ICLE International Center for Law & Economics

## FTC Hearings on Competition & Consumer Protection in the 21st Century

*FTC Project No. P181201*

# Comments of International Center for Law & Economics:

## *Antitrust Principles and Evidence-Based Antitrust Under the Consumer Welfare Standard*

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We thank the Commission for the opportunity to comment on "Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201."

The International Center for Law and Economics (ICLE) is a nonprofit, nonpartisan research center whose work promotes the use of law & economics methodologies to inform public policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth.[1]

ICLE's scholars have written extensively on competition and consumer protection policy. Some of our writings are included as references in the comment below. Additional materials may be found at our website: www.laweconcenter.org.

In this comment, we primarily address the fourth topic raised by the Commission ("Antitrust law and the consumer welfare standard"). Our comments also speak to several other questions, including specifically:

1. Competition and consumer protection issues in communication, information, and media technology networks;
2. The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring "platform" businesses;
3. The intersection between privacy, big data, and competition;
4. The Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters; and
5. Evaluating the competitive effects of corporate acquisitions and mergers.

We do so in part through the lens of history, in part through the lens of contemporary economic analysis. In section I, we look at the history and evolution of antitrust policy. In Section II, we consider the continued vitality of the consumer welfare standard. In Section III, we discuss the importance of economically grounded, evidence based antitrust.

By combining lessons from the history of antitrust policy and contemporary economics, we hope that our analysis helps to elucidate the key issues faced by the Commission as it deliberates on the future of antitrust policy.

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## I. Introduction

In 1995, then-FTC-Chairman Pitofsky convened a set of hearings — the Global Competition and Innovation hearings ("Pitofsky Hearings") — aimed at investigating the implications for antitrust law, economics, and policy of "increasing globalization and rapid innovation."[2] As the Pitofsky Hearings report noted:

> These changes create new possibilities and raise new problems for consumers, businesses, and government agencies. It is in everyone's interest that government understand these developments in order to make sure that the marketplace continues to work competitively for businesses and consumers.[3]

Two decades later — a near eternity in Internet time — the same changes are proceeding apace, and the need for greater understanding remains; arguably, it is even more acute today.

By the 1990s, the global marketplace had already grown dramatically, and technology startups were beginning to test new regulatory and legal fault lines. Today we face an even-more-tightly integrated world market, along with the intensification of international tariff disputes, the creative imposition of non-tariff trade barriers (including antitrust enforcement), and the increased brazenness of politicized industrial policy implementation that expanded global competition brings.

Meanwhile, several of the tech companies that were at most fledglings (if they existed at all) in 1995 have grown to become some of the most highly valued companies in the world. Their success — and the dramatic evolution of the world economy it has brought about — has engendered a new wave of hand wringing over firm size, industry structure, the social consequences of economic and technological change, and the proper role of antitrust and consumer protection law in addressing them.

Chairman Simon and the Commission should be commended for undertaking these hearings. Greater understanding of the antitrust and consumer protection implications of significant economic developments is always welcome. In particular, there remains much about the welfare implications of competition policy decisions surrounding innovation that we still don't understand.[4]

Yet, while some of the business, economic, and legal specifics are novel, important, and worthy of investigation, the core *policy* issues we face today are nothing new, and they weren't new even in the

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[2] FED. TRADE COMM'N STAFF, ANTICIPATING THE 21 ST CENTURY: COMPETITION AND CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, VOL. I (1996) at 1, *available at* https://www.ftc.gov/reports/anticipating-21st-century-competition-consumer-protection-policy-new-high-tech-global.

[3] *Id.*

[4] *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L. J. 1, 22 (2007) ("The literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role.").

1990s. The innovation that drives economic growth, while generally beneficial, nonetheless inevitably causes adverse effects for *some* businesses and/or the interests of *some* social commentators, and this has resulted in attempts to politicize antitrust in order to protect those businesses and/or social interests. What is troubling is how little we seem to remember of what we *do* know, even as slightly different versions of the same antitrust debates continue to recur.

Fundamentally, what we know is this: First, unless and until a demonstrably better alternative is offered (and none has been, either today or over the course of antitrust's 100-year history), the consumer welfare standard — warts and all — is the appropriate touchstone for antitrust enforcement and adjudication. Whether specific firm conduct or enforcement decisions promote consumer welfare is, of course, always up for discussion. But that antitrust law, enforcement decisions, and policy should not intentionally incorporate or be informed by inherently idiosyncratic and inevitably politicized public policy preferences is beyond doubt.

Second, competition and consumer protection policy should be economically grounded and evidence-based. Similarly, decisions regarding policy *changes* should be based on rigorous, economically robust, and constantly tested empirical knowledge. But it is insufficient to point to even well-supported empirical claims regarding aggregated market effects or specific case outcomes as the basis for (often-dramatic) policy prescriptions. Rather, decisions regarding competition and consumer protection policy must be undertaken with a robust understanding of the institutional structures and agency processes by which they are implemented.

Arguments abound that we should ratchet up antitrust and consumer protection enforcement in various ways in order to tackle hot-button issues like excessive concentration, insufficient privacy protection, fake-news, wealth inequality, and the like. But few of them rest on solid empirical evidence, and fewer still (if any) seriously address whether or how defects in policy and enforcement decisionmaking processes may have led to the claimed problems and whether or how altering those processes would correct them. Such arguments should not simply be ignored, but nor should they be taken seriously unless and until they are rigorously supported by economic, empirical, and institutional analysis.

### A. Lessons from History: the Industrial Reorganization Act and the Rejection of the Structure-Conduct-Performance Paradigm

We have, of course, been debating these matters throughout the course of antitrust and consumer protection history. As judicial doctrine and regulatory policy have evolved over the past century to incorporate our better (but still far from perfect) understanding of industrial organization and the consequences of antitrust enforcement, they have moved generally toward, rather than away from economically grounded policies aimed at the protection and promotion of consumer welfare. And yet, throughout that time, presumptions at odds with economic learning and empirical evidence, and preferences to defend politically favored stakeholders (or to "defend" antitrust from the asserted political power of large corporations) have repeatedly crept back into the discussion.

To take just one egregious episode, in 1973, Michigan Senator Philip Hart introduced Senate Bill 1167, the Industrial Reorganization Act,[5] in order to address perceived problems arising from industrial concentration. Among other things — and most remarkably, given Hart's assertion that the bill was offered as "an alternative to government regulation and control"[6] — the bill would have required the creation of an "Industrial Reorganization Commission" to "study the structure, performance, and control" of seven "priority" industries,[7] and, for each, to:

> develop a plan of reorganization… whether or not any corporation [was determined to possess monopoly power]. In developing a plan of reorganization for any industry, the Commission shall determine for each; such industry —
>
> (A) The maximum feasible number of competitors at every level without the loss of substantial economies;
> (B) The minimum feasible degree of vertical integration without the loss of substantial economies; and
> (C) The maximum feasible degree of ease of entry at every level.[8]

The bill was grounded in the belief that industry concentration led inexorably to monopoly power; that monopoly power, *however obtained*, posed an inexorable threat to freedom and prosperity; and that the antitrust laws were insufficient to address the purported problems. Thus the preamble to the Industrial Reorganization Act asserts that:

> [C]ompetition… preserves a democratic society, and provides an opportunity for a more equitable distribution of wealth while avoiding the undue concentration of economic, social, and political power; [and] the decline of competition in industries with oligopoly or monopoly power has contributed to unemployment, inflation, inefficiency, an underutilization of economic capacity, and the decline of exports….[9]

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[5] Industrial Reorganization Act, S. 1167, 93rd Cong., 1st Sess. (1973).

