

ANTITRUST POPULISM AND THE CONSUMER WELFARE STANDARD: WHAT ARE WE ACTUALLY DEBATING?

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For the last several years, debate over the proper role of antitrust has not been limited to academics, economists, lawyers, and judges, but routinely includes politicians, journalists, and increasingly the general public. Critics of modern antitrust enforcement are raising concerns about increasing concentrations of economic power, especially in high-profile sectors such as internet search, social networking, and e-commerce. Some refer to these critics as “antitrust populists,” and label a growing group of such critics the “New Brandeis School.”¹

Many antitrust populists question whether the consumer welfare standard, with its focus on prices, output, and product quality, is capable of addressing harmful concentrations of economic power in the modern economy. Others argue that antitrust has a broader role to play in U.S. society; rather than focusing, as it now does, on anticompetitive conduct, these populists argue that antitrust should address a broad range of social ills, including wealth and income inequality, the influence of money in American politics, the erosion of privacy, and systemic threats posed by firms that are “too big to fail.” Some proposals would address these social ills by having antitrust enforcement

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¹ Louis Brandeis was a leading voice against rising economic concentration in the early 20th century. He saw concentrated economic power as dangerous and warned about the “curse of bigness.” LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* (Osmond K. Fraenkel ed., 1934). Antitrust populists’ association with Brandeis may be overstated. For example, some populists have suggested regulating online platforms as public utilities. Brandeis, however, was skeptical of public-utility regulation and worried that replacing competition with a regulatory regime would lead to regulatory capture. See Jonathan Taplin, Opinion, *Is It Time to Break Up Google?*, N.Y. TIMES (Apr. 22, 2017), www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html.

agencies and courts directly consider them when reviewing conduct. But most proposals would use antitrust enforcement to attack these problems indirectly, through policies that their proponents argue would more aggressively promote open markets and competition.

Because populists often frame their critiques as rejecting the consumer welfare standard, responses have frequently focused on defending that standard.² Some commentators have targeted the populists' sweeping rhetoric and references to broad societal goals to argue that antitrust should "stay in its lane," but have not engaged to the same extent with the populists' specific reform proposals or underlying concerns about economic power. Others have responded that more aggressive enforcement may be beneficial, but argue that the agencies and courts should use existing tools associated with a consumer welfare approach. In rebuttal, populists have argued that the antitrust establishment is missing their points or refusing to engage in a meaningful discussion about true reform.³

To clarify the parameters of this debate, we examine where antitrust populist proposals and mainstream antitrust analysis materially overlap, and where they fundamentally diverge. We proceed in two parts. First, we briefly contextualize today's antitrust populism and describe the arguments put forward by contributors to the debate. We also describe responses from mainstream commentators and the populists' rebuttals. The number of contributors to the debate is increasing rapidly, and we do not attempt to catalogue all commentary. Instead, we describe archetypal contributions.

Second, we present a framework to evaluate populist proposals for reform. We divide proposed reforms into two categories. Proposals in the first category, properly understood, seek to advance goals—such as lower prices and enhanced output, quality, and innovation—that the consumer welfare standard advances, but propose to advance those goals through more interventionist approaches. Proposals in the second category seek to advance economic or political goals that the consumer welfare standard does not (or at least does not directly) advance. The proposals in the second category would either rely on laws other than the antitrust laws or else fundamentally change the antitrust benchmark and potentially sacrifice consumer welfare to pursue other goals.

² We use the terms "populist" and "establishment" to reference two camps in the debate over the role of antitrust. We generally group into the populist camp commentators who are both critical of current antitrust enforcement and who either expressly or implicitly claim to reject the consumer welfare standard or embrace considerations beyond consumer welfare in discussing proposals for antitrust reform. We generally group into the "establishment" camp commentators who endorse consumer welfare as the appropriate antitrust benchmark. These labels are necessarily imprecise; indeed, identifying the areas of actual philosophical overlap between the two camps is an important focus of this article.

³ See *infra* Part I.D.

Although proposals in the second category gain headlines, on close examination many of the antitrust populists' proposals fall in the first category. These proposals critique existing antitrust standards and presumptions but ultimately propose enforcement models that the consumer welfare benchmark can encompass.

Initially evaluating proposals for consistency with the consumer welfare standard helps bring clarity to the debate. Mainstream commentators should recognize that addressing some antitrust-populist proposals requires more than simply defending the consumer welfare standard. Instead, mainstream commentators must evaluate these proposals on their merits, using the consumer welfare benchmark. Conversely, populists should recognize that overheated rhetoric or a shortage of specifics may cause mainstream commentators to dismiss their proposals too quickly or on grounds unmoored to the proposals' merits. Populist proposals that truly depart from the consumer welfare standard would benefit from specificity and a rigorous explanation of why consumer welfare is not up to the job. And if populists would address concentration of economic power through non-antitrust solutions—e.g., sector specific regulation—they should clearly distinguish those solutions from an antitrust approach.

I. THE MODERN-DAY ANTITRUST POPULISM MOVEMENT

A. OVERVIEW

Both antitrust populists and defenders of the antitrust mainstream give historical accounts of the antitrust laws that support their respective positions.⁴ Although we will not retread that ground in detail, a few key principles provide helpful historical context.

The U.S. antitrust laws were rooted in “populism,” a term that has been described as “a slippery term with no fixed meaning or ideology.”⁵ Populism has been used to label various ideologies across the political spectrum.⁶ At its core, populism pits the “the people” against the “elites,” portraying “a fierce conflict between the powerless and the powerful.”⁷

⁴ Compare, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966), with Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1215–18 (2012) (arguing that Robert Bork used a “Trojan Horse” to disguise his own policy preferences as those of the drafters of the Sherman Act).

⁵ MARK ROLFE, *THE REINVENTION OF POPULIST RHETORIC IN THE DIGITAL AGE* 24 (Alan Finlayson et al. eds., 2016).

⁶ *Id.*; see also D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357, 1358–60 (2018) (discussing backlash against large tech companies that has “attracted support from left and right wing populist forces”).

⁷ ROLFE, *supra* note 5, at 25.

The antitrust laws were the product of a populist movement in the late 19th and early twentieth century.⁸ In the following decades, the Supreme Court said that the laws were created to protect small producers from big businesses.⁹ In 1936, Congress enacted the Robinson-Patman Act, which amended the Clayton Act to prevent manufacturers from giving chain stores and larger retailers more favorable pricing than they gave small businesses.¹⁰ And in 1945, Judge Learned Hand wrote in *Alcoa* that Congress enacted the Sherman Act to promote “a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of the few,” and that the antitrust laws “perpetuate and preserve” this system “for its own sake and in spite of [its] possible cost.”¹¹ In the 1960s, the Supreme Court further observed that Congress passed the antitrust laws to combat “a rising tide of economic concentration,” hoping to preserve local control over industry and small business.¹²

The 1970s and early 1980s saw a shift in the antitrust mainstream, a shift coinciding with the publication of Robert Bork’s *The Antitrust Paradox*. Bork and other academics, many associated with the University of Chicago, argued that the Sherman Act’s main goal was to promote “consumer welfare,” and that that goal could be achieved through an enforcement policy that respected business efficiency.¹³ Bork and his cohorts portrayed past enforcement approaches as unscientific, contrary to sound economics, and counter to the goal of maximizing consumer welfare.¹⁴

The “Chicago” approach—consistent with a broader body of scholarship that extended well beyond the University of Chicago—gained broad accept-

⁸ See Richard Hofstadter, *What Happened to the Antitrust Movement?*, HARPER’S MAG., NOV. 1964, at 77.

⁹ See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 240–41 (1918) (Brandeis, J.) (enumerating the benefits of a trade regulation that allowed country dealers and farmers to participate in wholesale markets in Chicago on more favorable terms); *Brown Shoe Co. v. United States*, 370 U.S. 294, 333–34 (1962) (discussing the legislative history of the Sherman Act and explaining that “Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business”).

¹⁰ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (noting that Congress passed the Robinson-Patman Act “to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power”) (quoting *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960)).

¹¹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427, 429 (2d Cir. 1945).

¹² *Brown Shoe*, 370 U.S. at 315–16.

¹³ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61–66, 98 (1978). See generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–27 (1979) (detailing the contributions of Aaron Director, Ward Bowman, John McGee, and Lester Telser).

¹⁴ See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSP., Winter 2000, at 43, 52–55.

ance in the courts and antitrust enforcement agencies.¹⁵ The Supreme Court adopted Bork’s language in 1979, declaring that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”¹⁶ In 1982 and 1984, the DOJ and FTC updated their merger guidelines to reflect economic learning and changing enforcement norms, in effect embracing the Chicago approach.¹⁷ Today, the consumer welfare standard continues to govern how courts and agencies evaluate conduct under U.S. antitrust laws, and continues to evolve and be informed by new economic learning.¹⁸

Current-day antitrust populists often advocate a rejection of—or even a “counterrevolution” against—the consumer welfare standard. One common critique is that Bork and other consumer welfare proponents sold their approach based on a history and purpose of the antitrust laws that was “divorced from the record.”¹⁹ In the populists’ view, the Sherman and Clayton Acts reflected a national movement against concentration, economic dominance, and accumulation of political power, and the Chicago School “rewrote antitrust” to eliminate these goals.²⁰ Populists have presented their proposals as efforts to “restore” antitrust to its original purpose and objectives.²¹

Antitrust populists also point to economic evidence that they contend shows that the antitrust laws have been under-enforced. They highlight evidence that

¹⁵ See Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495, 496–98 (2019) (describing scholarship from outside the University of Chicago endorsing the consumer welfare approach to antitrust).

¹⁶ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Bork’s analysis of the legislative history and adopting the term “consumer welfare prescription” to describe the purpose of the Sherman Act).

¹⁷ See Kovacic & Shapiro, *supra* note 14, at 54.

¹⁸ See, e.g., U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010), [ftc.gov/os/2010/08/100819hmg.pdf](https://www.ftc.gov/os/2010/08/100819hmg.pdf) [hereinafter Horizontal Merger Guidelines]; *FTC v. Actavis, Inc.*, 570 U.S. 136, 158–59 (2013) (endorsing a rule of reason framework for reverse payment settlements to identify settlements that likely reduce consumer welfare); see also Muris & Nuechterlein, *supra* note 15, at 498–521 (describing the “post-Chicago” scholarship and its connection to consumer welfare).

¹⁹ E.g., Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 1, 11 (2017); *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Barry C. Lynn, Exec. Dir., Open Mkts. Inst., [judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf](https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf) [hereinafter Lynn Prepared Statement] (outlining history of antitrust thinking and arguing that Bork’s assertions “stand in direct opposition to the American antimonopoly tradition of Madison, Wilson, Brandeis, Roosevelt, Eisenhower, Johnson, and Marshall”).

²⁰ See LUIGI ZINGALES, *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* at xviii (2012) (describing the Sherman Act as “a popular revolt against the political corruption perpetrated by large corporations”); Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 373 (2014) (detailing the “historic commitment of antitrust law to consumer populism”).

²¹ E.g., Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 237 (2017).

some industries have become more concentrated, and argue that higher concentration has led to poor market performance.²² They also cite research suggesting that profits are rising for the most profitable firms and that market concentration is a driver of growing income inequality.²³ Among the most prominent studies is a paper published by two of President Barack Obama's economic advisors, Jason Furman and Peter Orszag, who documented a rise in "supernormal returns on capital" that they argue has contributed to rising inequality.²⁴

Finally, in a parallel to an earlier age of antitrust populism, the current critique sometimes invokes colorful rhetoric and imagery, depicting large firms as pervasive threats to small businesses, working families, and American democracy. An *Economist* cover story, for example, warned that tech companies are harming consumers and called on regulators to "tame the titans."²⁵ The magazine's cover depicted Amazon, Facebook, and Google as giant robots looming over the earth, eating smaller robots and ripping brick-and-mortar retailers from the landscape.



