Federal Trade Commission Closes Google/DoubleClick Investigation

Proposed Acquisition Unlikely to Substantially Lessen Competition

FOR RELEASE

December 20, 2007

The Federal Trade Commission today announced that it will not seek to block Google Inc.'s proposed $3.1 billion acquisition of Internet advertising server DoubleClick Inc. In a 4-1 vote to close its eight-month investigation of the transaction, the Commission wrote in its majority statement that “after carefully reviewing the evidence, we have concluded that Google’s proposed acquisition of DoubleClick is unlikely to substantially lessen competition.”

Although interested parties have raised concerns about the proposed acquisition’s impact on consumer privacy, the Commission observed that such issues are “not unique to Google and DoubleClick,” and “extend to the entire online advertising marketplace.” The Commissioners further wrote that “as the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition,” the FTC lacks the legal authority to block the transaction on grounds, or require conditions to this transaction, that do not relate to antitrust. Adding, however, that it takes consumer privacy issues very seriously, the Commission cross-referenced its release of a set of proposed behavioral marketing principles that were also announced today.

The Commission statement, authored by Chairman Deborah Platt Majoras and Commissioners Jon Leibowitz, William E. Kovacic and J. Thomas Rosch, focused on the agency’s antitrust review of the proposed acquisition, which, as in all horizontal merger investigations, was based on the standards set forth in the joint FTC/Department of Justice Horizontal Merger Guidelines. Applying these guidelines, as well as Commission policy and case law in evaluating non-horizontal theories, agency staff analyzed three principal theories of potential competitive harm. First, it sought to determine whether Google’s acquisition of DoubleClick threatened to eliminate direct and substantial competition between the two companies. Its thorough analysis of the evidence showed that the companies are not direct competitors in any relevant antitrust market, eliminating the need for further analysis.

Next, because mergers and acquisitions may also eliminate beneficial potential competition, the agency examined the implications of Google’s continuing efforts to enter the third party ad serving markets. If these efforts had the potential to eliminate a competitor that was uniquely positioned to have a pro-competitive effect on these markets, that would raise antitrust concerns. The agency’s evidence, however, showed that current competition among firms in this market is vigorous, and will likely increase. The evidence also indicates that Google’s entry, even if it were to be successful, likely
would not have a significant impact on competition. Therefore, the elimination of potential competition also did not raise antitrust concerns.

Finally, the agency evaluated whether Google’s acquisition of DoubleClick could harm competition by allowing Google to exploit DoubleClick’s position in the third party ad serving markets to the benefit of Google’s ad intermediation product, AdSense. In some instances, according to the Commission, a proposed transaction may allow a dominant seller of one product to harm competition in the market for a related complementary product, for example, by exclusively bundling – or otherwise tying together – its product with the acquired firm’s product after the acquisition. Such a strategy, however, can only be anticompetitive if the merged firm has market power.

As explained in the Commission’s statement, because the evidence failed to show that DoubleClick has market power in the third party ad serving markets, it is unlikely that Google could effectively foreclose competition in the related ad intermediation market following the acquisition. The evidence also showed that it was unlikely that Google could manipulate DoubleClick’s third-party ad serving products in a way that would competitively disadvantage Google’s competitors in the ad intermediation market. Further, the evidence demonstrated that any aggregation of consumer and competitive data resulting from the acquisition is unlikely to harm competition in the ad intermediation market. These factors resolved any competitive concerns related to these markets.

The statement concluded, however, “The markets within the online advertising space continue to quickly evolve, and predicting their future course is not a simple task. Accounting for the dynamic nature of an industry requires solid grounding in facts and the careful application of tested antitrust analysis. Because the evidence did not support the theories of potential competitive harm, there was no basis on which to seek to impose conditions on this merger. We want to be clear, however, that we will closely watch these markets and, should Google engage in unlawful tying or other anticompetitive conduct, the Commission intends to act quickly.”

The Commission vote to close the investigation was 4-1, with Commissioner Pamela Jones Harbour voting no and issuing a separate dissenting statement and Commissioner Jon Leibowitz joining the Commission statement, but also issuing a separate concurring statement. In his statement, he noted “both the serious vertical competition issues raised by Google’s proposed acquisition of DoubleClick as well as the substantial privacy issues that, though in part brought to light by the deal, clearly transcend it.” In her statement, Commissioner Harbour wrote, “I dissent because I make alternate predictions about where this market is heading, and the transformative role the combined Google/DoubleClick will play if the proposed acquisition is consummated.”

Copies of the statements and the newly issued self-regulatory privacy principles can be found at www.ftc.gov. The FTC’s Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Room 394, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave, N.W., Washington, DC 20580. To learn more about the Bureau of Competition, read “Competition Counts” at http://www.ftc.gov/competitioncounts.

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Mergers: Commission clears proposed acquisition of DoubleClick by Google

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of the online advertising technology company DoubleClick by Google, both of the US. The Commission's in-depth investigation, opened in November 2007 (see IP/07/1688), concluded that the transaction would be unlikely to have harmful effects on consumers, either in ad serving or in intermediation in online advertising markets. The Commission has therefore concluded that the transaction would not significantly impede effective competition within the European Economic Area (EEA) or a significant part of it.

Google operates an Internet search engine that offers search capabilities for end users free of charge and provides online advertising space on its own websites. It also provides intermediation services to publishers and advertisers for the sale of online advertising space on partner websites through its network "AdSense".

DoubleClick mainly sells ad serving, management and reporting technology worldwide to website publishers and to advertisers and agencies. Such technology allows internet publishers and advertisers to ensure that advertisements are posted on the relevant websites and to report on the performance of such advertisements.

The Commission's in-depth market investigation found that Google and DoubleClick were not exerting major competitive constraints on each other's activities and could, therefore, not be considered as competitors at the moment. Even if DoubleClick could become an effective competitor in online intermediation services, it is likely that other competitors would continue to exert sufficient competitive pressure after the merger. The Commission therefore concluded that the elimination of DoubleClick as a potential competitor would not have an adverse impact on competition in the online intermediation advertising services market.

The Commission also analysed the potential effects of non-horizontal relationships between Google and DoubleClick following concerns raised by third parties in the course of the market investigation. These relationships concern DoubleClick's market position in ad serving, where Google, by controlling DoubleClick's tools, could allegedly raise the cost of ad serving for rival intermediaries, and Google's market position in search advertising and/or online ad intermediation services, where Google could allegedly have required purchasers of search ad space or intermediation to also purchase DoubleClick's tools.

The Commission found that the merged entity would not have the ability to engage in strategies aimed at marginalising Google's competitors, mainly because of the presence of credible ad serving alternatives to which customers (publishers/advertisers/ad networks) can switch, in particular vertically integrated companies such as Microsoft, Yahoo! and AOL. The market investigation also found that the merged entity would not have the incentive to close off access for competitors in the ad serving market, mainly because such strategies would be unlikely to be profitable.
The Commission's decision to clear the proposed merger is based exclusively on its appraisal under the EU Merger Regulation. It is without prejudice to the merged entity's obligations under EU legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data and the Member States' implementing legislation.

More information on the case will be available at:

http://ec.europa.eu/comm/competition/mergers/cases/index/m94.html#m_4731
August 22, 2012

Thomas O. Barnett, Esq.
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Re: Proposed Acquisition of Instagram, Inc. by Facebook, Inc. File No. 121-0121

Dear Mr. Barnett:

The Commission has been conducting an investigation to determine whether the proposed acquisition of Instagram, Inc. by Facebook, Inc. may violate Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

By direction of the Commission.

April J. Tabor
Acting Secretary
August 22, 2012

Patricia R. Zeigler, Esq.
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, N.W.
Washington, D.C. 20005-1706

Re: Proposed Acquisition of Instagram, Inc. by Facebook, Inc. File No. 121-0121

Dear Ms. Zeigler:

The Commission has been conducting an investigation to determine whether the proposed acquisition of Instagram, Inc. by Facebook, Inc. may violate Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

By direction of the Commission.

April J. Tabor
Acting Secretary
April 10, 2014

Erin Egan  
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Anne Hoge  
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Dear Ms. Egan and Ms. Hoge:

I am sending you this letter in connection with Facebook, Inc.'s proposed acquisition of WhatsApp Inc., a company that offers an instant messaging service with reportedly hundreds of millions of users worldwide. As you know, both companies collect data from consumers but make different promises and statements with respect to consumers' privacy. In particular, and as discussed in more detail below, WhatsApp has made a number of promises about the limited nature of the data it collects, maintains, and shares with third parties – promises that exceed the protections currently promised to Facebook users. We want to make clear that, regardless of the acquisition, WhatsApp must continue to honor these promises to consumers. Further, if the acquisition is completed and WhatsApp fails to honor these promises, both companies could be in violation of Section 5 of the Federal Trade Commission (FTC) Act and, potentially, the FTC’s order against Facebook.2

WhatsApp’s Statements to Consumers Regarding Privacy

In its most recent privacy policy, dated July 7, 2012, WhatsApp makes several statements about the types of data that it collects. It states that “WhatsApp does not collect names, emails,

1 This letter represents my views and does not necessarily represent the views of the Commission or any individual Commissioner.
addresses or other contact information from its users’ mobile address book or contact lists other than mobile phone numbers . . .”3 It also states that “We do not collect location data” and that “The contents of messages that have been delivered by the WhatsApp Service are not copied, kept or archived by WhatsApp.”4 The policy further represents that “We do not use your mobile phone number or other Personally Identifiable Information to send commercial or marketing messages without your consent . . .” Similarly, it states that “We do not sell or share your Personally Identifiable Information (such as mobile phone number) with other third-party companies for their commercial or marketing use without your consent.”5 WhatsApp’s hundreds of millions of users have agreed to use the WhatsApp service, and to have WhatsApp collect and transmit their information, with the understanding that these promises will be honored.

