ANTITRUST LAW AND ITS CRITICS

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Antitrust law is back in the news and, perhaps for the first time since 1912, in the presidential campaign. The Federal Trade Commission and various committees of Congress have held hearings on fundamental antitrust questions. Scholars from multiple disciplines have published books,[1] articles, and reports addressing whether antitrust law needs substantial revision. Perhaps the most compelling evidence of the winds of change is that leading academic economists now appear to take seriously proposals that acquisitions by tech platforms that create "risks of anticompetitive effects" should be prohibited and that large tech platforms like Amazon should be "broken apart from any participants on the platform."[2] Prominent conservative commentator Peggy Noonan has said of Facebook: "Break them up. Break them in two, in three; regulate them."[3]

A confluence of four factors seems to have provoked this unrest. The first is a rising populism, on both the left and the right, that decries free markets, globalism, and increasing inequality within the developed countries. The second is the rise of big tech, which provokes unease because its power seems to expand without limit through scale and scope economies and network effects; because it is based on new and largely invisible technology; because it aggregates data and threatens privacy; because it implicates broader themes of powerful communications media, which have repeatedly been subject to antitrust scrutiny in the past; and because some fear that big tech undermines political stability and familiar communities and associations. The third is a growing

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[1] *E.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019); ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY (2018); JONATHAN TEPPER WITH DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION (2019); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

[2] *Breaking Up Large Tech Companies*, UNIV. OF CHI. BOOTH SCH. OF BUS.: IGM FORUM (Mar. 26, 2019), www.igmchicago.org/surveys/breaking-up-large-tech-companies.

[3] Peggy Noonan, Opinion, *Overthrow the Prince of Facebook*, WALL ST. J. (June 6, 2019), www.wsj.com/articles/overthrow-the-prince-of-facebook-11559862145.

body of economic studies that suggest that market concentration and market power have increased in recent years. The fourth is the increasing concern of libertarians about private, as well as government, power and evidence of widespread increases in industry concentration.

Antitrust law is the tool that comes first to mind as a means of addressing concerns about private economic power. On the surface, there appears to be a conversation about the future of antitrust law between three groups. The first group might be called the conservatives. They argue that antitrust law is basically fine as it is[4] and that market concentration is transitory and, when enduring or not a reflection of superior efficiency, is largely "the result of heavy regulation rather than a natural development from the nature of business."[5] To the extent they advocate revisions to antitrust doctrine, they generally support modifying doctrinal provisions, such as market-share presumptions in horizontal merger cases, that make enforcement easier,[6] and extending doctrinal provisions that restrict enforcement, such as the price-cost test for predatory pricing, to more complex forms of conduct, such as loyalty discounts.[7] The second group might be called mainstream progressives. They argue that antitrust enforcement has been too lax and that antitrust law should be adjusted but within the prevailing consumer welfare paradigm.[8] The third group might be called the populist critics. They include the self-described "New Brandeis" proponents[9] and some who have more far-reaching and eccentric proposals.[10]

In fact, however, there are really two very separate conversations. One, between conservatives and progressives, concerns how antitrust law might best promote economic welfare. The other, pushed largely by the populists, concerns how to replace what is now known as antitrust law with alternatives

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[4] *See, e.g.*, Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2019).

[5] TYLER COWEN, BIG BUSINESS: A LOVE LETTER TO AN AMERICAN ANTI-HERO 83–84, 91 (2019).

[6] Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance,* 80 ANTITRUST L.J. 377 (2015).

[7] Benjamin Klein & Andres V. Lerner, *Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts*, 80 ANTITRUST L.J. 631 (2016).

[8] *See, e.g.*, Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, J. ECON. PERSP., Summer 2019, at 44; Iona Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019); John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice (Oct. 9, 2018) (unpublished manuscript); Steven C. Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards (Nov. 6, 2017) (unpublished manuscript).

[9] *E.g.*, WU, *supra* note 1, at 33–44; Lina M. Khan, *Amazon's Antitrust Paradox,* 126 YALE L.J. 710, 742–44 (2017); Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM: BUS. (Mar. 8, 2019), medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

[10] *E.g.*, POSNER & WEYL, *supra* note 1, at 250–76; TEPPER & HEARN, *supra* note 1, at 233–48.

that will serve other objectives, in addition to economic welfare, such as promoting an equitable distribution of wealth and of economic and political power. The two conversations seldom intersect in any meaningful way.