[6] Philip A. Hart, *Restructuring the Oligopoly Sector: The Case for a New 'Industrial Reorganization Act'*, 5 ANTITRUST L. & ECON. REV. 35, 37 (1972) (which reprints Sen. Hart's statement, along with the text of the bill and an analysis of the bill prepared by the Senate Antitrust and Monopoly Subcommittee staff).

[7] *Id.* at Title I, § 203(a)(1).

[8] *Id.* at Title I, § 203(a)(2).

[9] *Id*. at preamble.

That sentiment — rooted in the reflexive application of the (largely-discredited[10]) structure-conduct-performance (SCP) paradigm[11] — has resurfaced today as the asserted justification for similar (although less onerous) antitrust reform legislation[12] and the general approach to antitrust analysis commonly known as "hipster antitrust."[13] Sen. Klobuchar's Consolidation Prevention and Competition Promotion Act of 2017, for example, asserts that:

> [C]oncentration that leads to market power and anticompetitive conduct makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality;
>
> undue market concentration also contributes to the consolidation of political power, undermining the health of democracy in the United States; [and]
>
> the anticompetitive effects of market power created by concentration include higher prices, lower quality, significantly less choice, reduced innovation, foreclosure of competitors, increased entry barriers, and monopsony power.[14]

Despite repeated attempts,[15] the Industrial Reorganization Act was never enacted into law. But the conversation around the proposal is instructive, as efforts to invigorate antitrust enforcement today have adopted many of the same underpinnings as those of the Industrial Reorganization Act. And a key part of the response to the bill and its claims, as reflected in Senate testimony on the proposal by Henry G. Manne, turns on the lack of empirical support for the claims upon which it rested:

> [T]he studies done to date strongly indicate that there is little or no significant correlation between industrial concentration and corporate profits. To be sure, if one selects a particular year with peculiar characteristics, the figures can be made to appear otherwise, but in general, over a significant period of time, this lack of correlation seems well substantiated....

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[10] *See generally* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, eds., 1974), and *see especially* Harold Demsetz, *Two Systems of Belief About Monopoly*, in *id*. at 164-184. *See also* Sam Peltzman, *The Gains and Losses from Industrial Concentration,* 20 J. L. & ECON. 229 (1977); Yale Brozen, *The Concentration-Collusion Doctrine,* 46 ANTITRUST L. J. 826 (1978).

[11] *See* JOE BAIN, INDUSTRIAL ORGANIZATION 372-468 (1968).

[12] *See, e.g.*, Consolidation Prevention and Competition Promotion Act, S. 1812, 115th Cong., 1st Sess. (2017).

[13] See, for example, the essays collected in the April 2018 volume of the CPI ANTITRUST CHRONICLE, "Hipster Antitrust" (Konstantin Medvedovsky, ed.), *available at* https://www.competitionpolicyinternational.com/antitrust-chronicle-hipster-antitrust/.

[14] Consolidation Prevention and Competition Promotion Act, *supra* note 12, at § 2(a)(4) - (6).

[15] Sen. Hart had previously introduced the bill under the same name in 1972 as S. 3832, 92nd Cong., 2nd Sess. (1972). Apparently he also introduced the bill in 1974 and 1975. *See* Harry First, *Woodstock Antitrust*, CPI ANTITRUST CHRONICLE (April 2018) at 1, *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-First.pdf.

> The studies referred to [] indicate that there is no causal relationship between concentration on the one hand and monopoly profit on the other. We are, it appears, as apt to find companies earning a higher than market rate of return in nonconcentrated industries as in concentrated ones.
>
> Indeed, one thing on which there is unequivocal agreement among economists… is that monopoly rates of return are realized regularly in some of the least-concentrated industries imaginable: those for personal services…. In the industrial sector on the other hand, where remedies for unproved problems abound, monopoly rates of return, when they do occur, seem unlikely to persist for a significant period of time.[16]

And as Yale Brozen so aptly put it back in 1978:

> Industries have become concentrated where that was the road to lower costs. It is these lower costs that have created temporary, above-average profitability in concentrated industries when it has occurred. Where concentration was not the road to lower costs, industries have remained unconcentrated. The market has worked surprisingly well, where it has been permitted, to conserve our resources and maximize our output. *The antitrust agencies' concentration on concentration in recent years is misdirected and should cease.*[17]

## B. Antitrust Based on Principle and Evidence, not Populist Sentiment

The state of the evidence has not, in fact, appreciably changed since the 1970s (or the 1990s), despite repeated, questionable claims to the contrary.[18]

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[16] Henry G. Manne, Testimony on the Industrial Reorganization Act before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly (Apr. 1974), *reprinted in* Henry G. Manne & Geoffrey A. Manne, *Henry G. Manne: Testimony on the Proposed Industrial Reorganization Act of 1973 – What's Hip (in Antitrust) Today Should Stay Passé*, ICLE Antitrust and Consumer Protection Research Program White Paper 2018-2, at 14-15 [hereinafter *Henry G. Manne Testimony*], *available at* https://laweconcenter.org/wp-content/uploads/2018/05/hgm-testimony_on_indust_reorg_act_1974-2018-05-03.pdf.

[17] Yale Brozen, *The Concentration-Collusion Doctrine, supra* note 10 at 856 (emphasis added).

[18] *See* Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (April 5, 2018) (*forthcoming*, ANTITRUST MAGAZINE) at 10-11, *available at* https://ssrn.com/abstract=3156912, and papers cited therein. As Werden & Froeb conclude:

> No evidence we have uncovered substantiates a broad upward trend in the market concentration in the United States, but market concentration undoubtedly has increased significantly in some sectors, such as wireless telephony. Such increases in concentration, however, do not warrant alarm or imply a failure of antitrust.
>
> Increases in market concentration are not a concern of competition policy when concentration remains low, yet low levels of concentration are being cited by those alarmed about increasing concentration…

*See also* Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, Note submitted as background material for OECD Hearing on Market Concentration, DAF/COMP/WD(2018)69 (Jun. 2018), at 9-16, *available at* http://www.oecd.org/daf/competition/market-concentration.htm; James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* (Feb. 8, 2018), *available at* https://ssrn.com/abstract=3120849 (undermining the copiously cited De Loecker and Eeckhout (2017) paper's claims of market power arising from increased

> As it stands, there is no empirical foundation on which to conclude that monopoly power is rising. To the extent that markups are increasing, other studies show that output has increased and that quality-adjusted prices have remained stable. Claims that concentration has increased at least find somewhat consistent empirical support, although the extent of those changes are up for debate. There is no reliable empirical basis, however, to support the inference that the United States economy has experienced a systematic increase in market power.[19]

Not only is there seemingly no reliable empirical support for claims that concentration necessarily leads to, or has led to, increased market power and the economic harm associated with it, but there is even less support for claims that concentration leads to the range of social ills ascribed to it by antitrust populists.

