Will Antitrust Become Progressive?

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Introduction

Populism has staked its claim in American antitrust policy. While it has not yet significantly influenced the federal judiciary, it does have a presence in the antitrust enforcement Agencies. At this point, however, the populist antimonopoly movement has provided few new ideas. It has mainly exhumed policies from a half century or more ago. These include moving merger policy back to the 1960s, reviving the Robinson-Patman Act of the 1930s-1970s, reinstating aggressive per se rules against vertical restraints from the 1960s and 1970s, calling for breakups in concentrated industries that harken back to the “Concentrated Industries” proposals of the late 1960s,¹ and even returning antitrust policy to some imagined earlier state that was ignorant of economics. The movement needs to evolve if it is to survive.

Unrest in the current period invites comparisons with the Gilded Age and early twentieth century. During that period Populism and Progressivism were two ways that American thought and policy responded to fundamental changes in society and the economy.² The responses reflected a shift from a rural to more urban population, the dramatic rise of new technologies and corresponding growth of large firms, changing employment relationships and wealth distribution, and expanding demands for technical and scientific training.

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²On populism, see Federico Finchelstein, From Fascism to Populism in History (Univ. Cal. Press, 2019); on Progressivism, see Ronald J. Pestritto, America Transformed: The Rise and legacy of American Progressivism (Encounter, 2021).
Although their political and intellectual ideas often overlapped, Populists and Progressives were more notable for their differences. Populism became a prominent force in Gilded Age political movements, confronting the railroads and other institutions of big business and finance. Its roots were agrarian, heavily driven by a romanticized vision of the past. Progressivism was demographically more urban. Populism could be strongly anti-intellectual and exhibited a tendency toward demagoguery. Progressivism was more prominent among better educated Americans and claimed a strong presence in American universities. It was much less enamored of the past and more forward looking.

A good illustration of the divide between populists and progressives in the early twentieth century was the Darwinian theory of evolution by natural selection. In the often-storied “monkey” trial in 1925, high school teacher John T. Scopes had been indicted for teaching evolution in violation of the Butler Act, a Tennessee statute that forbade it. Populist politician William Jennings Bryan joined the prosecutors and argued what he believed to be the biblical view that people were created by God as a species, identical to the human beings of the present day. Against him was defense attorney and Progressive Clarence Darrow, defending evolution.3

Two powerful themes in populist thought were reaction and anti-expert bias. For the numerous Christian populists of the 1920s this presented as a strong form of Biblical literalism, or the idea that an ancient text should take precedence over anything that science might produce – even to the point of forcing it on people through legislation.

In sharp contrast, the Progressives gave us three forward-looking scientific methodologies that have proven to be durable and even essential to this day. One was marginalism in economics, which Progressives embraced with enthusiasm, whether or not they can

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legitimately claim to have invented it. Its most visible American promoter in the early twentieth century was Progressive John Bates Clark of Columbia University, who was also a major contributor to the framing of the Clayton Antitrust Act, a statute that could never have been invented by populists. Marginalism transformed economics from a backward-looking to a forward-looking discipline. Value inhered not in averages taken from the past, but rather in human anticipation of the next thing. The marginalist revolution was so pervasive that even today the vast majority of economists, right, center, and left, adhere to some form of marginalist analysis. Those who reject it have been relegated to the smallest of niches.

The difference between classical and marginalist economics was prominently displayed in the economic dispute about labor and wages. Traditional political economists adhered to the “wage-fund” theory, which stated that wages were dictated by a firm’s previously earned surplus, which had to be divided among workers. Progressives, by contrast, believed that the rate of wages should be based on a worker’s “marginal contribution,” or the anticipated amount that a worker contributed to the value of the enterprise. The classical theory of wages tended to drive them toward subsistence, while the marginalist theory focused on marginal value, which was much greater. Marginalism led Progressives like Clark to support labor unions and collective bargaining, even though he understood it to be a form of collusion.