**Statements Made by WhatsApp and Facebook After the Purchase of WhatsApp**

Following Facebook’s announced intent to acquire WhatsApp, both companies have made public statements indicating that the promises in WhatsApp privacy policies would be honored. Following the announcement of the purchase, an article was placed on the WhatsApp blog that stated:

> Here’s what will change for you, our users: nothing . . . . And you can still count on absolutely no ads interrupting your communication. There would have been no partnership between our two companies if we had to compromise on the core principles that will always define our company, our vision and our product.6

Following the announcement of the proposed acquisition of WhatsApp, Facebook chief executive Mark Zuckerberg was quoted as saying “We are absolutely not going to change plans around WhatsApp and the way it uses user data.”7 Similarly, a Facebook spokesperson stated that “As we have said repeatedly, WhatsApp will operate as a separate company and will honor its commitments to privacy and security.”8

**Future Uses of WhatsApp User Data**

The statements in WhatsApp’s privacy policy, combined with the recent public statements by both Facebook and WhatsApp, constitute clear promises to consumers about the collection and use of their data by WhatsApp and, following WhatsApp’s purchase, Facebook. As you know, the FTC has brought many cases alleging that the failure to keep promises made

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4 Id.
5 Id.
about privacy constitutes a deceptive practice under Section 5 of the FTC Act. In addition, the FTC has made clear that, absent affirmative express consent by a consumer, a company cannot use data in a manner that is materially inconsistent with promises made at the time the data was collected, and that such use of data could be an unfair practice under Section 5.

WhatsApp’s privacy policy clearly states, among other things, that users’ information will not be used for advertising purposes or sold to a third party for commercial or marketing use without the users’ consent. Facebook’s purchase of WhatsApp would not nullify these promises and WhatsApp and Facebook would continue to be bound by them. Further, Facebook has recently promised consumers that it would not change the way WhatsApp uses customer information. Therefore, any use of WhatsApp’s subscriber information that violates these privacy promises, by either WhatsApp or Facebook, could constitute a deceptive or unfair practice under the FTC Act. Moreover, such an action could violate the FTC’s order against Facebook. Among other things, the Order enjoins Facebook and its subsidiaries from misrepresenting the extent to which they maintain the privacy or security of consumers’ personal information and requires Facebook and its subsidiaries to obtain consumers’ affirmative express consent before sharing their nonpublic information in a manner that materially exceeds any privacy setting.

Before changing WhatsApp’s privacy practices in connection with, or following, any acquisition, you must take steps to ensure that you are not in violation of the law or the FTC’s order. First, if you choose to use data collected by WhatsApp in a manner that is materially inconsistent with the promises WhatsApp made at the time of collection, you must obtain consumers’ affirmative consent before doing so. Second, you must not misrepresent in any manner the extent to which you maintain, or plan to maintain, the privacy or security of WhatsApp user data. Failure to take these steps could constitute a violation of Section 5 and/or the FTC’s order against Facebook. Finally, if you choose to change how you collect, use, and share newly-collected WhatsApp data, we recommend that you offer consumers an opportunity to opt out of such changes or, at least, that you make clear to consumers that they have an opportunity to stop using the WhatsApp service.

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11 Violation of the order could subject the company to civil penalties of up to $16,000 per violation.
Hundreds of millions of users have entrusted their personal information to WhatsApp. The FTC staff will continue to monitor the companies’ practices to ensure that Facebook and WhatsApp honor the promises they have made to those users.

Sincerely,

Jessica Rich
Director
Bureau of Consumer Protection
EUROPEAN COMMISSION
PRESS RELEASE

Brussels, 3 October 2014

Mergers: Commission approves acquisition of WhatsApp by Facebook

The European Commission has authorised, under the EU Merger Regulation, the proposed acquisition of WhatsApp Inc. by Facebook, Inc., both of the United States. Facebook (via Facebook Messenger) and WhatsApp both offer applications for smartphones (so-called "apps") which allow consumers to communicate by sending text, photo, voice and video messages. The Commission found that Facebook Messenger and WhatsApp are not close competitors and that consumers would continue to have a wide choice of alternative consumer communications apps after the transaction. Although consumer communications apps are characterised by network effects, the investigation showed that the merged entity would continue to face sufficient competition after the merger.

Commission Vice President in charge of competition policy, Joaquín Almunia, said: "Consumer communications apps keep European citizens connected and are becoming increasingly popular. While Facebook Messenger and WhatsApp are two of the most popular apps, most people use more than one communications app. We have carefully reviewed this proposed acquisition and come to the conclusion that it would not hamper competition in this dynamic and growing market. Consumers will continue to have a wide choice of consumer communications apps."

The Commission’s investigation focused on three areas: (i) consumer communications services, (ii) social networking services, and (iii) online advertising services.

As regards consumer communications services, the Commission focussed its assessment on apps for smartphones, as WhatsApp is not available for other devices. The Commission found that Facebook Messenger and WhatsApp are not close competitors. Indeed, despite the fact that Facebook Messenger is a standalone app, the user experience is specific given its integration with the Facebook social network. For WhatsApp, access to the service is provided through phone numbers while for Facebook Messenger, a Facebook profile is required. Users seem to use the two apps in different ways and many of them use the two apps simultaneously on the same mobile handset. Furthermore, this is a very dynamic market with several competing apps available on the market, such as Line, Viber, iMessage, Telegram, WeChat and Google Hangouts.

The consumer communications apps market is characterised by network effects, that is to say the value of the service to its users increases with the number of other users. Network effects may allow the entity which enjoys a large network to keep its competitors out of the market. Given their popularity, both WhatsApp and Facebook Messenger already have large customer bases. However, a number of factors mitigate the network effects in this particular case. Indeed, the Commission found that the consumer communications apps market is fast growing and characterised by short innovation cycles in which market positions are often reshuffled. Moreover, launching a new app is fairly easy and does not require significant time and investment. Finally, customers can and do use multiple apps at the same time and can easily switch from one to another.
As regards social networking services, the market investigation showed that their boundaries are continuously evolving. Some third parties suggested that WhatsApp is already a social network which competes with Facebook. However, the Commission found that the parties are, if anything, distant competitors in this area, in particular given a substantially richer experience offered by Facebook. Moreover, there is a large number of alternative service providers, including other consumer communications apps, such as Line and WeChat. Further, even in the event of an integration between WhatsApp and Facebook such that Facebook’s position in social networking services could be strengthened, the net gain in terms of new members of the social network would be limited, since the user base of WhatsApp already overlaps to a significant extent with that of Facebook. Hence, no matter what the precise boundaries of the market for social networking services are and whether or not WhatsApp is considered a social network, competition is unlikely to be negatively affected by the merger for such services.

Although WhatsApp is not active in online advertising, the Commission examined whether the transaction could strengthen Facebook’s position in that market and hamper competition. In particular, the Commission examined the possibility that Facebook could (i) introduce advertising on WhatsApp, and/or (ii) use WhatsApp as a potential source of user data for improving the targeting of Facebook’s advertisements. The Commission concluded that, regardless of whether Facebook would introduce advertising on WhatsApp and/or start collecting WhatsApp user data, the transaction would not raise competition concerns. This is because after the merger, there will continue to be a sufficient number of alternative providers to Facebook for the supply of targeted advertising, and a large amount of internet user data that are valuable for advertising purposes are not within Facebook’s exclusive control.

In the context of this investigation, the Commission analysed potential data concentration issues only to the extent that it could hamper competition in the online advertising market. Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of EU competition law.

Based on the above, the Commission therefore concluded that the transaction would raise no competition concerns.

The transaction was notified to the Commission on 29 August 2014.

**Background**

Facebook provides social network online platforms offering a range of social services, including consumer communications and photo / video sharing functionalities to consumers and advertisers. In particular, Facebook offers the social networking platform "Facebook", the consumer communications app "Facebook Messenger" and the photo and video-sharing platform "Instagram". These services can be accessed through the internet on PCs and via specific apps on smartphones and tablets. Facebook also provides online advertising space. For this purpose, Facebook collects data regarding the users of its social networking platforms and analyses them in order to serve advertisements on behalf of advertisers, which are "targeted" at each particular user of its social networking platforms. Facebook’s social networking platform has 1.3 billion users worldwide, 300 million of which are also users of the Facebook Messenger app.

WhatsApp is the provider of a messaging app enabling users to exchange multimedia instant messages. Unlike Facebook, WhatsApp is currently not available on PCs and tablets, it does not store messages on its servers and it does not sell advertising space. WhatsApp has 600 million users worldwide.
The Commission has already considered the market for consumer communications services in previous decisions, in particular in 2011 in the Microsoft / Skype case (see IP/11/1164) and in 2013 in the Microsoft / Nokia case (see IP/13/1210).

**Merger control rules and procedures**

The Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds (see Article 1 of the Merger Regulation) and to prevent concentrations that would significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

The vast majority of mergers do not pose competition problems and are cleared after a routine review. From the moment a transaction is notified, the Commission generally has a total of 25 working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II).

More information on this case is available on the Commission's competition website, in the public case register under the case number M.7217.

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For the public: Europe Direct by phone 00 800 6 7 8 9 10 11 or by e-mail
FTC to Examine Past Acquisitions by Large Technology Companies


FOR RELEASE
February 11, 2020

TAGS: Technology | Mobile | Bureau of Competition | Bureau of Economics | Office of Policy Planning | Competition

Note: The FTC will host a conference call for media with FTC Chairman Joe Simons:

Date: Feb. 11, 2020
Time: 1 p.m. ET
Call-in: 877-226-8216, confirmation number 4193234

Call-in lines, which are for media only, will open 15 minutes prior to the start of the call.

The Federal Trade Commission issued Special Orders to five large technology firms, requiring them to provide information about prior acquisitions not reported to the antitrust agencies under the Hart-Scott-Rodino (HSR) Act. The orders require Alphabet Inc. (including Google), Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft Corp. to provide information and documents on the terms, scope, structure, and purpose of transactions that each company consummated between Jan. 1, 2010 and Dec. 31, 2019.

The Commission issued these orders under Section 6(b) of the FTC Act, which authorizes the Commission to conduct wide-ranging studies that do not have a specific law enforcement purpose. The orders will help the FTC deepen its understanding of large technology firms’ acquisition activity, including how these firms report their transactions to the federal antitrust agencies, and whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds and therefore do not need to be reported to the antitrust agencies.

“Digital technology companies are a big part of the economy and our daily lives,” said FTC Chairman Joe Simons. “This initiative will enable the Commission to take a closer look at acquisitions in this important sector, and also to evaluate whether the federal agencies are getting adequate notice of transactions that might harm competition. This will help us continue to keep tech markets open and competitive, for the benefit of consumers.”
The Special Orders require each recipient to identify acquisitions that were not reported to the FTC and the U.S. Department of Justice under the HSR Act, and to provide information similar to that requested on the HSR notification and report form. The orders also require companies to provide information and documents on their corporate acquisition strategies, voting and board appointment agreements, agreements to hire key personnel from other companies, and post-employment covenants not to compete. Last, the orders ask for information related to post-acquisition product development and pricing, including whether and how acquired assets were integrated and how acquired data has been treated.

