

# Should Antitrust Enforcement Account for Socially Desirable, but Otherwise Anticompetitive, Objectives?

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Arguments abound that we should reform 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 decision-making 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.

### LESSON 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,<sup>1</sup> 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”<sup>2</sup> – the bill would have required

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<sup>1</sup> Industrial Reorganization Act, S. 1167, 93rd Cong., 1<sup>st</sup> Sess. (1973).

<sup>2</sup> 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).

the creation of an “Industrial Reorganization Commission” to “study the structure, performance, and control” of seven “priority” industries,<sup>3</sup> 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.<sup>4</sup>

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....<sup>5</sup>

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<sup>3</sup> *Id.* at Title I, § 203(a)(1).

<sup>4</sup> *Id.* at Title I, § 203(a)(2).

<sup>5</sup> *Id.* at preamble.

That sentiment – rooted in the reflexive application of the (largely-discredited<sup>6</sup>) structure-conduct-performance (SCP) paradigm<sup>7</sup> – has resurfaced today as the asserted justification for similar (although less onerous) antitrust reform legislation<sup>8</sup> and the general approach to antitrust analysis commonly known as “hipster antitrust.”<sup>9</sup> 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.<sup>10</sup>

Despite repeated attempts,<sup>11</sup> 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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<sup>6</sup> 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).

<sup>7</sup> See JOE BAIN, *INDUSTRIAL ORGANIZATION* 372-468 (1968).

<sup>8</sup> See, e.g., Consolidation Prevention and Competition Promotion Act, S. 1812, 115th Cong., 1st Sess. (2017).

<sup>9</sup> 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/>.

<sup>10</sup> Consolidation Prevention and Competition Promotion Act, *supra* note 8, at § 2(a)(4) - (6).

<sup>11</sup> 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.<sup>12</sup>

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.*<sup>13</sup>

### **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.<sup>14</sup>

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<sup>12</sup> 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](https://laweconcenter.org/wp-content/uploads/2018/05/hgm-testimony_on_indust_reorg_act_1974-2018-05-03.pdf).

<sup>13</sup> Yale Brozen, *The Concentration-Collusion Doctrine*, *supra* note 6 at 856 (emphasis added).

<sup>14</sup> 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...

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.<sup>15</sup>

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.<sup>16</sup> 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:

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

<sup>15</sup> Wright, *Towards a Better Understanding of Concentration*, *id.* at 14.

<sup>16</sup> See Werden & Froeb, *Don't Panic*, *supra* note 14 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.").

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 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.<sup>17</sup>

### **A. 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.”<sup>18</sup> 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 20<sup>th</sup> 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.<sup>19</sup>

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

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<sup>17</sup> Wright, *Towards a Better Understanding of Concentration*, *supra* note 14 at 3 & 17.

<sup>18</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 PENN. L. REV. 1051 (1979).

<sup>19</sup> THOMAS K. MCGRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN*, 141 (1984).

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.<sup>20</sup> “Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.”<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

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.

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<sup>20</sup> See, e.g., Geoffrey Manne, *The Illiberal Vision of Neo-Brandeisian Antitrust*, TRUTH ON THE MARKET (Apr. 16, 2018), <https://truthonthemarket.com/2018/04/16/the-illiberal-vision-of-neo-brandeisian-antitrust/>.

<sup>21</sup> 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>.

<sup>22</sup> Robert Pitofsky, *The Political Content of Antitrust*, *supra* note 18 at 1058.

<sup>23</sup> 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.

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.

### THE PROBLEMS WITH POLITICAL ANTITRUST

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 in her recent presidential bid, to take just one example, 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.<sup>24</sup>

For Senator Warren the antidote is clear: “it is time to do what Teddy Roosevelt did: pick up the antitrust stick again.”<sup>25</sup> 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.

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.

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<sup>24</sup> 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](https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf).

<sup>25</sup> 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](https://www.warren.senate.gov/files/documents/2017-5-16_CAP_Ideas_Conference_Speech.pdf).

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.”<sup>26</sup> 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.

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.<sup>27</sup>

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 anti-trust 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.”<sup>28</sup>

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.

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<sup>26</sup> Pitofsky, *The Political Content of Antitrust*, *supra* note 18 at 1065.

<sup>27</sup> Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, *supra* note 21 at 3.

<sup>28</sup> 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/>.

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.<sup>29</sup> 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.<sup>30</sup>

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

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<sup>29</sup> 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>.

<sup>30</sup> Gellhorn, *The New Gibberish at the FTC*, *supra* note 28.

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.”<sup>31</sup>

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”<sup>32</sup> and a “high level of careful analysis and insight being displayed by government agencies charged with enforcing the antitrust laws.”<sup>33</sup> 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”<sup>34</sup> 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,<sup>35</sup> and rent-seeking by smaller firms could be both more prevalent and more effective, and could, paradoxically, ultimately lead to *increased* concentration.

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<sup>31</sup> 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>.

<sup>32</sup> Gellhorn, *The New Gibberish at the FTC*, *supra* note 28

<sup>33</sup> *Id.*

<sup>34</sup> 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/>.

<sup>35</sup> 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>.

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<sup>36</sup> – 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 Center holds the number two spot.<sup>37</sup>

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 – \$12.8 million in 2019,<sup>38</sup> e.g. – is a drop in the bucket of the annual profits of hundreds of companies. For example, 262 of the firms in the 2019 Fortune 500 had profits in excess of \$1 billion. For these firms Google’s *total* lobbying spending would amount to no more than 1.3% 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 decision-making, 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.<sup>39</sup> 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

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<sup>36</sup> Asher Schechter, *Is There a Case to be Made for Political Antitrust?*, PROMARKET (Apr. 28, 2017), <https://promarket.org/case-made-political-antitrust/>.

<sup>37</sup> Top Spenders, OPENSECRETS.ORG, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2019> (last visited Feb. 10, 2021).

<sup>38</sup> *Id.*

<sup>39</sup> 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.*

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.

*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.<sup>40</sup>

Further, by imbuing antitrust with an ill-defined set of vague political objectives, antitrust becomes a sort of “meta-legislation.”<sup>41</sup> 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

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<sup>40</sup> Henry G. Manne Testimony, *supra* note 12 at 20. (Emphasis added).

<sup>41</sup> 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/>.

goals,<sup>42</sup> 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.

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<sup>42</sup> 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](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).