The Progressives also gave us two durable tools of social science. One was “cultural relativism,” or rejection of the anthropological idea that humanity existed in a hierarchy with Caucasians at the top. Cultural relativism progressed slowly and with

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8Franz Boas, The Mind of Primitive Man (1911).
difficulty through American social science, resisting strongly racist elements in early Progressive thought. The second tool was behaviorism, or the idea that human response is driven by the environment and must be understood by reference to observable and testable behavior, not by unverifiable assumptions about human nature.

Applying these new methods required technical training, or expertise. While populists were deeply suspicious of experts, progressives embraced them. Progressivism was popular in American universities. The rise of the social sciences as a university discipline is a Progressive phenomenon. So was the development of “economics,” which replaced “political economy,” a staunchly laisser faire discipline taught by everyone from clergymen to philosophers in nineteenth century schools. Once the dominant ideology had rid itself of excessive nostalgia for the past, it was capable of real accomplishment. While the Progressive legacy became more controversial in the 1950s and after, few doubt the importance of its principal contributions.

In antitrust the anti-monopoly, or neo-Brandeis, movement has been variously described as “populist” and “progressive.” It is in fact decidedly populist, reactionary, and backward looking. That became clear when the anti-monopoly dominated antitrust enforcement Agencies delivered their draft Merger Guidelines in early 2023. That document ranks as one of the most backward-focused statements of

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10John B. Watson, Behaviorism (1924); John B. Watson, Psychology from the Standpoint of a Behaviorist (1919).
12Hovenkamp, Political Economy, supra.
antitrust policy in the history of its enforcement. The source it cited most frequently (17 times) was the Supreme Court’s 1962 *Brown Shoe* merger decision, as if it were the gospel for merger law.\(^\text{15}\) It largely ignored that the Supreme Court itself had corrected most of that decision’s worst features.\(^\text{16}\) *Brown Shoe* became to antitrust policy what the evangelical Bible had been for populists of the 1920s.

The final version of the Merger Guidelines, issued later that same year, hosed down the draft’s most extreme features – signaling the Agencies’ recognition that not all winds were blowing in the same direction.\(^\text{17}\) *Brown Shoe* retained a prominent spot, but the revised Guidelines reintroduced more responsibility in economics, a saner approach to market definition, and more recognition of the fact that merger law is properly focused on the exercise of market power, manifested by higher prices, lower output, and restrained innovation.

The following discussion identifies areas in which excessive populism has driven the antimonopoly movement into indefensible corners. It could become much more durable by channeling antitrust in realistic pro-enforcement ways that focus on the true problems of market power and consumer and labor harm.

**Economics and Expertise**

Populism often reflects resentment of elites or experts, motivated by a belief that for all their expression of regard for the public interest, most are self-serving.\(^\text{18}\) A reflection of this in the antimonopoly

\(^{15}\) *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

\(^{16}\) See Herbert Hovenkamp, Did the Supreme Court Fix *Brown Shoe*? (Promarket, Stigler Center, 2023), [https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe/](https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe/).


literature is its belief that antitrust has been thrown off track by excessive reliance on economics, or for some, any economics at all.\textsuperscript{19}

That position is inconsistent with the history of antitrust, which has always engaged economics extensively, particularly since the passage of the decidedly pro-enforcement Clayton Act in 1914.\textsuperscript{20} Even the Sherman Act prior to that was focused on practices that threatened to reduce output (“restrain trade”) and raise prices, two important criteria of economic welfare.\textsuperscript{21} In a 1963 dissent, even \textit{Brown Shoe} author Chief Justice Warren described the Sherman Act as embodying “perhaps the most basic economic policy of our society….\textsuperscript{22}

The \textit{Brown Shoe} era, which has become canonical for anti-monopolists, provides no support for an anti-economic vision of antitrust. Whatever one might think about \textit{Brown Shoe’s} own economics, the Supreme Court’s \textit{Philadelphia Bank} decision a year later relied on no fewer than seven economists – more than any Supreme Court antitrust decision to that time. For its best-known presumption that a merger is unlawful if it creates a firm with a market share greater than 30% it cited four economists. All of them would have adopted stricter standards than the Court did.\textsuperscript{23} \textit{Philadelphia Bank} institutionalized a way of thinking about mergers that was driven by the dominant economic concerns of its time, reflected mainly in Harvard School structuralism. It spoke of competition under the antitrust laws as a part of “our fundamental national economic policy,”