By the same token, there is little evidence that the application of law or regulation to more vigorously prohibit, shrink, or break up large companies will *correct* these asserted problems.[20] To be sure, the claims are important ones, and they deserve the sort of further investigation contemplated by these hearings. But the widespread and enthusiastic derivation of *policy prescriptions* among an increasing number of politicians, members of the press, and regulatory advocates on the basis of the existing evidence that we see is unfounded and unwise. As Josh Wright notes:

> Learning about individual case outcomes is a good thing. But it often distracts from the issue of whether agency decision-making generating policy is calibrated correctly.
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> * * *
>
> Questions about policy are concerned with process, and the evidence needed to address policy questions is different and goes beyond a determination of whether any particular

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concentration and showing that "[r]easonable calibrations accounting for the representativeness of public firms show a flat or even decreasing aggregate markup").

[19] Wright, *Towards a Better Understanding of Concentration*, *id.* at 14.

[20] *See* Werden & Froeb, *Don't Panic*, *supra* note 18 at 11:

> Moreover…, [p]rohibiting mergers does not alter the natural evolution of industry structure in which some firms thrive and grow while others languish or fail. An old literature in industrial organization economics explains that, when success and failure are random events, markets become concentrated over time.
>
> More importantly, market concentration naturally results from the growth of firms that are more innovative and efficient than their peers. A group of academics reporting increased industry concentration cite the rise of "superstar firms" as the cause of increasing concentration and as a major force reshaping the economy. But if superior skill and industry account for the spectacular success of these firms, both the competitive process and antitrust law are working as intended.

*See also* Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L. J. 361, 386 (2018) ("Kwoka has drawn inferences and reached conclusions about contemporary federal merger enforcement policy that are unjustified by his data and his methods…. His conclusions about the growing permissiveness of enforcement policies lack substantiation. Overall, we are unpersuaded that his evidence can support such broad and general policy conclusions.").

> decision was right or wrong. In order to gain a better understanding of merger policy effectiveness, we must better understand the process by which enforcers make policy generating decisions.[21]

### C. Political Antitrust: Brandeis and the Neo-Brandeisians

Starting with Justice Brandeis, and arguably even before then, lawyers and antitrust scholars struggled to incorporate a wide variety of often conflicting values into antitrust law — what Robert Pitofsky dubbed "the political content of antitrust."[22] We learned over time, however, through hard-won experience, that antitrust works best when it focuses on economically sound, empirically rooted analysis that frames its inquiry with a clear and singular goal: the welfare of consumers.

As the late, great business historian, Thomas McCraw, writes of Louis Brandeis' efforts to combat "the curse of bigness" early in the 20th century:

> Brandeis' fixation on bigness as the essence of the problem doomed to superficiality both his diagnosis and his prescription… It meant that he must argue against vertical integration and other innovations that enhanced productive efficiency and consumer welfare. It meant conversely that he must favor cartels and other loose horizontal combinations that protected individual businessmen against absorption into tight mergers but that also raised prices and lowered output. It meant that he must promote retail price fixing as a means of protecting individual wholesalers and retailers, even though consumers again suffered. It meant, finally, that he must become in significant measure not the "people's lawyer" but the spokesman of retail druggists, small shoe manufacturers, and other members of the petite bourgeoisie. These groups, like so many others throughout American history, sought to use the power of government to reverse economic forces that were threatening to render them obsolete. In Brandeis they found a talented champion.[23]

The resurgent populist antitrust — or "Neo-Brandeisian" movement — shares much in common with Brandeis and those who pushed for the Industrial Reorganization Act. And it suffers from many of the same failings. Most fundamentally: The failure to grapple with the reality that constraining firm size in an effort to promote the political and economic power of consumers or favored businesses may actually have the *opposite* of its intended effect.[24] "Indeed, some spokespersons for movement

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[21] Wright, *Towards a Better Understanding of Concentration*, *supra* note 18 at 3 & 17.

[22] Robert Pitofsky, *The Political Content of Antitrust*, 127 PENN. L. REV. 1051 (1979).

[23] THOMAS K. MCGRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN, 141 (1984).

[24] *See, e.g.*, Geoffrey Manne, *The Illiberal Vision of Neo-Brandesian Antitrust*, TRUTH ON THE MARKET (Apr. 16, 2018), https://truthonthemarket.com/2018/04/16/the-illiberal-vision-of-neo-brandeisian-antitrust/.

antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting."[25]

Even Robert Pitofsky, in his 1979 paper advocating *in favor* of incorporating political concerns into antitrust, noted that not all non-economic concerns were appropriate for consideration by antitrust enforcers:

> There are a number of non-economic concerns that can play no useful role in antitrust enforcement. These include (1) protection for small businessmen against the rigors of competition, (2) special rights for franchisees and other distributors to continuing access to a supplier's products or services regardless of the efficiency of their distribution operation and the will of the supplier (a kind of civil rights statute for distributors), and (3) income redistribution to achieve social goals.[26]

Remarkably, at least two of these (protection for small businesses and income redistribution) are now offered as core, constituent parts of the Neo-Brandeisian, populist antitrust resurgence.[27]

The truly progressive approach to antitrust — the one that acknowledges the progress made in our understanding of the most beneficial role of antitrust, with the greatest potential to advance our economy and improve society — is one that focuses on testable economic hypotheses underpinned by solid empirical evidence. This approach, adopted after more than a century of contradictory enforcement actions and judicial decisions, provides clarity and avoids the whims of politically motivated parties. Efforts to roll back the clock on antitrust to the 1960s — to Make Antitrust Groovy Again, as it were — are regressive and threaten to sacrifice the welfare of consumers for the sake of the unsubstantiated, idiosyncratic preferences of a few self-appointed guardians.

It's hard enough to predict what the future will look like as a descriptive matter. It is another matter entirely to assess what the net competitive effects will be of the unpredictable interplay of innumerable (and often unknowable) forces in a complex economy. Regulators should be reluctant to intervene in markets — and well-designed regulatory systems will constrain their discretion to do so. When they do intervene they should do so only where clear economic evidence indicates actual competitive harm or its substantial likelihood.

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[25] Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, U. of Penn, Inst. for Law & Econ. Research Paper No. 18-7 (Feb. 2018) at 3 (*forthcoming*, Notre Dame Law Review), *available at* https://ssrn.com/abstract=3097452.

[26] Robert Pitofsky, *The Political Content of Antitrust*, *supra* note 22 at 1058.

[27] *See, e.g.*, Senate Democrats, *A Better Deal: Cracking Down on Corporate Monopolies* (Jul. 2017), *available at* https://democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf. The "Better Deal" claims that "[t]he extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors." *Id.* at 1. Its proscriptions are aimed at, among other things, using competition policy to address alleged "higher prices, lower pay, the squeezing out of competition, and increasing inequality." *Id.* at 3.

