TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT

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Abstract. Antitrust enforcement is back in the spotlight with advocates from both the political left and the populist political right demanding fundamental competition-policy changes. While there are differences among those calling for such changes, several common beliefs generally unite them. This includes a contention that the writings and interpretations of Robert Bork and the Chicago School of economics have led antitrust astray in a manner fundamentally inconsistent with the original intent of the Sherman Act. Further, they are united by a belief that recent empirical, economic studies indicate that the economy is becoming overly concentrated, that market power has been increasing dramatically, that performance in many, if not most, markets has been deficient, and that too much profit is going to too few firms. In this article, we identify and detail twelve fallacies of what they call the "neo-antitrust movement" and their associated claims. At the heart of these fallacies is a fundamental misunderstanding of economics and the consumer welfare standard that has been at the heart of competition policy since at least the 1960s. Additionally, there is a heavy reliance on studies that, upon closer scrutiny, do not support the positions of those who cite them. While competition law should be amenable to change, many of the proposals of the neo-antitrust movement would make antitrust less effective in its core mission without achieving the goal of ameliorating other possible injustices about which they are concerned.

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INTRODUCTION

Antitrust is back in the spotlight with both the political left and the populist right offering critiques and tendering proposals that would revert antitrust to its purported historic origins. Some have given the moniker "Hipster Antitrust" to these advocates of change,[1] while many of these advocates themselves prefer the title "New Brandeisians."[2] Since both of these phrases appear judgmental regarding the merits of this somewhat amorphous movement, we adopt the term "neo-antitrust" to delineate this group. We refer to the current antitrust framework, primarily demarcated through its focus on protecting the competitive process as defined by its effect on consumers and their welfare, as "modern antitrust."

While neo-antitrust is neither a homogenous movement, nor a fully worked-out policy program, there are a number of common threads. This article lists twelve fallacies of thought associated with at least some aspects of the neo-antitrust movement. Some proponents of the neo-antitrust school expressly invoke some of these fallacies. Other fallacies are simply implicit errors. Not all of these fallacies apply to all proponents, but each applies to more than a few.

By pointing out these fallacies, we do not mean to imply that there cannot be reasonable debate concerning antitrust enforcement and its goals. There is a long and healthy history of such debate in academia, the courts, and competition agencies, as well as in the business community and society more broadly.[3] Moreover, there are legitimate concerns about various phenomena that may be causing harm to the lives of Americans that the advocates of the neo-antitrust movement want to redress by bringing them under the purview of a more interventionist competition regime. This includes issues such as the distribution of wealth, the difficulties faced by small business owners and the communities they serve, or the abuse of political power. However, a key theme of this paper is that many of the proposals of the neo-antitrust movement would make antitrust less effective in its core mission without achieving the goal of ameliorating other possible injustices about which they are concerned. It is our hope that this paper will contribute to a more reasoned and fruitful debate regarding the proper objectives and role of antitrust.

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[1] *See, e.g.*, Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294–95 (2019).

[2] *See*, *e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

[3] *See, e.g.*, William H. Page, *The Ideological Origins and Evolution of U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION L. & POL'Y 1 (ABA Section of Antitrust Law) (2008).

I. FALLACY ONE: COMPETITION IN THE UNITED STATES IS CLEARLY DECLINING

Some members of the neo-antitrust movement point to several studies that, in their view, demonstrate a decline in competition. These studies purport to show, inter alia, that (1) market concentration is increasing and (2) corporate profits and margins have been increasing.[4] Moreover, they assign causality for these trends to supposedly lax antitrust standards and enforcement.[5] They do not consider or caveat that these studies suffer from potentially serious deficiencies—including the fact that the observed outcomes cannot be tied closely to any alleged failings of antitrust policy.

It is worth noting at the outset that high concentration, by itself, does not demonstrate a failure of antitrust policy or imply an outcome that is bad for consumers or for society as a whole. Even if it were true that overall concentration in properly measured antitrust markets was increasing, and even if it were also true that many firms were earning a very high return, this is not direct evidence of a decline in competition. In other words, concentration and competition are not the same thing. Competition is about the process. If firms grow organically to have high market shares because they are more efficient, offer low prices, and beneficial new products while—due to economies of scale or networks effects—earn very high returns, then the economy and consumers are better off. In such a situation the market may appear to have high concentration and high profits. However, it is not the high concentration that has led to the high profits. Rather, a few firms grow to positions of leadership and earn high profits either because they reduce costs or provide goods that consumers prefer, or both.[6] Ultimately, market performance is the point of competition, while counting the number of players is not. Thus, an undue focus on concentration is seriously flawed regardless of any shortcomings of the studies at issue.

First, consider studies finding that industry concentration is increasing. Perhaps the first, and certainly the most well-known, of these is a study by

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4 *See*, *e.g.*, COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4–6 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf; Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?*, 23 REV. FINANCE 697 (2019); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 16–18, 31–32 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017), https://www.nber.org/papers/w23687; Robert E. Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the US Economy* 2–3, 16–19 (Nat'l Bureau of Econ. Research, Working Paper No. 24574, 2018), https://www.nber.org/papers/w24574.

5 *See, e.g.*, Grullon et al., *supra* note 4, at 734–35.

6 *See, e.g.*, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 1–3 (1973). This hypothesis was treated skeptically by many economists until statistical studies confirmed that market-share effects on profitability dominate industry concentration effects. *See generally, e.g.*, David J. Ravenscraft, *Structure-Profit Relationship at the Line of Business and Industry Level,* 65 REV. ECON. & STAT. 22 (1983).

the Council of Economic Advisers ("CEA") from 2016.[7] There have also been similar studies and statistics in the popular press.[8] The main conclusion of the CEA study is that "[s]everal indicators suggest that competition may be decreasing in many economic sectors, including . . . increases in industry-specific measures of concentration."[9] The first major problem with the CEA and similar studies is that they use highly aggregated data, such as Census data. For example, the CEA study uses a fifty-firm concentration ratio ("CR50") in thirteen broad sectors, such as "wholesale trade" and "utilities."[10] It does not take more than a moment to realize that such aggregations have no real relevance to competition.[11] For example, many of the firms operating in wholesale trade are not competitors of one another (they do different things, and may not even operate in the same geographic areas). An electricity producer in Northern California does not compete with one in Florida, but both would be included in the utilities sector.

Relevantly, in its report, the CEA acknowledges the fundamental difference between aggregated concentration measures and antitrust market power.[12] This critical qualification is frequently ignored by those using the CEA's (and other similar studies') findings in the service of their particular agendas.[13] For instance, Professor Lina M. Khan cites the CEA report, among others, and concludes that "[a] growing body of work shows that the consumer welfare frame has failed even on its own terms—namely, by leading to higher prices without any clear efficiency gains."[14]

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7 COUNCIL OF ECON. ADVISERS, *supra* note 4.

8 *See, e.g.*, The Data Team, *Corporate Concentration: The Creep of Consolidation Across America's Corporate Landscape*, THE ECONOMIST (Mar. 24, 2016), https://www.economist.com/graphic-detail/2016/03/24/corporate-concentration.

9 COUNCIL OF ECON. ADVISERS, *supra* note 4, at 1.

10 *See id.* at 4 tbl.1.

11 A crucial and widely agreed upon antitrust principle is that relevant markets are defined based on the substitutes to which consumers will turn in response to a price increase or a corresponding non-price change such as a reduction in product quality. *See, e.g.*, Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806–07, 1810 (1990). There is little relevance in suggesting that concentration may be increasing in an industry comprised of producers whose products are not viewed by consumers as substitutes for one another.

12 *See* COUNCIL OF ECON. ADVISERS, *supra* note 4, at 4 ("The statistics presented in Table 1 are national statistics across broad aggregates of industries, and an increase in revenue concentration at the national level is neither a necessary nor sufficient condition to indicate an increase in market power.").

13 Additionally, Jason Furman, the Chairman of the Council of Economic Advisors when the CEA Report was published, recently chaired a panel to advise the United Kingdom on digital competition issues. Among the other recommendations, the panel firmly supports the consumer welfare standard, which is the regime that the neo-antitrust movement believes is at the heart of the problem and responsible for the alleged increases in concentration. *See* DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION, 5, 86–88 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf ("Consumer welfare is the appropriate perspective to motivate competition policy and a completely new approach is not needed. This approach is flexible and can take into account broader considerations than price, narrowly defined, and also include choice, quality and innovation, among other areas.").

14 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 739 n.148 (2017).

Gregory Werden and Professor Luke Froeb further explain why increases in concentration in such broad aggregates need not bear any relationship to increases in concentration in relevant antitrust markets.[15] For example, if the more concentrated antitrust markets are growing more quickly than the less concentrated ones within these broad aggregates, this can lead to increasing Herfindahl-Hirschman Indexes ("HHIs") (in the broad aggregates) even if there has been no actual increase in concentration (in the relevant antitrust markets). Indeed, there can be increases in concentration in the broad aggregates even if there have been decreases in concentration in the underlying relevant antitrust market.[16]

Professor Carl Shapiro notes that, to the extent increases in concentration in these broad aggregates reflect actual increases in concentration, it would appear that the increases and levels of concentration are modest.[17] For example, the weighted average HHI in the various sectors mentioned in a widely publicized study in *The Economist* is no more than 700.[18] This is equivalent to the concentration level of a market with around fourteen equal-sized competitors.[19]

In addition to relying on studies that use concentration measures for aggregations that are not actual antitrust markets, many advocates of neo-antitrust point to studies purporting to show that markups are increasing (higher markups presumably being evidence of greater market power and less competition).[20] However, a number of studies question the validity of these results. For example, Professor James Traina finds that when economists use measures of markups broader than the ratio of price to the cost of goods sold (i.e., if one includes costs such as marketing and management costs) there is no discernible trend pointing to increasing markups.[21] This result is consistent with the increasing importance of intangibles in the economy. Similarly, to the extent that the economy is shifting towards industries and markets in which fixed costs are very high, such as in high-tech industries where there are large upfront development costs, even vibrant competition tends to

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15 Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 74.

16 This result is obtained if both the highly concentrated antitrust markets and the less concentrated markets within the broader aggregates experience a drop in concentration due to entry, but the more highly concentrated markets grow faster than the less concentrated ones.

17 *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 726–30 (2018).

18 *See id.* at 729.

19 Fourteen equally sized competitors would have a market share of a little over seven percent, which would give an HHI of around 700.

20 *See, e.g.*, De Loecker & Eeckhout, *supra* note 4, at 8–11.

21 James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* 4–6 (Stigler Ctr., Working Paper No. 17, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849; *see also* John Van Reenen, *Increasing Differences Between Firms: Market Power and the Macro-Economy* 10, 16–17 (Ctr. Econ. Performance, Discussion Paper No. 1576, 2018), https://cep.lse.ac.uk/pubs/download/dp1576.pdf.

produce outcomes where price-cost margins, though not actual economic profits, are increasing.[22]

Even if margins across the economy are on average rising, this hardly evidences either reduced competition or any failure of antitrust.[23] For example, a study by Professor Robert Hall finds that margins have been increasing over time, but the margin increases are greatest in highly regulated industries such as finance, utilities, and healthcare.[24] It is problematic to argue that such results are primarily the result of lax antitrust enforcement. Finally, as noted in other contexts, measures of markups and profitability, as used in these studies, can often provide a poor measure of a firm's market power and a poor measure of performance in an industry.[25]

Given these shortcomings, advocates of neo-antitrust will often point to Professor John Kwoka's meta-analysis of merger retrospectives.[26] This study purportedly showed that agencies were approving numerous anticompetitive mergers.[27] The study, however, has a number of weaknesses. Michael Vita & David Osinski explain its limited usefulness as a criticism of *current* antitrust policy.[28] These problems include, inter alia, the fact that Kwoka's merger

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22 *See, e.g.*, Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity* 13–14 (US Census Bureau, Ctr. Econ. Studies, Working Paper No. 18-48, 2018), https://www2.census.gov/ces/wp/2018/CES-WP-18-48.pdf.

23 Yet some in the neo-antitrust movement are quick to assign causality without sufficient support. *See, e.g.*, Khan, *supra* note 2, at 132 ("The resulting system is so warped that enforcement efforts geared around 'consumer welfare' have, according to important recent studies, resulted in higher prices and markups, meaning that this philosophy is failing even on its own terms.").

24 *See* Hall, *supra* note 4, at 14–15.