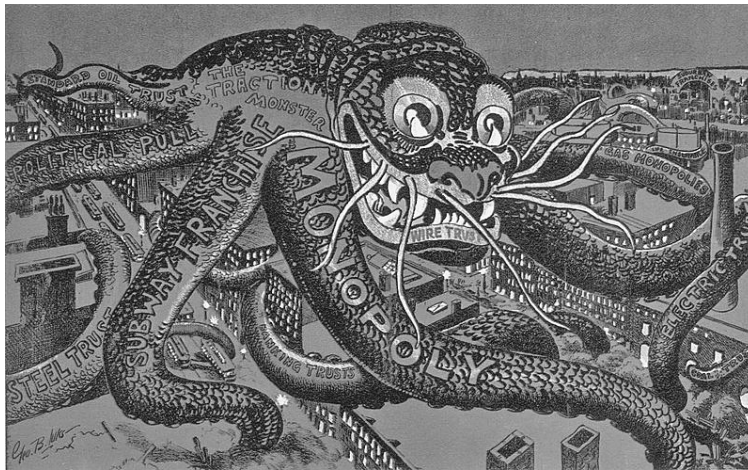
²² E.g., JONATHAN TEPPER WITH DENISE HEARN, *THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION* 35–61 (2019) (arguing that greater economic concentration has resulted in lower productivity, fewer start-up businesses, and lower capital investment).

²³ See, e.g., Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?*, 23 *REV. FIN.* 697 (2019) (concluding that more than 75% of U.S. industries have experienced an increase in concentration levels over the last two decades).

²⁴ Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, in *TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS* 19 (Martin Guzman ed., 2018); see also TEPPER & HEARN, *supra* note 22, at 217–32; Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 *Q.J. ECON.* 519, 519–21 (2016) (finding wealth inequality over the last 100 years followed a U-shaped evolution, in which wealth inequality was high at the beginning of the 20th century, fell from 1929 to 1978, and steadily increased since then).

²⁵ *How to Tame the Tech Titans*, *ECONOMIST* (Jan. 18, 2018), economist.com/leaders/2018/01/18/how-to-tame-the-tech-titans.

The imagery bears an undoubtedly intended resemblance to classic “trust” cartoons published at the turn of the 20th century:²⁶



There is an enormous body of scholarship addressing the original purposes of the antitrust laws. Scholars have offered competing accounts, each accompanied by citations to historical evidence. But addressing today’s antitrust challenges does not require resolving this debate, which may become a distraction. Both populists and mainstream commentators recognize that the antitrust statutes were written in broad terms, and that learning over time can properly inform enforcement approaches.²⁷ The Supreme Court has also recognized the important role of this evolution, explaining in *State Oil Co. v. Khan*:

“*Stare decisis* is not an inexorable command.” In the area of antitrust law, there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.” . . . Accordingly, this Court has reconsidered its decisions construing the Sher-

²⁶ George B. Luks, Illustration, *The Menace of the Hour*, THE VERDICT, Jan. 30, 1899, at 8–9.

²⁷ See, e.g., TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 50–51 (2018) (“A law like the Sherman Act, like the Constitution, is so broadly worded and unclear in its application that it does not take real meaning or shape without an enforcement tradition.”); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 745–47 (2019); A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269 (2020).

man Act when the theoretical underpinnings of those decisions are called into serious question.²⁸

Although populists frequently argue that the antitrust laws were designed to address more than just consumer harm, many of the populists' proposals for reform do not actually require revisiting the modern-day mainstream view that consumer welfare is the best benchmark for deciding antitrust cases. The application of the consumer welfare standard has evolved with economic learning since the 1960s,²⁹ and can continue to evolve as needed to meet many of the antitrust populist critiques, insofar as they identify failures to address anticompetitive conduct that results in higher prices or reduced output, quality, or innovation.³⁰ Similarly, proposals that genuinely depart from the consumer welfare standard should rise or fall based on their impact on today's world, not on the intentions of legislators in the 19th or early 20th centuries. For example, advocates of moving to a "public interest" or other multifactor standard that departs from consumer welfare must show—accounting for modern judicial experience and economic learning—that the benefits of doing so would outweigh the costs, in terms of administrability, economic efficiency, and predictability of outcome.

B. CONTRIBUTORS TO TODAY'S ANTITRUST POPULIST MOVEMENT

There is a long tradition in the United States of resistance to "big business," chain stores, and consolidation in certain industries (especially retail).³¹ In recent years, growing numbers of commentators have argued for "restoring" antitrust enforcement's role in this resistance. In 2006, Barry Lynn published an article in *Harper's* depicting "a world dominated by immense global oligopolies that every day further limit the flexibility of our economy and our

²⁸ 522 U.S. 3, 20–21 (1997) (quoting *Payne v. Tenn.*, 501 U.S. 808 (1991) and *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978)). *See also, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (finding that *stare decisis* did not compel continued adherence to the *per se* rule against vertical price restraints in the face of "respected authorities in the economic literature," and the DOJ and FTC counseling otherwise; also noting the Court's gradual evolution in that direction as it gained experience evaluating vertical restraints); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977) (overturning the *per se* rule for vertical nonprice restraints).

²⁹ *See Melamed & Petit, supra* note 27, at 749–50 ("It is simply wrong and a non-sequitur to say that, because Bork and other so-called Chicago School scholars were influential in the adoption of the [consumer welfare] standard, current antitrust doctrine is or needs to be limited by their understandings of economics in the 1960[s].").

³⁰ JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 202–03* (2019) (observing that antitrust law can evolve in response to changes in business practices and economic activity, political realignments, and developments in economic analysis).

³¹ *See, e.g.*, STACY MITCHELL, *THE HOME TOWN ADVANTAGE: HOW TO DEFEND YOUR MAIN STREET AGAINST CHAIN STORES . . . AND WHY IT MATTERS* (2000).

personal freedom within it.”³² Although Lynn acknowledged that the consumer welfare standard promotes the interests of *consumers*, he argued that the standard leaves firms “free to gouge any other class of citizen.”³³ Lynn posited an antitrust case against Walmart, which he argued abused monopsony power.³⁴ He suggested that the only way to ensure a free market would be to break up Walmart and other (unspecified) similarly situated firms.³⁵

Lynn published *Cornered* in 2010. The book offers a “tour of monopoly,”³⁶ cataloguing evidence of concentration in various industries and advancing the thesis that there are “hidden monopolies everywhere.”³⁷ Lynn traced the history of antimonopoly sentiment to early America, characterizing the anger that led to the Boston Tea Party as part of a broader, sustained movement against concentration that continued until the 1970s.³⁸ Lynn argued that the Reagan administration stopped enforcing the antitrust laws in favor of “Always Lower Prices,” a policy (and a variant on an iconic Walmart slogan) that, according to Lynn, allows monopolists to increase prices; reduce variety, quality, and safety; and restrain entrepreneurs, inventors, and workers.³⁹ Lynn concluded that “regulation must follow the broad-ax tradition, which means that we must use our powers to split and split again the institutions [monopolists] use to magnify their power.”⁴⁰

In 2014, academic and politician Zephyr Teachout invoked populist rhetoric to call for new antitrust legislation that would impose absolute size caps for all corporations.⁴¹ Teachout tied her proposal to disenchantment with the

³² Barry C. Lynn, *Breaking the Chain: The Antitrust Case Against Wal-Mart*, HARPER’S MAG., July 2006, at 29.

³³ *Id.* at 32.

³⁴ *Id.* at 30–31 (“The problem is that Wal-Mart, like other monopsonists, does not participate in the market so much as use its power to micromanage the market, carefully coordinating the actions of thousands of firms from a position above the market.”).

³⁵ *Id.* at 36.

³⁶ BARRY LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* X (2010).

³⁷ *Id.* at 1.

³⁸ *Id.* at 97–100, 243–46.

³⁹ *Id.* at x (“[M]onopolists rip us off as consumers, raising the prices we must pay for our food, drugs, products, and services, even as they lower variety, quality and safety [M]onopolists take away our properties and liberties as entrepreneurs, professionals, workers, and inventors.”); *see also id.* at 52 (“Always Lower Prices is always an express trip not merely to rule but also to ruin.”).

⁴⁰ *Id.* at 254.

⁴¹ Zephyr Teachout, *Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform* (Fordham Law Legal Studies Research Paper No. 2384182, 2014), papers.ssrn.com/sol3/papers.cfm?abstract_id=2384182. Teachout notes that former Senator Ted Kennedy proposed an absolute size cap in 1979 that would have prohibited companies from merging that had over \$2 billion in assets. *Id.* at 10.

Supreme Court's decision in *Citizens United v. FEC*⁴² regarding campaign finance, as well as to the 2008 financial crisis.⁴³ She argued that the largest companies have disproportionate political influence because of their size, and that economies of scale (insofar as they exist) can be achieved by companies operating under her proposed size caps.⁴⁴ Teachout proposed a radical departure from the consumer welfare standard, suggesting that companies with more than \$10 billion in assets or liabilities should lose limited liability, and that the government should be authorized to break them up, regardless of industry or market structure, and even absent collusive acts or monopolization.⁴⁵ She conceded that a flat size cap might increase prices in certain industries and acknowledged that her proposal was outside today's conception of antitrust, but argued that antitrust should be part of a broader political and economic vision for America.⁴⁶

In 2014, Sandeep Vaheesan advocated a revival of the late 19th-and early 20th-century antitrust movement to ensure that "the antitrust laws have a political counterweight to balance their powerful opponents in the Fortune 500."⁴⁷ He argued that the consumer welfare standard as defined by Robert Bork embraces a nonintuitive definition of "consumer" that includes both consumer surplus and profits that accrue to shareholders and other business owners, under the theory that business owners will ultimately use their dividends and capital gains, and therefore should be treated as consumers.⁴⁸ According to Vaheesan, a "true" consumer welfare standard is one that prevents wealth transfers from consumers to producers.⁴⁹ Vaheesan acknowledged that the standard that he advocated is consistent with mainstream antitrust thought, but called on the agencies and courts to explicitly reject Bork's definition of the consumer welfare standard and strengthen their commitment to an approach that protects consumers.⁵⁰

⁴² 558 U.S. 310 (2010).

⁴³ Teachout, *supra* note 41, at 1.

⁴⁴ *Id.* at 41–45 (reviewing economic literature and concluding that the economies of scale are largely unproven).

⁴⁵ *Id.* at 4, 42 (arguing "there is very little that can't be done for \$10 billion").

⁴⁶ *Id.* at 3, 44–45.

⁴⁷ Vaheesan, *supra* note 20, at 405, 427 ("Antitrust law, as articulated by the Supreme Court, has always sought to protect a nonelite group of Americans against the power of big business—the very essence of populism.").

⁴⁸ *Id.* at 404.

⁴⁹ *Id.*

⁵⁰ *Id.* at 405.