## II. The Consumer Welfare Standard

The urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult to resist. Conflating size with market power, and market power with political power, many recent calls for regulation of the tech industry, in particular, and large companies everywhere are framed in antitrust terms. Senator Elizabeth Warren, to take just one example, has asserted that:

> Left unchecked, concentration will destroy innovation. Left unchecked, concentration will destroy more small companies and start-ups. Left unchecked, concentration will suck the last vestiges of economic security out of the middle class. Left unchecked, concentration will pervert our democracy into one more rigged game.[28]

For Senator Warren the antidote is clear: "it is time to do what Teddy Roosevelt did: pick up the antitrust stick again."[29] And she is not alone. A growing chorus of advocates and scholars on both the left and right have become vocal proponents of activist antitrust, confidently calling for invasive, "public-utility-style" regulation or even the dissolution of the world's most innovative companies essentially because they seem "too big." Unconstrained by a sufficient number of competitors and/or regulators, the argument goes, these firms impose all manner of alleged social harms — from fake news, to the demise of local retail, to low wages, to the veritable destruction of democracy. What is needed, they say, is industrial policy that shackles large companies or mandates more, smaller firms.

As we explore in more detail below, this view is directly contrary to the past century's experience and learning. If applied, it would effectively jettison the crown jewel of modern antitrust law — the consumer welfare standard — and return antitrust to an earlier era in which inefficient firms were protected from the burdens of competition at the expense of consumers. And in so doing it would put industrial regulation in the hands of would-be central planners, unconstrained by objective standards and with limited, if any, political accountability.

### A. A Proper Foundation for Antitrust

The years surrounding the adoption of the Sherman Act were characterized by dramatic growth in the high-tech industries of the day—manufacturing, refining, railroads, and telecommunications—as well as corporate and conglomerate consolidation. For many, the purpose of the Sherman Act was

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[28] Sen. Elizabeth Warren, *Reigniting Competition in the American Economy*, Keynote Remarks at New America's Open Markets Program Event (Jun. 2016), *available at* https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

[29] Sen. Elizabeth Warren, *Remarks*, Center for American Progress Ideas Conference (May 2017), *available at* https://www.warren.senate.gov/files/documents/2017-5-16_CAP_Ideas_Conference_Speech.pdf.

to stem this growth — to prevent *low* prices and large firms from "driving out of business the small dealers and worthy men whose lives have been spent therein."[30]

The relatively unprincipled approach to antitrust adjudication that dominated even through the 1960s eventually gave rise to serious criticism of the entire body of law.[31] A rigorous debate, led by Aaron Director at the University of Chicago, developed as scholars and lawyers sought to establish a proper foundation for antitrust laws that would lead to an analytically useful framework.[32] Director was one of the first to observe that "bigness" was an insufficient gauge for determining when firms were acting anticompetitively.[33]

Director observed that, as the law had developed, a firm that ended up growing to a large size was treated as a *monopolizer*, regardless of the causes of that growth. In many cases, such treatment was unwarranted.[34]

Reformers recognized that economic efficiency as a measure of antitrust efficacy was not merely a good in itself, but, in fact, a powerful signifier of the revealed preferences of society: An economic efficiency standard is *actually* pro-social, whereas a politically managed antitrust standard is merely *allegedly* pro-social.[35]

While significant debate over appropriate rules and standards remained among antitrust reformers, some unifying themes emerged. First and foremost, antitrust should be focused on fostering consumer welfare, without a political thumb on the scale.[36] Second, the reformers persuasively argued

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[30] U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

[31] *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under § 7, the Government always wins.").

[32] *See, e.g.*, RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed. 1981) ("Much of the economic analysis expounded in these notes is based on ideas first proposed by Director. A number of these ideas were later developed and published by other economists whose work we cite, but these citations conceal Director's seminal role in the development of the economics of competition and monopoly presented in this book."). *See also* Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282–83 (1956).

[33] Director & Levi, *id.* at 284.

[34] *Id.* at 285.

[35] *See* Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE (Dec. 1963), *reprinted in* 65 COLUM. L. REV. 363, 368 (1965).

[36] There is, of course, a debate — and confusion — over whether the exact welfare standard used in antitrust should be focused on "consumer welfare" or "total welfare." The relevant point for our purposes here is that antitrust law came to incorporate a standard solely based on economic welfare, while rejecting an ambiguous socio-political standard that shifted based on enforcement preferences.

that economic theory, empirical evidence, and the error-cost framework should guide antitrust enforcement decisions.[37]

The insistence on a rigorous economic basis for implementation of consumer-welfare-oriented antitrust provides courts with a concrete mechanism for distinguishing between good and bad conduct, based not on the effect on rival firms but on the effect on consumers. Absent such a standard, any firm could potentially be deemed to violate the antitrust laws for any act it undertakes that could impede its competitors.

By aligning legal theories of harm with economic theories and empirical evidence regarding when and how conduct was anticompetitive, rigor and predictability were introduced into the antitrust enforcement process.[38] These insights provided a coherent framework for analyzing allegedly anticompetitive conduct — and specifically for distinguishing between procompetitive and anticompetitive conduct.[39]

### B. The Problems with Political Antitrust

The adoption of the consumer welfare standard was an enormous improvement over what came before it. Yet no one would assert that every aspect of antitrust policy in furtherance of the consumer welfare standard is perfect and should remain unchanged. There will always be grounds for critique and improvement of specific policy decisions and processes. But none of these arguments undercuts the basic merits of the standard and its supremacy over alternatives.

Antitrust enforcers and courts have a difficult time as it is ensuring that their decisions actually benefit consumers. As Robert Pitofsky once said, "antitrust enforcement along economic lines already incorporates large doses of hunch, faith, and intuition."[40] But the existence of imperfections does not justify intervention that would move us further away from economic objectives. Indeed, such intervention would more than likely make the imperfections worse.

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[37] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

[38] *Id.* at 14. (Erring on the side of permitting questionable firm conduct "would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution").

[39] Thus, for example, as far back as Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911), the Supreme Court had held that an antitrust claim could be sustained on the basis of a firm merely lowering its prices with an intent to harm rivals. Ultimately, however, the courts updated antitrust doctrine to reflect economists' improved theoretical and empirical work on predatory pricing. Eventually, an economically meaningful distinction was drawn between the circumstances in which the lowering of prices (regardless of intent) was deemed procompetitive, and those in which anticompetitive effects were realistically plausible. *See* Brooke Group Limited v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).

[40] Pitofsky, *The Political Content of Antitrust*, *supra* note 22 at 1065.

When antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions, as Herbert Hovenkamp highlighted in a recent paper:

> As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete.[41]

Even with careful economic analysis, it will not always be clear how to resolve the inevitable tensions between consumer welfare and other policy preferences. In 1978, then-FTC-Chairman Michael Pertschuk laid out his vision for a "new competition policy" at the FTC. In it, he asserted that antitrust policy must consider

> the social and environmental harms produced as unwelcome by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of market-stimulated demands."[42]

It is not clear what it would mean to take account of these things in the context of anything approaching a rigorous policy framework. But even more troublingly, many, if not all of them call for a *rejection* of the core, competition-focused objective of antitrust.