Part I sets the stage by briefly summarizing the core principles and institutional context of antitrust law as it now exists. Part II addresses the conversation between the conservatives and the mainstream progressives about antitrust law and economic welfare. Part III explains why the concerns raised by the populist critics, although often couched in terms of economic welfare, are not really about economic welfare and why antitrust law cannot prudently address both economic welfare and the other objectives with which these critics are concerned. Part IV gazes through a hazy crystal ball and suggests possible ways to bring the conversations closer together.

I. ANTITRUST LAW AND THE CONSUMER WELFARE STANDARD

U.S. antitrust law prohibits private, anticompetitive conduct that results in more market power than would otherwise exist.[11] There are three basic elements to any antitrust offense: anticompetitive conduct, an actual or likely increase in market power compared to the but-for world as a result of the creation or maintenance of market power, and a causal connection between them. Anticompetitive conduct is conduct that is not efficiency-based competition on the merits—conduct that does not, in other words, shift the supply curve to the right by innovation or other forms of cost reduction, shift the demand curve to the right by innovation or other forms of product improvement, or reduce above-cost prices. For this purpose, increased market power means the ability profitably to increase price or otherwise disadvantage trading partners through a reduction in the competitive efficacy of actual and potential rivals. The competitive efficacy of rivals can be reduced both by collusion among rivals that would otherwise compete and by conduct that weakens or excludes rivals.

Anticompetitive conduct can increase the actor's market power only by impairing the competitive process. By definition, market power reflects harm to the competitive process. Market power diminishes economic welfare when it is used to increase price, reduce output, or harm rivals and when it reduces incentives for product improvement, cost reduction, or innovation. Antitrust law is thus about protecting the competitive process in order to promote eco-

[11] A. Douglas Melamed, *Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. F. 163 (2017).

nomic welfare.[12] This is commonly known as "the consumer welfare standard."[13]

Antitrust law is more complicated than that, of course. For example, single firm conduct can violate the antitrust laws only if the defendant winds up with an amount of market power sufficient to be called monopoly power or with a dangerous probability of obtaining monopoly power.[14] Also, there are per se rules and other "quick look" decision tools, in which an increase in market power is presumed and need not be proven. It is often said that exclusionary conduct can be illegal, even if it has some efficiency benefits, if those benefits are outweighed by the resulting harm to competition,[15] but few if any cases have so held. Perhaps most important, antitrust law embraces simplified principles and rules even though they sometimes permit the creation of market power by conduct that does not promote efficiency.

These principles and rules are largely made by judges. The key statutory provisions are brief and imprecise. In effect, Congress "delegated much of its lawmaking power to the judicial branch."[16] Legal doctrine thus evolves in a common law-like process that "permits the law to adapt to new learning" from business and judicial experience, economic theory and analysis, and market developments.[17]

The principles and rules of antitrust law are heavily influenced by error-cost analysis. The basic idea is that antitrust cases almost always involve uncertainty and that antitrust principles should therefore be shaped, not to reflect the theoretically optimal outcome that an all-knowing fact finder might reach, but rather to reduce likely error costs. These error costs include the costs of

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[12] *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Abbot B. Lipsky, Jr., Adjunct Professor, George Mason Univ. Antonin Scalia Law School).

[13] There is a debate within the antitrust mainstream about whether antitrust law should be focused on consumer welfare, as that term is used by economists, or total welfare, e.g., Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2541 (2013), or between consumer welfare and consumer surplus, e.g., Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 162–64 (2011). This debate is immaterial to the analysis and argument in this article, but it could be relevant to possible revisions of antitrust law.

[14] *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) ("The percentage we have already mentioned—over ninety— . . . . is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent [sic] is not.").

[15] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 95 (D.C. Cir. 2001) (per curiam); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458–59 (1993).

[16] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[17] Baxter, *supra* note 16, at 666–73.

false positives (i.e., false convictions, such as blocking a procompetitive merger or condemning efficient conduct) and false negatives (i.e., false acquittals, such as permitting an anticompetitive merger or conduct that excludes rivals and does not generate substantial efficiencies). Error-cost analysis teaches that antitrust law should be designed to minimize the sum of the costs of false positives and false negatives. The theory makes good sense.[18]

Error-cost analysis figured prominently in so-called Chicago School thinking. In a very influential article, then-Professor and now-Judge Frank Easterbrook argued that false positives are a more serious problem than false negatives.[19] Easterbrook reasoned that a false positive—blocking a merger or prohibiting conduct—is manifest in a final and enduring government order. By contrast, Easterbrook argued, new entry, innovation, and other changed circumstances are likely to dissipate the harm to competition enabled by a false negative.[20]