25 *See, e.g.*, Franklin M. Fisher, *On the Misuse of the Profit-Sales Ratio to Infer Monopoly Power*, 18 RAND J. ECON. 384, 384–85, 394–95 (1987). There is also a vast economic literature that sought to relate various measures of industry performance, such as rates of return or price–cost margins, to economic structure. For critical reviews of this literature, see Richard Schmalensee, *Chapter 16: Inter-Industry Studies of Structure and Performance*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 952, 960–69 (Richard Schmalensee & Robert D. Willig eds., 1989); Demsetz, *supra* note 6, at 1–9; Michael Salinger, *The Concentration-Margins Relationship Reconsidered*, 1990 BROOKINGS PAPERS ECON. ACTIVITY: MICROECONOMICS 287, 318–20. More recently, FTC economist Devesh Raval has called into question the usefulness of the margin measures used in markup studies. *See* Devesh Raval, Testing the Production Approach to Markup Estimation 1–2 (Feb. 18, 2019) (unpublished manuscript) (located at http://www.devesh-raval.com/markupTest.pdf).

26 *See, e.g.*, Khan, *supra* note 14, at 739 n.148 (citing JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015)) ("A growing body of work shows that the consumer welfare frame has failed even on its own terms—namely, by leading to higher prices without any clear efficiency gains."); Markus Dertwinkel-Kalt & Christian Wey, *Evidence Production in Merger Control: The Role of Remedies* 5 (Düsseldorf Inst. for Competition Econ., Discussion Paper No. 217, 2016), https://www.econstor.eu/handle/10419/130192 ("Kwoka . . . present[s] empirical evidence for the EU and the US which questions whether remedies effectively counter anti-competitive merger effects.").

27 JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 116–17 (2015).

28 *See* Michael Vita & F. David Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies*: A Critical Review*, 82 ANTITRUST L.J. 361, 366 (2018).

sample consists primarily of transactions *before* 2000 and none later than 2006, the majority of the included mergers are a very limited representation of the industries evaluated by the antitrust agencies, and that the study does not use generally accepted meta-analytic techniques.[29]

Another significant issue is that several of the largest price increases in Kwoka's sample are from FTC studies of consummated mergers where remedies were imposed.[30] The studies reflect post-merger, but pre-remedy, situations. Kwoka nevertheless uses the pre-remedy price increases to bolster his claim that enforcement policy is too lenient.[31] Had he examined the relevant markets after the FTC remedies took effect, he may well have found that antitrust enforcement prevented, rather than condoned, anticompetitive outcomes.

In sum, while there should be continuous assessment of antitrust policy,[32] the evidence cited by proponents of the new antitrust movement, including the finding of higher aggregate concentration ratios in broad industries and the Kwoka study of merger outcomes, do not support claims that antitrust enforcement has been too lax and there is need for a new standard or paradigm.

II. FALLACY TWO: THE EVOLUTION OF ANTITRUST TO THE CONSUMER WELFARE STANDARD IS A BETRAYAL OF LEGISLATIVE INTENT

There is a view among certain members of the neo-antitrust group that they are returning antitrust to a state in line with the original intent of the legislators when Congress passed the Sherman,[33] Clayton,[34] and Federal Trade Commission Acts[35] in the late nineteenth and early twentieth century.

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29 *Id.* at 363, 366–67.

30 KWOKA, *supra* note 27, at 90–91; *see also* Vita & Osinski, *supra* note 28, at 369, 375–76. These include the *Scott Graphics/Xidex* and *Kalvar/Xidex* mergers described in David M. Barton & Roger Sherman, *The Price and Profit Effects of Horizontal Merger: A Case Study*, 33 J. INDUS. ECON. 165 (1984), and the *Evanston Northwestern/Highland Park* merger described in Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*, 18 INT'L J. ECON. BUS. 17 (2011).

31 KWOKA, *supra* note 27, at 103–04; *see also* Vita & Osinski, *supra* note 28, at 376.

32 Indeed, FTC economists have produced twenty-nine retrospective merger studies to date. *See* Press Release, Federal Trade Commission, FTC Announces Agenda for the 13th Session of its Hearings on Competition and Consumer Protection in the 21st Century (Mar. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-announces-agenda-14th-session-its-hearings-competition. The FTC provided citations to each study at https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf. *Id.*

33 Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

34 Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

35 Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

As a corollary, they argue that the consumer welfare standard is a betrayal of that original intent.[36] Specifically, the argument is that the federal antitrust statutes were implemented in order to support populist goals such as combatting the influence of trusts on the American political system.[37] Moreover, economic concepts such as efficiency and welfare were not the primary considerations—rather, objectives such as protecting small businesses and others based on notions of "fairness" were at the forefront.[38]

The reality is that there was no uniform approach to antitrust from its inception throughout the early- to mid-twentieth century, and characterizations to the contrary involve a selective view of the complexity and lack of coherence in early antitrust jurisprudence.[39] Indeed, as noted by Professor

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[36] *See, e.g.*, Khan, *supra* note 14, at 737 ("[T]he undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e., whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e., whether consumers are materially better off). Antitrust law and competition policy should promote not welfare but competitive markets. *By refocusing attention back on process and structure, this approach would be faithful to the legislative history of major antitrust laws*.") (emphasis added); Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J.F. 980, 991 (2018), https://www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust ("The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts."); Russell Brandom, *The Anti-Monopoly Case Against Google: A Conversation with Open Markets' Barry Lynn*, THE VERGE (Sept. 5, 2017, 2:55 PM), https://www.theverge.com/2017/9/5/16243868/google-monopoly-antitrust-open-markets-barry-lynn ("We created antitrust laws originally to protect our liberties, often as producers of stuff. Say I've grown a bushel of wheat and I want to bring my wheat to market. I want there to be no corporation standing between me and the person who's buying my wheat so I can engage in an open negotiation in a competitive environment against other farmers for the favor of these buyers. . . . The second purpose was to protect our democracy against huge concentrations of wealth and power. To protect our democratic institutions. And the third purpose [was] to protect your community. . . . Those were the goals. They're political goals. [But] in the late 1970s and 1980s, the Chicago School came along and said all those political considerations are very wasteful, and what we should really do is remake monopoly law so it focuses on serving the welfare of the consumer." (second and fourth alterations in original)).

[37] Khan, *supra* note 14, at 737–40.

[38] *Id.* at 739–42.

[39] *See, e.g.*, RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 199–200 (Alfred A. Knopf, Inc. 1965) (1952) ("The goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition, and at least some members of Congress must have been under the spell of this intellectually elegant model, insofar as they were able to formulate their economic intentions in abstract terms. The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to need protection."). For a walkthrough of the various eras of antitrust enforcement from an economic perspective, see William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000). *See*

Ernest Gellhorn & Professor William Kovacic, "Like many legislative watersheds, the debates and events surrounding the passage of the Sherman Act contain something for everyone. To generations of observers, the Sherman Act's legislative record has supplied a wishing well into which one can peer to glimpse evidence that supports preferred policies."[40] What is clear, however, is that, by design, the antitrust laws have always had an evolutionary character that recognizes the need to adjust to new learnings.[41]

Regarding this evolution, Professor Richard Hofstadter noted that in its early history, antitrust had a powerful movement quality but very few accomplishments in the courts.[42] Later, in the 1940s through the 1960s, it ceased to be a movement just as it was attaining litigation success: "[O]nce the United States had an antitrust movement without antitrust prosecutions; in our time there have been antitrust prosecutions without an antitrust movement."[43] Thus, when adherents of the neo-antitrust movement bemoan that current antitrust enforcement ignores original intent, they also ignore that the period closest to the enactment of the statutes was a period of limited interventionism. Indeed, in the first ten years or so of the Sherman Act, the vast majority of antitrust cases prosecuted labor unions rather than businesses[44]—a fact that might come as a surprise to some in the neo-antitrust movement.

On the other hand, antitrust's most interventionist period (the 1940s through the 1960s)[45] was fundamentally not a populist era. As noted by Professors Kovacic and Shapiro, this era got much of its impetus from the work of an earlier generation of University of Chicago economists like Henry Simons, Jacob Viner, and Frank Knight.[46] Later judicial decisions, if not entirely due to the influence of economics, were at least very consistent with

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also Douglas H. Ginsburg, *Bork's* "Legislative Intent" *and the Courts*, 79 ANTITRUST L.J. 941, 941–42, 950 (2014); Page, *supra* note 3, at 1–2.

40 ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 20 (4th ed.1994).

41 *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."); *see also* State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997). In *Khan*, which overturned the per se condemnation of maximum resale price maintenance, Justice O'Connor wrote for a unanimous court that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" *Id.* at 5, 20–22 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978)).

42 *See* HOFSTADTER, *supra* note 39, at 193–94.

43 *Id.* at 189, 194–95.

44 *See, e.g.*, Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30–31 (1963) ("But however hesitant and tentative the federal courts may have been initially in applying the statute to business activities, no such reluctance was evidenced when the defendant was a union. Between passage of the statute in 1890 and the decision of the Supreme Court in the *Trans-Missouri Freight* case in 1897, lower federal courts found unions in violation twelve times while only one violation was found involving a business.").

45 *See* Kovacic & Shapiro, *supra* note 39, at 49–52.

46 *Id.* at 49.

the learnings of economists such as Joe Bain, and the structure-conduct-performance paradigm.[47] Economists like Jesse Markham, Henry Simons, Maurice Clark, and even a young George Stigler also played a role in this era of activism.[48] Thus, a diverse range of antitrust scholars agree that even before the formal adoption of the consumer welfare standard in the 1970s, economic criteria were a major, if not the primary, objective of the antitrust laws since their inception.

For example, former FTC Chairman Robert Pitofsky, an ardent advocate for more interventionist antitrust policies,[49] stated:

> Although the political forces that produced the major antitrust statutes—in 1890, 1914, 1936, and 1950—varied widely, those statutes once enacted have almost always been enforced and interpreted so that economic considerations were paramount. The issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale, but rather whether they had any role to play at all, and if so, how they should be defined and measured.[50]

Pitofsky also indicates that neither the legislative history of the Sherman Act nor subsequent jurisprudence intended to undermine monopoly power obtained through superior business acumen,[51] arguably one of the primary goals of the neo-antitrust movement given their focus on the "tech giants." Moreover, Pitofsky noted a number of non-economic concerns that should not play a role in antitrust enforcement, including some at the heart of the neo-antitrust movement, such as "protection for small businessmen against the rigors of competition" and income redistribution.[52]

Likewise, Professor Herbert Hovenkamp, who co-authored the most widely used legal treatise on antitrust, states:

> One of the great myths about American antitrust policy is that courts first began to adopt an "economic approach" to antitrust problems in the relatively recent past. At most, this "revolution" in antitrust policy represented a change in economic models. Antitrust policy has been forged by economic ideology since its inception.[53]

Professor William Page adds that the early goal of antitrust laws was "the restoration of a competitive market rather than the establishment of fair

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47 *See* JOE S. BAIN, INDUSTRIAL ORGANIZATION, at viii (1959); Kovacic & Shapiro, *supra* note 39, at 51–52.

48 *See* Kovacic & Shapiro, *supra* note 39, at 51–53.

49 *See, e.g.*, Robert Pitofsky, *Introduction: Setting the Stage*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 3–6 (Robert Pitofsky ed., 2008).

50 Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

51 *Id.* at 1053.

52 *Id.* at 1058.

53 Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: A Historical Perspective*, 59 ANTITRUST L.J. 75, 75 (1990).

outcomes."[54] Similarly, Professor Michael Jacobs found that "[i]n almost every era of antitrust history, policymakers have employed economic models to explain or modify the state of the law and the rationale for its enforcement."[55]

Consequently, the modern era, with its emphasis on consumer welfare, is just the latest stage in the built-in evolutionary nature of antitrust. There has been a move away from some of the heavily interventionist holdings of the prior era (e.g., *United States v. Aluminum Co. of America*,[56] *Brown Shoe Co. v. United States*[57]) because economic learnings have evolved and the antitrust laws were designed to incorporate such new learnings.[58]

As for Justice Brandeis himself, while he was clearly concerned that monopolies threatened democracy and limited the scope of individual opportunity (which is consistent with modern antitrust), he also believed that firm economic principles should support antitrust enforcement.[59] Moreover, while he believed that legislators could incorporate goals such as individual opportunity in the shaping of the antitrust laws, the application of the legal standard differentiates the role of the lawyer, enforcer, and judge from that of the legislator.[60] As Jonathan Sallet noted:

> The laws Brandeis proposed and supported did not ask a federal antitrust agency to decide whether a company was too politically powerful . . . Rather, Brandeis favored standards that looked directly at economic . . . outcomes, such as a firm's market share or the use by dominant firms of practices like tying or exclusive contracts. His approach, in other words, was to find enforceable legal standards that identify harmful industrial conduct in a manner that vindicates social and democratic values.[61]

Further, Werden finds that much of what Brandeis wrote and advocated for "are in the mainstream of antitrust law today."[62] For example, Brandeis stated, "There is nothing in our industrial history to indicate that there is any

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54 Page, *supra* note 3, at 5.