For instance, Jonathan Adler has described the collision between antitrust and environmental protection in cases where, precisely because of reduced output, collusion might lead to better environmental outcomes, such as improved conservation of wild fish and other common pool resources.[43]

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[41] Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, *supra* note 25 at 3.

[42] Michael Pertschuk, *Address before the New England Antitrust Conference* (1977), *quoted in* William E. Kovacic, *1977: When Modern US Antitrust Began*, King's College London Thursday Night Lecture Series (Nov. 23, 2017), *available at* https://www.kcl.ac.uk/law/research/centres/european/KCL-Thursday-Night-Talk-Beginnings-23-November-2017.-Kovacic-slides.pdf. *See also* Ernest Gellhorn, *The New Gibberish at the FTC*, THE AMERICAN (May 1, 1978), *available at* http://www.aei.org/publication/the-new-gibberish-at-the-ftc/.

[43] Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3 (2004). Julian Morris has noted that antitrust's suspicion of competitor collusion has been, and is intrinsically, antithetical to the sort of collaboration that industry-wide environmental efforts might require. Whether this is socially desirable or not, it seems nonsensical to ask competition regulators and courts to *impede* competition as part of antitrust enforcement and adjudication. *See also* Julian Morris, *The Effect of Corporate Average Fuel Economy Standards on Consumers*, REASON FOUNDATION (Apr. 2018) at 10, *available at* https://reason.org/wp-content/uploads/2018/03/corporate-average-fuel-economy-standards-consumers.pdf.

How would a court or enforcer conceivably evaluate that trade-off? It is difficult enough to evaluate the procompetitive justifications for certain conduct already — including in somewhat similar circumstances where intrabrand price or distribution constraints, for example, may be aimed at preserving the "common pool resource" of brand value or consumer goodwill. But that difficulty is only magnified where the trade-off is between incommensurate benefits, distributed over entirely different populations, and without any operational connection between them within the firm undertaking the conduct in question.

Whatever benefits might conceivably come from giving weight to non-economic values, even just at the margin, they would inevitably come at the expense of the core, competitive values of modern antitrust. As Ernest Gellhorn noted in his masterful critique of Pertschuk's "socially conscious" vision for the FTC:

> Competitive values must be sacrificed if social values are to be given primacy — or else the new policy is nothing more than rhetoric and official deception. The second and equally important point is that the new chairman's "humanistic model" for antitrust is formless, shapeless, and unpredictable. There simply are no generally accepted "democratic and social norms" for applying the antitrust laws — and some of the new chairman's announced values are worrisome, at least to the extent they are offered as the basis for determining the shape and operation of much of our economy.
>
> The problem is that unless antitrust law has an objective and principled foundation, antitrust enforcement can become the personal plaything of enforcement personnel, or the stock in trade of lobbyists and influence-peddlers.[44]

While it is perfectly reasonable to *care* about political corruption, worker welfare, and income inequality, it is not at all reasonable to try to shoehorn goals based on these political concerns into antitrust — a body of legal doctrine whose tools are wholly inappropriate for achieving those ends. As Carl Shapiro has noted, "The fundamental danger that 21st century populism poses to antitrust is that populism will cause us to abandon this core principle and thereby undermine economic growth and deprive consumers of many of the benefits of vigorous but fair competition."[45]

Before contorting antitrust into a policy cure-all, it is important to remember that the competition-focused consumer welfare standard evolved out of sometimes good (price fixing bans) and sometimes questionable (prohibitions on output contracts) doctrines that were subject to legal trial and error. This evolution was marked by "increasing economic sophistication"[46] and a "high level of

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[44] Gellhorn, *The New Gibberish at the FTC*, *supra* note 42.

[45] Carl Shapiro, *Antitrust in a Time of Populism,* INT'L J. INDUS. ORG. (2017) (*forthcoming*) at 28, *available at* http://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

[46] Gellhorn, *The New Gibberish at the FTC*, *supra* note 42

careful analysis and insight being displayed by government agencies charged with enforcing the antitrust laws."[47] And the vector of that evolution was toward the use of antitrust as a reliable, testable, and clear set of legal principles that are ultimately subject to economic analysis, and away from politically-oriented antitrust.

When the populists ask us, for instance, to return to a time when judges could "prevent the conversion of concentrated economic power into concentrated political power"[48] via antitrust law, they are asking for much more than just adding a new gloss to existing doctrine. They are asking for us to unlearn the lessons of the twentieth century that ultimately led toward the maturation of antitrust law.

What's more, constraining firm size — the antitrust populists' catch-all, cure-all to virtually all alleged social problems — in order, ostensibly, to promote consumer political and economic power, may actually have the *opposite* effect.

To begin with, if growth in size and output are limited in order to meet political antitrust priorities, firms will seek instead to raise their profits through political influence. Erecting barriers to entry and raising rivals' costs through regulation are time-honored American political traditions,[49] and rent-seeking by smaller firms could be both more prevalent and more effective, and could, paradoxically, ultimately lead to *increased* concentration.

As a slight, but crucial, aside, it must be noted that critics of "bigness" resolutely assert a correlation between firm size and the effective exercise of political influence[50] — *e.g.:* "There is a direct connection between economic power, bigness, and political power" (Luigi Zingales); "Market power begets political power, and political power influences policy outcomes" (Diana Moss). Yet there is little evidence to suggest that such a correlation actually exists or is very strong. While it is frequently noted, for example, that Alphabet, Google's parent company, spends more on lobbying than any other *company*, it is never noted that the top eight spots are held by *associations*, at least some of which (*e.g.*, the American Medical Association) have interests that are likely antithetical to Google's. Nor is it noted that the Open Society Policy Institute holds the number four spot.[51]

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[47] *Id.*

[48] William A. Galston & Clara Hendrickson, *A Policy at Peace With Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, Brookings Institution Report (Jan. 2018), *available at* https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/.

[49] *See*, *e.g.*, James Bessen, *Lobbyists Are Behind the Rise in Corporate Profits*, HARV. BUS. REV. (May 26, 2016), https://hbr.org/2016/05/lobbyists-are-behind-the-rise-in-corporate-profits.

[50] Asher Schechter, *Is There a Case to be Made for Political Antitrust?*, PROMARKET (Apr. 28, 2017), https://promarket.org/case-made-political-antitrust/.

[51] Top Spenders, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/top.php?showYear=2018 (last visited Aug. 16, 2018).

But more to the point, size does not equal spending, and spending does not equal influence. For all the claims of massive spending and political power, the reality is that even the total of Google's lobbying spending — $11 million so far in 2018[52] — is a drop in the bucket of the annual profits of hundreds of companies. For example, 230 of the firms in the 2017 Fortune 500 had profits in excess of $1 billion. For these firms Google's *total* lobbying spending would amount to no more than 1.1% of profits, and for most of them considerably less. Targeted spending on particular issues at the same level as that of the largest companies is hardly out of reach for a huge number of firms, and not remotely out of reach for virtually every firm if acting through an association or otherwise in concert. There is just no basis to assume that size has much effect on political influence.