Courts have adopted some aspects of antitrust doctrine for the explicit purpose of avoiding false negatives, even acknowledging that they would permit some anticompetitive conduct.[21] Perhaps more important, antitrust courts have often imposed almost impossibly high burdens of proof on plaintiffs for the explicit or implicit purpose of avoiding false negatives. For example, the majority in *Ohio v. American Express* held that direct proof of harm to competition is insufficient and the relevant market must be defined and proved in all cases involving vertical restraints, on the ground that such restraints can serve procompetitive purposes; that harm to competition cannot be inferred absent proof of reduced output or supra-competitive prices; and that efficiencies from

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[18] To be complete, the theory would also take account of administration and transaction costs in the enforcement of antitrust law, which also should and do influence antitrust doctrine.

[19] Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

[20] Easterbrook's analysis was underspecified because error costs are a function of both the duration and the magnitude of costs, and Easterbrook addressed only their duration. Some disagreed with Easterbrook for this and other reasons at the time, but their concerns were paid little heed. *E.g.*, Richard S. Markovitz, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41 (1984); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 800–02 (1987).

[21] These include the law regarding predatory pricing, e.g., Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) ("As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting."), and unilateral refusals to deal, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 414 (2004) (expressing concern about "the problem of false positives" and noting that "[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited").

vertical restraints can be presumed even if they are not supported by evidence.[22]

The inherent nature of antitrust law makes it fertile soil for a cautious error-cost approach. Antitrust law is a law of general application that applies to almost all industries. Antitrust enforcers and tribunals will thus not have deep industry expertise, comparable to that of a sectoral regulator, except perhaps in the tiny portion of industries that have been subject to repeated antitrust scrutiny. Because antitrust principles must apply to all industries, they cannot be fashioned to fit the idiosyncrasies of particular industries. Fact-finding or, more precisely, application of general principles to very diverse facts thus does the heavy lifting in antitrust enforcement. And those facts often involve the unknowable, e.g., future innovation, and the unobservable, e.g., incremental costs. Uncertainty is inevitable.

Perhaps more important, enforcement of U.S. antitrust law, unlike competition law in most other nations, is decentralized. In addition to the Justice Department and the Federal Trade Commission, 50 states[23] and any person injured by a violation of the antitrust law can bring an enforcement action.[24] It is likely, therefore, that a much higher percentage of suspected antitrust violations are subject to scrutiny in the United States than elsewhere and that deterrence of anticompetitive business conduct in general is a more important component of the impact of antitrust law on the economy. Antitrust principles thus need to be fashioned with careful attention to whether they will send clear signals to the business community about the line between permissible and impermissible conduct and whether they will be administrable by hundreds of generalist district courts.

II. ANTITRUST LAW AND ECONOMIC WELFARE

A number of mainstream antitrust scholars have in recent months expressed the view that antitrust enforcement has been too lax and that antitrust law is too permissive. They are motivated at least in part by recent scholarship showing increases in industrial concentration,[25] share of GDP going to capital rather than labor,[26] and price/cost margins[27] and that mergers over the past 20

[22] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287–90 (2018). These aspects of the decision are explained in greater detail in A. Douglas Melamed, *The* American Express *Case: Back to the Future*, 18 COLO. TECH. L.J. 7 (2020).

[23] *See, e.g.*, Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972).

[24] *See* 15 U.S.C. § 4.

[25] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 721–31 (2018).

[26] David Autor et al., *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. (PAPERS & PROC.) 180 (2017).

[27] Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, Q.J. ECON. (forthcoming 2020).

years or so have often resulted in higher prices.[28] These studies do not prove that antitrust enforcement has been too lax or even that market power has been increasing throughout the economy, but they lend support to those inferences.