\begin{itemize}
  \item \textsuperscript{19}E.g., Daniel Hanley, De-Economizing Antitrust Law Starts with Market Definition, The Sling (Apr. 28, 2023).
  \item \textsuperscript{20}Herbert Hovenkamp, The Invention of Antitrust, 96 S. Cal. L. Rev. 129 (2022).
\end{itemize}
and a necessary alternative to “cartelization or governmental regimentation of large portions of the economy.”\textsuperscript{24} While the economics that 1960s era antitrust decisions embraced differed in important ways from current industrial economics, to say that the decisions did not embrace economics is nonsense.

Four things seem to account for the anti-monopolist hostility toward economics. \textit{First} is nostalgia for an imagined past which is largely false. There is no period in antitrust history in which Supreme Court antitrust policy embraced a non-economic ideology.

\textit{Second} is a belief that antitrust policy should be more concerned with equal distribution. This concern has been reflected quite strongly in the past. For example, the Robinson-Patman Act was part of a vehement anti-chain-store movement, concerned mainly to protect smaller retailers at the expense of larger ones that consumers preferred.\textsuperscript{25} The Supreme Court’s \textit{Brown Shoe} jurisprudence in the 1960s condemned mergers because they led to better products or services or lower costs, and for the protection of smaller competing sellers.\textsuperscript{26} This concern to protect businesses that customers might find less desirable very likely accounts for calls to return to greater Robinson-Patman Act enforcement and the infatuation with \textit{Brown Shoe} today.

Why an increased concern with distribution should require abandonment of economics in antitrust in not entirely clear. Jonathan Baker has argued that anti-monopolists typically see a “bifurcated choice” between all-out regulation or extreme laissez faire.\textsuperscript{27} That is consistent with a populist perspective that sees everything in extremes.

\textsuperscript{24}\textit{Phila. Bank}, 374 U.S. at 372.
\textsuperscript{25}Herbert Hovenkamp, Can the Robinson-Patman Act be Salvaged? (Stigler Center, Promarket, Oct. 13, 2022), https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged/
There are intermediate positions. For example, a “consumer welfare” welfare principle targeting high prices or restraints on innovation supports both efficient use of resources and broad distribution – certainly when juxtaposed against a “general welfare” doctrine that can result in lower output and higher prices, while protecting producers.\(^{28}\) In any event, here the anti-monopoly position offers nothing new but simply chooses sides with a decades old and always-controversial view about the goals of antitrust.

Third is a thoroughly populist and often manipulated idea that policy must be determined by public opinion, and economic expertise interferes with that. That rapidly becomes a recipe for demagoguery - - an all too common feature of populism because public opinion is so easily manipulated.\(^ {29}\) A more defensible view is that enforcers should use economics where it is beneficial, and then take on the task (not always easy) of explaining it to the public. That is more like the model we follow in, say, medicine or chemistry. Public opinion does not determine the role of DNA and genetic testing in medical diagnosis. In a democratic society, however, those employing it have an obligation to explain their importance in understandable language. The general public is entitled to know the nature, likely consequences, and justifications of policy decisions that affect their lives.

Antitrust economics has become moderately technical in some areas, such as analysis of mergers and the measurement of market power, causation, and damages. The techniques used there may be out of reach of the average layperson. In most cases the economics used in litigation is not particularly cutting edge, although it does demand some technical proficiency.\(^ {30}\) The academic literature ranges much further, of course.

One important function of economics in antitrust is to prevent people from making dumb mistakes. Economic ignorance is a far more

\(^{28}\)As defended in Oliver E. Williamson, Economies as an Antitrust Defense: the Welfare Tradeoffs, 58 Am. Econ. Rev. 18 (1968).
\(^{30}\)For a good basic introduction see Roger D. Blair and David L. Kaserman, Antitrust Economics (2d ed. 2008).
serious threat to competitive markets than economics itself. For example, one consequence of economic ignorance is that many anti-monopolists do not appreciate the link between product output and the demand for labor. With some exceptions, consumers and labor are in the same boat. A healthy economy with competitive product prices and high output benefits both. On the other hand, if one ignores the product market and treats output as a constant, then it becomes easy to see consumers and labor as playing against each other in a zero-sum game.