Moreover, many things other than dollars influence political decisionmaking, and it can hardly be said that Google, or any other large company, succeeds in all its efforts to influence politics — just as it must be acknowledged that relatively small companies, labor unions, and activist organizations often succeed in theirs.[53] As Henry G. Manne noted in his testimony on the 1973 Industrial Reorganization Act:

> There is, however, a "political" argument that should also be considered. It is that some corporations are so large that they are able to "control" the Government, presumably as it were, to "buy" the protection, the subsidy, the transportation system, the war, or whatever they want from the Government.
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> * * *
>
> Unfortunately, the energy utilized in making these assertions is about the only force behind them, and again it does not require complicated empirical studies to show the error, or perhaps the mendacity, for example, behind these assertions.
>
> Has the automobile industry, for example, been more successful in Washington than the environmentalists? Have the petroleum companies spent as much money lobbying for protective legislation as has the National Education Association? Has the steel industry received as much bounty from our seemingly universal Federal welfare system as have the elderly, the uneducated, or those stricken with a strange desire to engage in farming? One could go on like this almost endlessly. But to ask these rhetorical questions is sufficient to make the point.

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[52] *Id.*

[53] No doubt, at the margin, "small or medium size companies can rarely match the resources of a corporate leviathan in seeking government bestowed advantages." Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PENN. L. REV. 1191, 1198 (1977). But there are *a lot* of "corporate leviathans." Moreover, it must be "said that some small companies also have been adroit in securing favors from the state. The exemption which hog cholera serum producers have received from the antitrust laws is only one example. 7 U.S.C. § 852 (1970)." *Id.*

> *There is simply no correlation between the concentration ratio in an industry, or the size of its firms, and the effectiveness of the industry in the halls of Government. This scare argument about the political power of large corporations is a sham.*
>
> We all know that the institutions that influence policies in Washington are those that can deliver the votes or utilize their finances to secure votes. And these are the very practices that large corporations are relatively weakest in performing, especially as compared to unions, farmers, consumer organizations, environmentalists, and other large voting blocks.[54]

Further, by imbuing antitrust with an ill-defined set of vague political objectives, antitrust becomes a sort of "meta-legislation."[55] As a result, the return on influencing a handful of government appointments with authority over antitrust becomes huge — increasing the ability and the incentive to do so.

And finally, if the underlying basis for antitrust enforcement is extended beyond economic welfare effects, how long can we expect to resist calls to *restrain* enforcement precisely to further those goals? All of a sudden the effort and ability to get exemptions will be massively increased as the persuasiveness of the claimed justifications for those exemptions, which *already* encompass non-economic goals,[56] will be greatly enhanced. We might even find, again, that we end up with even *more* concentration because the exceptions could subsume the rules.

All of which of course highlights the fundamental, underlying problem: *If antitrust becomes more political, the outcome will be less democratic, more politically determined results* — precisely the opposite of what proponents claim to want.

The Commission's current inquiry is thus timely and highly relevant to the ongoing debate. Through these proceedings, the ongoing conversation can be focused on how best to take an effects-based, error-cost oriented approach to enhancing the consumer welfare standard.

## III. Economically Grounded, Evidence-Based Antitrust

One of the important lessons of economics in antitrust is that economic tools are uniquely capable (although still imperfectly so) of distinguishing competitive from anticompetitive conduct — the perennial challenge of (non-cartel) antitrust enforcement and adjudication. Non-economic evidence (so-called "hot docs," for example) can be counter-productive and can obscure rather than illuminate

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[54] Henry G. Manne Testimony, *supra* note 16 at 20. (Emphasis added).

[55] Geoffrey Manne, *The Antitrust Laws Are Not Some Meta-Legislation Authorizing Whatever Regulation Activists Want: Labor Market Edition*, TRUTH ON THE MARKET (Sep. 22, 2017), *available at* https://truthonthemarket.com/2017/09/22/the-antitrust-laws-are-not-some-meta-legislation-authorizing-whatever-regulation-activists-want-labor-market-edition/.

[56] *See generally* ANTITRUST MODERNIZATION COMM'N REPORT AND RECOMMENDATIONS, Chap. IV.B 333-342 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

the competitive significance of challenged conduct. A rigorous adherence to economic principles and economic reasoning is essential if antitrust enforcers are to ensure that their interventions actually benefit consumers.

Thus, a necessary corollary to reliance on the consumer welfare standard in antitrust cases is that an evidence-based approach rooted in error-cost analysis is crucial. Particularly in innovative markets where unfamiliar business strategies are attempted, and the relative knowledge of regulators and enforcers is low, it is critical to hew to an evidence-led, error-cost approach to antitrust evaluation.[57]

The error-cost framework in antitrust originates with Easterbrook's seminal analysis,[58] itself built on twin premises: first, that false positives in enforcement are more costly than false negatives because self-correction mechanisms mitigate the latter but not the former; and second, that errors of both types are inevitable, because distinguishing procompetitive conduct from anticompetitive conduct is an inherently difficult task.[59]

A key virtue of employing the error-cost framework is that it helps to avoid the bias of economists, who frequently fail to conduct their analyses in a realistic institutional setting and avoid incorporating the social costs of erroneous enforcement decisions into their recommendations for legal rules.

Antitrust over-deterrence is not costless — the losses from erroneously deterred innovative business practices may be unseen, but they function as a drag on society nonetheless. The goal of the error-cost approach is optimal enforcement that errs on the side of permitting innovative practices that might otherwise be difficult to square under existing antitrust rules.

Applying this approach, the regulator, court, or policymaker holds a prior belief about the likelihood that a specific business practice is anticompetitive. These prior beliefs are updated with new evidence either as the theoretical and empirical understanding of the practice evolves over time or with case specific information. The optimal decision rule is then based on the new, updated likelihood that the practice will be anticompetitive by minimizing a loss function measuring the social costs of Type 1 and Type 2 errors.

Innovation by definition generally involves new business practices or products — and novel business practices or innovative products have historically not been treated kindly by antitrust authorities. From an error-cost perspective, the fundamental problem is that economists have had a longstanding

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[57] *See generally* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. ECON. 153 (2010).