The proposals of these mainstream progressives are varied. For example, some propose modifying standards applicable to vertical mergers[29] or challenging more often mergers that might harm sellers.[30] Others propose challenging most favored nation agreements used by digital platforms[31] or so-called horizontal shareholding.[32] Carl Shapiro and I have suggested initiating antitrust enforcement against standard-setting organizations that fail to take reasonable steps to ameliorate the welfare-reducing effects of technology market monopolies created by the multi-company agreements they orchestrate.[33]

The most comprehensive expression of mainstream progressive views is set forth in Jon Baker's excellent book *The Antitrust Paradigm*,[34] the title of which is of course a play on Robert Bork's *The Antitrust Paradox. The Antitrust Paradigm* consists of three parts. Part I addresses fundamental antitrust issues. Baker describes a "political consensus" supporting antitrust law, a compromise between regulation and laissez faire—between deterring anticompetitive conduct and chilling efficiencies—that can be expected to endure only if courts "maintain the efficiency gains that flow from competition."[35] He argues persuasively that the inclusion of noneconomic goals in mid-20th century antitrust law chilled efficient conduct and inherently leads to excessive judicial discretion and, ultimately, political corruption of antitrust law.[36] But, Baker argues, the antitrust consensus is in jeopardy because of the failures of antitrust law even when measured solely by its impact on economic welfare.[37] Baker sets forth several reasons to believe that market power has been generally increasing in the United States and now

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[28] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 93–99 (2015); *Examining the Impact of Health Care Consolidation: Hearing Before the H. Comm. on Energy & Commerce Oversight and Subcomm. on Investigations*, 115th Cong. (2018) (statement of Martin Gaynor, Professor, Carnegie Mellon Univ.).

[29] *E.g.*, Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018).

[30] *E.g.*, C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018).

[31] *E.g.*, Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

[32] *E.g.*, Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016).

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

[34] BAKER, *supra* note 1.

[35] *Id.* at 42.

[36] *Id.* at 57–61.

[37] *Id.* at 48–52.

presents a "serious public policy problem."[38] The problem, Baker argues, is that antitrust law has gone too far in the direction of laissez-faire or antitrust minimalism.

Part II consists of a more concrete discussion of antitrust rules for the information economy. Baker insightfully discusses, among other things, inferring agreement from algorithmic coordination,[39] exclusionary conduct by dominant platforms,[40] ways in which mergers can reduce innovation,[41] anticompetitive conduct involving patents,[42] and market definition when platforms are involved.[43]

Baker looks forward in Part III. He describes three factors that he believes "point in the direction of strengthened antitrust"—changes in business practices, political realignments, and developments in economic analysis.[44] He ends with a call to action that will no doubt appeal to mainstream progressives.

Chapters 4 and 5 of Part I of *The Antitrust Paradigm* are a reprise of Baker's earlier criticism of the approach to error costs manifest in current antitrust law.[45] "Although the error-cost framework is a neutral economic tool, contemporary antitrust conservatives" have used it to advocate against antitrust intervention by overstating "the incidence and significance of false positives and understat[ing] the incidence and significance of false negatives."[46] They have based their advocacy on numerous "erroneous arguments" about markets and institutions, arguments that Baker addresses and refutes.[47]

The issues raised in these chapters are critical to current controversies about antitrust policy. For present purposes, it does not matter whether Easterbrook and other antitrust conservatives were right about error costs in the past. The question now is whether changed circumstances warrant reassessing the relative tolerance for the risks of false positives and false negatives that antitrust law now embodies. The indications of under-enforcement summarized above and the failure in court of economically sound cases suggest that the likelihood of false negatives might be greater than previously thought and perhaps

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[38] *Id.* at 31.
[39] *Id.* at 99–118.
[40] *Id.* at 119–49.
[41] *Id.* at 150–75.
[42] *Id.* at 178–82.
[43] *Id.* at 182–89.
[44] *Id.* at 203.
[45] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).
[46] BAKER, *supra* note 1, at 74.
[47] *Id.* at 81–95.

that current antitrust law has gone too far in its quest to avoid false positives. Those indications, together with the size, seemingly boundless scale and scope economies, and apparently durable market power of some of the global mega-firms and new learning about entry barriers and contestable markets, suggest that the duration and costs of false negatives might be greater than previously thought. Similarly, new empirical tools for assessing mergers and improved understanding of the economic effects of vertical agreements suggest that the likelihood of false positives might be lower than previously thought. And studies showing that mergers rarely achieve anticipated efficiencies suggest that the costs of false positives might be lower than previously thought.[48]

Recalibrating the law's relative tolerance for the risks of false positives and false negatives could change antitrust law in numerous ways. It could, for example, lead to doctrinal changes, such as eliminating the recoupment requirement in predatory-pricing cases, which has been criticized as being incoherent and a needless obstacle to proving anticompetitive pricing.[49] It could encourage courts to clarify the law regarding unlawful refusals to deal. In *Aspen Skiing*, the Court emphasized that the defendant had demonstrated a willingness to forgo profitable dealing with a competitor in order to increase its market power.[50] Dicta in the Court's subsequent decision in *Trinko* have been read by some to mean that a plaintiff must show a prior course of dealing between the defendant and the excluded party to establish an unlawful refusal to deal.[51] The law might be clarified to make clear that evidence other than a prior course of dealing might in appropriate circumstances suffice to prove a profit sacrifice, or it might find certain refusals to deal unlawful even absent a profit sacrifice.[52]

More broadly, antitrust law could be more willing to find violations on the basis of circumstantial evidence or predictions of future developments that are necessarily uncertain. The demanding proof required in some recent cases might be reexamined if the law were more willing to risk false positives and

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[48] *See, e.g.*, Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016).