Popular sentiment today is actually more consistent with an economic approach. U.S. polling strongly indicates a dominant concern with high prices and other issues relating to financial well-being, not so much with big business or industrial concentration. The polling also reveals a concern about threats to democracy, but these are viewed as coming largely from political idealogues. The one identified business source is social media. That puts a focus on Meta(Facebook), as well as X(Twitter), Tik-Tok, and others. It says less about Alphabet, Amazon, Apple, or Microsoft. In any event, it is difficult to see how antitrust law could offer a solution to these challenges to democracy. Nothing in the text of the antitrust laws justifies it.

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31See Jan De Loecker et al., The Rise of Market Power and the Macroeconomic Implications, 135 J. Pol. Econ. 561, 611 (2020): An increase in markups implies a decrease in aggregate output produced, whenever demand is not perfectly inelastic. Lower output produced then implies lower demand for labor. This results in both lower labor force participation and lower wages. Even if supply is perfectly elastic, real wages decrease with market power because the price of the output good has increased....

32E.g., Gallup on these issues, https://news.gallup.com/poll/1675/most-important-problem.aspx (showing polling through February, 2024).

The fourth likely reason for populist hostility to antitrust economics is a belief that economics is little more than a brief for defendants. This reflects mainly an unhealthy obsession with the Chicago School.\textsuperscript{34} In fact, economics can point antitrust in both pro- and anti-enforcement directions. For example, during the marginalist heyday when the Clayton Act was passed, it was decidedly pro-enforcement, as it was under the structuralist school that dominated antitrust policy at the time of \textit{Philadelphia Bank}.

The opposition to economics in anti-monopoly circles is also reactionary and counterproductive. Populists oppose it instinctively, even when it can help them. A good example is anti-monopolists’ harsh treatment of the widely used “hypothetical monopolist test” (HMT) for a relevant antitrust market.\textsuperscript{35} The HMT rests on the eminently sensible proposition that if the target of antitrust is monopoly, then we should have a test that is designed to identify markets that can be monopolized. The HMT often, although not invariably, defines smaller markets than alternatives. Smaller markets are generally pro-enforcement because they yield bigger market shares. As a result, the Agencies continue to use them, no matter what the anti-monopoly rhetoric.\textsuperscript{36}

Anti-monopolists would prefer to define markets by reference to what are sometimes called the “\textit{Brown Shoe} factors,” reflecting their ideological enslavement to that decision.\textsuperscript{37} The main thing that can be said for the \textit{Brown Shoe} factors is that the Supreme Court embraced them in 1962.\textsuperscript{38} They are not articulated in any antitrust statute nor defined in the legislative history. For the most part they represent a


\textsuperscript{37} Hanley, supra.

\textsuperscript{38} \textit{Brown Shoe Co. v. United States}, 370 U.S. 294, 325 (1962).
lay person’s casual conception of what a “market” should look like. Most of them are flat wrong. One Brown Shoe factor is “reasonable interchangeability,” without reference to the margins at which interchangeability occurs. That is an example of what is commonly known as the Cellophane fallacy: if you see people switching between wax paper and cellophane to wrap their peanut butter sandwiches, the two must be in the same market.39 Never mind that cellophane is being sold at a monopoly price while wax paper is competitive. That is to say, monopoly creates interchangeability by forcing people to look for alternatives. As a result, “reasonable interchangeability” as Brown Shoe defined it plays right into the monopolist’s hands.

Another Brown Shoe factor, that a market is distinguished by “unique production facilities,” is also wrong more often than it is right. Most often a single product is manufactured in numerous production facilities owned by one or many firms, and often with different technologies. That was even true in the Brown Shoe case itself, where Brown’s national market share was only 7%. Many other plants owned by other firms were producing products in the same market. On the other side, a single production facility often produces many noncompeting products. So the approach is both over- and under-inclusive.