55 Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C.L. REV. 219, 226 (1995).

56 148 F.2d 416 (2d Cir. 1945).

57 370 U.S. 294 (1962).

58 *See* C. Paul Rogers III, *Why Do Bad Antitrust Decisions Sometimes Make Good Law? The* Alcoa *and* Brown Shoe *Examples*, 71 SMU L. Rev. 97, 126 (2018) (describing how even "bad" decisions are useful in developing subsequent antitrust litigation).

59 Jonathan Sallet, *Louis Brandeis: A Man for This Season*, 16 COLO. TECH. L.J. 365, 386–87 (2018).

60 *Id.* at 370.

61 *Id.* at 370–71.

62 Gregory J. Werden, *Back to School: What the Chicago School and New Brandeis School Get Right* 11 (Unaffiliated, Working Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247116.

need whatever to limit the natural growth of a business in order to preserve competition."[63] Further, Werden notes

> As a justice of the Supreme Court, Brandeis was less interventionist than nearly all of his brethren, even though he was motivated to protect small business. One of his majority antitrust opinions, reversing a judgment for the government in a patent-related case, held that "there must be a definite factual showing of illegality." That sensible view seems more consistent with the Chicago School than with the New Brandeis School.[64]

In sum, by design, the antitrust laws were crafted with open-ended language and have always had an evolutionary, common-law character that allows them to adapt to changing understandings in the law and in economics. This is a fact that spans the entire history of antitrust enforcement in the United States, and not just the modern era.

> Whatever one's view regarding the true *intent* of antitrust legislation, a perhaps more fundamental policy issue is what the role of antitrust *should* be. As maintained throughout this paper, regardless of the purity of its pedigree, the modern approach is superior to the proposals of the neo-antitrust movement in terms of its coherence, effectiveness in promoting market competition, and administrability.

III. FALLACY THREE: MODERN ANTITRUST IS OVERLY BEHOLDEN TO ROBERT BORK AND TO A RADICAL CHICAGO SCHOOL VIEW THAT MARKETS ARE SELF-CORRECTING AND THAT ONLY HIGHLY CONCENTRATING MERGERS ARE POTENTIALLY OBJECTIONABLE

Many advocates of the neo-antitrust movement contend that current antitrust practice, especially its strong focus on economics, is overly beholden to the so-called "Chicago School" and in particular to the thinking of Robert Bork.[65] There is no doubt that Bork's work was part of an important intellectual movement to bring more economic reasoning into antitrust.[66] That being said, while the Chicago School is more varied and complex than the caricature painted by many of these critics,[67] what the critics appear to primarily

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63 LOUIS D. BRANDEIS, *Competition*, *reprinted in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 112, 114–15 (Osmond K. Fraenkel ed., 1934).

64 Werden, *supra* note 62, at 12 (quoting Standard Oil Co. (Ind.) v. United States, 283 U.S. 163, 179 (1931) (footnotes omitted).

65 *See, e.g.*, Khan, *supra* note 14, at 727–30 (discussing how Bork's ideas influenced legislation and courts); Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Apr. 2018) 5–6 (summarizing critiques of the Chicago School's ideas).

66 *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11 (1966) ("[C]ourts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies.").

67 For a more accurate description of the Chicago School's contributions to antitrust, see Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3

mean by this contention is that under the influence of the Chicago School, antitrust enforcers and the courts find only highly concentrating, horizontal transactions objectionable and consider virtually all vertical arrangements to be either efficient or competitively neutral.[68]

While the Chicago School has been influential regarding antitrust in many ways, this misrepresentation ignores numerous aspects of modern antitrust enforcement and various developments that have taken place over the last fifty years or more. For one, as previously discussed, the primary objective of modern antitrust is the consumer welfare standard. It may come as a surprise to some antitrust observers that while Bork certainly supported a careful application of economic analysis and explicitly used the term "consumer welfare" for what he claimed should be the proper standard for antitrust policy,[69] the *actual* consumer welfare standard is not what Bork himself advocated. What Bork meant was what many today call a "total welfare" or a "social welfare" standard.[70] Bork argued for a broad efficiency standard that would give weight to both consumer and producer welfare.[71] That is generally not what antitrust agencies or courts do. Under current antitrust enforcement and jurisprudence, efficiency claims as they apply to producer welfare are held to a very high standard. To the extent such claims are considered, they are dismissed unless it can be shown that they are not achievable through less anticompetitive means and will ultimately be passed on to consumers.[72] Such treatment of efficiencies has little in common with what Bork himself advocated.

COMPETITION POL'Y INT'L 24, 32 (2007) ("Unfortunately, the Chicago/Post-Chicago narrative has also tempted commentators to adopt extreme and misleading descriptions of one camp or the other—but most frequently of the Chicago School. These descriptions often paint the Chicago School as monolithic, ideological, and extreme in its views. It is none of those things. Chicago authors have documented some of the only empirical examples of raising rivals' costs theories, contributed to the theory of collusion, and explored the use of tying and other practices to monopolize adjacent markets. These caricature-like descriptions of the Chicago movement, however, threaten to nonsensically turn 'Chicago School' into a pejorative and have no place in a meaningful dialogue about antitrust policy." (footnotes omitted)).

68 *See, e.g.*, Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 271 (2017) ("For example, courts had historically treated horizontal mergers in concentrated markets, tying, and vertical restraints as competitively suspect. Along with Baxter, Miller, and other new federal antitrust officials, judges on the federal bench—such as Bork himself, Frank Easterbrook, and Richard Posner—abandoned this traditional approach."(footnotes omitted)).

69 Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J. L. & ECON. S19, S19–S20 (2014).

70 *See, e.g.*, *id.* at S20 (defining "consumer welfare" as "total welfare (equivalent to consumer plus producer surplus and economic efficiency)"); Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND. 4–5 (Oct. 2018), https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf ("Bork himself downplayed the focus on consumers, instead stressing the importance of maximizing overall public welfare and economic efficiency in general.").

71 Kennedy, *supra* note 70, at 5.

72 *See* U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 10 (2010).

As for the allegedly outsized role of the Chicago School, many of the tools that the agencies currently use in their analytical techniques and enforcement policies are certainly not from Chicago, such as the unilateral effects revolution that has taken place in merger enforcement over the past quarter century. Unilateral effects theories, which can readily discern potential competitive problems from mergers in moderately concentrated markets, started being applied to antitrust long after the advent of the Chicago School.[73] Decidedly non-Chicago scholars, such as Robert Willig, Jonathan Baker, Carl Shapiro, and Joseph Farrell, who hail from places such as Princeton and Berkeley, championed these theories.[74] Such "non-Chicago" theories have played a leading role in merger enforcement for over two decades,[75] and many would argue that such theories have resulted in a more aggressive posture for the antitrust agencies and plaintiffs.[76] For example, in his review of FTC staff analyses from 1989 through 2016, Malcolm Coate finds "something of an upward trend" in horizontal merger challenges.[77] While measuring enforcement intensity across time and geographies is a potentially fraught activity,[78] it is notable that Coate finds declining staff support for considerations that tend to mitigate a finding of competitive harm, such as ease of entry or cognizable efficiencies.[79] While he finds increasing recognition of power-buyer theories, the effect does not seem to impact the merger-challenge decision.[80]

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73 Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 337 (comparing the successes of the post-Chicago theories, including the unilateral effects theory).

74 *See, e.g.*, Jonathan B. Baker, *Contemporary Empirical Merger Analysis*, 5 GEO. MASON L. REV. 347, 350 (1997) (describing how economic studies of unilateral effect are useful in analyzing market power); Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E.J. THEORETICAL ECON. art. 9, 1–2 (2010), https://faculty.haas.berkeley.edu/shapiro/alternative.pdf (proposing an indicator for effects of mergers that is based on "unilateral (rather than coordinated) effects" to better predict all forms of effects); Robert D. Willig, *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, BROOKINGS PAPERS: MICROECONOMICS (1991) at 281, 293 (noting that the 1984 Merger Guidelines had erroneously "neglected" unilateral effects).

75 *See, e.g.*, Carl Shapiro, *Mergers with Differentiated Products*, 10 ANTITRUST 23, 24 (Spring 1996) ("It is fair to say that economic analysis of differentiated-products mergers at the Division typically focuses on unilateral effects, unless there are structural factors facilitating collusion following the merger or there is a history of collusion in the industry."); Malcolm B. Coate, The Merger Review Process at the Federal Trade Commission from 1989 to 2016 2, 18 (Feb. 28, 2018) (unpublished paper) (https://ssrn.com/abstract=2955987) (noting that "[a] trend toward unilateral effects analysis is observed" and "[o]ne can point to a noticeable decline in the application of the collusion theory over time").

76 *See, e.g.*, William McConnell, *Obama Administration Most Aggressive Ever in Regulating Mergers and Acquisitions,* THESTREET (May 23, 2016), https://www.thestreet.com/markets/mergers-and-acquisitions/big-government-steps-up-challenges-to-big-business-in-merger-wars-13538758 ("*TheStreet* has discovered a pattern of increased regulatory actions challenging mergers that dates back to the Reagan administration.").

77 *See* Coate, *supra* note 75, at 8–9.

78 *See, e.g.*, Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, 22 ANTITRUST 37, 37–38 (Summer 2008).

79 Coate, *supra* note 75, at 2–3, 28.

80 *See id.* at 21.

Characterizing modern antitrust theory as captive to the Chicago School also ignores many other developments involving the application of game theory and theories of information to antitrust. For example, the agencies have successfully used bargaining theory to revive their enforcement program in the health care area,[81] and recently the DOJ relied on it heavily in an ultimately unsuccessful challenge to the merger of AT&T and Time Warner.[82]

Similarly, the view that antitrust has gone astray by condoning virtually all vertical practices ignores general developments in both theory and enforcement policy in this area. "Post-Chicago" models show that by breaking down certain strict assumptions vertical restraints by a dominant firm can (although will not necessarily) produce anticompetitive results.[83] Such theories can play a prominent role at the US antitrust agencies. Indeed, Bruce Hoffman, former Director of the Bureau of Competition at the FTC, has noted that the antitrust agencies challenged twenty-two vertical mergers between 2000 and the start of 2018.[84] Rhetorical claims by some that antitrust condones all manner of dominant firm conduct also ignores recent enforcement in the area of vertical restraints, as evidenced by the Qualcomm, McWane, Intel, Dentsply, Transitions, and Microsoft matters.[85] While current policy towards vertical mergers or vertical restraints may not be as prominent a focus of antitrust enforcement as some more problematic activities, such as criminal price-fixing or horizontal mergers in concentrated markets, policy in the vertical area hardly resembles the caricaturized Chicago School approach, where almost all vertical arrangements, with the exception of regulatory evasion, are seen as efficient and per se legal.[86]

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81 *See* Darren S. Tucker, *Seventeen Years Later: Thoughts on Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE, Oct. 2009, at 1, 10.

82 *See* United States v. AT&T, Inc., 916 F.3d 1029, 1037 (D.C. Cir. 2019).

83 For a summary of the literature, see Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 61–74 (Konkurrensverket 2008).

84 *See* D. Bruce Hoffman, Acting Dir., Bureau of Competition, FTC, Remarks at the Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC 1 (Jan. 10, 2018).

85 *See* United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001); United States v. Dentsply Int'l, Inc., 190 F.R.D. 140, 141 (D. Del. 1999); FTC's Complaint for Equitable Relief at 2, FTC v. Qualcomm, Inc., No. 5:17-cv-00220-LJK (N.D. Cal. May 21, 2019); McWane, Inc., Docket No. 9351, at 1 (Fed. Trade Comm'n Jan. 30, 2014), https://www.ftc.gov/system/files/documents/cases/140206mcwane-opinion_0.pdf; Complaint at 1, Transitions Optical, Inc., Docket No. C-4289 (Fed. Trade Comm'n Apr. 22, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/04/100427transopticalcmpt.pdf; Complaint at 2, Intel Corp., Docket No. 9341 (Fed. Trade Comm'n Dec. 16, 2009), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.