Vaheesan later offered a more detailed vision of how the FTC could “resurrect antitrust law as ‘a comprehensive charter of economic liberty.’”⁵¹ His critique pointed to the legislative history of the Federal Trade Commission Act, and argued that the Commission’s interpretation of its authority has failed to advance consumer welfare.⁵² Vaheesan argued that the way in which the Commission has applied the rule of reason has been deficient in various respects, and called on the FTC to establish structural presumptions of illegality for a broader set of “competitively suspect conduct.”⁵³ For Vaheesan, this conduct includes (1) mergers by dominant or near-dominant firms and mergers in concentrated markets,⁵⁴ (2) certain types of potentially exclusionary conduct by dominant or near-dominant firms,⁵⁵ and (3) vertical restraints that limit retail competition, such as resale price maintenance and exclusive distribution territories.⁵⁶ Vaheesan would allow parties to rebut the FTC’s prima facie case of anticompetitive conduct based on those presumptions.⁵⁷ Vaheesan also called for the FTC to challenge monopolies under its Section 5 authority—even where there is no evidence of exclusionary conduct—based on a showing of persistent and substantially harmful market power.⁵⁸ By establishing a system of presumptions, Vaheesan argued, the FTC could simplify antitrust enforcement and greatly diminish uncertainty for market participants.⁵⁹

Later in 2016, Vaheesan co-authored an article with Lina Khan that posited a growing concentration of economic and political power in recent decades and a disconnect between the legislative history of the antitrust laws and modern enforcement.⁶⁰ They called on the antitrust agencies and courts to realign

⁵¹ Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 650 (2017) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

⁵² *Id.* at 650, 657–63 (tracing the history of the FTC Act and arguing that the FTC should embrace Congress’s “grand progressive-populist vision of antitrust”).

⁵³ *Id.* at 676.

⁵⁴ *Id.* at 679 (“At a minimum, the FTC should deem vertical acquisitions by dominant or near-dominant firms to be presumptively illegal, regardless of the size of the acquired firm. In addition, a merger between a firm with a thirty percent or greater market share in one market and another firm with a thirty percent or greater share in an adjacent market could be subject to a presumption of illegality.”).

⁵⁵ *Id.* at 680 (“A market share greater than or equal to forty percent would seem to be a reasonable cutoff. For firms in this category, the FTC should adopt presumptions of illegality for, among other practices, exclusive dealing, market-share discounts, and predatory pricing.”).

⁵⁶ *Id.* at 682 (“The justifications for these restraints are largely theoretical and not applicable to the vast majority of consumer products.”).

⁵⁷ *Id.* at 679, 681–82, 684.

⁵⁸ *Id.* at 684–86.

⁵⁹ *Id.* at 689.

⁶⁰ Khan & Vaheesan, *supra* note 21, at 236, 270–72 (“Even bracketing its moral undesirability, extreme economic inequality subverts political equality and threatens American democracy.”).

the antitrust laws with Congress's vision by advancing a "citizen interest" standard and offered four concrete policy reforms.⁶¹ First, antitrust enforcers and courts should replace the open-ended rule of reason with simple presumptions of illegality for horizontal mergers in concentrated markets, monopolization, and vertical restraints.⁶² Second, they should adopt a "no-fault" monopoly and oligopoly standard to challenge concentration that "inflicts substantial injury and cannot be justified on operational grounds, such as economies of scale," even absent anticompetitive conduct.⁶³ Third, agencies and courts should more often prohibit mergers completely rather than accept divestitures or conduct remedies, and (where remedies are accepted) favor structural remedies over behavioral solutions.⁶⁴ Finally, the antitrust agencies should be subject to greater transparency obligations, to allow the public to "both celebrate victories and hold the agencies accountable."⁶⁵

In 2017, Khan published an award-winning note in the *Yale Law Journal* entitled *Amazon's Antitrust Paradox*.⁶⁶ Khan challenged what she described as the consumer welfare standard's focus on short-term price effects and argued that current antitrust enforcement systematically fails to address anticompetitive harms, particularly in the case of online platforms.⁶⁷ Her article took specific aim at the law regarding predatory pricing and vertical integration.⁶⁸ In Khan's view, existing antitrust doctrine improperly assumes that predatory pricing is rare, ignoring that it can be a highly rational strategy for online platforms, where the market creates incentives for firms to pursue market share over shorter-term profit.⁶⁹ Existing doctrine also overlooks platforms' role as critical intermediaries for their competitors, and the resulting power

⁶¹ *Id.* at 276.

⁶² *Id.* at 279–85 ("The agencies and courts continue to assume, on the basis of very thin evidence, that the complex and interminable inquiries demanded by the rule of reason and other standards produce superior outcomes. But mounting evidence suggests just the opposite: that this approach has neither lowered prices nor led to efficiency gains.")

⁶³ *Id.* at 285–87 (citing the dramatic increase in the price of the EpiPen as harm to the public that cannot be addressed by current antitrust thinking).

⁶⁴ *Id.* at 287–91 (describing divestitures in the Hertz/Dollar Thrifty merger and the Albertsons/Safeway merger as "spectacular failures" and arguing that divestitures are both inefficient and fail to curb growing consolidation in American industries).

⁶⁵ *Id.* at 291–93 (proposing requirements that the agencies conduct publicly available retrospective reviews and disclosure inter- and intra-agency documents currently protected by a FOIA exemption).

⁶⁶ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710 (2017). The note received the Michael Egger prize from the *Yale Law Journal* and a 2018 Concurrence Antitrust Writing Award.

⁶⁷ *Id.* at 717.

⁶⁸ *Id.* at 790–802.

⁶⁹ *Id.* at 791–92.

platform owners can exercise to exploit information they obtain in that role and to undermine rivals.⁷⁰

Populist critics often have explicitly called for antitrust to end its reliance on the consumer welfare standard. In December 2017, Barry Lynn testified before the Senate Subcommittee on Antitrust, Competition, and Consumer Rights,⁷¹ arguing that the consumer welfare standard had “cleared the way for three decades of corporate concentration that has remade almost every corner of the U.S. political economy” and “resulted in a wide variety of effects deeply harmful to businesses, workers, and consumers.”⁷² Lynn argued that antitrust regulators and courts should “formally abandon” the consumer welfare standard, and adopt a system that would achieve the original purpose of the antitrust laws.⁷³

Similarly, in his 2018 book *The Curse of Bigness: Antitrust in the New Gilded Age*, Professor Tim Wu argued that “antitrust’s intended economic and political roles cannot be fully recovered without jettisoning the absurd and exaggerated premise” that “‘consumer welfare’ [is] the lodestone of antitrust law.”⁷⁴ And he warned that that failure to address issues such as economic concentration and income inequality, in part but not exclusively through antitrust, is “yielding a new generation of xenophobic, nationalist, and racist politics.”⁷⁵

Other contributors to the movement have focused criticism on very large tech companies (some of which are now facing investigations by federal enforcement agencies, state attorneys general, and Congress). Early contributors to these critiques included Professor Ganesh Sitaraman and author and commentator Matt Stoller, among others. Professor Sitaraman put forth four recommendations to respond to the controversy stemming from the “behemoth size and power” of tech platforms. His blueprint for reform includes a proposal to reinvigorate the antitrust laws by applying public-utility regulations to tech platforms, including through non-discriminatory access rules, “quarantine” of business lines with monopoly power (to prevent exploitation in adjacent markets), and rate regulation.⁷⁶ Stoller has argued in favor of litigation,

⁷⁰ *Id.* at 792–97.

⁷¹ Lynn Prepared Statement, *supra* note 19.

⁷² *Id.* at 2.

⁷³ *Id.* at 13–15.

⁷⁴ WU, *supra* note 27, at 135.

⁷⁵ *Id.* at 22.

⁷⁶ GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, REGULATING TECH PLATFORMS: A BLUEPRINT FOR REFORM (2018).

regulation, and new laws to break up tech companies and regulate their use of data.⁷⁷

C. ANTITRUST POPULISM BECOMES A POLITICAL FOCUS

The new antitrust populism is not just an academic movement. Politicians and other policymakers have also been contributing. In June 2016, the Roosevelt Institute and the Center for American Progress published policy papers calling for more aggressive antitrust enforcement.⁷⁸ The same month, at an event hosted by the New America Foundation, Democratic Senator Elizabeth Warren declared that, “today, in America, competition is dying.”⁷⁹ By July 2017, congressional Democrats introduced a “Better Deal” platform, which offered a range of economic policy prescriptions, including a plan to “crack down on corporate monopolies and the abuse of economic and political power.”⁸⁰

In December 2017, Senator Warren urged regulators to address what she called America’s monopoly problem by “grow[ing] a spine and enforc[ing] the law.”⁸¹

In December 2018, Representative David Cicilline, the then-incoming chair of the House Judiciary Committee’s antitrust subcommittee, said he was “deeply concerned” by reports about tech companies abusing market power, and announced plans to introduce legislation on the issue.⁸² Six months later, Chairman Cicilline’s subcommittee launched a bipartisan investigation into competition in digital markets. The subcommittee issued far-reaching requests

⁷⁷ Matt Stoller, *The Great Breakup of Big Tech Is Finally Beginning*, THE GUARDIAN (Sept. 9, 2019), [theguardian.com/commentisfree/2019/sep/09/the-great-break-up-of-big-tech-is-finally-beginning](https://www.theguardian.com/commentisfree/2019/sep/09/the-great-break-up-of-big-tech-is-finally-beginning).

⁷⁸ MARC JARSULIC ET AL., CTR. FOR AM. PROGRESS, REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY (2016); ROOSEVELT INST., UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER (Nell Abernathy et al. eds., 2016).

⁷⁹ Senator Elizabeth Warren, Keynote Remarks at New America’s Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

⁸⁰ HOUSE DEMOCRATS, *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power* (July 2017) [hereinafter *Better Deal*].

⁸¹ Elizabeth Warren, Opinion, *Three Ways to Remake the American Economy for All*, THE GUARDIAN (Dec. 6, 2017), [theguardian.com/commentisfree/2017/dec/06/elizabeth-warren-monopolies-american-economy](https://www.theguardian.com/commentisfree/2017/dec/06/elizabeth-warren-monopolies-american-economy) (“Americans don’t need to review the complexities of the Herfindahl-Hirschman Index to get what’s going on in this country.”).