The Commission plans to use the information obtained in this study to examine trends in acquisitions and the structure of deals, including whether acquisitions not subject to HSR notification might have raised competitive concerns, and the nature and extent of other agreements that may restrict competition. The Commission also seeks to learn more about how small firms perform after they are acquired by large technology firms. These and related issues were discussed during several sessions of the FTC’s 2018 Hearings on Competition and Consumer Protection in the 21st Century, and this study is part of the follow-up from those Hearings.

The FTC has a statutory right under the HSR Act to review acquisitions and mergers over a certain size before they are consummated, and the study will help the Commission consider whether additional transactions should be subject to premerger notification requirements. The orders will also contribute broadly to the FTC’s understanding of technology markets, and thereby support the FTC’s program of vigorous and effective enforcement to promote competition and protect consumers in digital markets.

The Commission vote to approve issuing the Special Orders was 5-0. Commissioners Christine S. Wilson and Rohit Chopra issued a joint statement.

The Federal Trade Commission develops policy initiatives on issues that affect competition, consumers, and the U.S. economy. Like the FTC on Facebook, follow us on Twitter, read our blogs, and subscribe to press releases for the latest FTC news and resources.

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FAQs: Technology Platform 6(b) Study

1. What is a 6(b) study?

Section 6(b) of the FTC Act gives the FTC special authority and tools to conduct studies, separate from the agency’s law enforcement authority. Under Section 6(b), the FTC can issue an order to require a company to file annual or special reports, in writing, to answer specific questions about various aspects of the company’s business conduct.

2. Why is the FTC conducting this 6(b) study?

We plan to use the responses to our Special Orders to better understand acquisitions by certain technology companies. In particular, the study will help the FTC assess whether U.S. antitrust authorities are receiving adequate notice of transactions that might limit or eliminate competition. The Hart-Scott-Rodino (HSR) Antitrust Improvements Act requires premerger filings when the parties and the transaction meet certain size thresholds. The FTC will study whether large tech companies are making potentially anticompetitive acquisitions—including acquisitions of nascent or potential competitors—that fall below HSR filing thresholds.

3. How did the Commission select targets for this set of 6(b) Special Orders?

We selected five large technology platform companies. They have the largest market capitalizations in the United States, and each firm has made many acquisitions of smaller firms.

4. What do you expect to learn from the 6(b) orders?

We expect to learn more about how major technology companies structure their transactions when they acquire other businesses or otherwise gain influence or control, as well as the broader context for these transactions and the specific markets they affect. We also expect to learn more about transactions that are not currently being reported under the HSR rules, including whether these transactions might raise antitrust concerns worthy of antitrust investigations.

5. What is the anticipated outcome of this 6(b) study?

Typically, when the agency issues 6(b) Special Orders, the Commission later authorizes staff to issue a report summarizing the findings and, perhaps, offering recommendations for further action. With respect to this project, after staff and the Commission review the information obtained with these 6(b) Special Orders, they will decide whether further study, a report, or other action is warranted.
6. What is the relationship between a 6(b) study and law enforcement? Does the issuance of these 6(b) orders foreshadow possible law enforcement action, including efforts to unwind any of these firms’ prior acquisitions?

This 6(b) study is a policy and research project. The study is not a law enforcement investigation and does not have a specific law enforcement purpose. However, as with all of our policy work, our learning is likely to inform our program of vigorous enforcement to promote competition and protect consumers. This particular study will deepen our understanding of acquisition activity in important technology markets, which should make our enforcement efforts more effective. If the Commission wanted to pursue any subsequent law enforcement investigations or actions, the Commission would need to authorize those separately.

7. Can you explain more precisely what type of information you’re requiring the companies to provide? Is it information about how the deals were transacted, or about what the companies did with the assets afterwards?

The Special Orders will gather the following information from companies:

- A list of acquisitions over the past ten years that were not previously reported to the federal U.S. antitrust authorities;
- Documents concerning the rationale for these acquisitions;
- The structure of these transactions;
- Pre- and post-acquisition business plans;
- Information about what the company did with the acquired business or assets, including modification of products, services, or terms of service; and
- The tools and analyses used to evaluate potential acquisition targets.
We support the Commission’s decision to issue a 6(b) study designed to assess the sufficiency of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (“HSR Act”) thresholds with respect to technology mergers and acquisitions of competitive significance. The Commission will benefit from a deeper understanding of the kinds of transactions – and the nature of their competitive impact – that were not reportable under the HSR requirements.

While non-reportable deals involving technology companies garner significant attention, academic work in other industries raises similar questions about the sufficiency of the HSR notification process. Given the FTC’s significant expertise in the healthcare industry, and the vital importance of quality healthcare services at competitive prices to every American consumer, we encourage the Commission to analyze sub-HSR deals in that industry next. During the last three decades, the share of independent dialysis facilities has shrunk drastically and two national chains now own the majority of dialysis facilities and earn nearly all of the industry’s revenue, with most acquisitions occurring below the HSR thresholds. Similar patterns of “stealth consolidation” have been observed in pharmaceutical and hospital markets. We urge the Commission to consider similar 6(b) studies across other industries to ensure that we have a more complete understanding about the competitive effects of non-reportable mergers writ large.

While we commend the FTC for exploring this timely and important topic, we reiterate our call for the Commission to prioritize 6(b) studies that explore consumer protection issues arising from the privacy and data security practices of technology companies, including social media platforms. In particular, we encourage the FTC to study whether and, if so, how content curation and targeted advertising practices impact data collection, use, and sharing, and how the monetization of data impacts the creation and refinement of algorithms that drive content curation and targeted advertising practices.

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1 Eliason, Paul J. et al., How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry, 135 Quarterly J. Econ. 221 (2020) (finding that during the past three decades, the share of independent dialysis facilities fell from 86% to 21%, so that DaVita and Fresenius now own more than 60% of facilities and earn more than 90% of the industry’s revenue); Wollmann, Thomas, How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare, working paper (2018) (finding that “many proposed dialysis facility acquisitions that would otherwise be blocked over 95% of the time are blocked less than 5% of the time when exempt from premerger notification requirements… Exempt facility acquisitions account for most of the rise in industry-wide within-market concentration over the last two decades.”).

2 Cunningham, Colleen et al. Killer Acquisitions, working paper (2019) (finding that “killer acquisitions” in pharma disproportionately occur just below the HSR threshold and generally appear to involve products that are less likely to launch and more likely to be discontinued); Wollmann, Thomas, Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act, 1 American Economic Review: Insights 77 (2019) (tracking hospital mergers from 1994 to 2011 and finding that mergers exempt under the revised, higher, filing thresholds but not exempt under the original thresholds greatly increase after the revision, and that 50% of all hospital mergers are horizontal and exempt under the higher thresholds).
Antitrust law is back in the news and, perhaps for the first time since 1912, in the presidential campaign. The Federal Trade Commission and various committees of Congress have held hearings on fundamental antitrust questions. Scholars from multiple disciplines have published books, articles, and reports addressing whether antitrust law needs substantial revision. Perhaps the most compelling evidence of the winds of change is that, of approximately 40 leading academic economists recently surveyed, half said that acquisitions by tech platforms that create “risks of anticompetitive effects” should be prohibited and that large tech platforms like Amazon should be “broken apart from any participants on the platform.”

Prominent conservative commentator Peggy Noonan has said of Facebook: “Break them up. Break them in two, in three; regulate them.”

A confluence of four factors seems to have provoked this unrest. The first is a rising populism, on both the left and the right, that decries free markets, globalism, and increasing inequality within the developed countries. The second is the rise of big tech, which provokes unease because its power seems to expand without limit through scale and scope economies and network effects; because it is based on new and largely invisible technology; because it aggregates data and threatens privacy; because it implicates broader themes of powerful communications media, which have repeatedly been subject to antitrust scrutiny in the past; and because some fear that big tech undermines political stability and familiar communities and associations. The third is a growing body of economic studies that suggest that market concentration and market power have increased in recent years. The fourth is the increasing concern of libertarians about private, as well as government, power and evidence of widespread increases in industry concentration.

Antitrust law is the tool that comes first to mind as a means of addressing concerns about private economic power. On the surface, there appears to be a conversation about the future of antitrust law between three groups. The first group might be called the conservatives. They argue that

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3 Peggy Noonan, Overthrow the Prince of Facebook, WALL ST. J. (June 6, 20019), www.wsj.com/articles/overthrow-the-prince-of-facebook-11559862145.
antitrust law is basically fine as it is⁴ and that market concentration is transitory and, when enduring or not a reflection of superior efficiency, is largely “the result of heavy regulation rather than a natural development from the nature of business.”⁵ To the extent they advocate revisions to antitrust doctrine, they generally support modifying doctrinal provisions, such as market share presumptions in horizontal merger cases, that make enforcement easier,⁶ and extending doctrinal provisions that restrict enforcement, such as the price-cost test for predatory pricing, to more complex forms of conduct, such as loyalty discounts.⁷ The second group might be called mainstream progressives. They argue that antitrust enforcement has been too lax and that antitrust law should be adjusted but within the prevailing consumer welfare paradigm.⁸ The third group might be called the populist critics. They include the self-described “New Brandeis” proponents⁹ and some who have more far-reaching and eccentric proposals.¹⁰

In fact, however, there are really two very separate conversations. One, between conservatives and progressives, concerns how antitrust law might best promote economic welfare. The other, pushed largely by the populists, concerns how to replace what is now known as antitrust law with alternatives that will serve other objectives, in addition to economic welfare, such as promoting an equitable distribution of wealth and of economic and political power. The two conversations seldom intersect in any meaningful way.

Part I sets the table by briefly summarizing the core principles and institutional context of antitrust law as it now exists. Part II addresses the conversation between the conservatives and the


⁵ TYLER COWEN, BIG BUSINESS: A LOVE LETTER TO AN AMERICAN ANTI-HERO 83–84, 91 (2019).


⁹ E.g., WU, CURSE OF BIGNESS, supra note 1; Lina M. Khan, Amazon's Antitrust Paradox, 126 YALE L.J. 710, 731–37 (2017); Elizabeth Warren, Here’s How We Can Break up Big Tech, MEDIUM|BUSINESS (2019), medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

¹⁰ E.g., TEPPER & HEARN, MYTH OF CAPITALISM, supra note 1; POSNER & WEYL, RADICAL MARKETS, supra note 1, supra.