86 That being said, sound theoretical and empirical support exists for having greater scrutiny over horizontal mergers relative to vertical mergers, integration, and restrictions. *See, e.g.*, Global Antitrust Institute, Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers 4 (Sept. 6, 2018), https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf; James C. Cooper et al., *Vertical Antitrust Policy As a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648 (2005); Francine Lafontaine

Moreover, while it may be true that the trend in antitrust enforcement since the 1960s has been more lenient towards many horizontal transactions, vertical practices, and certain dominant firm behaviors, this is not solely the product of the Chicago School. Kovacic has noted that many such developments were actually due to the impact of scholars associated with the more interventionist "Harvard School," including Donald Turner, Philip Areeda, and Justice Stephen Breyer.[87] The most obvious example of this would be the influential Areeda-Turner standard for predatory pricing.[88]

The contention that modern antitrust is beholden to the Chicago School also ignores a number of important Supreme Court decisions that had a broad consensus and reflect diverse origins. For example, the *Verizon Communications Inc. v. Law Offices of Curtis Trinko, LLP*[89] decision that limited the applicability of the essential-facilities doctrine, was unanimous, including Justices Ruth Bader Ginsberg and Stephen Breyer.[90] As noted by Kovacic, while the *Trinko* opinion was written by Justice Scalia, Scalia relied heavily on ideas formulated by Justice Breyer when he was an appeals-court judge, in cases such as *Town of Concord* and *Massachusetts v. Boston Edison Co.*,[91] to articulate the decision's rationale.[92] Other cases include: *Credit Suisse Securities (USA) LLC v. Billing*,[93] a decision written by Justice Breyer (with only Justice Thomas dissenting) that dismissed claims brought by investors against underwriters and which may have narrowed the scope of antitrust in regulated industries;[94] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[95] a unanimous decision which extended the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[96] standard for predatory pricing to predatory buying;[97] and *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*,[98] a unanimous decision that held against plaintiffs' price-squeeze claims.[99]

& Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 666 (2007); O'Brien, *supra* note 83, at 58.

87 William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 30; *see also* Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 COMPETITION POL'Y INT'L 59, 71–72 (2007).

88 Kovacic, *supra* note 87, at 46.

89 540 U.S. 398 (2004).

90 *Id.* at 400, 411.

91 915 F.2d 17 (1st Cir. 1990).

92 *See Trinko*, 540 U.S. at 411–12; Kovacic, *supra* note 87, at 68–69.

93 551 U.S. 264 (2007).

94 *See id.* at 267, 270, 287; Howard A. Shelanski, *Justice Breyer, Professor Kahn, and Antitrust Enforcement in Regulated Industries*, 100 CALIF. L. REV. 487, 505 (2012).

95 549 U.S. 312 (2007).

96 509 U.S. 209 (1993).

97 *Weyerhaeuser*, 549 U.S. at 315.

98 555 U.S. 438 (2009).

99 *Id.* at 442.

Naturally, pointing out that a considerable fraction of current antitrust enforcement and jurisprudence has roots outside of the Chicago School does not mean that one should see the influence of the scholars associated with this movement as detrimental to antitrust. The important issue is not whether the Chicago School is responsible for antitrust being too lax—but whether antitrust is *actually* too lax. In the era prior to the consumer welfare standard, scholars within antitrust almost universally agree that antitrust enforcement was overly interventionist. Indeed, Robert Pitofsky, an antitrust scholar that few would associate with the Chicago School, is heavily critical of the structural standards created by cases such as *United States v. Von's Grocery Co.*,[100] or *Brown Shoe*.[101]

Thus, far from being captive to Robert Bork and the Chicago School, antitrust enforcement has a healthy history of incorporating economic learning from all schools of thought. It is simply not credible to contend that antitrust analysis and enforcement is bound to one theory or another.

IV. FALLACY FOUR: THE CONSUMER WELFARE STANDARD FOCUSES MONOMANIACALLY ON PRICE, TO THE EXCLUSION OF MORE IMPORTANT ECONOMIC CONSIDERATIONS SUCH AS QUALITY AND INNOVATION

Many advocates of neo-antitrust argue that modern antitrust focuses too much on price and that this results in too low of a level of enforcement.[102] This is simply wrong. There is abundant evidence that the agencies and antitrust generally are concerned with non-price factors in addition to price factors.[103] Since at least 1982, the *Horizontal Merger Guidelines* have noted that adverse impacts on beneficial non-price attributes is a concern of horizontal merger policy, and indeed the focus of the agencies on such issues has increased as these *Guidelines* have gone through subsequent iterations and

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100 384 US. 270 (1966).

101 *See* Pitofsky, *supra* note 50, at 1070.

102 *See, e.g.*, Khan, *supra* note 14, at 716. ("Due to a change in legal thinking and practice in the 1970s and 1980s, antitrust law now assesses competition largely with an eye to the short-term interests of consumers, not producers or the health of the market as a whole; antitrust doctrine views low consumer prices, alone, to be evidence of sound competition.").

103 *See, e.g.*, U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 1, at 2 (2010) ("Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence.").

updates.[104] Further, in 1995, the US issued licensing agreement guidelines that directly integrate innovation concerns into competition law assessment.[105]

Moreover, an examination of the actual enforcement activities of the agencies indicate that non-price concerns play a significant role in agency enforcement. These concerns led agencies to bring cases in a variety of industries—including medical treatments and devices,[106] tech firms,[107] cellular providers,[108] and other industries.[109] Professor Joshua Wright notes that "[b]etween 2004 and 2014, the FTC challenged 164 mergers, and [*at least*] 54 of them alleged harm to innovation."[110] Further, it bears remembering that the most important exclusion case of the last several decades, *United States v. Microsoft*,[111] focused almost exclusively on non-price harms.[112] More recently, the extensive multiyear Google search bias investigation by the FTC involved a market with a zero price and concerned issues of quality.[113]

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104 The 1968 version of the Horizontal Merger Guidelines does not mention non-price factors, but given its emphasis on industry structure, it does not really consider competitive effects at all. *See generally* U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES, http://www.justice.gov/atr/hmerger/11247.pdf.

105 *See* U.S. DEP'T OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 1.0, at 2 (1995). These guidelines have most recently been updated in 2017. *See* U.S. DEP'T OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017).

106 *See, e.g.*, FTC v. Steris Corp., 133 F. Supp. 3d 962, 964 (N.D. Ohio 2015) (alleging that the merger would harm future competition by putting an end to Synergy's plans to enter the US market with a promising new x-ray sterilization technology); Complaint at ¶ 42, Otto Bock HealthCare North America, Inc., Docket No. 9378 (Fed. Trade Comm'n Apr. 18, 2018), 2018 WL 2042043 (noting that both defendants responded to the other's innovations in product features and functionality of their microprocessor prosthetic knees).

107 *See, e.g.*, Complaint at 4, 19, United States v. Bazaarvoice, Inc., No. C 13-cv-00133, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014) (alleging that prior to the merger, the two companies had engaged in "feature driven one-upmanship" and that the transaction "significantly reduced incentives to . . . invest in innovation"); Statement, Federal Trade Commission, Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc. at 2, File No. 141-0214 (F.T.C. Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219 zillowmko-jdw-tmstmt.pdf (discussing how staff considered whether the combined entity's incentives to innovate by developing new features attractive to consumers on the free side of the market would be affected).

108 *See, e.g.*, Complaint at 3, United States v. AT&T, No. 1:11-cv-01560, 2011 WL 13273135 (D.D.C. Oct. 29, 2011) (alleging that consumers would face not only higher prices and less variety–but less innovation post-merger).

109 *See, e.g.*, Complaint at 9, Verisk Analytics, Inc., Docket No. 9363 (Fed. Trade Comm'n Dec. 19, 2014) (concerning competition in the development of high-resolution aerial images for roof reports), https://www.ftc.gov/enforcement/cases-proceedings/141-0085/veriskeagleview-matter.

110 Joshua D. Wright, *Antitrust Provides a More Reasonable Regulatory Framework Than Net Neutrality* 11 (Geo. Mason Univ. Law & Econ. Research Paper Series No. 17-35, 2017).

111 253 F.3d 34 (D.C. Cir. 2001).

112 *Id.* at 71, 87.

113 *See* Statement, Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google's Search Practices at 2, Google, Inc., File No. 111-0163 (Fed. Trade Comm'n Jan. 3, 2013),

Advocates of neo-antitrust sometimes point to what appears to be the greater number of European cases focused on non-price factors as evidence that US antitrust enforcement is lax in this regard.[114] Even if this were true (and we have seen no compelling empirical research demonstrating it to be the case), this would not be evidence of any shortcomings of the consumer welfare standard, since both US and EU antitrust authorities employ the standard. This merely illustrates that there can be legitimate debate about the ideal level of enforcement within the contours of the consumer welfare standard.[115]

Further, with respect to non-price factors, it is also important to note that careful attention to these dimensions will not necessarily lead to more enforcement. It is widely acknowledged by economists and competition agencies themselves that under certain conditions, higher concentration or cooperative efforts among firms (both horizontal and vertical) can lead to *more* innovation and product variety.[116]

V. FALLACY FIVE: LARGE MARKET CAPITALIZATION IS AN ANTITRUST PROBLEM (A.K.A., "BIG IS BAD")

A number of proponents of neo-antitrust have pointed to the large capitalization of several firms, particularly the so-called "tech giants," as evidence of the flaccidity of current antitrust policy and the need for sterner action.[117] Indeed, Senator Amy Klobuchar has introduced a bill that would

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https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf; *see also* John M. Yun, *Understanding Google's Search Platform and the Implications for Antitrust Analyses*, 14 J. COMPETITION L. & ECON. 311, 322 (2018).

114 *See generally* Eleanor M. Fox, *US and EU Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY 339, 339–54 (Edward Montgomery Graham & J. David Richardson eds., 1997). For instance, there have been EU cases involving the elimination of pipeline and medical products. *See generally* 2015 O.J. (C 25) 17; 2014 O.J. (C 436) 11; 2014 O.J. (C 371) 21; 2012 O.J. (C 174) 25. There have also been EU cases motivated by concerns regarding harm to the ability of potential rivals to innovate. *See generally* 2015 O.J. (C 310) 7; 2011 O.J. (C 529) 1.

115 *See* Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 376 (2005). Importantly, Heyer details the role that uncertainty plays in antitrust enforcement and the need to more systematically incorporate a decision's expected value over all possible outcomes. *Id.* This explicit recognition can perhaps explain some of the seemingly dramatic differences in antitrust outcomes between the US and the EU. *Id.* at 375–76.

116 Ultimately, the relationship between innovation and market structure is not straight-forward and is a fact-intensive inquiry. *See, e.g.*, Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361, 401 (Josh Lerner & Scott Stern eds., 2012); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 14 ("[I]n markets in which innovation is significant, the traditional concentration-competition relationship is on a weaker or more nuanced empirical and theoretical footing than otherwise.").

117 *See, e.g.*, Ganesh Sitaraman, *Taking Antitrust Away from the Courts: A Structural Approach to Reversing the Second Age of Monopoly Power* 15 (Vanderbilt U. L. Sch. Legal Stud. Res. Paper Series

ban significant acquisitions by any company with a market cap higher than $100 billion unless the acquirer could demonstrate that the transaction would not lessen competition by more than a de minimis amount.[118] As of this writing, some ninety companies would fall under these strictures.[119] Along these lines, as part of her 2020 presidential campaign, Senator Elizabeth Warren has proposed legislation that would prevent companies with global revenue of $25 billion or more from owning both a "platform utility" and any participant on that platform.[120]

Basing antitrust violations on capitalization is largely a reversion to the "big is bad" era of antitrust.[121] The mere size of a company says nothing about its market share in any relevant antitrust market. More importantly, it says nothing about whether a very large and successful firm—even one with a dominant share of an economic market—is harmful to consumers. Indeed, given the dot-com bubble and the recent "unicorn" phenomenon,[122] tying high market capitalization to antitrust issues appears even *more* problematic than the earlier "big is bad" era. There are numerous reasons a company can have a high valuation, including an innovative business model, high profits across a breadth of different markets, high growth, or simply speculative bubbles. The latter importantly shows that high capitalization can result from flawed expectations, which make them especially problematic for inferring

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No. 19-02, 2018), https://greatdemocracyinitiative.org/wp-content/uploads/2018/09/Taking-Antitrust-Away-from-the-Courts-Report-092018-3.pdf ("Any merger involving a company with more than 1,000 employees, that has a significant market capitalization ($1 billion), or that impacts sectors of significant public concern, should have to be affirmatively justified with an open period for public comment and participation."); Adonis Hoffman, *New Congress Should Start Regulating Big Tech*, THE HILL (Nov. 7, 2018, 3:00 PM), https://thehill.com/opinion/technology/415256-its-time-congress-started-regulating-big-tech ("Given the massive size and market capitalization of Facebook, Amazon, Apple, Netflix and Google alone, it is not heresy to ask whether an antitrust review is in order.").