Two other Brown Shoe factors, “specialized vendors” and “distinct customers” are wrong more often than they are right. The collection of things that a specialized vendor normally sells are complements, not principally substitutes. For example, a specialized medical vendor might sell catheters, bandages, and blood pressure monitors, but that does not mean that these three products are in the same market. The same thing is true of the hospital or pharmacy that purchases them (“distinct customers”). In sum, the Brown Shoe factors are a set of criteria that we would do well to ignore, particularly since nothing in the antitrust statute supports them. They are perpetuated only by dead orthodoxy.

By contrast, the hypothetical monopolist test for a relevant market simply asks “is this a group of products that is capable of being monopolized.”40 For example, “automobiles” is likely a relevant market under the HMT test: most substitutes are not sufficiently close to hold them to their cost. However, a subset of electric vehicles (EVs) might also be a relevant market if gasoline vehicles are not close enough competitors to hold EV prices close to their costs. The relevant market is the smallest grouping of sales that meets the HMT test. Thus, for example, several decisions have held that a pioneer drug and its generic equivalents (chemically identical) are in the same market, but not other drugs that treat the same systems.41

Perhaps in a misguided effort to appeal to the general population, anti-monopolists discard fairly simple economic methodologies in other ways. For example, it is common knowledge that firms compete along many avenues, including price, quality, innovation, working conditions and other things. The focus of measurement, however, has been heavily on prices. For example, the traditional SSNIP test for market definition queries how firms would respond to a “small but significant increase in price” charged by rivals, or SSNIP. The 2023 Merger Guidelines would rebrand this to SSNIPT to refer to both prices and other terms.

But there are good, enforcement based reasons for the methodological limitation to prices. Not only are data far easier to obtain, but as people doing the sciences have known for generations, often a streamlined model that does not attempt to take every factor into account makes more useful predictions than a more “realistic” model that attempts to include everything.42 Managing of merger analysis under the multiple factors that the Merger Guidelines describe

is likely to be so cumbersome that it will significantly reduce enforcement. More likely, economists at the agencies will attempt to reduce all of these factors to their cash value, or perhaps ignore them. At this writing what will happen is hard to say, but the 2023 Guidelines serve to turn a straightforward, manageable, and quite pro-enforcement query into something much more complex and indeterminate.

**Overly Simplistic Rules**

Both centrists and anti-monopolists believe that antitrust’s rule of reason has become too cumbersome. Enforcement falters as a result. This is largely the fault of the Supreme Court, which has had a difficult time dealing with the series of presumptions that form rule-of-reason analysis. Under the rule of reason, a plaintiff must show market power plus an allegation and some evidence that the defendant’s conduct is causing competitive harm. Having shown that, the burden shifts to the defendant to provide a harmless explanation. Then, if needed, the burden shifts back to the plaintiff to show that similar effects could have been achieved by a less restrictive alternative. Conceptually, the amount of proof needed to trigger the first presumption should be relatively small -- roughly equivalent to the “probable cause” necessary for a police search. Most of the evidence is in the defendant’s control, and the defendant should have the principal obligation to produce it.

The Supreme Court has articulated this framework but never really adopted it. Instead, it wants to see virtually the full case established right at the beginning.\(^{43}\) The most troublesome decision was *California Dental*, which held that the FTC’s showing of market power plus a highly suspicious set of restraints on dentists’ advertising was not enough to shift the burden of proof because there might be alternative explanations.\(^{44}\) The Court folded an answer to the defendant’s explanations into the plaintiff’s initial burden of proof. The result is that the plaintiff must prove practically its entire case just to get past what should be a relatively simple presumption. Indeed,


\(^{44}\)Calif. Dental Ass’n v. FTC, 526 U.S. 756 (1999).
the only time the Supreme Court has supported condemnation under the rule of reason is when the challenged conduct amounted to a naked restraint, as it was in the NCAA athlete compensation case.\footnote{NCAA v. Alston, 141 S.Ct. 2141 (2021). On Alston’s use of the rule of reason, see Herbert Hovenkamp, A Miser’s Rule of Reason: The Supreme Court and Antitrust Limits on Student Athlete Compensation, 78 NYU Ann. Surv. Am. L. 1 (2022).}