[58] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

[59] *Id.* at 5.

tendency to ascribe anticompetitive explanations to new forms of conduct that are not well understood. As Nobel Laureate Ronald Coase described in lamenting the state of the industrial organization literature:

> [I]f an economist finds something — a business practice of one sort or another — that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of understandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.[60]

The task of distinguishing anticompetitive behavior from pro-competitive behavior is a herculean one imposed on enforcers and judges and, even when economists get it right before a practice is litigated, some error is inevitable. The power of the error-cost framework is that it encourages regulators, judges and policy makers to harness the power of economics, and the state-of-the-art theory and evidence, into the formulation of simple and sensible filters and safe harbors rather than to convert themselves into amateur econometricians, game theorists, or behaviorists.[61]

### A. Rejecting intent evidence in antitrust analysis

It is beyond dispute that getting antitrust adjudication right is difficult. Above all, it is a tall order to expect courts (or enforcers, or even the businesspeople whose decisions are at issue) to fully grasp the actual, broad economic effect of the conduct at issue or their decisions regarding it. Even so, however, it does not follow that we should abandon the attempt to achieve principled, accurate, economically rigorous adjudication by pursuing decisions based on more-accessible, yet less-probative, evidence.[62]

Reliance by courts and regulators on accounting information, business rhetoric and, in particular, expressions of intent to "prove" antitrust violations is misplaced. Meanwhile, the likelihood of error resulting from the use of business documents is substantial. Nevertheless, there is a regulatory and

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[60] Ronald Coase, *Industrial Organization: A Proposal for Research*, in POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION (Victor R. Fuchs, ed., 1972). For more modern critiques of the industrial organization literature in the same vein, *see* Timothy J. Muris, *Economics and Antitrust*, 5 GEO. MASON. L. REV. 303 (1997), Bruce H. Kobayashi, *Game Theory and Antitrust: A Post Mortem*, 5 GEO. MASON L. REV. 411 (1997) (reviewing critiques of the IO literature); David S. Evans & Jorge Padilla, *Neo-Chicago Approach to Unilateral Practices*, 72 U. CHI. L. REV. 73 (2005).

[61] Indeed, one of the most powerful implications of the error-cost framework is one that creates some tension for economically minded antitrust scholars. The implication is that a movement towards sophisticated rule of reason standards that attempt to determine fully the competitive effects of a given practice on a case-by-case basis with modern economic tools, a movement many antitrust economists support, is likely to increase error costs if sufficient attention is not paid to the administrability of the tests.

[62] As Justice Holmes observed, "[i]f justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 48 (1880).

scholarly effort to bring business documents and business rhetoric to bear in proving antitrust cases.[63]

Recently, at a conference on tech, media, and telecom competition, the moderator, Teddy Downey of the Capitol Forum, asked: if the price and output aims of the consumer welfare standard were abandoned, what evidence would be relied upon instead?[64] Former FCC general counsel and former Antitrust Division AAG Jonathan Sallet's answer was that antitrust decisionmaking would rely on *rhetoric* in lieu of economic evidence:

> There's a lot of evidence about what companies actually think from presentations to boards of directors, for example… When you are preparing a case to go to court you are looking to demonstrate that the Sherman Act or the Clayton Act, neither of which uses price as the only form of harm, is going to be violated. And you look of course to econometric and economic testimony, *but you also look to what the parties say*. And over and over again, in my experience with both agencies, we would see circumstances where economists would come in and say a certain set of facts had to be true as a matter of economic theory, and they were powerful in the presentations and the economic theory was sound. *But when one actually looked at the documents of what the corporations believed it's not what the corporations believed and more importantly it wasn't what they were doing.*[65]

But this approach has a "the light's better over here" feel to it.[66] It is undoubtedly easier to "discover" relevant markets and anticompetitive behavior by inferences from business language than it is from rigorous economic analysis. Regulators and courts (to say nothing of juries) are moved by business rhetoric. But it is not clear that business rhetoric bears much relationship to economic reality. Business managers are not, generally, economists; nor are they antitrust lawyers. Accounting, accountability, personal incentives and other concerns that do not relate in an obvious way to the maximization of the firm's profits influence the daily operation of business — and the language of business — far more than do underlying economic and legal concepts.[67]

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[63] *See, e.g.*, Maurice E. Stucke, *Is Intent Relevant?*, 8 J. L. ECON. & POL'Y 801, 831 (2012) ("Excluding intent evidence also increases the risk of false positives. Intent evidence can be very helpful when the defendants are not primarily motivated by profits and objectively determining the restraints' overall welfare effects is difficult")

[64] The Fourth Annual Tech, Media, & Telecom Competition Conference, Capitol Forum (Dec. 13, 2017).

[65] *Merger Policy for Tech Giants and Broadband Providers Panel*, The Fourth Annual Tech, Media, & Telecom Competition Conference, Capitol Forum (Dec. 13, 2017) (emphasis added) https://youtu.be/OmBaqNsO7tU?t=51m12s

[66] *See* Ronald A. Cass, *Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough for Government Work?*, 21 LAW & POL'Y INT'L BUS. 609, 618 n. 40 (1990) (commenting on the use of accounting data in dumping cases and likening it to "the joke about the drunk looking for his car keys not where he dropped them but under the lamppost where the light is better").

[67] On this point, and for this section generally, see Geoffrey A. Manne & E. Marcelus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005), upon which many of the points here are based.

Antitrust law must chart a narrow course between fostering and restraining competition. Because the same economic activity can have desirable or undesirable consequences depending on the circumstances, by its nature antitrust analysis is constrained to outlaw not specific conduct, but rather *conduct that has specific economic consequences*.[68]

Identifying conduct that has — or is likely to have in the future — anticompetitive effect is difficult. It is an inherently economic exercise, and one that is somewhat at odds with the courts' traditional reliance in other civil and criminal law contexts on documentary evidence to demonstrate whether a proscribed action took place or whether the actor possessed the requisite degree of culpability in undertaking it. "There is a significant distinction between the reliability of evidence used to demonstrate that an actor engaged in specific, intended conduct, and evidence used to demonstrate that an actor's conduct had a particular, economic, and legal effect."[69]

At the same time, the effort to identify business documents to make out an antitrust case is extremely burdensome.

> [S]earching out intent tends to make antitrust litigation interminable with the massive discovery or trial that threatens to overburden the system.... [E]ven seemingly irrelevant fragments are introduced in the hope that they might add up to something. Even worse, emphasizing purpose frequently masks a failure to analyze the conduct.[70]

But the real concern is not the cost of obtaining these documents per se (although that is itself a very real problem).[71] Rather, the issue is in the use of these documents in the perennial quest for the smoking gun: the "hot doc" that makes the case. The problem is that the analytical value of such documents is often quite limited, even though their persuasive value is often quite substantial. As George Benston frequently noted, business documents and public filings containing accounting data "are useful for internal control, but are not designed or often useful for the measurements demanded by economists and lawyers."[72]

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[68] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) ("It takes economists years, sometimes decades, to understand why certain business practices work, to determine whether they work because of increased efficiency or exclusion."). *See also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-95 (1986) (antitrust violation may not be inferred from conduct that potentially has both procompetitive and anticompetitive effects).

[69] Manne & Williamson, *Hot Docs vs. Cold Economics*, *supra* note 67 at 647.

[70] 7 PHILLIP E. AREEDA, ANTITRUST LAW §1506 (p. 393) (1986)

[71] Compliance with Hart-Scott-Rodino is notoriously costly: "despite some FTC and DOJ efforts to reduce burdens, second request compliance costs remain very high, averaging $4.3 million." Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, 14(3) ABA SECTION ON ANTITRUST LAW THRESHOLD NEWSLETTER 26, 33 (Summer 2014).

[72] George J. Benston, *Accounting Numbers and Economic Values*, 27 ANTITRUST BULL. 161, 162 (1982).