118 Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. § 3(3)(B)(ii) (2017).

119 *See* Erin Duffin, *The 100 Largest Companies in the World by Market Value in 2019 (in Billion U.S. Dollars)*, STATISTA (last edited Aug. 12, 2019), https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/.

120 Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c. Of note, Warren defines a "platform utility" as "an online marketplace, an exchange, or a platform for connecting third parties." *Id.*

121 *See* D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1130 (2016) ("'Big is bad' has been a bogeyman of antitrust since the time of *Standard Oil*. However, bigness is not an antitrust offense. Rather, antitrust focuses on consumer welfare loss and there has not been a decided merger or a litigated conduct decision that has said otherwise for at least a generation." (footnote omitted)).

122 *See, e.g.*, Aileen Lee, *Welcome to the Unicorn Club: Learning from Billion-Dollar Startups*, TECHCRUNCH (Nov. 2, 2013, 2:00 PM), https://techcrunch.com/2013/11/02/welcome-to-the-unicorn-club/.

monopoly problems. This is to say nothing of the extremely high volatility in market capitalization rates often due to rumors or general market gyrations.[123]

The excessive focus on firm size and market capitalization also belies a fundamental misunderstanding of market economies. The dynamic incentives to become successful, even "dominant," are activities that should be encouraged. As Judge Learned Hand noted, "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins."[124] Further, as previously quoted, Brandeis stated, "There is nothing in our industrial history to indicate that there is any need whatever to limit the natural growth of a business in order to preserve competition."[125] The idea of heavily regulating or cavalierly breaking up firms because they are successful in satisfying consumer demand has no basis in sound economic analysis. The reality is that some markets may justify containing only a handful of firms. This is not evidence of monopoly power, let alone lax antitrust enforcement, but of efficient markets. The notion that breaking up tech firms, such as Amazon, Google, and Facebook, or heavily regulating them based on perceived and conjectured theories of harm is not only reckless—it will undoubtedly chill innovation incentives. Notably, Microsoft, which was at least as feared as Amazon and other "tech giants" are today, was decidedly not condemned for being a rich monopolist but for anticompetitive conduct after a careful investigation.[126]

Indeed, it is unclear whether a focus on market capitalization will result in fewer false negatives, as these advocates appear to hope. Ignoring real indicia of market power in favor of looking at revenue or capitalization might instead result in less enforcement where market power truly exists. Finally, it is unclear what the effects of such rules might have on innovation, as undoubtedly a desire to be bought out forms a large impetus for innovation in today's tech sector.[127]

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123 *See* Richard Epstein, *Beware of Populist Antitrust Law*, FORBES (Jan. 23, 2019, 1:00 AM), https://www.forbes.com/sites/richardepstein/2019/01/23/beware-of-populist-antitrust-law/ ("[H]istory is littered with dominant firms that have lost their way, some of which have returned to greatness, but most not. Just think of other changes in the DJIA. Gone from the Dow are former household names as Goodyear, Alcoa, Eastman Kodak, Bethlehem Steel, Union Carbide. In their place are the likes of Apple, Boeing, Johnson & Johnson, Nike and Pfizer. Any firm that thinks it is too big to fail is one step closer to failure.").

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

125 BRANDEIS, *supra* note 63, at 114–15.

126 United States v. Microsoft Corp., 253 F.3d 34, 72 (D.C. Cir. 2001).

127 *See, e.g.*, Brett Hollenbeck, *Horizontal Mergers and Innovation in Concentrated Industries*, 18 QUANTITATIVE MARKETING & ECON. 1, 33 (2020), https://econpapers.repec.org/article/kapqmktec/ (finding that the prospect of being bought out results in significantly higher rates of innovation).

VI. FALLACY SIX: NOT RECOGNIZING THAT ABANDONING AN ECONOMIC WELFARE FRAMEWORK AND RELYING MORE ON POPULIST GOALS TO GUIDE ANTITRUST WILL LEAD ANTITRUST TO DEPEND MORE ON RHETORIC AND RULES OF THUMB

Amidst all the criticism of the consumer welfare standard, it may pay to step back and consider some of the advantages of the standard. One is that it is a standard grounded in economic reasoning and microeconomic foundations. Given its basis in economic reasoning, the consumer welfare standard forces antitrust to rely on rigorous models of consumer and firm behavior. Economic models allow practitioners to focus on the most important explanations for particular phenomena. Models enable one to input relevant and available evidence to see the likely consequences. Moreover, models are transparent and result in testable implications. This does not mean that they are always simple to understand or apply. Transparency, however, forces practitioners to be explicit about their assumptions, which allows others to evaluate those assumptions and how they affect the implications of the model.

Additionally, the consumer welfare standard, as an economic standard, relies on scientific reasoning. This merely means that it provides a means for falsifiability and self-correction. By forcing practitioners to be explicit regarding theories and assumptions, the standard facilitates testing those theories and assumptions against real-world experience and data. If the facts do not support the theories, new theories will emerge and then be tested. It is undeniable that, in this light, antitrust has seen and continues to see enormous changes and improvements in its methodologies.[128]

A real danger of unmooring antitrust from an economic approach based on foundational welfare concepts and replacing it with a vague reliance on populist goals is that antitrust will become reliant on rhetoric and various rules of thumb rather than scientific reasoning. Examples of rhetoric and rules of thumb in the neo-antitrust movement are not difficult to locate; this is also true of antitrust decisions before the explicit formalization of the consumer welfare standard. For example, in discussing Amazon's highly effective distribution system, which it allows third-party merchants to use, Professor Khan states:

> The conflicts of interest that arise from Amazon both competing with merchants and delivering their wares pose a hazard to competition, particularly in light of Amazon's entrenched position as an online platform. Amazon's conflicts of interest tarnish the neutrality of the competitive process. The thousands of retailers and independent businesses that must ride Amazon's rails to reach market are increasingly dependent on their biggest competitor.[129]

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128 *See supra* Part III.

129 Khan, *supra* note 14, at 780.

There certainly can be a viable anticompetitive theory regarding Amazon's behavior. An example may be that, under certain conditions, Amazon could leverage its power as a selling platform into related markets. Indeed, such a theory is already part of the current antitrust toolkit. To result in a violation, the theory would also require evidence of likely or actual competitive harm. The concern is not that there is no viable theory of harm; rather it is that Khan seems to be convicting Amazon with no such evidence. Her contention involves no discussion of harm to consumers or competition, merely a rhetorical display arguing that the neutrality of the competitive process has somehow been "tarnished." As Professor Timothy Muris and former FTC General Counsel Jonathan Nuechterlein pointed out, such rhetorical flourishes against A&P underlays much of the jurisprudence behind the Robinson-Patman Act, which the vast majority of observers agree has been a particularly misguided area of antitrust.[130]

Dangerously, rhetoric and rules of thumb can support almost any position. As with many of the concerns expressed above, this will lead to increased unpredictability in antitrust. Indeed, with sufficiently powerful-sounding rhetoric, antitrust can be led to take positions that contradict its prime mission: to ensure competition is based on the merits. Finally, many of the benefits of relying on economic reasoning in antitrust will be lost, such as forcing practitioners to be explicit regarding their assumptions. Given that rhetoric is more art than science, it is also likely that antitrust will lose much of its transparency and ability to self-correct.

VII. FALLACY SEVEN: NOT RECOGNIZING THAT THEIR PROPOSALS WILL STRAIN COMPETITION AGENCY RESOURCES, INCREASE UNCERTAINTY, AND MAKE THESE AGENCIES MORE POLITICAL AND SUBJECT TO CAPTURE

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff.[131] As will be discussed more fully in the

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130 *See* Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P* 5, 8–12 (George Mason Univ. Law & Econ. Research Paper Series No. 18-15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186569.

131 *See*, *e.g.*, Jon Leibowitz, Chairman, Fed. Trade Comm'n, Remarks as Prepared for Delivery: Fall Forum 2011 (Nov. 17, 2011), at 2, https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-ftc-chairman-jon-leibowitz-prepared-delivery/111117fallforum.pdf ("A lot of things impressed me about the Commission when I got here: the range of issues that we saw every day, the amazing quality and dedication of the staff; just to name a few examples."); Edith Ramirez, Commissioner, Fed. Trade Comm'n, Address at the 20th Annual Golden State Antitrust and Unfair Competition Law Institute (Oct. 21, 2010), at 4, https://www.ftc.gov/sites/default/files/documents/public_statements/address-commissioner-ramirez/101021goldenstate.pdf ("But one thing that made this decision easier was the team of

context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general.[132] Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists.[133] Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard).[134] Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.[135]

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview.[136] Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes,[137] will require significantly more active market supervision than is currently the case. While many

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talented antitrust lawyers and economists at the agency. I came away from this investigation highly impressed with the level of in-house expertise at the Commission. The depth of their knowledge became increasingly evident during many briefings and the Commission's ongoing deliberations. Whether relating to cutting-edge apps or other markets, I quickly gained confidence that the agency's staff had the capacity to stay on top of marketplace developments, drill down into the specifics, and share their learning in ways that would enable me to make a well-informed decision in this and future cases.").

132 *See Federal Employment Reports: Employment and Trends – September 2013*, OPM.GOV (Sept. 2013), https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2013/september/.

133 *See Bureau of Economics Biographies*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies (last visited Sept. 18, 2019).

134 *See What We Do*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do (last visited Sept. 18, 2019).

135 *See* STEPHEN BREYER, REGULATION AND ITS REFORM 156–57 (1982).

136 *See* Samuel R. Miller, *More Aggressive Antitrust Enforcement Would Create More Jobs and Grow the Economy*, VERDICT: LEGAL ANALYSIS & COMMENT. FROM JUSTIA (Sept. 6, 2017), https://verdict.justia.com/2017/09/06/aggressive-antitrust-enforcement-create-jobs-grow-economy.

137 *See, e.g.*, Joshua Gans, *Enhancing Competition with Data and Identity Portability*, THE HAMILTON PROJECT, June 2018, at 19, https://www.hamiltonproject.org/assets/files/Gans_20180611.pdf; Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

proponents of modern antitrust would agree that the antitrust agencies are underfunded,[138] there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

Second, many of the above proposals would require not only more staff, but also staff with differing expertise from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

Students of bureaucracies consider a visible and measurable output key for quality control in such organizations.[139] Currently, the consumer welfare standard provides such a metric.[140] Abandoning this metric, as advocated by many proponents of the neo-antitrust movement, and replacing it with vague and numerous populist objectives threatens to make the competition agencies more difficult to manage and assess.

For example, some have advocated that the competition agencies adopt a "public interest standard" similar to what is used by the Federal Communications Commission ("FCC") and other agencies.[141] However, after ninety

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138 *See generally, e.g.*, Peter Swire, *Funding the FTC: Globalization and New Information Technologies Necessitate an Appropriations Boost*, CENTER FOR AMERICAN PROGRESS (Feb. 26, 2007, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2007/02/26/2633/funding-the-ftc/.

139 *See, e.g.*, James Q. Wilson, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 161 (1989).

140 A clear objective also facilitates the development of performance measures that help governments evaluate the effectiveness of national competition agencies, thereby promoting greater accountability to the public. *See, e.g.*, William E. Kovacic, Hugh M. Hollman & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25, 26 (2011) ("Without consistent, meaningful performance measures, it is difficult to make sound judgments about agency quality and to compare agency performance across different time periods, or to benchmark agencies with their counterparts in other jurisdictions. This obstacle impedes the identification of useful improvements in agency design or operations, and frustrates efforts to assess the efficacy of any single reform.").

141 *See, e.g.*, K. Sabeel Rahman & Lina Khan, *Restoring Competition in the U.S. Economy*, *in* UNTAMED: HOW TO CHECK CORPORATE FINANCIAL AND MONOPOLY POWER 18–25 (Nell Abernathy et al. eds., 2016), https://rooseveltinstitute.org/wp-content/uploads/2016/06/Untamed-Final-Single-Pages.pdf; Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

years of use, many think the "public interest standard" remains ill-defined.[142] For instance, the FCC's order related to the Comcast–NBCU merger included a number of conditions unrelated to the acquisition, including requirements to increase local news coverage, expand children's programming, broadcast public service announcements, enhance the diversity of programming available to Spanish-speaking viewers, offer discount broadband services to low-income Americans, and provide high-speed broadband to schools, libraries, and underserved communities.[143] The danger here is that antitrust enforcement becomes less predictable and, consequently, creates uncertainty, which adversely impacts market activity and investments. Further, it also makes the competition agencies more "political" as the stakes of a practice or transaction become higher for both of the parties involved, as well as third parties. Observers have noted that agencies like media regulators tend to be more "political" than antitrust regulators for a number of such reasons.[144]

Finally, as noted above, the goal of antitrust enforcement is not to supervise firm or market behavior, but rather to make infrequent interventions so that markets can more nearly achieve certain socially desirable objectives on their own. Other forms of regulation involve a continuing relationship between the firms being regulated and the regulator. The continuing relationship between regulators and the regulated often leads to what is called "regulatory capture."[145] Proposals put forward by the neo-antitrust advocates to expand the objectives and responsibilities of the antitrust agencies would force these agencies into continuing relationships with certain firms and industries and thereby make them more susceptible to many of the phenomena they claim to eschew.