Electronic copy available at: https://ssrn.com/abstract=3519523
mainstream progressives about antitrust law and economic welfare. Part III explains why the concerns raised by the populist critics, although often couched in terms of economic welfare, are not really about economic welfare and why antitrust law cannot prudently address both economic welfare and the other objectives with which these critics are concerned. Part IV gazes through a hazy crystal ball and suggests possible ways to bring the conversations closer together.

I. ANTITRUST LAW AND THE CONSUMER WELFARE STANDARD

U.S. antitrust law prohibits private, anticompetitive conduct that results in more market power than would otherwise exist.\(^{11}\) There are three basic elements to any antitrust offense: anticompetitive conduct, an actual or likely increase in market power compared to the but-for world as a result of the creation or maintenance of market power, and a causal connection between them. Anticompetitive conduct is conduct that is not efficiency-based competition on the merits—conduct that does not, in other words, shift the supply curve to the right by innovation or other forms of cost reduction, shift the demand curve to the right by innovation or other forms of product improvement, or reduce above-cost prices. For this purpose, increased market power means the ability profitably to increase price or otherwise disadvantage trading partners because of a reduction in the competitive efficacy of actual and potential rivals. The competitive efficacy of rivals can be reduced both by collusion among rivals that would otherwise compete and by conduct that weakens or excludes rivals.

Anticompetitive conduct can increase the actor’s market power only by impairing the competitive process. By definition, market power reflects harm to the competitive process. Market power diminishes economic welfare when it is used to increase price, reduce output, or harm rivals and when it reduces incentives for product improvement, cost reduction, or innovation. Antitrust law is thus about protecting the competitive process in order to promote economic welfare.\(^{12}\) This is commonly known as “the consumer welfare standard.”\(^{13}\)

Antitrust law is more complicated than that, of course. For example, single firm conduct can violate the antitrust laws only if the defendant winds up with, or with a dangerous probability of

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\(^{13}\) There is a debate within the antitrust mainstream about whether antitrust law should be focused on consumer welfare, as that term is used by economists, or total welfare, e.g., Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 Fordham L. Rev. 2497 (2013), or between consumer welfare and consumer surplus, Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. Competition L. & Econ. 133 (2011). This debate is immaterial to the analysis and argument in this paper, but it could be relevant to possible revisions of antitrust law.
obtaining, an amount of market power sufficient to be called monopoly power. Also, there are per se rules and other “quick look” decision tools, in which an increase in market power is presumed and need not be proven. It is often said that exclusionary conduct can be illegal, even if it has some efficiency benefits, if those benefits are outweighed by the resulting harm to competition, but few if any cases have so held. Perhaps most important, antitrust law embraces simplified principles and rules even though they sometimes permit the creation of market power by conduct that does not promote efficiency.

These principles and rules are largely made by judges. The key statutory provisions are brief and imprecise. In effect, Congress “delegated much of its lawmaking power to the judicial branch.” Legal doctrine thus evolves in a common law-like process that “permits the law to adapt to new learning” from business and judicial experience, economic theory and analysis, and market developments.

The principles and rules of antitrust law are heavily influenced by error-cost analysis. The basic idea is that antitrust cases almost always involve uncertainty and that antitrust principles should therefore be shaped, not to reflect the theoretically optimal outcome that an all-knowing fact finder might reach, but rather to reduce likely error costs. These error costs include the costs of false positives (i.e., false convictions, such as blocking a procompetitive merger or condemning efficient conduct) and false negatives (i.e., false acquittals, such as permitting an anticompetitive merger or conduct that excludes rivals and does not generate substantial efficiencies). Error-cost analysis teaches that antitrust law should be designed to minimize the sum of the costs of false positives and false negatives. The theory makes good sense.

Error-cost analysis figured prominently in so-called Chicago School thinking. In a very influential article, then-Professor and now-Judge Frank Easterbrook argued that false positives are a more serious problem than false negatives. Easterbrook reasoned that a false positive—blocking a merger or prohibiting conduct—is manifest in a final and enduring government order. By contrast, Easterbrook

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14 See, e.g., United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (“The percentage we have already mentioned—over ninety—. . . is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent [sic] is not.”).


17 Baxter, supra note 166, at 666.

18 To be complete, the theory would also take account of administration and transaction costs in the enforcement of antitrust law, which also should and do influence antitrust doctrine.

argued, new entry, innovation, and other changed circumstances are likely to dissipate the harm to
competition enabled by a false negative.20

Courts have adopted some aspects of antitrust doctrine for the explicit purpose of avoiding false
positives, even acknowledging that they would permit some anticompetitive conduct.21 Perhaps more
important, antitrust courts have often imposed almost impossibly high burdens of proof on plaintiffs for
the explicit or implicit purpose of avoiding false positives. For example, the majority in Ohio v. American
Express held that direct proof of harm to competition is insufficient and the relevant market must be
defined and proved in all cases involving vertical restraints, on the ground that such restraints can serve
procompetitive purposes; that harm to competition cannot be inferred absent proof of reduced output
or supra-competitive prices; and that efficiencies from vertical restraints can be presumed even if they
are not supported by evidence.22

The inherent nature of antitrust law makes it fertile soil for a cautious error-cost approach.
Antitrust law is a law of general application that applies to almost all industries. Antitrust enforcers and
tribunals will thus not have deep industry expertise, comparable to that of a sectoral regulator, except
perhaps in the tiny portion of industries that have been subject to repeated antitrust scrutiny. Because
antitrust principles must be applicable to all industries, they cannot be fashioned to fit the idiosyncrasies
of particular industries. Fact-finding, or more precisely application of general principles to very diverse
facts, thus does the heavy lifting in antitrust enforcement. And those facts often involve the
unknowable, e.g., future innovation, and the unobservable, e.g., incremental costs. Uncertainty is
inevitable.

Perhaps more important, enforcement of U.S. antitrust law, unlike competition law in most
other nations, is decentralized. In addition to the Justice Department and the Federal Trade

20 Easterbrook’s analysis was underspecified because error costs are a function of both the duration
and magnitude of costs and Easterbrook addressed only their duration. Some disagreed with
Easterbrook for this and other reasons at the time, but their concerns were paid little heed. E.g., Donald
F. Turner, The Durability, Relevance, and Future of American Antitrust Policy, 75 CALIF. L. REV. 797, 800
(1987); Richard S. Markovitz, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63

21 These include the law regarding predatory pricing, e.g., Brooke Grp. Ltd. v. Brown & Williamson
Tobacco Corp., 509 U.S. 209, 223 (1993) (“As a general rule, the exclusionary effect of prices above a
relevant measure of cost either reflects the lower cost structure of the alleged predator, and so
represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control
without courting intolerable risks of chilling legitimate price cutting.”), and unilateral refusals to deal,
(expressing concern about “the problem of false positives” and noting that “[e]nforced sharing also
requires antitrust courts to act as central planners, identifying the proper price, quantity, and other
terms of dealing—a role for which they are ill suited.”).

22 Ohio v. Am. Express Co., 138 S. Ct. 355 (2018). These aspects of the decision are explained in
greater detail in A. Douglas Melamed, The American Express Case: Back to the Future, 18 COLO. TECH. L.J.
___ (2019).
Commission, fifty states\textsuperscript{23} and any person injured by a violation of the antitrust law can bring an enforcement action.\textsuperscript{24} It is likely, therefore, that a much higher percentage of suspected antitrust violations are subject to scrutiny in the United States than elsewhere and that deterrence of anticompetitive business conduct in general is a more important component of the impact of antitrust law on the economy. Antitrust principles thus need to be fashioned with careful attention to whether they will send clear signals to the business community about the line between permissible and impermissible conduct and whether they will be administrable by hundreds of generalist district courts.

II. ANTITRUST LAW AND ECONOMIC WELFARE

A number of the most prominent names in mainstream antitrust thinking have in recent months expressed the view that antitrust enforcement has been too lax and that antitrust law is too permissive. They are motivated at least in part by recent scholarship showing increases in industrial concentration,\textsuperscript{25} share of GDP going to capital rather than labor,\textsuperscript{26} and price/cost margins\textsuperscript{27} and that mergers over the past 20 years or so have often resulted in higher prices.\textsuperscript{28} These studies do not prove that antitrust enforcement has been too lax or even that market power has been increasing throughout the economy, but they are suggestive of those inferences.

The proposals of these mainstream progressives are varied. For example, some propose modifying standards applicable to vertical mergers\textsuperscript{29} or challenging more often mergers that might harm sellers.\textsuperscript{30} Others propose challenging most favored nation agreements used by digital platforms\textsuperscript{31} or so-called horizontal shareholding.\textsuperscript{32} Carl Shapiro and I have suggested antitrust enforcement against

\begin{itemize}
  \item \textsuperscript{23} Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).
  \item \textsuperscript{24} 15 U.S.C. § 4.
  \item \textsuperscript{25} E.g., Carl Shapiro, \textit{Antitrust in a Time of Populism}, 61 INT’L J. INDUS. ORG. 714 (2018).
  \item \textsuperscript{26} E.g., David Autor et al., \textit{Concentrating on the Fall of the Labor Share}, 107 AM. ECON. REV. (PAPERS & PROCEEDINGS) 180 (2017).
  \item \textsuperscript{32} Einer Elhauge, \textit{Horizontal Shareholding}, 129 HARV. L. REV. 1267 (2015).
\end{itemize}
standard-setting organizations that fail to take reasonable steps to ameliorate the welfare-reducing effects of technology market monopolies created by the multi-company agreements they orchestrate.33

The most comprehensive expression of mainstream progressive views is set forth in Jon Baker’s excellent book The Antitrust Paradigm,34 the title of which is of course a play on Robert Bork’s The Antitrust Paradox. The Antitrust Paradigm consists of three parts. Part I addresses fundamental antitrust issues. Baker describes a “political consensus” supporting antitrust law, a compromise between regulation and laissez faire—between deterring anticompetitive conduct and chilling efficiencies—that can be expected to endure only if courts “maintain the efficiency gains that flow from competition.”35 He argues persuasively that the inclusion of noneconomic goals in mid-twentieth century antitrust law chilled efficient conduct and inherently leads to excessive judicial discretion and, ultimately, political corruption of antitrust law. But, Baker argues, the antitrust consensus is in jeopardy because of the failures of antitrust law even when measured solely by its impact on economic welfare. Baker sets forth several reasons to believe that market power has been generally increasing in the United States and now presents a “serious public policy problem.”36 The problem, Baker argues, is that antitrust law has gone too far in the direction of laissez-faire or antitrust minimalism.