For example, firms routinely designate "markets" in their business documents. Antitrust regulators and plaintiffs, given the green light by the Supreme Court's *Brown Shoe* decision,[73] often use this business language to make out their product and geographic market definitions, even though the "market" identified by the business may bear little or no resemblance to an economically-relevant market defined by the tests mandated by the courts and by the antitrust agencies' merger guidelines.[74] Antitrust cases can turn on whether the courts accept such use of business language, and thus "what is said in a company's documents may shape its destiny in an antitrust or unfair competition case."[75]

To be sure, business documents can be legitimately useful to regulators, such as when they contribute to an appropriate — and appropriately-economic — market analysis. They may also provide a basic picture of the industry under scrutiny. However, some uses of these documents — particularly to demonstrate economic consequences — are *not* appropriate:

> [I]n many cases, antitrust regulators and plaintiffs attribute unjustified economic and legal significance to the language of corporate managers. The consequence is that regulators and courts are writing out the economic underpinning of the antitrust laws and substituting rhetoric and unreliable accounting instead. This may lead to misguided enforcement that chills the competitive activity that antitrust is intended to foster.[76]

### *1. The* AT&T/Time-Warner *merger decision: The correct approach to non-economic evidence*

Seemingly recognizing precisely this problem, the court in the AT&T/Time Warner merger took a decisive turn away from musings, speculation, and words of corporate managers and moved toward a more rigorous analysis of the models and data supporting the economic analysis of the merger.[77] Virtually the entirety of the court's substantive analysis comes under headings like "Defendants' Own Statements and Documents Provide Little Support for the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger," or "The Evidence Is Insufficient to Support the Inputs and Assumptions Incorporated into Professor Shapiro's Bargaining Model"[78] — all of them detailing how it was inappropriate to draw economic conclusions from the relied-upon, non-economic evidence.

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[73] Brown Shoe v. United States, 370 U.S. 294 (1962).

[74] U.S. Dep't. of Justice & Fed. Trade Comm'm, *Horizontal Merger Guidelines* (Aug. 2010) *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (last visited Aug. 15, 2018)

[75] Don T. Hibner Jr. & Suzanne B. Drennon, *What Lawyers Should Know About Markets: The Good, The Bad and The Ugly*, 50 FED. LAW. 38 (Mar./Apr. 2003).

[76] *See* Manne & Williamson, *Hot Docs vs. Cold Economics*, *supra* note 67 at 613.

[77] United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018).

[78] *Id.* at 166.

To begin with, the court rejected the implicit claim that the government need demonstrate only that harmful conduct was *possible* (arguably provable by reference only to statements of intention by the parties), not that harm was *likely* to result from their conduct (a demonstration that would require assessment of likely economic consequences, rather than mere inferences based on the parties' intent):

> The Government appears to suggest that incentive to engage in anticompetitive conduct — without any demonstration as to the probability of acting on that incentive — is sufficient reason to block a proposed merger. This proposition seems impossible to square with the legal standards governing Section 7 actions, which require a probability of anticompetitive effects.[79]

But even more to the point, the court rejected the government's economic conclusions based on statements of possibility and even intent offered by the defendants:

> [E]vidence indicating defendants' recognition that it could be possible to act in accordance with the Government's theories of harm is a far cry from evidence that the merged company is likely to do so (much less succeed in generating anticompetitive harms as a result).[80]

It further rejected the inference of anticompetitive outcomes from the presentation of evidence without intrinsic economic consequences:

> As with its primary, increased-leverage claim of harm, the Antitrust Division decided to spill most of its ink developing undisputed facts — HBO is popular, valuable, and an effective promotional tool.... *It did not, however, come to Court with economic evidence of any kind, and proffered only bare conjecture about how there may be "like a thumb on the scale" in favor of the Government's promotion-withholding stratagem.* As such, the Government's evidence is too thin a reed for this Court to find that AT&T has, in that well-worn turn-of-phrase, either the "incentive" or the "ability" to withhold HBO promotional rights in order to "lessen competition substantially." For these reasons, it is small wonder that Professor Shapiro himself refused to endorse the theory, testifying that, in his view as an economist, such a ploy "[o]n its own... would not have such a big impact, that it would substantially lessen competition."[81]

Similarly, the court rejected the government's conclusions drawn from survey data of how consumers would respond to AT&T's conduct if it followed the government's predicted path, again undercutting the claims of anticompetitive effect based on these assumptions:

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[79] *Id.* at 252.

[80] *Id.* at 210.

[81] *Id.* at 252 (emphasis added).

> Academic literature cited by both [the Defendants' and the government's experts] establishes that the average correlation for predictions of [actual conduct based on expressions of intent in surveys] falls between .3 and .6. [The government's expert], nonetheless, purports to assign a correlation value of 1.0, that is, a perfect linear association where intent predicts behavior virtually every time. And even that unsupported correlation "basically disappears" when respondents are asked to predict their behavior with respect to new products or situations.[82]

Conversely — and appropriately — the court did give greater weight to the merging parties' economic expert's analysis of third-party pricing data, using a variety of statistical techniques:

> Defendants, by contrast, did seek to analyze the available pricing data resulting from prior instances of vertical integration. Although they initially had trouble obtaining some of the relevant pricing data from the Government or third-parties… they were eventually able to obtain the data after seeking relief from this Court. Defendants' lead economic expert, Professor Dennis Carlton, then analyzed that third-party pricing data, among other proprietary and public-source data in his possession to test whether it is "true that content prices are higher on a network when it's sold by someone who's vertically integrated."[83]

Notably, the court did not simply accept the defendants' assertions of economic effects (even those derived from econometric analysis) based on analogous, though distinct circumstances — which also fail to demonstrate conclusively that the predicted effects will arise in different circumstance. Nevertheless, the probative value of that sort of analysis compared to that of the government's far-less-economically meaningful evidence was clear:

> To be sure, neither Professor Carlton's econometric analysis nor the testimony discussed above provides "perfect evidence" of what will happen as a result of the challenged merger. But when weighed against the relatively weak documentary and third-party testimonial evidence proffered by the Government in support of its increased-leverage theory, the real-world evidence indicating that vertical integration has not affected content prices or affiliate negotiations further undermines the persuasiveness of the Government's proof.[84]

There are perfectly good reasons to expect to see "bad" documents in business settings even when there is no antitrust violation lurking behind them. Indeed, the very ubiquity of "hot docs" supports the notion that that they are often meaningless from an antitrust perspective. Just as, without evi-

[82] *Id.* at 233-34.

[83] *Id.* at 215–16.

[84] *Id.* at 219.

dence of effect, "ordinary marketing methods available to all in the market" are not anticompetitive,[85] so, too, ordinary rhetoric used by all in the market should not be deemed anticompetitive, either.

## IV. Conclusion

Thank you for the opportunity to comment on these important and timely issues. We look forward to participating in the upcoming hearings, providing further comments on the important topics they will address, and working with the Commission to promote competition, innovation, and the welfare of consumers.

[85] Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 93 (2d Cir. 1981).