Further, asking competition agencies to consider issues beyond the competitive process and economic welfare can create discontinuities across firms and in the law.[146] Thus, expanding antitrust to encompass greater limitations on firm behavior based on considerations such as income inequality, small-business welfare, full employment, or viewpoint diversity can have a different emphasis depending on the political regime in force at a given moment. As a result, firms that have had a merger or other antitrust review may be subject to different restrictions relative to other similarly situated firms

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142 *See generally, e.g.*, Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/.

143 Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc., 26 FCC Rcd. 4238, 4371, 4374 (2011).

144 *See* Jonathan Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in the Communications Sector*, 9 COMPETITION POL'Y INT'L 1, 1 (2013).

145 *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971).

146 *See, e.g.*, William E. Kovacic and David A. Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1181 (2016).

that either have not faced agency review or were subject to antitrust restrictions during an administration with differing priorities.

In sum, while the proponents of neo-antitrust do not regard the antitrust agencies as particularly well-functioning now, many of their proposals have the potential to significantly and adversely affect their performance. They would strain resources by requiring involvement in areas that would expand the scale and scope of the agencies, increase uncertainty, and necessarily make agencies more political and subject to capture.

VIII. FALLACY EIGHT: EXPANDING THE GOALS OF ANTITRUST COMES AT NO COST IN TERMS OF MANAGING TRADEOFFS

As just noted, there are numerous proposals to expand the contours of antitrust beyond its current emphasis on consumer welfare in the context of the competitive process. These include considering inequality, protecting small business, protecting employment and wages, promoting diversity of opinion, and even improving environmental quality. Many of the proponents of the neo-antitrust movement also want to see a renewed emphasis on structural factors.[147] Enforcing such myriad goals will lead to incompatible objectives.

This is not to suggest that there are no tradeoffs within the current consumer welfare standard. One example is when a particular practice might increase prices but also leads to more innovation. While these case-by-case challenges are inevitable, the consumer welfare standard provides a basis to evaluate this tradeoff—the path that leads to more consumer welfare is the one chosen.

Now consider how adding objectives outside of the competitive process can complicate evaluating tradeoffs. For example, goals like increased innovation may be the result of transactions or practices that allow for more automated processes in production. This may conflict with some of the other goals promoted by advocates of the new antitrust, which were mentioned above, like the promotion of employment or concerns with equality.

Unlike a tradeoff between prices and innovation, which can be adjudicated through their net effect on consumers and the size of the economic pie, the conflicting goals of innovation and lower prices on the one hand and the effect on possibly low-skilled and low-income workers on the other, would appear to create conflicting values with no similar adjudicatory framework. Moreover, it is not clear that adjusting enforcement standards to consider concerns related to workers affected by a transaction would even advance the goals of employment and equality. Lower prices can do more to promote equality than any putative concern with workers. It is not difficult to postulate similar unmanageable tradeoffs that will come from expanding the goals of antitrust. For example, should one reduce cancer by allowing anticompetitive

147 Khan, *supra* note 14, at 745.

tobacco mergers? Ease pollution by allowing all coal and steel plants to merge? Reduce inequality by preventing successful firms from becoming more efficient?

IX. FALLACY NINE: NEO-ANTITRUST PROPOSALS CAN BE EFFICIENTLY IMPLEMENTED THROUGH THE EXISTING REGULATORY AND LEGAL FRAMEWORK

As noted above, expanding the scope of antitrust into new areas beyond the confines of the relevant market, or even beyond the economic field to concerns such as environmental quality, will have costs for competition agencies as their resources become stretched more thinly. However, to the extent such areas already are, or should be, the concern of other governmental bodies or other areas of law, a number of additional harms can result beyond those relevant to the competition agency itself.

The primary harm is simply waste, as multiple agencies actively study and intervene in the exact same things. Nevertheless, there are numerous other concerns. For example, "overdeterrence" can result if competition agencies get involved in areas that are the province of regulatory agencies, or handled through other means, such as contracting, as is often the case with privacy concerns.[148] While proponents of neo-antitrust seem to be primarily concerned with issues of underdeterrence, the potential for overdeterrence is broadly recognized in both the legal and economic realms and the costs can be very real.[149]

Overdeterrence is somewhat related to the issue of false positives, and both have similar effects. However, whereas false positives go more to the issue of the incorrect detection of a violation, overdeterrence goes more to the issue of the chilling effects from overly harsh punishment for a particular practice. It is also the case that by imposing a second level of review, which may be less accurate than the primary level, the likelihood of false positives is increased when competition agencies step into the areas already covered by regulators or other areas of the law.

Another key argument for limiting the role of competition agencies in non-competition issues is that other regulators may be led to believe that they can shirk their responsibilities. In a sense, this may mitigate some of the concerns with overdeterrence stated above. That is, if the regulator believes the competition agency will handle matters on its behalf, it may not start an

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148 *See*, *e.g.*, The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(2) (2018) (administered by the Department of Education); Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-6(a) (administered by the Department of Health and Human Services).

149 *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 16 (1984). In jurisdictions such as the United States, with treble damages and class action suits, overdeterrence may prove particularly costly. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 801–02 (1987).

investigation or impose a penalty. However, this is hardly an argument for allowing competition agencies to get involved in such matters because this essentially impairs the effectiveness of the regulatory regime. This can be particularly harmful in less developed nations with emergent antitrust and regulatory institutions.[150]

On the other hand, with respect to detailed industry-specific knowledge, the regulatory agency may have informational advantages over the competition authority. (In the case of regulated industries, industry-specific knowledge often relates to a particular firm.) Thus, the competition agency will often not be adding to the expertise of the regulator and could also be undermining the legitimacy of both agencies.[151]

None of this is to say that there cannot be antitrust intervention in regulated industries or that antitrust agencies should not intervene when firms use various forms of regulation in an anticompetitive manner. For example, in the matter of *Union Oil Co. of California* ("*Unocal")*,[152] the FTC alleged that a company misrepresented its patent position to a state regulatory authority (the California Air Resources Board) during rulemaking proceedings.[153] However, that was primarily a competition issue and not a regulatory one.

This Articles has been discussing the intervention of competition agencies in areas of law or regulation that are already the province of other agencies or statutes. Another argument is that antitrust should intervene in cases where there simply are no relevant laws or agencies. For example, in positing why competition agencies may have to pursue non-competition goals Professor Ioannis Lianos argues:

> The idea is that the competition law decision-maker lacks information about the structural position of the various actors in all other social spheres in which they may interact . . . . [T]his argument does not hold, simply because of the lack of other institutional options, such as the inability of the EU to employ fiscal instruments in order to systematically redistribute wealth across the Union, in contrast with the situation in the US, where there are adequate fiscal instruments to pursue redistribution at the federal level.[154]

A distinction needs to be made between the extension of antitrust liability to certain areas and the involvement of competition agencies in areas that have little or no intersection with antitrust. To the extent there is a pressing need for a remedy in some area for which there is no solution, one is talking

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150 *See* Alden Abbott & Seth Sacher, *Avoiding the "Robin Hood Syndrome" in Developing Antitrust Jurisdictions*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE–LIBER AMICORUM 1, 4 (Nicolas Charbit et al. eds., 2013), http://ssrn.com/abstract=2243614.

151 To the extent there is particular expertise residing in the competition agency, such as a particularly knowledgeable staff member, this expertise can be shared without involving the entire competition agency as a redundant investigator or prosecutor.

152 138 F.T.C. 1 (2004).

153 *Id.* at 2.

154 Ioannis Lianos, *Polycentric Competition Law* 16 (U.C. London Ctr. for Law, Econ. & Soc'y Research Paper Series, 2018), https://www.ucl.ac.uk/cles/sites/cles/files/cles_4-2018_final.pdf.

about the latter rather than the former. While there may be some argument for involving the competition agency if the need is particularly pressing, this still involves costs. Thus, intervention in such situations still strains the resources of the competition agency and hinders the development of the appropriate regulatory or other legal framework for dealing with the issue. Given the costs, such interventions should be undertaken only reluctantly.

As noted above, some of the arguments for extending antitrust liability proffered by advocates of neo-antitrust include extending antitrust liability to areas currently handled largely by contract law, such as privacy concerns. Substituting antitrust liability for contracts can have several costs. For example, just as regulators have advantages over competition enforcers in certain areas, contract law has clear advantages over antitrust. Thus, contract law often recognizes that circumstances can change in ways unforeseen by the parties and this may require good-faith renegotiation of terms. Competition law, as applied in many jurisdictions, may not possess this flexibility. Trying to remedy contractual shortcomings through competition law can chill efficient contracting, as market participants may develop less efficient contracts than they otherwise would, since they may now believe that they face, or are able to bring, antitrust actions in the case of certain disputes.

X. FALLACY TEN: ABANDONING THE CONSUMER WELFARE FRAMEWORK AND REPLACING IT WITH POPULIST GOALS HAS LIMITING PRINCIPALS

As noted above, the objective of modern antitrust is to protect the competitive process as defined by its effect on consumer welfare. Thus, this framework has two aspects: (1) that the welfare of consumers should be paramount; and (2) that antitrust should only intervene in situations involving abuses of the competitive process.

These principles provide an administrable framework for enforcing the antitrust laws. It allows businesses, the courts, and the agencies to focus on variables on which firms compete to obtain consumers, namely price, innovation, and quality, where innovation and quality encompass factors such as variety and the development of new and improved goods. If a transaction or practice, on net, improves these metrics from the perspective of consumers (i.e., lower prices or improved quality) it passes antitrust muster. If the opposite holds, it does not.

Many advocates of the new antitrust want to abandon both the consumer harm and competitive process criteria.[155] One problem here is that this can lead to antitrust having no limiting criteria in terms of the problems to which it can be applied and the evaluative criteria which can be used to adjudicate

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155 *See* Khan, *supra* note 14, at 737 ("Antitrust law and competition policy should promote not welfare but competitive markets."); Joseph V. Coniglio, *How the "New Brandeis Movement" Already Overshoots the Mark: Sketching an Alternative Theory for Understanding the Sherman Act As a Consumer Welfare Prescription*, COMPETITION POL'Y INT'L (Oct. 2017) 4–5.

between states of the world.[156] In this vein, there have been proposals that antitrust consider issues, inter alia, related to income distribution, media diversity, global warming, privacy, the promotion of employment, wage growth, small business formation, and even "fake news."[157]

In terms of objective standards, as noted previously, some have called for antitrust to adopt an FCC-like "public interest standard." Professor Rutger Claassen and Professor Anna Gerbrandy have proposed that the "capability approach," developed by the economist Amartya Sen and the political philosopher Martha Nussbaum in the context of evaluating economic development, be applied to antitrust.[158] This approach would focus on the "capability" of individuals to achieve certain "functionings."[159] Functionings are defined "beings," such as being well nourished, being undernourished, being safe, being able to participate in social and economic activities, and being in bad health, and "doings," such as voting in an election, traveling, eating your fill, and consuming fuel to get warm.[160]

Many of the problems that the lack of limiting principles will lead to were discussed in the context of the other fallacies examined above. Not the least of these is that myriad objectives and subject matters will likely strain the limited resources of the competition agencies and require the expansion of staff, including the addition of staff with training in areas that currently have had little traditional relationship with antitrust. Secondly, the predictability of the enforcement process becomes more questionable as the factors that may be subject to investigation or liability may multiply. Third, the antitrust agencies will become more regulatory and bureaucratic given that an increased number of interest groups will have an interest in the outcome of an investigation or case. Further, as discussed more fully in the last fallacy, while there can often be tradeoffs within the current objective of consumer welfare, adding objectives beyond the consumer welfare standard has the potential to greatly increase the difficulty of adjudicating among various potential tradeoffs.

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156 As Justice Lewis Powell noted in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 (1977), "an antitrust policy divorced from market considerations would lack any objective benchmarks."