⁸² Alexei Alexis, *House Lawmaker Plans Antitrust Bill Aimed at Tech Giants*, BLOOMBERG L. (Dec. 11, 2018), [bna.com/house-lawmaker-plans-n57982094552/](https://www.bna.com/house-lawmaker-plans-n57982094552/). In May 2019, Representative Cicilline expressed concern that “America is in a monopoly crisis” and criticized the DOJ Antitrust Division for “weaponiz[ing] its advocacy program to help monopolists and undermine robust enforcement.” Press Release, Congressman David Cicilline, *Cicilline Calls on DOJ’s Antitrust Division to Do Its Job* (May 22, 2019), [cicilline.house.gov/press-release/cicilline-calls-doj-s-antitrust-division-do-its-job](https://www.cicilline.house.gov/press-release/cicilline-calls-doj-s-antitrust-division-do-its-job).

for documents and information in 2019, held a high profile hearing with the CEOs of some of the largest tech companies in July 2020, and has indicated it plans to issue a report on its findings in Fall 2020.⁸³

Populist antitrust themes also emerged among Democratic presidential candidates in 2019, with large tech and agriculture drawing particular scrutiny. For example, in March 2019, Senator Warren proposed breaking up certain large tech companies.⁸⁴ As the idea gained traction and publicity, other candidates and politicians made similar promises or stated they would at least consider such actions.⁸⁵ Senator Amy Klobuchar warned that the country is “entering what is essentially a new Gilded Age, and we need to take on the power of these monopolies,”⁸⁶ while Senator Warren promised to unwind agriculture mergers such as Bayer/Monsanto.⁸⁷ Senator Bernie Sanders promised to strengthen antitrust laws to “fight for farmers against powerful agribusiness.”⁸⁸

Although Democrats more frequently invoke antitrust populism, Republican politicians have done so also. In 2016, then-presidential candidate Donald Trump criticized large corporations on the campaign trail and suggested antitrust as one solution. He vowed that his administration would block the AT&T/Time Warner merger because the deal would result in “too much con-

⁸³ Jack Nicas & David McCabe, *Congress Asks More than 80 Companies for Big Tech Complaints*, N.Y. TIMES (Sept. 20, 2019), [nytimes.com/2019/09/20/technology/house-antitrust-investigation-big-tech.html](https://www.nytimes.com/2019/09/20/technology/house-antitrust-investigation-big-tech.html); Tony Romm, *House Lawmakers Ask Apple, Amazon, Facebook and Google to Turn over Trove of Records in Antitrust Probe*, WASH. POST (Sept. 13, 2019), [washingtonpost.com/technology/2019/09/13/house-lawmakers-ask-apple-amazon-facebook-google-turn-over-trove-records-antitrust-probe/](https://www.washingtonpost.com/technology/2019/09/13/house-lawmakers-ask-apple-amazon-facebook-google-turn-over-trove-records-antitrust-probe/); Press Release, U.S. House Committee on Judiciary, Antitrust Subcommittee Chair Cicilline Statement for Hearing on “*Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google*” (July 29, 2020), [judiciary.house.gov/news/documentquery.aspx?IssueID=14921](https://www.judiciary.house.gov/news/documentquery.aspx?IssueID=14921).

⁸⁴ Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), [nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html](https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html).

⁸⁵ David Sherfinski, *Joe Biden Says He’s Open to Breaking Up Facebook*, WASH. TIMES (May 14, 2019), [washingtontimes.com/news/2019/may/14/joe-biden-says-hes-open-breaking-facebook/](https://www.washingtontimes.com/news/2019/may/14/joe-biden-says-hes-open-breaking-facebook/); *Should Tech Giants Like Facebook, Amazon and Google Be Broken Up?*, N.Y. TIMES: MEET THE CANDIDATES (June 19, 2019); Tim Wu, Opinion, *Antitrust Returns to American Politics*, N.Y. TIMES (Mar. 13, 2019), [nytimes.com/interactive/2019/us/politics/big-tech-democratic-candidates.html](https://www.nytimes.com/interactive/2019/us/politics/big-tech-democratic-candidates.html).

⁸⁶ James Hohmann, *The Daily 202: Antitrust Is All the Rage. Monopolies and Mergers Emerge as Major Issues in the Democratic Primaries*, WASH. POST: POWERPOST (Apr. 1, 2019), [washingtonpost.com/news/powerpost/paloma/daily-202/2019/04/01/daily-202-antitrust-is-all-the-rage-monopolies-and-mergers-emerge-as-major-issues-in-the-democratic-primaries/5ca166921b326b0f7f38f2cf](https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/04/01/daily-202-antitrust-is-all-the-rage-monopolies-and-mergers-emerge-as-major-issues-in-the-democratic-primaries/5ca166921b326b0f7f38f2cf).

⁸⁷ *Id.*

⁸⁸ Bernie Sanders, Opinion, *I’ll Fight for Farmers Against Powerful Agribusiness*, DES MOINES REGISTER (Mar. 28, 2019), [desmoinesregister.com/story/opinion/columnists/caucus/2019/03/28/bernie-sanders-president-2020-caucus-agribusiness-factory-farming-rural-america-iowa-flood-trump-ceo/3297096002](https://www.desmoinesregister.com/story/opinion/columnists/caucus/2019/03/28/bernie-sanders-president-2020-caucus-agribusiness-factory-farming-rural-america-iowa-flood-trump-ceo/3297096002).

centration of power in the hands of too few.”⁸⁹ He also promised to consider breaking up Comcast and NBCUniversal, which merged in 2013,⁹⁰ and said that Amazon has “a huge antitrust problem” because it controls “so much.”⁹¹ On the 2016 campaign trail, Republican Josh Hawley invoked antitrust populism and argued shortly after he was elected that “[w]e need to have a conversation in Missouri, and as a country, about the concentration of economic power.”⁹² Senator Hawley referred to tech companies as “monopolies.”⁹³ And more recently, Republican Texas Attorney General Ken Paxton announced that he and attorneys general from 49 other states and territories were conducting a joint antitrust investigation into Google; Paxton cited “hundreds of [] stories from individuals with small businesses” about Google’s digital-advertising operations.⁹⁴

D. THE RESPONSE TO THE POPULIST CRITIQUE

The antitrust establishment has largely been critical of the new antitrust populism movement.⁹⁵ But responses have sometimes mischaracterized or oversimplified the populists’ critiques or failed adequately to engage with their proposed solutions.

Many critics of the populist movement have assumed that antitrust populists would replace the consumer welfare standard with a broad power for enforcers and courts to consider a range of public interest factors, for example

⁸⁹ Emily Stephenson, *Trump Vows to Weaken U.S. Media ‘Power Structure’ If Elected*, REUTERS (Oct. 22, 2016), [reuters.com/article/usa-election/trump-vows-to-weaken-u-s-media-power-structure-if-elected-idUSL1N1CS08H](https://www.reuters.com/article/usa-election/trump-vows-to-weaken-u-s-media-power-structure-if-elected-idUSL1N1CS08H).

⁹⁰ *Id.*

⁹¹ Eric Beech, *Trump Says Amazon.com Has ‘A Huge Antitrust Problem’*, REUTERS (May 12, 2016), [reuters.com/article/us-usa-election-trump-amazon-com-idUSKCN0Y4075](https://www.reuters.com/article/us-usa-election-trump-amazon-com-idUSKCN0Y4075).

⁹² Timothy B. Lee, *Newly Elected Republican Senator Could Be Google’s Fiercest Critic*, ARS TECHNICA (Nov. 24, 2018), arstechnica.com/tech-policy/2018/11/newly-elected-republican-senator-could-be-googles-fiercest-critic/.

⁹³ *Id.*

⁹⁴ The attorneys general participating in the investigation represent the District of Columbia, Puerto Rico, and all U.S. states except Alabama and California. Steven Overly & Margaret Harding McGill, *‘A Very Bad Day for Google’ as 50 States, Territories, Join Antitrust Probe*, POLITICO (Sept. 9, 2019), [politico.com/story/2019/09/09/-probe-1713159](https://www.politico.com/story/2019/09/09/-probe-1713159).

⁹⁵ In a recent law review article, Herbert Hovenkamp noted that the “antitrust *cognoscenti* may not take movement antitrust arguments seriously, regarding them as economically ill-informed, untested, excessively rhetorical, incoherent, or paranoid.” He went on to express disdain for the Democrat’s Better Deal plan, stating that the platform “gives a reader the strong impression that its slogans were selected in order to achieve maximum political traction with the *illiterati*, and perhaps that is all that can be expected of a political platform.” Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 588–93 (2018); see also Herbert Hovenkamp, *Platforms and the Rule of Reason: the American Express Case*, 2019 COLUM. BUS. L. REV. 35, 91 (“Today, the consumer welfare principle in antitrust is under attack from people who argue for abandonment of economic approaches to antitrust in favor of populism, political theory, or some other source.”).

by permitting merger reviews to examine whether a transaction would reduce wages, lead to job cuts, or harm small business.⁹⁶ In defending the consumer welfare standard, Herbert Hovenkamp and Carl Shapiro dismissed the idea that enforcement agencies could evaluate mergers based on their impact on employment, small businesses, or political power.⁹⁷

As discussed, many populists do call for disposing of the consumer welfare standard. Mainstream commenters have often focused on this rhetoric, causing them to overstate the extent to which populists' specific proposals would actually require a different benchmark. On examination, many specific contemporary populist critiques would not directly incorporate social and political concerns into antitrust rules of decision. Rather, many populists argue that harm to broader public interests is *a result of* failures to enforce antitrust laws aggressively, using traditional benchmarks like effects on pricing, quality, and output in relevant markets. As Lina Khan explained on a panel hosted by the American Constitution Society, “[P]ushing back against consumer welfare often gets mistaken for the view that antitrust really needs to move in a direction where we’re balancing all sorts of other considerations, like the political power of companies or the income of workers.”⁹⁸ To be sure, framing the populist position as “pushing back against consumer welfare” contributes to the confusion. But Khan went on to explain that “identifying as a descriptive matter that concentration of industries has political ramifications is not the same as saying that therefore the political power of companies should be factored into antitrust analysis.”⁹⁹

Still, academics, practitioners, and the antitrust agencies sometimes paint populists with a broad brush, premising responses on the proposition that, in criticizing the consumer welfare standard, populists are seeking to bring broader public interest considerations into antitrust assessments that would improperly punish competitors for competing. In May 2018, Deputy Assistant Attorney General Roger Alford said the “current debate between the consumer welfare standard and the public interest standard is illustrative of the tendency to trade the scalpel for the sledgehammer.”¹⁰⁰ He praised the con-

⁹⁶ E.g., Diana L. Moss, *Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers*, AM. ANTITRUST INST. (Apr. 25, 2017), antitrustinstitute.org/content/antitrust-and-inequality-what-antitrust-can-and-should-do-protect-workers (expressing concern that a public interest standard could capture any topic affected by a merger or challenge conduct, including issues ranging from employment to environmental concerns).

⁹⁷ Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2020 (2018).

⁹⁸ Am. Constitution Soc’y, *A Progressive View of Antitrust*, YOUTUBE (Apr. 3, 2018), [youtube.com/watch?v=LkYmOA2DqTy](https://www.youtube.com/watch?v=LkYmOA2DqTy).

⁹⁹ *Id.*

¹⁰⁰ Roger Alford, Dep. Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the Global Seminar Series in Düsseldorf: The Public Interest Standard and the Dangers of Dis-

sumer welfare standard for focusing antitrust inquiry, and argued that a “public interest” standard could result in undesirable discrimination in competition enforcement, with regulators favoring some competitors over others in pursuing broader social or political goals.

Assistant Attorney General Makan Delrahim also defended the consumer welfare standard in two speeches about antitrust enforcement involving online platforms.¹⁰¹ Delrahim acknowledged populist criticisms of antitrust enforcement in digital platform markets, and cited Lina Khan’s note as an example of “fresh thinking” that the antitrust community should encourage.¹⁰² Delrahim argued that existing antitrust tools are flexible enough to address the challenges presented by emerging threats to competition, and cautioned against discarding the antitrust consensus. He cited the *Microsoft* case as an example of how antitrust doctrine can evolve without “a seismic shift in how we think about antitrust law.”¹⁰³ In Delrahim’s view, the existing standard is “well-equipped to face threats to competition in media markets in the digital age.”¹⁰⁴

At the same time, members of the antitrust establishment (broadly speaking) have also advanced—whether in parallel or in response to the populists—their own proposals for making antitrust enforcement more effective using the existing consumer welfare framework.¹⁰⁵ For example, in May 2018, the *Yale Law Journal* featured a collection of nine articles, all of which took the position that existing antitrust enforcement tools are capable of addressing today’s antitrust challenges. In an introduction to the collection, Jonathan Baker, Jonathan Sallet, and Fiona Scott Morton acknowledged that the United States has “a market power problem,” and that original thinking underlying the Chicago School did not fully capture the realities of collusion and exclusion.¹⁰⁶ The articles discuss how today’s framework for antitrust enforcement could address issues presented by the digital economy, including multisided plat-

crimination (May 8, 2018), [justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-global-seminar-series-d](https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-global-seminar-series-d).

