Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement
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Abstract

Populist antitrust notions suddenly are fashionable again. At their core is the view that antitrust law is responsible for a myriad of purported socio-political problems plaguing society today, including but not limited to rising income inequality, declining wages, and increasing economic and political concentration. Seizing on Americans' fears about changes to the modern US economy, proponents of populist antitrust policies assert the need to fundamentally reshape how we apply our nation's competition laws in order to implement a variety of prescriptions necessary to remedy these perceived social ills. The proposals are varied and expansive but have the unifying theme of returning antitrust to the "big-is-bad" enforcement era prevalent in the first half of the twentieth century.

But the criticisms populist antitrust proponents raise are generally unsupported and often dramatized, and the resulting policy proposals are, accordingly, fatally flawed. There is sparse evidence today suggesting that the underlying trends these critics purportedly identify are real or in any way linked to lax antitrust enforcement. Ironically, populist antitrust proponents ignore that antitrust law debated over 50 years ago the same proposals that they are raising anew today. At that time, leading jurists, economists, enforcers, and practitioners from across the political spectrum rejected the use of liability standards that seek to evaluate a variety of vague and often contradictory socio-political goals or that condemn conduct based simply on the size of a company. They recognized that these tests led to incoherent and paradoxical results that often did more to hinder than to promote competition by undermining the rule of law and fostering corporate welfare. Instead, antitrust evolved the elegant "consumer welfare standard" that simplified the core issue of what constitutes harm to competition into a straightforward question: does the conduct at issue harm consumers?

Today, the consumer welfare standard offers a rigorous, objective, and evidence-based framework for antitrust analysis. It leverages developments in modern economics more reliably to predict when conduct is likely to harm consumers as a result of harm to competition. It offers a tractable test that is broad enough to contemplate a variety of evidence related to consumer welfare but also sufficiently objective and clear to cabin discretion and honor the principle of the rule of law. Perhaps most significantly, it is inherently an economic approach to antitrust that benefits from new economic learning and

is capable of evaluating an evolving set of commercial practices and business models. These virtues are precisely the target of the new populist antitrust movement, which seeks to reject economics in favor of mere supposition.

This Article makes the case in support of the current consumer welfare standard and against a sweeping set of unsupported populist antitrust reforms. There is significant room for debate within the consumer welfare model for what types of conduct should face antitrust scrutiny, what evidence is relevant, and where liability standards should be drawn. Such debate is healthy and to the benefit of antitrust enforcement. But it does not require abandoning decades of experience and economic learning that would turn back the hands of time and return us to an era where antitrust enforcement was incoherent and deleterious.

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