The solution to this problem is to reform the rule of reason so that judicial practice conforms more closely to the articulated rule. Manifestly, it is not to create a bunch of per se rules for practices that are anticompetitive only a small percentage of the time. For example, some in the anti-monopoly movement call for revival of a per se rule against tying arrangements.\footnote{E.g., “Open Markets Files Amicus Brief Laying Out Harms from Tying and Urging Court to Affirm Good Law on Practice (Aug. 3, 2020), https://www.openmarketsinstitute.org/publications/open-markets-files-amicus-brief-laying-out-harms-from-tying-and-urging-court-to-affirm-good-law-on-practice.} Per se tying rules, if taken seriously, would have prevented the laptop computer from ever being invented, because its technology is a tie of numerous components that previously had been separately provided by different companies. The arguments rely mainly on citations to cases from the 1940s through the 1960s that proclaimed it.\footnote{See, e.g., Daniel A. Hanley, In Praise of Rules-Based Antitrust, CPI Antitrust Chronicle (Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4710387;}

Most ties are procompetitive or competitively harmless. First, many are imposed by firms that lack any significant market power. Second, most of those remaining have perfectly sound justifications. One of the biggest generators of “tying” is technological change. For example, Apple created the iPhone by tying a cellular phone and a computer; and it ties cameras by installing one in the iPhone. Franchises and other suppliers of goods to retailers tie because tying becomes a mechanism for computing franchise royalties or assuring quality control of ingredients. IP licensors bundle because bundles reduce transaction costs substantially and limit the need for infringement suits. The standard should be that a tie cannot be condemned unless it is shown to reduce output and increase the price

\footnotesize{\textsuperscript{45}NCAA v. Alston, 141 S.Ct. 2141 (2021). On Alston’s use of the rule of reason, see Herbert Hovenkamp, A Miser’s Rule of Reason: The Supreme Court and Antitrust Limits on Student Athlete Compensation, 78 NYU Ann. Surv. Am. L. 1 (2022).}
of the tied-up bundle. A small proportion of ties would be condemned under such a test, but that is no justification for making them illegal per se.

For some practices, such as maximum price fixing, antimonopolists rely on old Supreme Court decisions even while acknowledging that they have been overruled.\textsuperscript{48} A per se rule against maximum resale price maintenance protects price-gouging dealers. Under maximum RPM supplier output goes up and consumers are better off; competitive dealers are not affected. In short, the old per se rule against maximum price fixing harmed just about everyone that antitrust might wish to protect, while protecting the monopoly of isolated dealers. All that can be said for it is that the Supreme Court stated it in 1968, but changed its mind in 1997.

Another instance of harmful anti-monopolist populism is the idea that mergers never produce cost savings, or efficiencies.\textsuperscript{49} It has no empirical foundation. Rather, it is a reaction to previous unsupported assumptions in the other direction – namely, that merger efficiencies dominate transactions.\textsuperscript{50}

Questions about merger efficiencies are heavily empirical. Economic studies of post-merger prices have made significant strides in recent years, enabling better predictions that associate market concentration levels or competitiveness with price increases. Some object that price and efficiency are not the same thing, which is of course true. But the merger statute does not target efficiencies. It targets monopoly or harm to competition, and for these price effects


are central. Studies of the effects of mergers on pricing go to the heart of antitrust law’s concern and necessarily take efficiencies into account.

The price effects of a merger are generally determined by two things: the increase in market power and, offsetting this, any decrease in cost. By itself, an observed price change does not tell us what part is attributable to one or the other. For example, an observed 10% price reduction following a merger could result from a merger that did not increase market power at all but that reduced costs enough to generate a 10% price reduction. It could also be a consequence of a merger that increased market power but produced a larger cost reduction, so that the net price reduction was 10%. Distinguishing these situations might be important for some purposes, but the outcome itself is antitrust law’s concern as defined by the statutes. Neither of these mergers “lessens competition” if the metric is price effects.