¹⁰¹ Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Keynote Address at the University of Chicago’s Antitrust and Competition Conference: Don’t Stop Believing’: Antitrust Enforcement in the Digital Era (Apr. 19, 2018), [justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos](https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos) [hereinafter Delrahim, University of Chicago Keynote]; Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the Jevons Colloquium in Rome: All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets (May 22, 2018), [justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-jevons-colloquium-rome](https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-jevons-colloquium-rome) [hereinafter Delrahim, Jevons Colloquium Remarks].

¹⁰² Delrahim, University of Chicago Keynote, *supra* note 101.

¹⁰³ *Id.* (discussing *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)).

¹⁰⁴ Delrahim, Jevons Colloquium Remarks, *supra* note 101.

¹⁰⁵ Collection, *Unlocking Antitrust Enforcement*, 127 *YALE L.J.* 1916 (2018).

¹⁰⁶ Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 *YALE L.J.* 1916, 1916–17 (2018).

forms¹⁰⁷ and most-favored-nation (MFN) clauses in online markets.¹⁰⁸ They also examine how the antitrust laws might be applied in novel ways, including in the context of minority investments in competing firms¹⁰⁹ and patent holdup.¹¹⁰ Finally, embracing the common law tradition of antitrust, the articles discuss how developments in economic learning can inform antitrust analysis.¹¹¹

Lina Khan and Sandeep Vaheesan published responses to the collection. Khan argued that although the collection's proposals were useful, they would likely prove inadequate to address America's market-power problem.¹¹² In her view, the consumer welfare standard systemically biases antitrust against intervention, creating a problem that cannot be remedied until "the original values of antitrust—including a distrust of concentrated power" are restored.¹¹³ Vaheesan similarly described the proposals as "disappointingly modest in scope."¹¹⁴ He argued that antitrust enforcement suffers from a "combination of technocratic hyperactivism and legislative lethargy," and "fail[s] to grapple with the deeper question of whose interests should be advanced by antitrust law."¹¹⁵ Notably, neither Khan nor Vaheesan advanced specific proposals for reform, other than calling for the antitrust establishment to recognize that the antitrust laws encompass a broader set of goals than current enforcement acknowledges.

In 2019, Jonathan Baker published *The Antitrust Paradigm: Restoring a Competitive Economy*, which expands on the thesis that the consumer welfare standard, properly applied, is up to the task of addressing many of the populist

¹⁰⁷ Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018).

¹⁰⁸ Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

¹⁰⁹ Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026 (2018).

¹¹⁰ A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110 (2018).

¹¹¹ C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018); Hovenkamp & Shapiro, *supra* note 97. Other examples of antitrust establishment critiques of particular applications of the consumer welfare standard include Melamed & Petit, *supra* note 27; Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018); and Gregory J. Werden, *Back to School: What the Chicago School and New Brandeis School Get Right* (Sept. 4, 2018) (unpublished manuscript), papers.ssrn.com//cfm?abstract_id=3247116.

¹¹² Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. 960, 963–64 (2018).

¹¹³ *Id.* at 979.

¹¹⁴ Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L.J. 980, 980 (2018).

¹¹⁵ *Id.* at 981, 995. Vaheesan faulted the authors for "writ[ing] as though consumer welfare antitrust is cast in stone" and ignoring that "[m]any commentators and politicians have raised questions about the fundamentals of antitrust." *Id.* at 981.

critiques.¹¹⁶ Although favoring more robust antitrust enforcement and criticizing the Chicago School approach, he observes that “[t]he Chicagoans properly saw economic analysis as central to developing antitrust rules and identifying enforcement targets.”¹¹⁷ And he argues that “though antitrust needs to be re-framed to combat market power, emulating the structural era’s noneconomic goals [e.g., by promoting small business] is probably not the best way to achieve this end.”¹¹⁸

II. PROPOSALS ADVANCED BY ANTITRUST POPULISTS

A. OVERVIEW

Populism has the potential to play a constructive role in shaping the development of antitrust, as other movements (such as the Chicago School) have done. But populism can realize that potential only if the antitrust community properly construes and substantively engages with populist criticisms.¹¹⁹ The antitrust community must rigorously evaluate populist proposals for concreteness and workability and examine their real-world consequences (both intended and unintended).

To frame the debate, we divide the ideas advanced by antitrust populists into two categories: (1) proposals that are consistent with the consumer welfare standard and (2) proposals that would fundamentally change or replace the consumer welfare standard and take aim at societal harms other than higher prices or reduced output, quality, or innovation in relevant markets. Proposals in the first category are largely motivated by concerns that the antitrust laws are not being adequately enforced. Reformers in this camp point to economic learning, suggesting that the current regime has failed with respect to particular types of conduct or industries. Proposals in the second category grab headlines but are actually less common. They are motivated by concerns apart from market performance. These reformers would make foundational changes to the antitrust laws, and advocate policies that may sacrifice consumer welfare, including long-term consumer welfare, to advance other policy goals. In some cases, these reformers use the language of antitrust—referring to an “anti-monopoly” agenda, for example—to advocate for remedies, such

¹¹⁶ BAKER, *supra* note 30, at 45–46.

¹¹⁷ *Id.* at 46.

¹¹⁸ *Id.* at 61.

¹¹⁹ Some critics of antitrust populism have complained that populists have failed to present concrete proposals. For example, David Balto and Matthew Lane have described contributors to the movement as “antitrust newcomers” with “no plan” and “calls for change for change’s sake.” David Balto & Matthew Lane, Opinion, *‘Hipster Antitrust’ Movement Is All Action, No Plan*, THE HILL (Mar. 16, 2018), thehill.com/opinion/judiciary/378788-hipster-antitrust-movement-is-all-action-no-plan.

as sector-specific regulation, that are not based in antitrust, i.e., are not aimed at harms to the competitive process.¹²⁰

These categories necessarily involve oversimplifications, and the populists and antitrust establishment may disagree with the typology. But this dichotomy sheds light on the role that the consumer welfare standard continues to play in populist critiques. As a rhetorical matter, populists often overtly reject the existing consumer welfare framework. But when it comes to their specific critiques or proposals for reform, many populists are advancing ideas that are perfectly consistent with a consumer welfare standard—albeit applied in a more aggressive way.

B. PROPOSALS TO IMPROVE EXISTING ANTITRUST ENFORCEMENT

Antitrust populists have advanced many proposals that, properly construed, would result in more aggressive antitrust enforcement while remaining within the consumer welfare framework. These proposals range from simple fixes, such as giving the agencies resources to bring more cases, to more substantial rule changes, such as altering current burden-of-proof allocations. The proposals are motivated by a concern that existing antitrust enforcement has led to consumer harm by erring too much on the side of under-enforcement.

1. *Dedicate Additional Resources for Antitrust Enforcement*

Antitrust populists have called for providing the FTC and DOJ with increasing funding and resources and for appointing more aggressively enforcement-minded leaders.¹²¹ They argue that expanded resources are necessary for the agencies to keep up with increased merger activity, technological changes, and newer and more nuanced anticompetitive practices in the economy.¹²²

This position is consistent with mainstream antitrust views and efforts to reinvigorate antitrust enforcement during the Obama and Trump administrations. For example, in 2016, President Obama issued an executive order requiring executive agencies and departments to take steps to address competition concerns, including by referring anticompetitive practices to the

¹²⁰ These include measures such as reducing regulatory complexity, restricting lobbying by former government officials, limiting patent rights, and enhancing consumer-protection measures. See, e.g., TEPPER & HEARN, *supra* note 22, at 244–47 (collection of non-antitrust remedies to monopoly problems).

¹²¹ JARSULIC ET AL., *supra* note 78, at 21 (“The FTC and DOJ need bigger budgets and larger staffs if competition policy is to play a more robust role.”); ROOSEVELT INST., *supra* note 78, at 21 (stressing the importance of appointing leaders who would pursue vigorous enforcement and contending that too many enforcers today have defense-side experience and that too few come from plaintiff-side firms, state-level enforcement agencies, or academia).

¹²² See JARSULIC ET AL., *supra* note 78, at 20–21.

DOJ and FTC.¹²³ In its fiscal year 2017 budget submission to Congress, the Antitrust Division highlighted the need for additional resources, requesting an additional \$15.5 million in funding for civil merger enforcement and criminal cartel enforcement, including funding for 98 additional attorneys.¹²⁴ And in its submission to Congress for fiscal year 2021, the Division requested an additional \$21.8 million to administer its caseload, including funding for 87 additional positions.¹²⁵

2. *Improve Agency Transparency and Accountability*

Antitrust populists also advocate various measures to increase agency transparency. For example, the Center for American Progress has proposed that the FTC and DOJ employ a network of experts to help assess proposed mergers, similar to the network that the Food and Drug Administration employs to help review new medical devices.¹²⁶ The Center argues that a network of experts would democratize what is currently a closed process, allowing outside experts to help assess mergers and provide public comment.¹²⁷ The Democrats' Better Deal proposed a new consumer competition advocate, who would proactively recommend investigations to the antitrust agencies.¹²⁸ The Better Deal would also require the agencies publicly to explain decisions not to pursue a recommended investigation.¹²⁹

Another common proposal is to strengthen retrospective reviews of consummated transactions. Although the agencies periodically conduct retrospective reviews, many antitrust populists have called for measures to institutionalize such efforts. For example, the Center for American Progress has proposed that the DOJ and FTC require merging companies to submit data for a three- to four-year period after a transaction, which could be an input for assessing the effectiveness of the agencies' merger-enforcement programs.¹³⁰ Lina Khan and Sandeep Vaheesan argued that the President should appoint an

¹²³ Exec. Order No. 13,725, 3 C.F.R. 452 (2017).

¹²⁴ ANTITRUST DIV., U.S. DEP'T OF JUSTICE, FY 2017 BUDGET REQUEST AT A GLANCE, justice.gov/jmd/file/822051/.

¹²⁵ ANTITRUST DIV., U.S. DEP'T OF JUSTICE, FY 2021 BUDGET REQUEST AT A GLANCE, justice.gov/doj/page/file/.

¹²⁶ JARSULIC ET AL., *supra* note 78, at 18.

¹²⁷ *Id.*

¹²⁸ *Better Deal*, *supra* note 80, at 2.

¹²⁹ *Id.*

¹³⁰ JARSULIC ET AL., *supra* note 78, at 19; *see also* Public Citizen, Comment Letter on Hearing on Competition and Consumer Protection in the 21st Century (Aug. 20, 2018) [hereinafter Public Citizen Comments] (urging the FTC to conduct retrospective reviews of approved mergers and imposed remedies), [ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0062-155233.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0062-155233.pdf); Khan & Vaheesan, *supra* note 21, at 292 ("One way to make agencies more accountable would be by requiring them to conduct publicly available retrospective reviews, assessing how their merger predictions actually played out.").

antitrust inspector general, who would independently assess how predictions about merger effects have actually played out, and whether merger remedies have succeeded.¹³¹

Calls for more agency transparency and accountability is another area where antitrust populism and the mainstream are largely in agreement. For example, at his confirmation hearing to become FTC Chairman, Joseph Simons told the Senate Commerce Committee that the FTC needed to devote substantial resources to determining whether the agencies have been too permissive of mergers.¹³² Simons identified the possibility of overly lax merger enforcement as one of the top three challenges facing the FTC, and advocated systematic evaluation of the agency's work through retrospective studies of enforcement actions.¹³³ And in September 2020, the FTC's Bureau of Economics announced a program to expand and formalize its efforts regarding merger retrospectives, including by dedicating additional resources and "maintaining a website devoted to research on retrospectives."¹³⁴

3. Pursue More Creative Theories of Competitive Harm

A common populist theme is that the enforcement agencies systematically under-enforce the antitrust laws by failing to pursue novel or creative theories of competitive harm. These critiques often focus on specific industries in which or types of conduct against which critics contend the agencies' enforcement efforts have fallen short.