157 *See, e.g.*, Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 10–13 (2015); Suzanne Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, 16 EUR. L.J. 780, 804–05 (2010); Sally Hubbard, *Fake News is a Real Antitrust Problem*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Fall 2017) 16, 17, https://www.competitionpolicyinternational.com/fake-news-is-a-real-antitrust-problem/.

158 Rutger Claassen & Anna Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, 12 UTRECHT L. REV. 1, 1–2 (2016), http://doi.org/10.18352/ulr.321.

159 *Id.* at 4–5.

160 *Id.*

XI. FALLACY ELEVEN: THOSE WHO ADHERE TO MODERN ANTITRUST DO SO BECAUSE THEY HAVE BEEN CAPTURED BY CORRUPT INTEREST GROUPS

While by no means a universal conviction among proponents of neo-antitrust, there have been more than a few allegations that the motivations behind those that support modern antitrust, as well as practitioners at the antitrust agencies themselves, are compromised and are not being intellectually honest. One set of allegations is that advocates of modern antitrust take certain positions because they are in the employ of, or are beholden to, some group whose interests are at odds with those of consumers.[161] In addition, there are allegations that the antitrust agencies broadly are "captured" by various interest groups,[162] or that specific decisions are the result of outside pressures, primarily from the so-called "tech industry."[163] This is a fallacy both

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161 *See, e.g.*, Vaheesan, *supra* note 36, at 989–90 ("Th[e] combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, 'an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.' Although proponents of technocratic antitrust may characterize it as 'pure' or 'scientific,' the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise." (footnotes omitted)); Martin Schmalz (@martinschmalz), TWITTER (Nov. 30, 2018, 10:35 AM), https://twitter.com/martincschmalz/status/1068574219179618304?lang=en ("Remarkable to see Dan O'Brien, whose two recent papers on the topic were sponsored by the institutional investor lobby @ICI to be included on the program, without even disclosing his conflict of interest.").

162 *See, e.g.*, Asher Schechter, *US Regulators Have Essentially Become Do-Nothing Institutions*, PROMARKET (Dec. 6, 2018), https://promarket.org/regulators-do-nothing/ ("What really happened is basically what I call an orgy of influence-peddling, with people moving in and out of the top of the FTC and the DOJ essentially green-lighting mergers and helping make them happen once they're out of government."); Jonathan Tepper, Statement at Roosevelt Institute Event: Crafting Effective Rules for Internet Platforms (Nov. 13, 2018), http://rooseveltinstitute.org/wp-content/uploads/2019/01/Crafting-Effective-Rules-for-Internet-Platforms_Pt.-1_final-1.pdf ("Upton Sinclair said that it's very difficult to get a man to understand something if his salary depends on him not understanding it. If you look at sort of the revolving door between K Street, the FTC, and George Mason University, for example, and it's one of many universities—you can go to Berkeley and find Carl Shapiro—and Google.").

163 *See, e.g.*, Jonathan Taplin, *Why Europe Got Tough on Google but the U.S. Couldn't*, THE WASH. POST: POSTEVERYTHING ANALYSIS (June 28, 2017, 9:30 AM), https://www.washingtonpost.com/news/posteverything/wp/2017/06/28/why-europe-got-tough-on-google-but-the-u-s-couldnt/?utm_term=.11462859dffa ("But the political appointees overrode the staff recommendation, an action rarely taken by the FTC[]. . . . The Journal pointed out that Google, whose executives donated more money to the Obama campaign than any company, had held scores of meetings at the White House between the time the staff filed its report and the ultimate decision to drop the enforcement action."); Jonathan Tepper, *Why Regulators Went Soft on Monopolies*, AM. CONSERVATIVE (Jan. 9, 2019, 12:01 AM), https://www.theamericanconservative.com/articles/why-the-regulators-went-soft-on-monopolies/ ("Or consider the recent FTC enforcement action against 1-800 CONTACTS. The FTC's opinion isn't bashful about who benefits from this enforcement—the very first part in the agency's 'proof' of anticompetitive effects was that the challenged conduct results in fewer Google ad sales, as if Google's welfare were a proxy for consumer welfare. The two cases demonstrate that the FTC is reluctant to take on the corporate giants—presumably a future

regarding the nature of those that practice or support modern antitrust as well as the nature of the neo-antitrust movement itself.

First, judging by associations alone, it is unclear that neo-antitrust should itself be considered any more authentic. Among antitrust consultants and lawyers, there clearly is money to be made on both sides of this debate. At the recent FTC "Hearings on Competition and Consumer Protection in the 21st Century" and at many conferences,[164] it is not unusual to find attorneys and consultants, as well as lobbyists for trade associations and corporate counsels, advocating both modern and neo-antitrust positions. Well-funded firms have hired antitrust lawyers and economists to support neo-antitrust type positions presumably based on their own desires for increased profits.[165]

Further, academics seeking to gain tenure have their own motivations. Clearly, they want to produce publications that are well cited, gain attention, and attract funding for future research.[166] At least at the margin, one way to increase the likelihood of citations and attention is to be provocative and dramatic. One could attribute such motives to many writings in the neo-antitrust vein; although, without more information, such allegations would appear prejudicial. Nevertheless, some advocates of neo-antitrust seem to be attributing such motives to modern antitrust advocates and agency practitioners based on similarly limited information.

Further, some advocates of the neo-antitrust movement have argued that the staff at antitrust agencies are lax because they are hoodwinked by sophisticated analyses produced by consulting firms.[167] It is undeniable that advocates of particular points of view hire skilled and high-priced attorneys,

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spot of employment—yet is willing to assume great legal risks to bring enforcement actions against small competitors at the behest of monopolists.") .

164 Beginning in 2018 and continuing into 2019, the FTC held a series of public hearings "examining whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy." *See Hearings on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM'N, https://www.ftc.gov/policy/hearings-competition-consumer-protection (last visited Aug. 3, 2019).

165 For example, Microsoft had been prominent in urging antitrust actions against Google. Thus, it publicly advocated in opposition to the Google/Doubleclick merger in congressional testimony. *See* Larry Dignant, *Google vs. Microsoft: Dueling DoubleClick Testimony*, ZDNET (Sept. 27, 2007, 9:13 GMT), https://www.zdnet.com/article/google-vs-microsoft-dueling-doubleclick-testimony/. It was also a prominent complainant in both the US's and the EU's search cases against Google. *See* Steve Lohr, *Antitrust Cry from Microsoft,* N.Y. TIMES (Mar. 31, 2011), https://www.nytimes.com/2011/03/31/technology/companies/31google.html; Ryan Tracy & Valentina Pop, *Google's Enemies Gear Up to Make Antitrust Case*, WALL STREET J. (June 24, 2019, 4:18 PM), https://www.wsj.com/articles/googles-enemies-gear-up-to-make-antitrust-case-11561368601.

166 *See, e.g.*, Brian A. Nosek, Jeffrey R. Spies & Matt Motyl, *Scientific Utopia: II. Restructuring Incentives and Practices to Promote Truth over Publishability*, 7 PERSP. ON PSYCHOL. SCI. 615, 615–16 (2012), https://journals.sagepub.com/doi/full/10.1177/1745691612459058.

167 *See, e.g.*, Tepper, *supra* note 162 ("So generally, what happens is, you promise that you won't raise prices. You hire . . . Charles River Associates. You then pay them to do a model, and then they say that prices will magically fall in these wonderful synergy like shares of the consumer.").

consultants, and others to advocate for their positions before the agencies. However, the contention that staff are deceived by flawed analyses reflects a complete lack of knowledge both of the integrity and the caliber of the staff at these agencies as well as the role that such reports play in an investigation.[168]

For one, while the lawyers and economists at private law firms are undoubtedly highly skilled, the economists and attorneys at the agencies are also highly skilled. While many spend their entire careers at the agencies, a number go on to great success in consulting (or academia), and are often supervised by prominent academics whose caliber is at least as high as the very best consultants hired by the parties under investigation.[169]

Further, if economic consultants' advocacy is to be given any consideration by the staff and decision makers at antitrust agencies, it must consist of more than a simple endorsement by a prestigious professor. Rather, advocacy consists of reports and other analyses that are subject to vetting. If an advocate is not willing to produce all the analyses underlying such reports (consisting not only of the data but also the programs and descriptions of what they have done), give sufficient time for vetting, and engage in a continual dialogue regarding those analyses, they are likely to be given virtually no weight.[170] Indeed, Professor Luke M. Froeb, an academic and former Director of the Bureau of Economics at the FTC and former Chief Economist at the DOJ, has discussed how in many ways the standard for advocacy is higher than that regarding academic research, given the high stakes.[171] This is

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168 For detailed discussions of how staff at antitrust agencies actually consider various pieces of evidence from the parties, including economic studies, see Michael J. Perry & Stephen Weissman, *The First Cut is the Deepest: Use of Economics Before the Antitrust Agencies and the Courts*, 32 ANTITRUST 44, 44–45 (2018); Darren S. Tucker & Amanda P. Reeves, *Effective Advocacy Before the Commission*, 24 ANTITRUST 52, 54–56 (2010).

169 For a recent list of former Bureau of Economics directors at the FTC, see *Former Bureau and Office Directors*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/biographies/former-bureau-office-directors (last visited Aug. 3, 2019). For a list of past Deputy Assistant Attorneys General for the Economic Analysis Group at the Department of Justice, Antitrust Division, see *Past Deputy Assistant Attorneys General For Economic Analysis*, DEP'T OF JUSTICE, https://www.justice.gov/atr/about-division/economic-analysis-group/past-deputy-assistant-attorneys-general-economic-analysis (last visited Aug. 3, 2019).

170 *See, e.g.*, Perry & Weissman, *supra* note 168, at 47 ("If an economic expert's testimony does not fit closely with the qualitative evidence, the court is unlikely to afford it much, if any weight."); David Scheffman, Dir., Bureau of Econ., Fed. Trade Comm'n, Address at Mergers and Acquisitions: Getting Your Deal Through in the New Antitrust Climate: Sources of Information and Evidence in Merger Investigations (June 14, 2002), https://www.ftc.gov/sites/default/files/documents/public_statements/sources-information-and-evidence-merger-investigations/scheffmanabanycbar.pdf.

171 *See, e.g.*, Luke Froeb, Director, FTC Bureau of Econ, Statement at ABA Section of Antitrust Law "Brown Bag" Program: Whither Merger Simulation?, ANTITRUST SOURCE (May 2004), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/may04.pdf ("As academics, you get peer review. I've got five of these sitting on my desk, and I'm probably going to devote a little bit of time to each one of them. But if you use one of these models in a damage case, you'll get a $100,000 referee report. In many ways, I think that the legal standard is higher.")

pertinent to analyses produced by parties subject to an investigation as well as third parties that advocate their own perspectives before the agencies. Moreover, the economic models or econometric analyses produced by staff are given far more weight than anything produced by outside parties, not least of all because staff will have access to more information, through its investigatory and subpoena powers.[172]

Some proponents of the new antitrust use "regulatory capture" arguments regarding the staff of the antitrust agencies, stating that they go easy on monopolists because they hope to work on their behalf in the future as either consultants or private-sector attorneys.[173] Yet, this "model" of how self-interested agency staff are incentivized is sophistry. First, it reflects a fundamental misunderstanding of the relationship between consulting firms, law firms, and agency staff. Consulting firms and law firms want to hire former staff members because of their agency expertise and reputations for effectiveness and rigor, not because of the positions they took.[174] Second, one can further illustrate the incongruity of these claims by looking at the careers of four FTC commissioners that voted not to sue Google for "search bias" in 2013—allegedly the most "captured" decision in recent FTC memory.[175] Julie Brill works at Microsoft,[176] which was a complainant against Google.[177] Clearly her employment was not a "reward" for her vote. Jon Leibowitz, Edith Ramirez, and Maureen Ohlhausen joined Davis Polk, Hogan Lovells, and Baker Botts, respectively.[178] To our knowledge, these firms do not

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172 Heyer argues, convincingly, that in certain instances the agencies can have more information regarding an alleged anticompetitive practice or market than the actual market participants. *See* Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 ANTITRUST L.J. 87, 87–88 (2007).

173 *See* Noah Smith, *The Battle Over Monopoly Power is Just Beginning*, BLOOMBERG (Dec. 10, 2018, 7:30 AM), https://www.bloomberg.com/opinion/articles/2018-12-10/the-battle-over-monopoly-power-is-just-beginning ("But some say that the FTC's neutrality is compromised. Tepper, for example, has argued that a revolving door between companies, lobbyists and the government gives FTC staffers an incentive to go easy on monopolists."); Tepper, *supra* note 163 ("The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have become revolving doors for highly paid economists and lawyers whose only goal is to look after their corporate clients rather than voters, consumers, workers, suppliers, and competition.").