Part II consists of a more concrete discussion of antitrust rules for the information economy. Baker insightfully discusses, among other things, inferring agreement from algorithmic coordination, exclusionary conduct by dominant platforms, ways in which mergers can reduce innovation, anticompetitive conduct involving patents, and market definition when platforms are involved.

Baker looks forward in Part III. He describes three factors that he believes “point in the direction of strengthened antitrust”—changes in business practices, political realignments, and developments in economic analysis.37 He ends with a call to action that will no doubt appeal to mainstream progressives.

Chapters 4 and 5 of Part I of The Antitrust Paradigm are a reprise of Baker’s earlier criticism of the approach to error costs manifest in current antitrust law.38 “While the error cost framework is a neutral economic tool, antitrust conservatives” have used it to advocate against antitrust intervention by overstating “the incidence and significance of false positives and understat[ing] the incidence and

34 BAKER, THE ANTITRUST PARADIGM, supra note 1.
35 Id. at 42.
36 Id. at 31.
37 Id. at 202–03.
significance of false negatives.” They have based their advocacy on numerous “erroneous arguments” about markets and institutions, arguments that Baker addresses and refutes.

The issues raised in these chapters are critical to current controversies about antitrust policy. For present purposes, it does not matter whether Easterbrook and other antitrust conservatives were right about error costs in the past. The question now is whether changed circumstances warrant reassessing the relative tolerance for the risks of false positives and false negatives that antitrust law now embodies. The indications of under-enforcement summarized above and the failure in court of economically sound cases suggest that the likelihood of false negatives might be greater than previously thought and perhaps that current antitrust law has gone too far in its quest to avoid false positives. Those indications, together with the size, seemingly boundless scale and scope economies, and apparently durable market power of some of the global mega-firms and new learning about entry barriers and contestable markets, suggest that the duration and costs of false negatives might be greater than previously thought. Similarly, new empirical tools for assessing mergers and improved understanding of the economic effects of vertical agreements suggest that the likelihood of false positives might be lower than previously thought. And studies showing that mergers rarely achieve anticipated efficiencies suggest that the costs of false positives might be lower than previously thought.

Recalibrating the law’s relative tolerance for the risks of false positives and false negatives could change antitrust law in numerous ways. It could, for example, lead to doctrinal changes, such as eliminating the recoupment requirement in predatory pricing cases, which has been criticized as being incoherent and a needless obstacle to proving anticompetitive pricing. It could encourage courts to clarify the law regarding unlawful refusals to deal. In *Aspen Skiing*, the Court emphasized that the defendant had demonstrated a willingness to forego profitable dealing with a competitor in order to increase its market power. Dicta in the Court’s subsequent decision in *Trinko* have been read by some to mean that a plaintiff must show a prior course of dealing between the defendant and the excluded party to establish an unlawful refusal to deal. The law might be clarified to make clear that evidence other than a prior course of dealing might in appropriate circumstances suffice to prove a profit sacrifice, or it might find certain refusals to deal unlawful even absent a profit sacrifice.

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39 *Id.* at 74.

40 *Id.* at 81–95.


More broadly, antitrust law could be more willing to find violations on the basis of circumstantial evidence or predictions of future developments that are necessarily uncertain. The demanding proof required in some recent cases might be reexamined if the law were more willing to risk false positives and less willing to risk false negatives.46

Merger law might be most suited to recalibration, for three reasons. First, there is reason to suspect underenforcement, i.e., an excessive number of false negatives, in the past.47 Second, studies showing that parties often fail to realize anticipated efficiencies from mergers suggest that the cost of false positives might be less than previously thought.48 Third, merger enforcement is largely a matter for the expert enforcement agencies. Adjusting the legal standards for merger enforcement is therefore less likely to lead to abuse by private litigants. Such concerns appear to have been responsible, at least in part, for driving some aspects of current antitrust doctrine.

The law applicable to acquisitions by dominant firms of small, nascent competitors, for example, might be revised. Current law implicitly presumes that mergers are efficient and, thus, that false positives would be costly. Plaintiffs are therefore required to prove that increased market power is a likely result of the merger. That is an almost impossible task when the harm to competition is both uncertain and likely to occur, if at all, only in future years. One could imagine a regime in which an acquisition by a dominant firm, defined by size and duration of market share or some other indicia, of a much smaller or nascent firm is presumed to be unlawful if the acquired firm is shown to have a realistic possibility of developing into a competitive threat to the dominant firm. In that event, the defendant would have the burden of proving that harm to competition is very unlikely or that the merger will create substantial, merger-specific efficiencies. In other words, instead of requiring the plaintiff to justify running the risk of a false positive, the defendant could be required in specified circumstances to justify incurring the risk of a false negative.49

Such changes will not come easily, and careful analysis might show that they should not be made. The progressives are not the only ones talking about antitrust law and economic welfare. More

46 See, e.g., Ohio v. Am. Express Co., 138 S. Ct. 355 (2018); United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (rejecting predatory pricing claim on the ground that the available data did not permit direct measurement of variable costs).

47 See, e.g., Shapiro, supra note 25, at 734–38.


49 A similar presumption has been used in mergers that result in significant increases in market concentration. See, e.g., United States v. Phila. Nat’l Bank, 374 U.S. 321 (1963); Polypore Int’l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012). Because any such presumption should, and presumably would, be based to an important extent, on economic learning, it should evolve over time as necessary to reflect advances in economic learning. See generally Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof, 127 YALE L.J. 1996 (2018) (discussing how the enforcement agencies have revised their use of structural presumptions in merger analysis); Stephen C. Salop, The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach, 80 ANTITRUST L.J. 269 (2015) (same).
conservative mainstream scholars argue that no major adjustments to antitrust law are called for or, as noted above, that antitrust law should in some instances be revised to reduce the risk of false positives. They argue, among other things, that there is no convincing evidence of widespread increases in market power,\textsuperscript{50} that increased market concentration reflects superior productivity and the forces of competition,\textsuperscript{51} that the law should not be changed on the basis of theoretical possibilities that have not been shown to be likely or frequent in fact,\textsuperscript{52} that presumptions that have been urged as a means to shift to defendants a burden of justification are based on unsound economics,\textsuperscript{53} and that the costs of false negatives emphasized by the progressives are lower than would be the costs of false positives if the law were revised to permit more aggressive enforcement.\textsuperscript{54}

These two groups, the mainstream progressives and the conservatives, are engaged in a serious conversation about whether, and if so how, antitrust law should be adjusted to better achieve the ultimate objective of promoting economic welfare. It’s the kind of conversation that policy wonks and technocrats love.\textsuperscript{55}

III. ANTITRUST LAW AND THE POPULIST CRITICS

Conversations that policy wonks and technocrats love do not often get wide public attention. The antitrust conversation that has gotten attention is that initiated by those who might be called antitrust’s populist critics. They include both legal scholars and others with more eclectic backgrounds.

Three recent books illustrate the critics’ concerns. Tim Wu’s \textit{The Curse of Bigness} focuses most directly on antitrust law. To oversimplify, Wu argues that antitrust law needs to be “updated to face the challenges of our time” posed by “extreme levels of industrial concentration” and “concentrated private

\textsuperscript{50} See, \textit{e.g.}, Seth B. Sacher & John M. Yun, \textit{Twelve Fallacies of the “Neo-Antitrust” Movement} (George Mason Univ. Law & Econ., Research Paper No. 19-12, 2019).

\textsuperscript{51} \textit{E.g.}, David Autor et al., \textit{supra} note 26.

\textsuperscript{52} Bruce H. Kobayashi & Timothy J. Muris, \textit{Chicago, Post-Chicago, and Beyond: Time To Let Go of the 20th Century}, 78 ANTITRUST L.J. 147 (2012).


\textsuperscript{54} \textit{E.g.}, \textit{id}.

\textsuperscript{55} Some commentators have suggested that certain antitrust conservatives are motivated more by libertarian values and normative notions of property rights, especially involving intellectual property, than about the consumer welfare standard. They seem to have in mind a fourth group, a rough conservative analogue of the populist critics on the left. But even those extreme conservatives are engaged in the lawyerly enterprise of trying to support their arguments within the normative framework of an antitrust law focused on economic welfare. If their arguments are tendentious and flawed because motivated by other objectives, they can be assessed by how well they serve the economic welfare objective. There is, therefore, no need for present purposes to identify such a fourth group.
power . . . with too much influence over government.”\textsuperscript{56} For this, Wu argues, antitrust law needs to return to the broader noneconomic goals originally intended by Congress. Wu’s short book is imprecise in important respects, perhaps because Wu appears to claim the mantle of “public advocate” fighting about matters of principle against powerful vested interests,\textsuperscript{57} and misstates contemporary antitrust law in places.\textsuperscript{58} Wu does, though, make clear that he longs for a robust antitrust law that will both restore the “big case tradition” to challenge the “tech trusts” in particular and deal aggressively with problems that arise in the “age of oligopoly.”

In \textit{The Myth of Capitalism}, Jonathan Tepper and Denise Hearn argue more broadly that competition is essential for capitalism but “remains an ideal that is receding further from our reach.”\textsuperscript{59} The government, they argue, “has not enforced rules that would increase competition, and through regulatory capture has created rules that limit competition.”\textsuperscript{60} Their book collects a diverse range of high-level data from which the authors draw broad conclusions about the failures of capitalism, which the data do not always support. As to antitrust law in particular, which the authors misstate in important respects, they argue that, since the election of President Reagan in 1980, “no president has enforced the spirit and letter of the Sherman and Clayton Acts.”\textsuperscript{61}

\textit{Radical Markets} is, well, more radical, and more imaginative. To authors Eric Posner and Glenn Weyl, the “most significant problem in our time is rising inequality within wealthy countries.”\textsuperscript{62} They argue that markets must be “strengthened, expanded and purified” but that the solution lies neither in “Market Fundamentalism,” which “is little more than a nostalgic commitment to an idealized version of markets as they existed in the Anglo-Saxon world in the nineteenth century,” nor “reliance on the discretion of bureaucratic elites to fix social ills.”\textsuperscript{63} Instead, they propose a variety of broad rules. These include, to ameliorate the “monopoly” power inherent in all property, requiring property owners to state the value of their property, which would provide both the basis for determining the amount of property tax owed and the price at which anyone else could buy the property;\textsuperscript{64} prohibiting institutional

\textsuperscript{56} WU, \textit{CURSE OF BIGNESS}, \textit{supra} note 1, at 16
\textsuperscript{57} Id. at 43 n.*.
\textsuperscript{59} TEPPER & DEARN, \textit{MYTH OF CAPITALISM}, \textit{supra} note 1, at xvi.
\textsuperscript{60} Id. at xviii.
\textsuperscript{61} Id. at 160.
\textsuperscript{62} POSNER & WEYL, \textit{RADICAL MARKETS}, \textit{supra} note 1, at 4.
\textsuperscript{63} Id. at xvi.
\textsuperscript{64} Id. at 61–62.
investors in almost all circumstances from diversifying their holdings within industries; and blocking mergers that increase political influence by concentrating lobbying capacity.