For example, critics frequently argue that the antitrust authorities have failed adequately to account for network effects, or that other scale advantages are imposing "insurmountable barrier[s] to entry."¹³⁵ Lina Khan and others have used Amazon as a case study. Khan argues that Amazon exploits data that it receives as the owner of the Amazon Marketplace to undermine challenges from rival suppliers, e.g., by using information about its rivals' sales to

¹³¹ Khan & Vaheesan, *supra* note 21, at 292.

¹³² S. COMM. ON COMMERCE, SCIENCE & TRANSP., 115TH CONG., STATEMENT ON BIOGRAPHICAL AND FINANCIAL INFORMATION 16 (2018), commerce.senate.gov/services/files/6C4149AF-3023-4825-90F1-3C38E279FD0D (statement of Joseph Simons, Federal Trade Commissioner nominee).

¹³³ *Id.*

¹³⁴ Press Release, Fed. Trade Comm'n, FTC's Bureau of Economics to Expand Merger Retrospective Program (Sept. 17, 2020), www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program.

¹³⁵ See Khan, *supra* note 66, at 773. David Dayen uses Retractable Technologies to tell the story of one small firm struggling to overcome entry barriers. Dayen argues that Retractable Technologies offers a superior single-use syringe that would protect healthcare workers from accidental needle sticks, but has struggled to gain market share against larger suppliers. David Dayen, *Bring Back Antitrust*, AM. PROSPECT (Nov. 9, 2015), prospect.org/article/bring-back-antitrust-0.

target their customers.¹³⁶ Khan claims that existing antitrust laws could address this type of data exploitation by more vigorously policing information transfers.¹³⁷ Khan has also contended that the consumer welfare standard's emphasis on consumers "has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs."¹³⁸

Although critics may claim that the consumer welfare standard neglects network effects, scale advantages, harm to innovation, or monopsony power (including in labor markets), the standard can and does address these issues—at least where they threaten to harm market performance.¹³⁹ Indeed, the current FTC and DOJ Horizontal Merger Guidelines contemplate consideration of these issues,¹⁴⁰ which have engendered recent antitrust enforcement actions. For example, the DOJ based its action against American Express on a theory of market power reinforced and protected by network effects.¹⁴¹ And the agencies have challenged mergers based on theories of monopsony harm¹⁴² and harm to innovation.¹⁴³ Stripped of rhetoric and properly understood, populist

¹³⁶ Khan, *supra* note 66, at 780–84 (arguing that Amazon uses its Marketplace to identify and copy popular third-party products, a strategy that "increases sales while shedding risk").

¹³⁷ *Id.* at 783 & n.376.

¹³⁸ Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

¹³⁹ See Khan, *supra* note 66, at 783 n.376 (discussing the European Commission's investigation into the Facebook/WhatsApp merger, which was premised on concerns about the exclusionary potential of big data).

¹⁴⁰ See Horizontal Merger Guidelines, *supra* note 18, § 6.

¹⁴¹ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). The European Commission and the German Federal Cartel Office have announced investigations into whether Amazon is using data collected about third-party sellers to gain an anticompetitive advantage. David Reid, *Amazon Is Being Investigated by the German Antitrust Authority*, CNBC (Nov. 29, 2018), [cnbc.com/2018/11/29/amazon-investigated-by-the-german-antitrust-authority.html](https://www.cnbc.com/2018/11/29/amazon-investigated-by-the-german-antitrust-authority.html).

¹⁴² See, e.g., Complaint ¶¶ 24–29, *United States v. George's Foods, LLC*, No. 5:11-cv-00043-gec (W.D. Va. May 10, 2011) (alleging that a chicken processing facility merger would have increased monopsony power in the upstream market for chicken grower services); Press Release, U.S. Dep't of Justice, *Blue Cross Blue Shield of Michigan and Physicians Health Plan of Michigan Abandon Merger Plans* (Mar. 8, 2010) (announcing the parties abandoned a proposed deal following the DOJ's decision to challenge the proposed transaction, and arguing that the proposed transaction would have given the combined company the ability to control physician reimbursement rates).

¹⁴³ Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1933 (2015) (between 2004 and 2014, the DOJ and FTC challenged 250 mergers and alleged harm to innovation in 84 of them); see also, e.g., Complaint ¶ 6, *United States v. Halliburton Co.*, No. 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016) (alleging that merger of two oilfield services companies would leave exploration and production companies with one fewer supplier driving innovation and development of new technologies); Complaint ¶¶ 57–58, *Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (Dec. 20, 2017) (alleging consummated merger reduced innovation competition in product features and functionality of microprocessor prosthetic knees); Complaint ¶¶ 71–73, *Illumina, Inc.*, FTC Docket No. 9387 (Dec. 17, 2019) (alleging that a merger of DNA sequencing companies would reduce innovation competition for long-read sequencing systems).

critiques focused on these issues do not reject the consumer welfare standard, but call for more aggressive intervention under that standard.

4. *Adopt Presumptions that Favor Enforcement*

a. Presumptions that Mergers Are Anticompetitive

One common populist critique is that current antitrust enforcement is too permissive of consolidation. Populists often cite John Kwoka's retrospective study of merger outcomes. That study concluded that mergers on average result in nontrivial price increases, and that the U.S. agencies have consistently permitted anticompetitive mergers.¹⁴⁴ To overcome this perceived failing, many populists would replace today's focus on nuanced, fact-intensive assessment of competitive effects with a stricter application of the *Philadelphia National Bank* framework to create a presumption of illegality for mergers that result in highly concentrated markets.¹⁴⁵ For example, the Democrats' Better Deal promised: "[U]nder our new standards, the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal."¹⁴⁶

Populists also argue that the current presumptions fail to account for serial acquisitions of nascent competitors, particularly in the tech industry.¹⁴⁷ As American Antitrust Institute President Diana Moss explains, the DOJ and FTC may be reluctant to challenge acquisitions of smaller, potential, or nascent competitors because regulators' decisions are driven by an error-cost analysis, under which the regulators "compare the costs of mistakenly chal-

¹⁴⁴ JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 153–60 (2015). Kwoka's book received attention from economists, lawyers, policymakers, and the media, and prompted a response from the FTC. Two economists from the FTC's Bureau of Economics argued that the evidence and empirical methods in Kwoka's book suffered from serious deficiencies that undermined the basis for his conclusions. Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361, 386 (2018). Kwoka responded, arguing that nothing in the FTC economists' critique undermined the methodology or conclusions of the book. John Kwoka, *Mergers, Merger Control, and Remedies: A Response to the Vita-Osinski Critique*, 82 ANTITRUST L.J. 741 (2019).

¹⁴⁵ On the more aggressive end of the spectrum, some populists have called for a bright-line rule rather than a presumption. For example, in a September 2019 *American Prospect* article, Sandeep Vaheesan wrote that the agencies "should treat a merger that creates a firm with 10 percent or more of a market as illegal and state they will block it in court," and should not permit otherwise illegal mergers on efficiency grounds. Sandeep Vaheesan, *Unleashing the Existing Anti-Monopoly Arsenal*, AM. PROSPECT (Sept. 24, 2019), prospect.org/day-one-agenda/monopoly-arsenal.

¹⁴⁶ *Better Deal*, *supra* note 80, at 2.

¹⁴⁷ DIANA L. MOSS, AM. ANTITRUST INST., *THE RECORD OF WEAK U.S. MERGER ENFORCEMENT IN BIG TECH* 10 (2019), antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.

lenging benign or pro-competitive deals to the cost of mistakenly not challenging anticompetitive deals.”¹⁴⁸

According to some populists, a strong presumption of illegality would result in a simpler and more predictable merger-review process and combat under-enforcement:

While agencies would still have to define relevant markets under the *Philadelphia National Bank* rule, the complexity of merger reviews would be greatly diminished. For one, these reviews would be significantly shortened and be much less dependent on competing speculations about the future development of markets. Armed with a simple rule rather than a standard that demands an exhaustive industry study and impossible projections of the future, the antitrust agencies, for example, would not have to spend more than a year investigating mergers in highly concentrated markets—as they routinely do now.¹⁴⁹

Like the presumption that now exists in the Horizontal Merger Guidelines, the presumption proposed above would be generally subject to the merging firms’ rebuttal: firms triggering the presumption could still merge if they could show that the merger would be unlikely to create or enhance market power.¹⁵⁰

This proposal may well be flawed because it would sacrifice accuracy in enforcement decisions and deter too many procompetitive transactions. But it is not inconsistent with the consumer welfare standard: Under the proposal as stated, agencies and courts would continue to evaluate whether transactions

¹⁴⁸ *Id.* at 7 (discussing the limited record of merger enforcement for transactions by large tech companies); see also Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, J. ECON. PERSP., Summer 2019, at 69, 78 (2019) (discussing how large tech companies might harm nascent and potential competition and arguing that a change in evidentiary requirements for cases involving harm to potential competition “would reduce the ability of powerful firms to acquire potential rivals before they mature into actual rivals, without stopping them from making acquisitions to improve their offerings or to challenge other firms with entrenched positions”).

¹⁴⁹ Khan & Vaheesan, *supra* note 21, at 281; see also Wu, *supra* note 27, at 127–29 (possible solutions could include “setting a higher bar for giant mergers” or “a return to structural presumptions, such as a simple but *per se* ban on mergers that reduce the number of major firms to less than four”).

¹⁵⁰ Horizontal Merger Guidelines, *supra* note 18, § 5.3 (“Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”); see also Khan & Vaheesan, *supra* note 21, at 281 (“The merging parties could rebut this presumption by establishing business justifications for their combination.”).

would result in increased prices or reduced output, quality, or innovation, rather than inquire into broader potential societal harms.¹⁵¹

b. Presumptions of Illegal Monopolization

Antitrust populists have also advocated presumptions that Section 2 has been violated when a dominant or near-dominant firm engages in exclusive dealing, refusals to deal, or below-cost pricing.¹⁵² For example, Lina Khan argues that the current law requiring below-cost pricing and a probability of loss recoupment for predatory pricing claims fails properly to account for the economics of online-platform markets.¹⁵³ Khan claims that network effects and control over data entrench early dominance, creating incentives for online platforms to price below cost to pursue growth, behavior that the current law assumes is rarely rational.¹⁵⁴ She also argues that recoupment is difficult to detect among online platforms, which may raise prices years later, or raise prices on different products or through finely tuned price discrimination.¹⁵⁵ To combat predatory pricing, Khan would replace *Brooke Group's* recoupment test¹⁵⁶ with a presumption of predation whenever a dominant online platform prices its products below cost.¹⁵⁷

Monopolization presumptions can be consistent with the consumer welfare standard.¹⁵⁸ The challenge for populists is to present well-developed arguments to support their view that presumptions protect consumer welfare better than do existing enforcement approaches, and that presumptions will not overdeter procompetitive conduct, unduly sacrifice accuracy of adjudications, or prove unduly difficult to administer.