The metrics that the government agencies use to assess mergers have improved over time. For concentration increasing mergers they remain fairly rough predictions. They ask two questions: what is the degree of market concentration following a merger; and second, how much did the merger increase concentration? The premise is that a useful correlation exists between effects on concentration and effects on price. Concentration is measured by the HHI, an index equal to the sum of the squares of the market shares of each firm in a well-defined market. An HHI of 1800, which the 2023 Merger Guidelines identify as a danger signal, is equal to a market with, say, six firms with markets shares of 20%, 20%, 20%, 20%, 10%, & 10%. However, an infinite number of combinations could yield the same result. In addition to a post-merger HHI exceeding 1800, a challengeable merger must have an HHI increase of at least 100. In that case a merger of any two firms in the illustrated group would be challengeable. The

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requisite HHI increase of 100 makes the 2023 Guidelines significantly more aggressive than the previous 2010 Guidelines, which mainly targeted increases in the 200 range. That will improve merger enforcement, assuming that the agencies obtain the funding to bring the higher number of merger cases that result.

Merger outcomes are also heterogeneous. Different mergers with similar market shares can actually affect prices much differently. Further, even among mergers classified as “horizontal,” or mergers among competitors, merging firms nearly always have complementary relationships.\(^\text{53}\) For example, two hospitals might merge because one of them has a much stronger oncology department, or two airlines may have many overlapping routes but also many connecting routes. Eliminating competition tends to increase prices, depending on concentration levels, but uniting complements tends to reduce them. These effects move in opposite directions.

High quality studies of pricing following mergers of competitors in concentrated industries, such as a recent one by the NBER, should provide a model for the future.\(^\text{54}\) That study indicated a roughly even division between price-increasing and price-decreasing mergers, although the price increases were somewhat larger than the decreases.\(^\text{55}\) All of the markets in which these mergers were tested were “highly concentrated” under the 2023 Merger Guidelines standard. Post-merger HHIs in the tested sample were 2000-4000, with some reaching as high as 6000. A selection of mergers more in the 1000-2000 HHI range would yield significantly fewer price increasing mergers, although there is no reason for thinking that these would produce fewer efficiencies. Indeed, the less likely that market power explains the anticipated gains from a merger, the more likely that efficiencies play a role. These figures suggest two things: first, the

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\(^{55}\)Id. at 9-10.
standards in the 2023 Guidelines are an improvement over those articulated in Guidelines from 2010; second, this is an area that requires ongoing study and reassessment.

Merger outcomes are also affected by the “single market” rule, which states that a merger can be condemned if it is anticompetitive in any market, without balancing offsetting gains in other markets. The effect is to increase merger enforcement in cases where a merger is efficient “on balance,” but not everywhere. One example is the 2024 JetBlue case, in which the court found “strong evidence that the combined, post-merger airline would result in substantial benefits for consumers.” However, there were a few markets (city-pairs) in which the merger lessened competition, and the court entered an injunction on the basis of those. In such cases, one solution is for the firms to “fix” the bad markets, usually by selling assets there to someone else. However, one thing that is clear is that even a merger that produces substantial efficiencies, as the JetBlue/Spirit merger would have, can sometimes be unlawful.

It is important to keep in mind that failing to condemn a price-increasing merger is socially costly, but condemning a price-reducing merger is costly as well. At the same time, there are good administrative reasons for adhering to the single-market rule. Under it the government need only identify a single market in which competition is harmed, and without quantifying the harm. By contrast, “netting out” costs and benefits in multiple markets requires a much more elaborate inquiry, and the measure must be cardinal rather than ordinal. That is, before we can balance we must be able to quantify the losses and gains in different markets.

A final example is the FTC’s current position that employee non-compete agreements should be unlawful, with few exceptions.\textsuperscript{58} The prevailing antitrust rules governing noncompetes are underdeterrent.\textsuperscript{59} Many of them can be harmful even in the absence of significant market power. But that does not mean that all of them are anticompetitive. They can perform a useful function when they are imposed on technically skilled employees who have access to trade secrets or who have received significant training or expertise from their employers. The FTC’s rule condemns bad and good alike. An effective antitrust policy in this area would condemn noncompetes presumptively, but then permit users to defend them by showing that these conditions obtain and that the challenged covenant is proportional to the need for protection.

