumers and labor. Big Tech platforms, even if large, often do just the opposite. While the anti-monopolist movement professes support for labor, that position cannot be reconciled with resistance to goals of high output, low prices, and unrestrained innovation in product markets.[229]

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227. First Amended Complaint ¶ 141, United States v. Apple, Inc., No. 24-cv-04055, (D.N.J. June 11, 2024).

228. Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., Farewell Address (Dec. 17, 2023), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address [https://perma.cc/48H5-RFVJ].

229. *See* Hovenkamp, *supra* note 16, at 526–28.

CONCLUSION

Antitrust policy can be more pro-enforcement than it is, and the agencies have done some good things. One is greater attention to harms in labor markets.[230] The move to increase enforcement against horizontal mergers is also a good one. Other portions of the 2023 Merger Guidelines are much harder to justify.[231] The areas of improvement, however, are modest tweaks more in line with what more pro-enforcement antitrust people have been supporting for decades. They hardly evidence a new way of looking at the world.

Increases in enforcement should be empirically justified with a focus on practices that have been proven to reduce output and increase prices, reduce product quality, or restrain innovation. Enforcers should look for problem markets where competition appears to be threatened, innovation is low, or prices are high compared to costs. Increased enforcement on behalf of workers is clearly justified because labor has been receiving a decreasing share of production for decades, almost certainly less than its marginal contribution.[232] By contrast, Big Tech remains one of the most important contributors to economic growth, setting the United States apart from other advanced economies, including the European Union.[233] Special aggression from antitrust enforcers is the last thing Big Tech needs, although antitrust enforcers should continue to be on the lookout for particular anticompetitive restraints.

Of all potential antitrust reforms, the single most beneficial would be changes in how the rule of reason is applied.[234] These could be executed without a statutory amendment, although they would need to be supported by the courts. The rule of reason itself is not statutory. The litigation weight that it carries is immense: it navigates the vast territory between clearly lawful conduct on one hand and conduct that clearly serves no purpose other than competitive harm on the other. To do that, the courts must first identify firms or groups that have

230. *See* discussion *supra* notes 15–20.

231. *See* Hovenkamp, *supra* note 59, at 19.

232. *See* Yeh, Macaluso & Hershbein, *supra* note 15 (explaining that manufacturing workers receive roughly sixty percent of their marginal contribution); Agustin Velasquez, *Production Technology, Market Power, and the Decline of the Labor Share* 1 (Int'l Monetary Fund, Working Paper No. 2023/032).

233. *See, e.g.*, Yann Coatanlem, *Why Europe is a Laggard in Tech*, FIN. TIMES (Feb. 26, 2024), https://www.ft.com/content/d4fda2ec-91cd-4a13-a058-e6718ec38dd1 [https://perma.cc/FR96-CQHU].

234. *See supra* Section VI.A.

market power, as measured by a reasonable metric such as the HMT. Then, they must identify both suspicious conduct that is capable of causing competitive harm and, at minimum, probable cause to believe that the defendant has engaged in such conduct. At that point, the defendant, who is the creator of its own conduct, should have an opportunity as well as the burden to explain it. Such an approach could be accomplished far more easily than it currently is. Further, it would avoid the completely unwarranted alternatives of per se legality on one side or per se illegality on the other.

Today, it should be clear: Protection of low prices, high output, and unrestrained innovation are an economically rational approach to antitrust policy, but they also represent a policy that is responsive to popular concerns. They are the ultimate in antitrust populism.