¹⁵¹ A consumer welfare approach simply requires assessment of potentially anticompetitive conduct against consumer welfare-based objectives—e.g., avoidance of noncompetitive prices and of reduced quality and innovation. A consumer welfare framework affords agencies and courts broad latitude to pursue these objectives through presumptions, per se rules, or detailed case-specific inquiry. *See generally* BAKER, *supra* note 30; Melamed & Petit, *supra* note 27.

¹⁵² Khan & Vaheesan, *supra* note 21, at 282. The proposal does not specify when a firm would be deemed dominant or near-dominant.

¹⁵³ Khan, *supra* note 66, at 784–90.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 791; *see also* Khan, *supra* note 112, at 977 (arguing predatory pricing can be anticompetitive even in the absence of recoupment).

¹⁵⁶ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (requiring the plaintiff to demonstrate “that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it”).

¹⁵⁷ Khan, *supra* note 66, at 791.

¹⁵⁸ BAKER, *supra* note 30, at 121 (“[T]he modern burden-shifting framework for evaluating the reasonableness of exclusionary conduct permits truncated condemnation under certain circumstances.”).

For example, enforcement agencies would need a principled way to determine which firms are dominant or near-dominant and therefore subject to the presumption. In addition, courts and enforcement agencies would need a reliable and practical method to measure whether a price is below cost, which is often very challenging to determine and can depend on the particulars of the industry and the particular firm's cost structure. Presumptions of illegality for exclusive dealing, refusals to deal, and below-cost pricing risk condemning conduct that is neutral or beneficial to the market. For instance, a presumption of predation risks punishing a firm that lowers its price to match its competition or offers a low price to introduce a new product. To address this risk, Khan suggests that the law permit a business-justification defense.¹⁵⁹ Even so, a predation presumption may deter firms from engaging in aggressive price cutting or other procompetitive conduct. Firms engaging in such conduct would run the risk that the presumption would apply and that they would be forced into long and expensive litigation in which they would bear the potentially heavy burden of establishing a business justification (under possibly amorphous standards).

5. Addressing Potential Exclusionary Conduct by Online Platforms

Populists have focused many of their critiques of antitrust enforcement on digital platforms.¹⁶⁰ Although some populist concerns and proposed solutions regarding platforms are outside mainstream antitrust, some are not. Specifically, concerns that online platforms use data or influence the transmission of information in ways that actually harm rivals and reduce competition can be addressed under current doctrine.¹⁶¹

For example, advocates argue that control over data can create substantial barriers to entry, entrench dominant players, and give firms an undue advantage in entering adjacent markets that rivals cannot match.¹⁶² Although Sally Hubbard of the Open Markets Institute has criticized the consumer welfare standard, she also appears to argue that competition issues involving information platforms could be subject to enforcement under the Sherman and Clayton Acts as they are construed today.¹⁶³ Hubbard takes aim at Facebook for allegedly prioritizing news content that either is native to Facebook's platform or can be viewed without taking the user to another site. Hubbard contends

¹⁵⁹ Khan, *supra* note 66, at 792.

¹⁶⁰ See generally ROOSEVELT INST., *supra* note 78; Khan, *supra* note 66.

¹⁶¹ See, e.g., Melamed & Petit, *supra* note 27, at 756–64 (discussing how potential theories of competitive harm advanced against online platforms' conduct could be reviewed and, if necessary, addressed under a consumer welfare framework).

¹⁶² E.g., ROOSEVELT INST., *supra* note 78, at 24; Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401 (2014).

¹⁶³ See Sally Hubbard, *Why Fake News Is an Antitrust Problem*, FORBES (Jan. 10, 2017), forbes.com/sites/2017/01/10/why-fake-news-is-an-antitrust-problem/.

that Facebook's practices often bias results toward "fake news" or legitimate news housed on Facebook, harming other news outlets that both compete with Facebook and rely on the platform for distribution.¹⁶⁴ If these alleged practices actually result in noncompetitive prices or reduced output in advertising markets or quality in content markets, they could be addressed under a consumer welfare approach.¹⁶⁵

Some populists also argue that the antitrust laws fail adequately to address non-price harms in the tech space, including harms relating to consumer privacy.¹⁶⁶ But the consumer welfare standard and agency practice do account for non-price harm to consumers. For example, in the Google/DoubleClick transaction, the FTC issued a closing statement explaining that it had "investigated the possibility that this transaction could adversely affect non-price attributes of competition, such as consumer privacy" and concluded that the transaction would not; rather, privacy concerns "extend[ed] to the entire online advertising marketplace."¹⁶⁷ And most recently, the investigations into digital markets opened by the FTC, the DOJ, Congress, and state attorneys general suggest that they believe that existing antitrust tools might address many of the non-price harms to which populists point.

C. PROPOSALS OUTSIDE THE EXISTING CONSUMER WELFARE FRAMEWORK

Some populist proposals would replace or supplement the consumer welfare standard, for example, by introducing no-fault monopoly rules, limits on vertical integration, or a "public interest" standard for merger reviews. Others have called for special rules for online platforms that would depart significantly from existing antitrust doctrine or establish entirely separate regulatory regimes.

Many of these proposals have received more attention and critical response than proposals to improve antitrust enforcement within the existing frame-

¹⁶⁴ *Id.*; see also Sally Hubbard, *The Case for Why Big Tech Is Violating Antitrust Laws*, CNN BUS. (Jan. 2, 2019), cnn.com/2019/01/02/perspectives/big-tech-facebook-google-amazon-microsoft-antitrust/index.html (arguing that Facebook violates Section 2 of the Sherman Act by prioritizing news content that keeps users on its platform, and calling on regulators to bring more cases).

¹⁶⁵ Of course, if Hubbard would condemn Facebook's practices absent harm in a properly construed market, then her proposal would require changes to existing antitrust doctrine, and may be outside antitrust entirely.

¹⁶⁶ Dina Srinivasan, Opinion, *Why Privacy Is an Antitrust Issue*, N.Y. TIMES (May 28, 2019), nytimes.com/2019/05/28/privacy-antitrust-facebook.html.

¹⁶⁷ Statement of the Federal Trade Commission Concerning Google/DoubleClick at 2–3, FTC File No. 071-0170 (Dec. 20, 2017), ftc.gov/system/files/documents/public_statements/edc-com_mstmt.pdf. The Commission also noted that some concerns over a merger's impact on privacy could extend beyond the reach of the antitrust laws. See *id.*

work. But these proposals in fact are less common and less developed than proposals that are consistent with the consumer welfare standard.

1. *Public Interest Considerations in Merger Review*

Under a “public interest” standard, mergers could be prohibited for reasons going beyond competitive harm, such as reduced wages, job cuts, or harm to small business. Critics of a public interest test argue that it would unconstructively inject social and political concerns into enforcement. For example, Diana Moss of the American Antitrust Institute (which generally advocates for aggressive antitrust enforcement) has warned that a public interest standard would introduce uncertainty into the antitrust laws and “could include everything that is affected by a merger or abusive conduct: employment, health and safety, and even environmental concerns.”¹⁶⁸

But proposals to use public interest as the actual rule of decision are rare.¹⁶⁹ Rather, antitrust populists typically argue that as a descriptive matter, antitrust under-enforcement harms the public interest (for example, by increasing income inequality, depressing wages, and reducing economic opportunities for workers), without advocating for public interest as a decisional benchmark.¹⁷⁰

Applying public-interest considerations in merger reviews would represent a dramatic departure from existing antitrust enforcement, and could sacrifice consumer welfare, including long-term consumer welfare, to pursue other, non-market, performance-based goals. Insofar as antitrust populists advance a public interest test, they must devise objective standards to ensure that the test does not transform into a broad power to regulate the economy for political ends and that the test proves predictable and administrable in practice. Those arguing for such a test must also respond to criticism that they are seeking to overextend antitrust law to address public-policy gaps and regulatory failures in other regimes.¹⁷¹ And they must explain why using antitrust for this purpose

¹⁶⁸ See, e.g., Moss, *supra* note 96.

¹⁶⁹ In an article for the *American Prospect*, David Dayen argues that monopsony power incentivizes suppliers to cut corners on labor and environmental standards and to depress wages, even while generating cheap goods, and argues that antitrust should consider a broader set of decisional factors than just consumer welfare effects. Dayen, *supra* note 135.

¹⁷⁰ Other populist critiques have been vague about whether the antitrust rule of decision should explicitly incorporate public-interest considerations, or whether these considerations should motivate other reforms. See, e.g., Public Citizen Comments, *supra* note 130 (arguing that the FTC “must find a way to reinfuse” broader considerations, including privacy, innovation, jobs, wages, and political power, into enforcement).

¹⁷¹ See, e.g., Shapiro, *supra* note 111, at 746 (“[I]t is important to recognize that antitrust cannot be expected to solve the larger political and social problems facing the United States today. In particular, while antitrust enforcement does tend to reduce income inequality, antitrust cannot and should not be the primary means of addressing income inequality; tax policies and employment policies need to play that role. Nor can antitrust be the primary policy for dealing with the corruption of our political system and the excessive political power of large corpora-

is preferable to employing sector-specific regulation or other mechanisms to address concerns outside the consumer welfare realm.

2. *Special Rules for Online Platforms*

Populists frequently argue that current antitrust rules are too rigid to address concerns that arise in the tech industry, such as potential competitive effects relating to aggregation of data, undue advantages based on economies of scale or scope, or erosion of consumer privacy. As discussed above, some of the concerns that populists raise—to the extent grounded in harm to market performance—could be addressed under the consumer welfare standard. Other proposals, however, plainly go beyond the current ambit of antitrust; these include populists' calls to limit firms' use of big data and to regulate online platforms as public utilities.

For example, one proposal would limit online platforms' use of cross-market data—i.e., prevent firms like Google and Amazon from using data acquired from one line of business to enhance another line of business.¹⁷² Populists argue that these limits could help prevent harm to smaller, rival businesses.¹⁷³ Other proposals include restrictions on platforms' use of consumers' data to prevent “regressive wealth transfers” through “information asymmetries” and price discrimination.¹⁷⁴ If these proposals aimed to prevent noncompetitive prices or reduced output, quality, or innovation, they might be consistent with the consumer welfare framework. Advocates of these proposals, however, appear to have other aims in mind: addressing “bigness,” denials of opportunities to other businesses, first-degree price discrimination, and racial discrimination, not harms to market performance.

Other proposals would regulate the platforms as public utilities, for example, by imposing duties to charge fair and reasonable prices and to serve all users equally and without discrimination, or by prohibiting dominant firms from owning any other lines of business.¹⁷⁵ These proposals look to railroad

tions; that huge problem is better addressed by campaign finance reform, a better-informed citizenry, stronger protections for voting rights, and far tougher laws to combat corruption.”)