On the surface, the populist critics, like the conservatives and mainstream progressives, are talking at least in part about whether antitrust law is well suited to promote its economic-welfare objective. They argue, in particular, that the “consumer-welfare standard” that has defined contemporary antitrust law is much narrower than suggested above and that it prevents antitrust law from effectively promoting economic welfare. They say, for example, that the consumer-welfare standard requires courts to pursue outcomes, a task for which they are not well-suited, instead of calling balls and strikes; confines antitrust law to a singular focus on consumer prices; is not able to address conduct that reduces innovation; and focuses solely on consumers and ignores harm to suppliers.

Nicolas Petit and I have argued elsewhere that each of these criticisms is incorrect. In brief, antitrust is about proscribing anticompetitive conduct and does not call upon courts to measure or regulate welfare outcomes. Antitrust law has in the past effectively addressed harms to innovation; harms to suppliers, including in labor markets; and anticompetitive conduct that had nothing to do with prices and involved products sold for a zero monetary price. The common focus on pricing data and other perceived problems reflect limitations on available data and difficult problems of proof, not any conceptual restrictions arising from the consumer-welfare standard. These limitations and problems have been, and no doubt will continue to be, ameliorated by advances in economists’ toolkit and legal doctrine.

The important point for present purposes, however, is not whether the criticisms are correct or incorrect. It is that the criticisms are largely unrelated to what the critics are really saying. The critics do not respond to arguments that their criticisms of the consumer-welfare standard are incorrect or otherwise explain how antitrust law should be changed in order to better promote economic welfare. To the contrary, they think that antitrust law focuses too narrowly on economic welfare and unduly privileges efficiency at the expense of other objectives. Their criticisms of the consumer-welfare standard are not the criticisms of technocrats with a shared objective but rather are a rhetorical device in aid of an argument for replacing economically focused antitrust law with a law aimed more broadly at

65 Id. at 191, 195.
66 Id. at 203.
68 WU, CURSE OF BIGNESS, supra note 1, at 85; TEPPER & DEARN, MYTH OF CAPITALISM, supra note 1, at 128, 158.
69 Wu, After Consumer Welfare, supra note 67.
70 POSNER & WEYL, RADICAL MARKETS, supra note 1, at 201; Wu, After Consumer Welfare, supra note 67.
attacking concentrations of economic and resulting political power. As Tepper and Hearn put it, “antimonopoly is more than antitrust.”

While the populist critics broadly share a concern about concentrations of power, they have various and potentially conflicting objectives. Many are concerned about the political power of big corporations. Some want to protect liberty and autonomy. Fewer are concerned about economic inequality. Tim Wu wants to protect competition and rivalry and to protect consumers from deception and manipulation.

The critics point to a variety of indicia of what they regard as undesirable concentrations of power and inequality, but the various indicia have quite different implications. Critics complain about what they see as evidence of increased market concentration; that is most relevant to economic welfare. They complain about evidence of economic power more broadly; that is most relevant to issues of economic inequality. They point to indications of increasing industry concentration, which they argue makes industry-wide lobbying more likely and effective and thus increases inequality in political power. The mainstream progressives have also pointed to a variety of indicia that do not directly show increases in the market power with which they are concerned, but they explain how those indicia are suggestive of increased market power. The populist critics paint with a broader brush.

Not surprisingly, the policy proposals of the populist critics are less specific that those of Jon Baker and other mainstream progressives, and the populists’ proposals are not consistent with one another. Tim Wu, for example argues that the law should simply prohibit anticompetitive conduct without requiring that it be shown to create market power in an antitrust market. Senator Warren and others, by contrast, seem to favor structural intervention to reduce the size of big companies or to

72 TEPPER & DEARN, MYTH OF CAPITALISM, supra note 1, at 16, 244.


74 WU, CURSE OF BIGNESS, supra note 1, at 16, 40; POSNER & WEYL, RADICAL MARKETS, supra note 1, at xv.

75 POSNER & WEYL, RADICAL MARKETS, supra note 1, at 4.

76 WU, CURSE OF BIGNESS, supra note 1, at 130, 137.

77 Id. at 15–18; TEPPER & DEARN, MYTH OF CAPITALISM, supra note 1, at xv, 31, 37, 197, 216–17, 221.

78 WU, CURSE OF BIGNESS, supra note 1, at 25, 58, 136-37.

79 Wu, After Consumer Welfare, supra note 67. As noted, proof of market power effects is not required by the antitrust law when the defendant engages in conduct that is deemed to be unlawful per se. But per se prohibition is based on the premise that likely economic injury can be inferred from the conduct itself, not on the idea that economic injury is immaterial.
restrict the scope of their dealings even without proof that they engaged in anticompetitive conduct. Posner and Weyl would block mergers likely to increase the lobbying clout of the merged firm.

It seems reasonable to assume that substantial and increasing inequality of wealth and economic and political power is a serious problem. Some might object to such inequality on moral grounds, but the case against the current inequality does not depend on moral concerns. Even if the wealthy and powerful can be said to have earned their rewards by some theory of just deserts, substantial and increasing inequality erodes community and political stability. This is especially so if, as evidence suggests, wealth and power, and their absence, are passed on to progeny. Government policies that are likely to reduce such inequality would thus seem to warrant careful consideration.

That does not mean, however, that antitrust law would be improved if it were expected both to promote economic welfare and to reduce some forms of inequality. There are substantial reasons to think that revising antitrust laws to further additional objectives would be unwise.

In the first place, broadening the objectives of antitrust law would necessarily impair its ability to promote economic welfare. The equality and power-dispersion objectives would frequently conflict with the economic-welfare objective. Indeed, adding additional objectives matters only when the additional objectives would lead to outcomes different from those realized by a singular focus on economic welfare.

Consider, for example, Wal-Mart’s innovation in supply-chain management, Apple’s introduction of the smart phone, and Microsoft’s licensing model for expanding the then-nascent personal computer industry. The companies that made those innovations gained economic and political power, and their major shareholders and executives became very wealthy as a result. Similar stories could be told on a smaller scale about countless forms of aggressive conduct and more modest

81 POSNER & WEYL, RADICAL MARKETS, supra note 1, at 203.
82 See, e.g., Angus Deaton, Today’s Inequalities Are Signs That Democratic Capitalism Is Under Threat, PROMARKET (June 26, 2019), promarket.org/todays-inequalities-are-signs-that-democratic-capitalism-is-under-threat/.
84 The populist critics argue that Congress did not intend the antitrust statutes to be focused exclusively on economic welfare and that a revised antitrust law that focused also on other objectives would be more faithful to Congress’s intent. While the debate about Congressional intent is not entirely settled, it is clear that antitrust law has long been regarded as a common law-like discipline that is given an evolving meaning through the litigation process. E.g., Kimble v. Marvel Entm’t, LLC, 135 S. Ct. 2401, 2413 (2015) (“Congress . . . intended [antitrust] law’s reference to ‘restraint of trade’ to have ‘changing content,’ and authorized courts to oversee the term’s ‘dynamic potential.’” (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988))); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act”). The discussion in the text focuses entirely on the policy issues raised by the critics.
innovations. Antitrust law regards such conduct as efficient, not anticompetitive, and the resulting market power as a deserved reward for welfare-increasing conduct. The prospect of such rewards is thought to be a valuable incentive for innovation and other forms of efficient conduct in the future. Such conduct does not violate the antitrust laws.

Now, imagine an antitrust law charged with taking into account the harmful contribution of such conduct to rising inequality of one form or another. If antitrust law were to prohibit welfare-enhancing conduct because of its effect on inequality, it would reduce economic welfare. The same would be true if the court ruled for defendant in order to promote non-economic objectives. Suppose, for example, that a small firm sought to enter a market dominated by Amazon and orchestrated a price-fixing cartel among input suppliers to facilitate that entry. An antitrust law focused on multiple objectives might overlook the defendant’s anticompetitive conduct in order to further the objective of diminishing Amazon’s size. Antitrust law has long rejected such “marketplace vigilantism.”

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighting inequality or political power, on the one hand, against economic welfare, on the other. There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary.

That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than one hundred years old. It is not an accident that

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85 United States v. Apple, Inc., 791 F.3d 290,332 (2d Cir. 2015) (holding that Apple violated the antitrust laws when it orchestrated a cartel among book publishers in order to facilitate its entry into the e-book business, which was then dominated by Amazon); see also United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (holding that price-fixing conspiracy is illegal even if the prices are “reasonable”); United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) (noting that courts “set sail on a sea of doubt” when they try to determine which restraints on competition are in the public interest), aff’d as modified, 175 U.S. 211 (1899).

86 Antitrust law struggles today even with the much less daunting problem of deciding how to treat conduct that both excludes rivals and creates substantial efficiencies in the same market. Several solutions have been proposed. The two that seem to have been applied most frequently in the cases—defendant wins if the conduct has real efficiency benefits and plaintiff wins if the conduct would have made no business sense for the defendant but for but for its exclusion of rivals and creation of market power – are in effect algorithms that obviate case-by-case weighting. While courts pay lip service in other cases to ad hoc weighing or balancing economic harms and benefits, they rarely do such balancing. They usually avoid that difficult task by finding that the conduct did not harm competition, that it did not create efficiencies, or that the defendants could have achieved the asserted efficiencies through less restrictive means. See, e.g., Michael A. Carrier, The Rule of Reason: An Empirical Update for the 21st Century, 16 GEO. MASON L. REV. 827 (2009).
populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

Second, if antitrust decisions are perceived as being arbitrary, they will be more easily subject to regulatory capture because there will not be seemingly principled bases to cabin antitrust decision making. The beneficiaries of a regime susceptible to capture are likely to be the powerful, not the powerless. Ironically, therefore, adding equality and dispersion of economic and political power to the objectives of the antitrust laws could prove detrimental to those very objectives.