174 *See* Baker, *supra* note 144, at 7 n.17 ("In both the antitrust and communications fields, moreover, the professional culture generally does not encourage lawyers to 'take sides' for their entire career; the culture in some other legal fields, like labor law, appears to differ.")

175 *See* Statement of the Federal Trade Commission, *supra* note 113, at 1,3.

176 Microsoft Corp. Blogs, *Microsoft Appoints Globally Respected Regulator to Privacy Leadership Role*, MICROSOFT (Apr. 28, 2017), https://blogs.microsoft.com/on-the-issues/2017/04/28/microsoft-appoints-globally-respected-regulator-privacy-leadership-role/.

177 Michael A. Salinger & Robert J. Levinson, *Economics and the FTC's Google Investigation*, 46 REV. INDUS. ORG. 25, 44 (2015) ("In particular, it appears that Microsoft urged the FTC to bring a case against Google.").

178 Jon Leibowitz joined Davis Polk. Peter Lattman, *Former Chairman of the F.T.C. is Set to Join Davis Polk*, N.Y. TIMES (June 17, 2013, 8:01 PM), https://dealbook.nytimes.com/2013/06/17/ex-chairman-of-the-f-t-c-is-set-to-join-davis-polk. Edith Ramirez joined Hogan Lovells. *Former FTC*

perform antitrust work for Google. As another example, attorney Michelle Yost Hale worked on the FTC enforcement action the Commission brought against Google and Motorola Mobility for alleged FRAND violations;[179] yet, she now works at Wilson Sonsini Goodrich & Rosati,[180] which represents Google in antitrust matters.[181] Third, the fact that antitrust agencies have litigated against or sought serious remedies in matters involving large companies, such as Microsoft,, AT&T, Intel, Apple, Qualcomm, as well as large companies in the oil, credit card, and pharmaceutical industries[182] belies the claim that the antitrust agencies are corrupted and are working in the service of "monopolies."

Indeed, a substantial portion of antitrust work at consulting and law firms involves advocacy on behalf of plaintiffs in private antitrust suits.[183] Such work usually involves supporting various vertical theories or other interventionist actions that are akin to many of the interventionist policies promoted by many neo-antitrust advocates.[184] Similarly, a large part of the agency work at such firms involves assisting complainants in their advocacy before the agencies regarding mergers or investigations of various firm

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Chairwoman Edith Ramirez Joins Hogan Lovells, HOGAN LOVELLS (Sept. 6, 2017), https://www.hoganlovells.com/en/news/former-ftc-chairwoman-edith-ramirez-joins-hogan-lovells. Maureen Ohlhausen joined Baker Botts. Ryan Lovelace, *FTC's Ohlhausen to Join Baker Botts, Bypassing Judicial Nomination*, LAW.COM (Dec. 6, 2018, 5:15 PM), https://www.law.com/nationallawjournal/2018/12/06/ftcs-ohlhausen-to-join-baker-botts-bypassing-judicial-nomination/.

179 Complaint at 147, Motorola Mobility LLC and Google, Inc., 156 F.T.C. 147 (July 23, 2013).

180 *Michelle Yost Hale*, WILSON SONSINI GOODRICH & ROSATI, https://www.wsgr.com/WSGR/DBIndex.aspx?SectionName=attorneys/BIOS/15580.htm (last visited Aug. 21, 2019).

181 *Internet Strategy and Litigation*, WILSON SONSINI GOODRICH & ROSATI, https://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/int_lit/index.htm (last visited Aug. 21, 2019).

182 *See generally, e.g.*, United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016) (credit card agencies); United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), https://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel; Don Clark & Michael J. de la Merced, *Qualcomm Violated Antitrust Laws, U.S. Judge Rules*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/business/qualcomm-antitrust-ruling.html; Patrick Lee, *4 Oil Companies Agree to Settle Antitrust Suit*, L.A. TIMES (Aug. 17, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-08-17-mn-444-story.html. The FTC has also litigated or sought remedies against numerous large pharmaceutical companies. *See, e.g.*, Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc., 286 F.R.D. 101 (D.D.C. 2012), *aff'd in part, vacated in part*, 778 F.3d 142 (D.C. Cir. 2015); Bristol-Myers Squibb Company, Docket No. C-4076, FTC File No. 011 0046 (final order issued April 14, 2003), https://www.ftc.gov/enforcement/cases-proceedings/0110046/bristol-myers-squibb-company-matter; Pfizer, Inc./Wyeth, Docket No. C-4267, FTC File No. 091 0053 (final order issued January 25, 2010), https://www.ftc.gov/enforcement/cases-proceedings/091-0053/pfizer-inc-corporation-wyeth-corporation-matter.

183 *See* Spencer Weber Waller, *In Praise of Private Antitrust Litigation*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Winter 2019) 7, 9 ("Private antitrust litigation usually exceeds agency litigation by a ten-to-one ratio. For example, in 2017, there were a total of 631 antitrust cases filed, of which 603 were private cases, amounting to over 95 percent of total new antitrust claims.").

184 *Id.* at 10.

behaviors. The so-called revolving door—to the extent it even exists—also helps bring good people into agencies, both at the start of their careers, when they may value the option of leaving later, and later in their careers, when they can use skills and experience developed outside on behalf of the public interest. This serves the purpose of helping the agencies employ a staff that is comparable in its skills to those of outside attorneys and consultants.

In sum, the best one can say is that there are multiple motivations to all sides of the debate in antitrust and no position is free of self-interest. While it may seem clichéd, ultimately the merits of such advocacy rise and fall on the strengths of the analysis—not on contentions that one side is pure and the other is corrupt.[185] One final point: if the supporters of modern antitrust actually are so corrupt, it is interesting to ask why many advocates of neo-antitrust want to so greatly expand the role of antitrust agencies.

XII. FALLACY TWELVE: THE FAILURE TO ACHIEVE CERTAIN POPULISTS GOALS IS A FAILURE OF MODERN ANTITRUST'S VIEW OF COMPETITION

Many proponents of neo-antitrust believe that modern antitrust has failed to promote enough "competition." They define modern antitrust's failure to promote enough competition in a multiplicity of ways, such as not enough emphasis on market concentration or a lack of concern with innovation, as well as other goals.[186] They argue that there are a number of sources of modern antitrust's failure in this regard, including the consumer welfare standard and its putative emphasis on price, as well as philosophical reasons, such as the outsized influence of a radical Chicago School approach to antitrust.[187] However, a failure to achieve many of their goals is not a failure of competition. Indeed, in certain cases, competition actually makes their goals harder to achieve.

This point was touched on in Fallacy IV, in which it was noted that it is widely acknowledged by economists and competition agencies that under certain conditions, higher concentration or cooperative efforts among firms (both horizontal and vertical) can lead to *more* innovation and product variety. This point also has relevance relating to certain concerns expressed by

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185 *See, e.g.*, Ariel Ezrachi & Maurice E. Stucke, *The Fight Over Antitrust's Soul*, 9 J. EUR. COMPETITION L. & PRAC. 1, 1–2 (2018) ("Not surprisingly, with so much profit (and power) at stake, corporate interests are fuelling the debate. On the one hand, some who favour a narrow technocratic antitrust policy—including some dominant firms, their investment bankers, and their legal and economic experts—want to keep the M&A pipeline open and minimise the relevance of ex post intervention. For them competition policy has evolved to its optimal point. On the other hand, some who favour more intervention do so selectively when it promotes their commercial interest: Encouraging a particular enforcement action which may help improve their (or their client's) market position and profitability, but not society overall. In an environment so captured, those in search of purity should look elsewhere.").

186 *See* Khan, *supra* note 14, at 737–46; Wu, *supra* note 65, at 14–15.

187 *See* Khan, *supra* note 14, at 737–46; Wu, *supra* note 65, at 14–15.

some neo-antitrust advocates about "mass manipulation" by the so-called tech giants.[188] The ability of advertisers and other firms to manipulate customers is a highly controversial proposition.[189] Nevertheless, even taking such an ability as given, it is unclear whether more competition results in more or less of such putative manipulation. More competition may mean firms compete to be better manipulators to attract more clients or for other reasons of profitability.[190] For example, Professor Eugenio J. Miravete found that as competition in US telecommunications markets increased, telecommunications providers offered more complicated price plans that offered poorer values.[191] Professor Aniko Hannak and others indicated that in reasonably competitive markets, such as travel websites with six major market participants, firms heavily engaged in price steering, which is the practice of reordering search results to place expensive items toward the top of the page.[192]

Similarly, consider the phenomenon of fake news, which some in the neo-antitrust movement have argued is an antitrust issue.[193] In terms of fake news, more competition could also make any putative problem worse.[194]

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188 *See America's Antitrust Apparatus Prepares to Act Against Big Tech*, ECONOMIST (Apr. 26, 2018), https://www.economist.com/business/2018/04/26/americas-antitrust-apparatus-prepares-to-act-against-big-tech ("When you assemble a room full of intelligent critics, the dizzying scope of the complaints against the tech industry becomes clear. They come in three flavours. . . . [T]hird, their probable pollution of the public sphere with fake news, mass manipulation and lobbying."); *see also* MARSHALL STEINBAUM & MAURICE E. STUCKE, ROOSEVELT INST., THE EFFECTIVE COMPETITION STANDARD: A NEW STANDARD FOR ANTITRUST 46 (2018), http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf ("Congress would either amend Section 2 of the Clayton Act or add a new provision to prohibit price discrimination where it generally harms consumers overall. Such would be [the] case with behavioral discrimination where firms use the data accumulated on individuals to get them to purchase things they otherwise wouldn't buy at the highest price they are willing to pay." (footnote omitted)).

189 Economists continue to reach polar conclusions regarding the effects of advertising. On one hand, there is research that emphasizes the ability of advertising to create "artificial" product differentiation and demand. On the other hand, a contrary body of research stresses the value of advertising in providing information. *See generally*, Kyle Bagwell, *Chapter 28: The Economic Analysis of Advertising*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1701, 1701–1844 (Mark Armstrong & Robert Porter, eds., 2007).

190 *See, e.g.*, ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY 102 (2016) ("Firms will *compete* in more accurately segmenting customers into subgroups to optimize pricing and profits." (emphasis added)).

191 Eugenio J. Miravete, *The Doubtful Profitability of Foggy Pricing* 19–20 (NET Inst., Working Paper No. 04-07, 2004), http://www.netinst.org/Miravete.pdf.

192 ANIKO HANNAK ET AL., MEASURING PRICE DISCRIMINATION AND STEERING ON E-COMMERCE WEB SITES 309–10 (2014), http://conferences.sigcomm.org/imc/2014/papers/p305.pdf.

193 *See generally* Hubbard, *supra* note 157, at 16. For a response to this assertion, see generally Seth B. Sacher & John M. Yun, *Fake News Is Not an Antitrust Problem*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Fall 2017) 28, https://www.competitionpolicyinternational.com/fake-news-is-not-an-antitrust-problem/.

194 This Article does not consider fundamental issues such as whether antitrust even has a role to play in regulating speech. For a further discussion of this issue, see Sacher & Yun, *supra* note 193.

Consider that a consumer has an array of options—one of them might be a fake-news article, but other choices may include legitimate news articles, other activities on the internet, or even activities off the internet. Now suppose the consumer chooses to engage with the fake-news article. For some reason, the fake-news item has gained the reader's attention among all these other possible things to which he or she could have devoted their attention. Given that the very essence of media competition is to gain the consumer's attention, increased competition may very well lead to more fake news dissemination, not less.

This does not mean that fake news should be a matter of indifference and that consumers have not been defrauded. It only means that since firms profit from satisfying consumer preferences, one flaw in the argument that "fake news" is a competition problem is that greater competition could lead to *more* production of "fake news" rather than less.

CONCLUSION

The proponents of neo-antitrust are asking antitrust paradoxically to both do too much and too little. They ask too much in that they want competition law to focus on objectives beyond its core competencies and to use nebulous evaluative criteria. They are asking too little in that much of what they advocate amounts to calls for antitrust to abandon much of the analytical rigor that it has come to apply over the past fifty to sixty years in favor of various presumptions and rules of thumb.

Among other problems, these proposals can strain limited enforcement resources as well as make enforcement less predictable. Ultimately, these changes would make antitrust less, rather than more, effective in its core mission, while doing little to ameliorate the other problems with which they are concerned. While competition law should certainly be amenable to change, only those changes based on firm principles and evidence should be embraced.