¹⁷² ROOSEVELT INST., *supra* note 78, at 23–24.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 24–25; Ganesh Sitaraman, *How to Regulate Tech Platforms*, AM. PROSPECT (Nov. 8, 2018), prospect.org/power/regulate-tech-platforms. Arguments in favor of public-utility regulations have come from political actors on both sides of the aisle. Steve Bannon, the former chief strategist to President Donald Trump, reportedly favors applying public-utility regulations to large tech companies. Robinson Meyer, *What Steve Bannon Wants to Do to Google*, THE ATLANTIC (Aug. 1, 2017), theatlantic.com/technology/archive/2017/08/steve-bannon-google-facebook/535473.

and early telecom regulations as a model to address the concentration of digital platforms.¹⁷⁶

In their most aggressive form, these proposals call for halting all acquisitions by certain large tech companies. The Open Markets Institute argued in 2017 that the FTC should use its existing authority to block any transactions between Facebook and other “new and promising products and services . . . until the American people, working through our government, determine how to ensure that Facebook’s power does not harm our nation’s security, democratic institutions, or the political rights and commercial freedoms of individual citizens.”¹⁷⁷ The organization cited revelations about Russia’s use of Facebook to influence the 2016 elections as grounds for the FTC to “move now to restrain and reduce Facebook’s power.”¹⁷⁸

In some instances—but not all—populists who have called for new rules that are outside the bounds of antitrust acknowledge the departure and address the consequences of a wholesale change to the current regulatory regime. For example, in *Amazon’s Antitrust Paradox*, Lina Kahn notes that “a public utility regime aims at eliminating competition: it accepts the benefits of monopoly and chooses instead to limit how a monopoly may use its power.”¹⁷⁹ K. Sabeel Rahman has similarly identified public-utility proposals and governance rules as a complement to antitrust, and in the case of tech companies, explained that “the very idea of capping size or breaking up these firms eliminates much of the social and economic value of the firms themselves.”¹⁸⁰

3. Rules Against “Bigness”

Another critique is that antitrust currently condemns only monopolies that are obtained or maintained through exclusionary conduct. Some critics contend that antitrust should also address monopolies that simply exploit economic power—e.g., by extracting monopoly rents as sellers or depressing prices as buyers—or that result in “stagnant” markets with insufficient innovation and entry.¹⁸¹ Several populists have called for a new law that would permit the breakup of large firms, or use of Section 2 to challenge non-exclu-

¹⁷⁶ ROOSEVELT INST., *supra* note 78, at 24–25; Sitaraman, *supra* note 175.

¹⁷⁷ Press Release, Open Mkts. Inst., Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions (Nov. 1, 2017), openmarketsinstitute.org/releases/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions.

¹⁷⁸ *Id.*

¹⁷⁹ Khan, *supra* note 66, at 797.

¹⁸⁰ K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1634, 1680 (2018) (“Not every form of problematic private power can be counteracted by traditional tools of antitrust enforcement and merger review.”).

¹⁸¹ *See, e.g.* WU, *supra* note 27, at 133–34; Khan & Vaheesan, *supra* note 21, at 286.

sionary exercises of monopoly power. Senator Charles Schumer adopted this view in a *New York Times* op-ed announcing the Democrats' Better Deal, promising: "We are going to fight to allow regulators to break up big companies if they're hurting consumers."¹⁸² As a precedent, populists often cite the government's case against AT&T in the 1980s, which ultimately separated the phone company's local phone business from its long-distance and equipment business.¹⁸³ They argue that the breakup of AT&T led to a substantial rise in competition in the telecom industry and paved the way for today's internet economy.¹⁸⁴

Several antitrust populists have advocated for a "break up" rule as one tool that should be available in the anti-monopoly toolbox. They argue that monopoly power can harm the public through exploitative conduct that does not violate U.S. antitrust laws. For example, Matt Stoller argues that "Amazon has forced publishers to offer it steep discounts on books, Monsanto is organizing the genetics behind much of our food supply, and the Cleveland Clinic exerts power over doctors throughout northeast Ohio."¹⁸⁵ Khan and Vaheesan cite two more examples: Mylan's increases in the price of the EpiPen to more than \$600, and energy companies' alleged use of artificial shortages to drive up the price of electricity during California's electricity crisis.¹⁸⁶

To address these types of harm, populists argue that antitrust needs to shift from its current focus on exclusion toward a focus on market structure.¹⁸⁷ In their view, the antitrust agencies should be empowered to challenge possession of lasting monopoly and oligopoly power, even absent "bad acts" by the company possessing market power, unless the company can justify its market power on operational grounds such as economies of scale.¹⁸⁸ If practicable, enduring monopolies and oligopolies would be broken up.¹⁸⁹

¹⁸² Chuck Schumer, Opinion, *A Better Deal for American Workers*, N.Y. TIMES (July 24, 2017).

¹⁸³ See WU, *supra* note 27, at 93–98; Khan & Vaheesan, *supra* note 21, at 291 (citing *United States v. W. Elec. Co.*, 552 F. Supp. 131, 226 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)); see also Taplin, *supra* note 1 (comparing AT&T's growth in the first half of the 20th century to the growth of Google, Facebook, and Amazon).

¹⁸⁴ See WU, *supra* note 27, at 97–98; Joel Stashenko, *Experts Question Effectiveness of Antitrust Approaches in Digital Economy*, LAW.COM: N.Y.L.J. (Jan. 30, 2017).

¹⁸⁵ Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC (July 13, 2017); see also WU, *supra* note 27, at 133–34.

¹⁸⁶ Khan & Vaheesan, *supra* note 21, at 286–87.

¹⁸⁷ See Stoller, *supra* note 185 ("Antitrust means protecting the family farm from Monsanto, free speech from Facebook, the community from Citibank.").

¹⁸⁸ Khan & Vaheesan, *supra* note 21, at 287 & n.362.

¹⁸⁹ *Id.* at 291 ("In cases in which the monopolist's power gives it a host of options to exclude competitors, enforcers and courts must address the root of the problem—the monopolist's very

Section 2 applies only to exclusionary conduct, so proposals to eliminate this requirement for antitrust enforcement would require legislative action.¹⁹⁰ If one were to set that obstacle aside, challenges to exploitative conduct, and remedies such as breaking up monopolies not created or maintained through exclusionary conduct, could theoretically be brought under a consumer welfare framework—if the standard for showing harm were based on harm to consumers (or to suppliers in cases involving monopsony power). But to the extent the standard would be based on advancing other societal interests, the proposals would fall outside the consumer welfare framework.

4. *Curtailing Vertical Integration*

Some populists criticize the current approach to antitrust for allowing harmful vertical integration, for example, by permitting firms to use dominance in one product area to capture market share in another.¹⁹¹ To address this perceived inadequacy, some populists have proposed a ban on vertical integration by “dominant” firms (including through internal expansion).¹⁹² This proposal often targets platform companies that compete in their own marketplaces, such as Amazon and Google.¹⁹³ The ban would, for example, prohibit Amazon from both running its own retail platform and the Amazon Marketplace (a retail platform for third-party sellers), and thereby prevent the company from using data collected as a third-party platform to advance its own retail sales.

One question that many of the populists’ critiques leave unanswered is whether current antitrust standards and tools could address the putative harms of vertical integration. In the United States, agencies already consider vertical issues in the merger review process¹⁹⁴, and Section 2 of the Sherman Act

existence. Rather than undertake a game of ‘whack-a-mole’ that is often beyond their institutional capabilities, they should restructure the monopolist’s business operations.”).

¹⁹⁰ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (holding that a monopolization claim requires evidence that the defendant has acquired, enhanced, or maintained monopoly power through exclusionary conduct “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”). *But see* Harry First, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L.J. 701, 704 (2019) (contending that “[c]lose[] examination of antitrust case law shows that there is no direct precedent barring the courts from finding that raising prices to an excessive level is conduct that violates Section 2 of the Sherman Act”).

¹⁹¹ *E.g.*, Khan, *supra* note 66, at 792. Populists have also been vocal about particular cases that raise vertical issues, including AT&T’s merger with Time Warner. *E.g.*, Press Release, Open Mkts. Inst., Open Markets Statement on AT&T/Time Warner Decision (June 12, 2018), openmarketsinstitute.org/open-markets-statement-att-time-warner-decision/ (praising the DOJ for challenging the transaction and calling on the DOJ to appeal Judge Leon’s decision).

¹⁹² *E.g.*, Khan, *supra* note 66, at 792; Sitaraman, *supra* note 175.

¹⁹³ See Khan, *supra* note 66, at 793–94; Sitaraman, *supra* note 175.

¹⁹⁴ See MARC JARSULIC ET AL., *supra* note 78, at 16 (“[T]he *Vertical Merger Guidelines* have not been updated since 1984, making them unrepresentative of both present economic thinking as well as current enforcement agency practice.”). In June 2020, the FTC and DOJ released final Vertical Merger Guidelines. See U.S. Dep’t of Justice & Fed. Trade Comm’n, Vertical Merger

prohibits single-firm conduct that illegally obtains or maintains a monopoly. If populists believe that existing laws cannot address harms associated with vertical integration, they should be clear when their proposed solutions depart from antitrust law entirely—i.e., are grounded in considerations other than protecting the competitive process. For example, Khan argues that her proposed limit on vertical integration has a rich history in U.S. law. She points to the Glass-Steagall Act's separation of commercial and investment banking as a prominent example.¹⁹⁵ But the rationale for the Glass-Steagall Act was not to protect competition. Instead, the law was designed to protect the safety of bank deposits from speculative investment activity.¹⁹⁶

III. CONCLUSION

Robust debate over the proper direction of antitrust enforcement is essential, and populist critiques can contribute to the rigor of that debate. At times, however, it is unclear what the debate is actually about, and overheated rhetoric—both from populists and from the antitrust establishment—can make it difficult to join issue in a productive way. Many populists have framed their critiques of current antitrust enforcement as rejecting the consumer welfare standard. Predictably, responses from the antitrust establishment have focused on defending that standard. But as we have explained, much of what populists have proposed is perfectly consistent with retaining consumer welfare as the benchmark for adjudication.

To be sure, populists would enforce the antitrust laws more aggressively. They believe that enforcement should err on the side of avoiding false negatives rather than false positives. And they are skeptical about the capacity of current antitrust tools to predict the market effects of conduct or transactions accurately, especially over the medium to long term. Accordingly, populists would rely more heavily on presumptions of anticompetitive effects or per se rules (rather than more searching inquiries into likely competitive effects) and eliminate safe harbors and other mechanisms designed to avoid deterring procompetitive behavior. But none of these ideas is necessarily inconsistent with judging conduct based on its effects on prices, output, innovation, or quality.

Of course, just because certain proposals are consistent with the consumer welfare standard does not mean they are good ones. Advocates for reform

Guidelines (June 30, 2020), www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

¹⁹⁵ See Khan, *supra* note 66, at 794–95.

¹⁹⁶ See Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.) (“An Act to provide for the safer and more effective use of the assets of banks, to regulate interbank control, to prevent the undue diversion of funds into speculative operations, and for other purposes.”).

must employ empirical evidence and reasoned argument to defend even these proposals against criticisms that they will deter robust rivalry; deprive the market of efficiencies that yield higher-quality and lower-cost products and greater innovation; or create administrability problems that are not justified by improvements in market outcomes. In responding to populist proposals, members of the antitrust establishment would do well to focus on these issues rather than on a rote defense of the consumer welfare standard. Some of the populist critiques are better developed and better grounded in economic evidence and theory than the establishment tends to acknowledge. At the same time, proposals by the antitrust establishment to address concerns about economic power indirectly, while keeping the focus on consumer welfare, deserve the populists' serious attention. These proposals—which acknowledge the problems with enforcement identified by populists but seek to show that existing tools can provide solutions—could prove a fruitful area of engagement between members of the establishment and those who reject the current framework.

As to populist proposals that would have antitrust reach beyond consumer welfare and directly pursue other objectives, we believe the burden is on the populists to make their case. Populists must respond to the prevailing view that the antitrust laws are not a panacea for addressing a broad range of societal ills; that antitrust enforcement works better when its objectives are cabined and clear; and that concerns about income inequality, general wage levels, and employment are better addressed by more tailored or sector-specific regulation.

We believe focusing the discourse on these issues will maximize the potential for today's debate to influence the common law development of antitrust in a constructive way.