The third and perhaps most important cost is rooted in the general application and decentralized enforcement of antitrust law. Antitrust law applies to almost all businesses, and it can be enforced by at least 52 government entities and any entity that has been harmed by an antitrust violation. Antitrust law thus has a widespread effect on business conduct throughout the economy. Its principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law.

If antitrust law is perceived as being arbitrary, it will provide a far less certain guide to business conduct. The effect might be disregard of antitrust law in circumstances in which it seems unpredictable. More likely, the effect will be excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition. The effectiveness of antitrust law in promoting competition and economic welfare will be seriously impaired.

These problems cannot be solved by legislative codification. To avoid arbitrariness, the codification would need to be precise. Simple, high-level rules (e.g., no company may have more than X employees or Y revenues) would serve their intended objectives very imperfectly and with substantial error costs. Because antitrust law applies to almost all industries and covers an infinite variety of market transactions, more detailed rules would need to be very complex. Complex rules would compound compliance problems for business entities and would be especially subject to rapid obsolescence and industry capture. Most important, any such rules would move antitrust law from a guardian of marketplace competition toward a vehicle for government regulation. Antitrust law would cease being either a prescription for economic welfare or “the Magna Carta of free enterprise.”

The populist critics are not talking about antitrust law as it has come to be understood. They are having a very different conversation. Insofar as they are talking about the problems associated with increasing inequality, it is an important conversation. But it is a conversation ill-suited for antitrust law –

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87 Some other nations’ competition laws do include objectives in addition to economic welfare. It is not clear how often those other objectives actually change outcomes in competition law proceedings or whether, when they do change outcomes, they do so in a principled manner. See generally, Harry First & Eleanor Fox, Philadelphia National Bank, Globalization and the Public Interest, 80 Antitrust L. J. 307 (2015). The issues in the United States are in any event more complex because of the broad scope and decentralized enforcement of U.S. antitrust laws.

88 United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); see also N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”).
for a law of general application, enforced in a decentralized manner, and intended at least in large part to promote vigorous marketplace competition and economic welfare.

IV. PUTTING THE TWO CONVERSATIONS TOGETHER

These are potentially perilous times for antitrust law. If antitrust law does not adapt in response to the progressive and populist critics—if it seems irrelevant or, more worrisome, revanchist—it risks being sidelined in favor of other laws. But if antitrust law is used to promote a populist agenda, it will be less able to promote economic welfare. It will probably not do a very good job of promoting the populist agenda either, in part because it is enforced case-by-case and thus cannot provide a systemic antidote to inequality or concentrated power.

Antitrust law should retain its singular focus on economic welfare. To do so effectively, it must remain faithful to its common law-like tradition of adapting in light of new learning and new experience. Antitrust law, and the executive and judicial institutions that enforce it, must grapple seriously with worthy and empirically-based ideas of the mainstream progressives; those of the conservatives; and, to the extent they are focused on promoting competition and economic welfare, those of the populists as well.

The conservatives and mainstream progressives can be expected to oppose the populist critics’ arguments for adding non-economic objectives to antitrust law. That does not mean, however, that their various concerns cannot converge in a single conversation.

A. ANTITRUST LAW

The populist critics have proposed changes to antitrust doctrine. They have suggested both that antitrust law should focus entirely on prohibiting bad conduct, without requiring proof of market power or effects, and that dominant firms should be broken up without proof that they engaged in anticompetitive conduct. These critics could contribute to the discussion of antitrust reform by endeavoring to explain how those proposals would help antitrust law promote economic welfare.

Antitrust law already does the first—prohibit bad conduct without a market power screen—with its per se rules. There are few such rules because the conventional wisdom has been that a market power requirement usefully screens out unimportant cases, keeps antitrust law focused on harms to competition, and reduces both false positives and antitrust compliance costs. The populist critics should be invited to demonstrate how broadening the category of per se rules, or more frequent use of “quick look” methods of condemning conduct that is thought to have no efficiency properties and risks harm to competition, might enhance economic welfare. For example, populist critics might undertake a study

89 Wu, After Consumer Welfare, supra note 67.

90 Wu, Curse of Bigness, supra note 1, at 132–33; Warren, supra note 9.
that goes beyond Lina Khan’s note about Amazon’s aggressive pricing\(^91\) and seeks to explain precisely how, if at all, Amazon’s conduct was not efficiency-based competition on the merits, how current predatory pricing law is inadequate to police such conduct, and how that law should be revised to prohibit such conduct in the future, taking into account error cost analysis.

Proposals for no-fault antitrust remedies have a distinguished lineage; luminaries such as Donald Turner\(^92\) and Nobel laureate Oliver Williamson\(^93\) have embraced them. Antitrust law has never incorporated no-fault remedies, however, because no one has yet articulated workable criteria for identifying the circumstances in which such remedies would do more to enhance economic welfare by promoting competition than to reduce economic welfare by disrupting efficient business organizations and strategies and distorting economic incentives. No-fault antitrust intervention might also be difficult to reconcile with the apparently singular focus of the statutory language and law enforcement context of U.S. antitrust law on prohibiting anticompetitive conduct, rather than authorizing regulation of undesirable market conditions.

The populist critics who now propose such remedies might try to demonstrate the circumstances in which the creation and maintenance of market power by efficient conduct can reduce economic welfare and in which antitrust remedies could prudently be invoked without proof of anticompetitive conduct, taking into account error-cost analysis. Those circumstances would likely entail substantial prior returns to investors, so that the prospect of such intervention in the future would not deter entrepreneurship; substantial likely future costs from market power absent intervention; industry or corporate characteristics that imply relatively modest disruption costs and lost scope and scale economies from intervention; and little likelihood that the market would tip back to monopoly soon after the break-up. Arguably, the prospect of dominant digital platforms with possibly boundless scale economies and network efficiencies provides an occasion to revisit the issue of no-fault antitrust remedies. The populist critics could address that issue in the context of a law that seeks to promote economic welfare.

It is tempting to suggest a broadening of that invitation. In an intriguing passage, Tim Wu said that “no one denies that economic considerations are what should govern any individual case.”\(^94\) Wu did not explain what he meant by that, but the comment suggests a world in which antitrust decision makers decide cases, as they do now, with a singular, rigorous focus on economic welfare but in which the decision rules—the legal doctrine and proof standards—are informed by broader concerns about aggregation and inequality of power and wealth. That way, Wu might imagine, antitrust law can have it all—it can be crafted to serve a range of objectives having to do with economic power but still leave judges with a clear enough mandate to guard against arbitrary decisions. Those broader concerns could then inform the discussion about abandoning market-power screens and no-fault intervention.

\(^91\) Khan, supra note 9, at 731–37.

\(^92\) CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959).

\(^93\) Oliver E. Williamson, Dominant Firms and the Monopoly Problem: Market Failure Considerations, 85 HARV. L. REV. 1512 (1972) (“the persistent dominance by a single firm is not to be expected” and “should be regarded as an actionable manifestation of market failure”).

\(^94\) WU, CURSE OF BIGNESS, supra note 1, at 55.
But that dichotomy between crafting the rules and applying them does not work for antitrust law because, as explained above, the law cannot sensibly be fully codified and depends on a common-law like evolution of legal doctrine and standards. Sound antitrust law is made by judges on a case-by-case basis. Even in jury cases, it is judges who develop legal doctrine, resolve legal questions, and craft jury instructions. The lawmakers—the judges—must have a coherent objective so their decisions, and thus the law, are not arbitrary. Non-economic objectives cannot be snuck in the back door by distinguishing creation of antitrust law from its application.

The populist critics do not need to confine their analysis of antitrust law to proposals to abandon the market-power or bad-conduct elements. Mainstream progressives have argued in part that the relative tolerance of the law for risks of false positives and false negatives should be recalibrated, in furtherance of the economic-welfare objective, in light of factors that suggest that the frequency and costs of false negatives are greater than previously thought and that the frequency and costs of false positives are lower than previously thought. The populist critics could join that conversation, even if only to respond to arguments that their proposals would reduce economic welfare.

B. REGULATION

Antitrust law has long been thought of as an alternative to—or, in a more forceful articulation, a means of obviating—regulation.\textsuperscript{95} The idea is that market competition most efficiently allocates resources and maximizes economic welfare and that interference with competition, whether by private market power or government regulation, is inferior to the preservation of competition by enforcement of the antitrust laws. From this perspective, regulation is appropriate only to constrain natural monopolies, which competition cannot effectively discipline, or to achieve non-economic objectives. At the very least, effective antitrust enforcement can reduce the need for regulation.

It is perhaps surprising, therefore, that regulation seems to be very much on the minds of even members of the mainstream antitrust communities. In recent months, expert reports commissioned by competition law enforcement agencies in the United Kingdom, the European Union, and Australia have recommended the creation of sectoral regulators to deal with, among other things, competition problems raised by the big digital platforms.\textsuperscript{96} In the United States, a multidisciplinary expert group


proposed more modestly that “the establishment of a sectoral regulator should be seriously considered.”

These recommendations might seem odd in a context that has traditionally seen antitrust law as a preferred alternative to regulation. A serious argument, however, can be made that the economic-welfare objective of antitrust law would be best served by establishing a sectoral regulator to address competition issues in certain contexts, such as those raised by the large digital platforms. The argument is based on two premises. The first is that antitrust law is a law of general application and decentralized enforcement; the second is that large digital platforms, for example, present competition issues that cannot be adequately addressed by antitrust rules suitable for all industries or a decentralized enforcement regime and require instead specialized rules and centralized enforcement.

For example, a digital platform might be barred from owning businesses that use the platform and compete against third parties that also use the platform if it were thought that harm to competition in the markets in which the businesses and the third parties compete cannot be adequately prevented by application of general antitrust rules restricting dealing with rivals, that the risk of harm is great, and that the risk of lost efficiencies from the prohibition is small. Certain kinds of above-cost price predation might be prohibited when platforms are willing to sacrifice profits to exclude rivals, even if a profit sacrifice or no economic sense test were not thought suitable for predatory pricing law in general. And more aggressive standards, unsuitable for antitrust law in general, might be adopted for required portability or licensing of data or interoperation among platforms in order to reduce entry barriers to new competition. A regulator might be better able than an antitrust court to fashion such a

97 STIGLER CTR. FOR THE STUDY OF THE ECONOMY AND THE STATE, UNIV. OF CHI. BOOTH SCH. OF BUS., REPORT OF THE COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS: MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE 79 (July 1, 2009), research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C. The author of this article was a member of the subcommittee.