\textbf{Scapegoating}

One characteristic of populism is the creation of scapegoats, and the resulting mistargeting of harm. At various times in history Jews, immigrants, intellectual elites, chain stores, and big tech have all been populist targets. Often scapegoats are identified by their success in certain areas, with their successes displacing or threatening the populist group.\textsuperscript{60}

Enforcement budgets are always small in relation to need, making triage necessary. In antitrust, the focus should be on stagnant industries exhibiting low innovation rates and lockstep pricing or other signs of oligopoly. While innovation rates in big tech have slowed somewhat, the five big tech companies (Alphabet #8, Apple #9, Microsoft #17, Amazon #18, Meta #41) remain near the top (2023) out

\textsuperscript{58}FTC, Non-Compete Clause Rule (Jan. 5, 2023), https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

\textsuperscript{59}See Deslandes v. McDonald’s USA, LLC, 81 F.4th 699, 702-704 (7th Cir. 2023) (finding inadequate market power under a rule of reason challenge to a purely vertical employee noncompete covenant, but also finding possibility of per se illegality to extent that a horizontal agreement among McDonald’s own restaurants and its franchisees may have existed).

\textsuperscript{60}See Denis Muller, Journalism and the Future of Democracy, ch. 3 (Palgrave-Macmillan, 2021).
of the 300 largest patent recipients. They appear to be competing rather than colluding, and they compete aggressively when new technologies such as AI come along. They have done considerable harm to less competitive or less innovative rivals.

Further, cases against big tech are very costly to bring. For example, the government’s disastrous lawsuit against IBM, which had many features resembling the current actions against big tech, was its most expensive litigation ever by the time of its dismissal in 1982. At the same time, other areas of antitrust, such as mergers of competitors, seem to suffer from chronic underenforcement.

Big tech platforms do engage in anticompetitive practices, but a draconian structural approach is not the best answer. Better to preserve the many things that make big tech among the most valuable contributors to the American economy and society, and then identify and ferret out anticompetitive practices. That is the approach antitrust most generally takes to anticompetitive activities in particular industries.

Whatever one might think of this misaligned venture as antitrust policy, it is also bad industrial policy. Leave aside the question whether the United States should have an industrial policy or simply rely on the market to select its winners, the fact is that big tech is a distinctly American invention. It has been exported with great success to everywhere else in the world. We should either be

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promoting it or letting it be, rather than looking for ways to undo its benefits.

It is also no surprise that the neo-Brandeis movement is hostile to consumer welfare as an antitrust goal. The war on big tech is flatly inconsistent with the welfare of consumers, which emphasizes low prices, high output, and unrestrained innovation. After a flirtation with neo-Brandeis rejection of consumer welfare, the Justice Department appears once again to have embraced it in its March, 2024, complaint against Apple. The complaint alleges that Apple’s practices have “not resulted in lower prices, higher output, improved innovation, or a better user experience.” That is about as orthodox a statement of consumer welfare as one can find anywhere.

This is one area where the populist version of anti-monopoly antitrust has done a great deal of affirmative harm—through such ventures as targeting “bigness” rather than true monopoly and signaling out innovative industries for scrutiny. Monopoly produces lower output, higher prices, and harm to both consumers and labor. Large firms often do just the opposite. While the movement professes support for labor, that position cannot be reconciled with resistance to a goal of high output, low prices and unrestrained innovation. As a general proposition labor as much as consumers benefits from them. These results are occasionally in tension with the labor laws which protect the right to strike, but that does not justify an antitrust policy of disfavoring high output, in the process harming both consumers and labor.

Conclusion:

Antitrust policy can be more pro-enforcement than it is, and the Agencies have done some good things. One is greater attention to harms in labor markets. The move to increase enforcement against

horizontal mergers is also a good one. The verdict is still out on some other portions of the 2023 Merger Guidelines. But these are modest tweaks, in line with what more pro-enforcement antitrust people have been supporting for decades. They hardly evidence a new way of looking at the world.

Increases in enforcement should be empirically justified, with a focus on practices that provably reduce output and increase prices, reduce product quality, or restrain innovation. Enforcers should look for problem markets where competition appears to be threatened, innovation is low, or prices are high in relation to costs. Today, antitrust populism stands as a significant obstruction to achieving those goals, which requires embracing new realities, not clinging to discarded ones. When the current anti-monopoly movement makes that move, it will have become progressive.

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