98 Dicta in recent cases have called into question the current vitality of that preference. In Trinko, Justice Scalia famously reasoned that, where “a regulatory structure designed to deter and remedy anticompetitive harm . . . exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust law contemplates such additional scrutiny.” Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 412 (2004); see also Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (Breyer, J.). Given the unusual circumstances in those cases, however, those dicta might best be understood as reflecting views about judicial accommodation of legislative and executive authority, assessment of the factual context of a regulated industry, and perhaps a cautious view of antitrust law in general, rather than indicating a judicial preference for regulation.

99 It is important in analyzing this issue to distinguish efficiencies from harms. Critics of Amazon, for example, complain that Amazon uses data about sales of third-party products on its platform to inform its proprietary product strategies to the detriment of the third-party sellers. Harm to third parties can harm competition in the market in which the third parties would otherwise compete, but Amazon’s use of data lawfully obtained from any source to improve its proprietary products is itself an efficiency benefit.
requirement that takes account of both the competition interests at stake and the privacy risks that such a requirement might create.

Similarly, unwinding mergers that were reviewed and cleared by the antitrust agencies years earlier might be bad for antitrust law in general because unwinding them might both create uncertainty and perverse incentives for egg scrambling and generate substantial disruption costs; but doing so with some of the acquisitions by the big tech platforms might on balance be thought desirable because of the unique aspects of digital commerce and, in particular, the common development in that sector of competition in unforeseen markets and, perhaps, the resulting inadequacy of ex ante merger review in that sector. A complete assessment of this possibility would require analysis of the disruption costs and lost efficiencies from unwinding such mergers and the likelihood that the unwinding would actually increase competition and economic welfare, as well as the administrative costs of overseeing the winding.

Importantly, the regulation need not be the kind of comprehensive, “public interest” regulation used in the past for natural monopolies, with rate setting, entry restriction, and broad line-of-business limitations. It might instead be a kind of industry-specific competition law aimed primarily, like the antitrust laws, at preserving competition to the maximum extent possible.

It may well be that none of these or similar ideas is sound. The competition problems might be less serious than critics of the big digital platforms believe. Perhaps more important are the well understood, inevitable problems of regulation. Regulation can require more industry knowledge and understanding than regulators are likely to have. It often leads to expansion of the scope of regulation by a kind of inexorable mission creep. Regulation that initially makes sense can rapidly become obsolete yet ossified by bureaucratic inertia and industry investment in regulatory compliance and industry features and structures caused by the regulation. Regulation can impose costly compliance burdens that favor large firms and handicap small firms and new entrants. And sectoral regulation can lead to regulatory capture, usually for the benefit of the very commercial interests that were intended to be constrained for the benefit of others. Not surprisingly, both conservatives and progressives have begun to push back against calls to regulate the digital platforms.100

The debate about regulation is nevertheless underway; and the populist critics, mainstream progressives, and conservatives can all participate in that debate. The first two groups can help assess both the adequacy of general antitrust principles to address the concerns about the impact of digital platforms on economic welfare and how, if at all, sectoral regulation might supplement or improve upon antitrust law for that purpose. They might also focus on how, if sectoral regulation is to address non-economic concerns, it might do so with no or minimal cost to economic welfare. For their part, the populist critics might focus on how sectoral regulation will further their objectives while also promoting, or at least not undermining, economic welfare. To the extent that the critics are focused on sectoral regulation, they will have no need to appropriate the language and goodwill of antitrust law for non-

economic objectives or to seek to refocus antitrust law itself on those objectives. The now-disparate conversations can become one.

V. CONCLUSION

*The Antitrust Paradigm, The Curse of Bigness, The Myth of Capitalism,* and other new books and articles have provoked an important rethinking of competition policy, but the thinking thus far has taken place in two separate conversations. The conservatives, progressives, and populists could join in a single conversation if all acknowledged, first, that antitrust law is not well suited to address concerns beyond protecting competition in order to further economic welfare and, second, that serious thought should be given to the possibility of new laws and regulations to serve other objectives and, perhaps, to supplement antitrust law in protecting competition and economic welfare in certain sectors.
Over the last several years, a movement to revive the anti-monopoly traditions of the United States has gained increasing momentum and even retaken its place in presidential political debate. While popularly known as a movement to "break up big tech," it is really a movement that reacts to the economic policies of the last 40 years. For we have, over that time, weakened and nearly abandoned the anti-
monopoly tradition that, in various forms, has been part of the U.S. system since the
Declaration of Independence and the original anti-monopoly tea-party protest. The
result has been decades of economic consolidation across industries like agriculture,
finance, pharmaceuticals, and telecommunications. It is a reaction also to the
consolidation of tech into just a few platforms, like Google, Facebook, and Amazon.

We have been left with an economy dominated by well-protected oligopolies who
maintain high profits, low levels of investment, and stagnant wages. Employers have
gained disproportionate power over their workers, thanks to a weakening of labor law,
declining unionization, and business models that coerce and restrict workers. The
policies have also contributed to the widening gap between rich and poor, and the
widespread economic dissatisfaction and anger that is a hallmark of our times.

The anti-monopoly movement is also a response to the undeniable sense that
concentrated private interests have an unfairly disproportionate influence over
government and Congress. The legislature regularly refuses to do what even
supermajorities of citizens want, like control drug prices or provide paid maternity leave.
Excessively concentrated industries, in other words, have become a threat to the basic
idea of representative democracy.

The simple premise of anti-monopoly revival is that concentrated private power has
become a menace, a barrier to widespread prosperity, and an indefensible division of the
spoils of progress and economic security that yields human flourishing. It has sparked a
wealth of new articles, books, studies and symposia. (A reading list can be found here.)
And the revival movement has attracted important political adherents that cross
ideological and party lines.

It is important to understand that the revival of an antimonopoly tradition is a broader
project than revival of the antitrust law. While that project is a key front, a broad set of
policy levers and legal interventions — including in labor law, intellectual property law,
corporate law, banking law and financial regulation, and campaign finance law — can
be used to structure markets and check private power in the service of anti-monopoly
values.

Given the stakes, it may be no surprise to hear that the effort to revive the antimonopoly
tradition has met resistance and sharp criticism — as such efforts always have. But in
one area the critics have made an important point concerning antitrust revival. Those who believe in a strong revival of antitrust, and a return to its anti-monopoly roots, have a duty to specify what, exactly, they mean, in concrete, legal detail.

As a response to that criticism, the following statement was drafted over lunch by a group of participants at the “A New Future for Antitrust” conference at the University of Utah in the Fall of 2019. It followed a specific challenge from Professor Dan Crane, a prominent antitrust professor and treatise author from the University of Michigan, to declare what, exactly, were the positions taken by his co-panelists calling for antitrust revival.

In that spirit, a few of us at the conference put together an initial list of principles and proposed reforms. There are of course, healthy differences in approaches to reviving antitrust. We share this list in the spirit of promoting further conversation and view it as just one starting point in an ongoing discussion about how to reorient antitrust towards its antimonopoly roots.

**The Utah Statement**

(as authored by a group of participants at “A New Future for Antitrust,” Oct 25, 2019, and edited thereafter)

We believe that:

(1) Subjecting concentrated private power to democratic checks is a matter of constitutional importance;

(2) The protection of fair competition is a means to a thriving and democratic society and an instrument for both the creation of opportunity and the distribution of wealth and power;

(3) Excessive concentration of private economic power breeds antidemocratic political pressures and undermines liberties; and

(4) While antitrust is not an answer to every economic distress, it is a democratically enacted and necessary element in achieving these aims.
In reflection of these principles, we therefore call for the following reforms to current antitrust doctrine and enforcement practice:

**A. Doctrine**

1. Vertical coercion, vertical restraints, and vertical mergers should enjoy no presumption of benefit to the public;

2. By rule or statute, non-compete agreements should be made presumptively unlawful;

3. The *Trinko* doctrine of implied regulatory preemption should be overruled;

4. The *Brooke Group* test for predatory pricing and *Weyerhaeuser* test for predatory bidding should be overruled;

5. The *Berkley Photo* standard for establishing monopoly leveraging should be restored;

6. The essential facilities doctrine should be reinvigorated for dominant firms that deny access to critical infrastructural services;

7. Structural presumptions in merger review should be restored;

8. The *LinkLine* doctrine holding that price squeeze allegations fail as standalone Section 2 claims should be overruled;

9. *Noerr-Pennington* should be overruled and replaced by a First Amendment defense and appropriate statutory protections for workers; and

10. The Clayton Act’s worker exemption should be extended to all who labor for a living, regardless of statutory employment status, for horizontal coordination, collective bargaining, and collective action in service of either.

**B. Method and Enforcement Practice**

1. It is not true that “Congress designed the Sherman Act as a ‘consumer welfare prescription’”;

2. Antitrust rules should be created through case development, agency rule-making, and legislation;
3. The States, the laboratories of economic experimentation, are a critical vanguard of enforcement efforts;

4. Private enforcement is a critical complement to public enforcement;

5. The markets for labor — and in particular problems caused by labor market monopsony — should be subject to robust antitrust enforcement, and enforcers should treat business structures that restrict alternatives for or coerce working Americans as suspect;

6. The broad structural concerns expressed by Congress in its enactment of the 1950 Anti-Merger Act, including due concern for the economic and political dangers of excessive industrial concentration, should drive enforcement of Section 7 of the Clayton Act;

7. Anticompetitive conduct harming one party or class should never be justifiable by offsetting benefits to another party or class. Netting harms and benefits across markets, parties, or classes should not be a method for assessing anticompetitive effects;

8. False negatives should not be preferred over false positives, and the costs of erroneous lack of enforcement should not be discounted or assumed harmless, but given appropriate weight when making enforcement decisions;

9. Structural remedies are to be preferred;

10. Harms demonstrated by clear and convincing evidence or empirical study should never be ignored or discounted based on theories that might predict a lack of harm;

11. Clear and convincing evidence of anti-competitive intent should be taken as a presumptive evidence of harm;

12. Mergers should be subject to both prospective and retrospective analysis and enforcement practice; and

13. The determination by the antitrust agencies of relevant market definitions should receive judicial deference.