[49] *See* C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group*: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018).

[50] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 (1985).

[51] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409–10 (2004).

[52] *See, e.g.*, Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. (forthcoming 2020) (manuscript at 29–37) (manuscript at scholarship.law.upenn.edu/faculty_scholarship/2093).

less willing to risk false negatives.[53] The law might, in some circumstances, not just focus on the most likely outcomes, but also take into account unlikely but very costly outcomes from antitrust intervention (false positive) or a lack of intervention (false negative).[54]

Merger law might be most suited to recalibration, for three reasons. First, there is reason to suspect under-enforcement, i.e., an excessive number of false negatives, in the past.[55] Second, studies showing that parties often fail to realize anticipated efficiencies from mergers suggest that the cost of false positives might be less than previously thought.[56] Third, merger enforcement is largely a matter for the expert enforcement agencies. Adjusting the legal standards for merger enforcement is therefore less likely to lead to abuse by private litigants. Concerns about such abuse appear to have been responsible, at least in part, for driving some aspects of current antitrust doctrine.

The law applicable to acquisitions by dominant firms of small, nascent competitors, for example, might be revised. Current law implicitly presumes that mergers are efficient and, thus, that false positives would be costly. Plaintiffs are therefore required to prove that increased market power is a likely result of the merger. That is an almost impossible task when the harm to competition is both uncertain and likely to occur, if at all, only in future years. One could imagine a regime in which an acquisition by a dominant firm, defined by size and duration of market share or some other indicia, of a much smaller or nascent firm is presumed to be unlawful if the acquired firm is shown to have a realistic possibility of developing into a competitive threat to the dominant firm. In that event, the defendant would have the burden of proving that harm to competition is very unlikely or that the merger will create substantial, merger-specific efficiencies. In other words, instead of requiring the plaintiff to justify running the risk of a false positive, the defendant could be required in specified circumstances to justify incurring the risk of a false negative.[57]

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[53] *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018); United States v. AMR Corp., 335 F.3d 1109, 1117–21 (10th Cir. 2003) (rejecting predatory-pricing claim on the ground that the available data did not permit direct measurement of variable costs).

[54] One way to conceptualize this is to imagine that there is a distribution of possible consequences in the relevant markets of antitrust intervention and that antitrust decisions might take into account, not just the median outcome in the distribution, but also the mean.

[55] *See* Shapiro, *supra* note 25, at 734–37.

[56] *See, e.g.*, Blonigen & Pierce, *supra* note 48.

[57] A similar presumption has been used in mergers that result in significant increases in market concentration. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 364–65 (1963); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1215–16 (11th Cir. 2012). Because any such presumption should, and presumably would, be based to an important extent, on economic learning, it should evolve over time as necessary to reflect advances in economic learning. *See generally* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018) (discussing how the enforcement agencies have revised their

Such changes will not come easily, and careful analysis might show that they should not be made. The progressives are not the only ones talking about antitrust law and economic welfare. More conservative mainstream scholars argue that no major adjustments to antitrust law are called for or, as noted above, that antitrust law should in some instances be revised to reduce the risk of false positives. They argue, among other things, that there is no convincing evidence of widespread increases in market power,[58] that increased market concentration reflects superior productivity and the forces of competition,[59] that the law should not be changed on the basis of theoretical possibilities that have not been shown to be likely or frequent in fact,[60] that presumptions that have been urged as a means to shift to defendants a burden of justification are based on unsound economics,[61] and that the costs of false negatives emphasized by the progressives are lower than would be the costs of false positives if the law were revised to permit more aggressive enforcement.[62]

These two groups, the mainstream progressives and the conservatives, are engaged in a serious conversation about whether, and if so how, antitrust law should be adjusted to better achieve the ultimate objective of promoting economic welfare. It's the kind of conversation that policy wonks and technocrats love.[63]

III. ANTITRUST LAW AND THE POPULIST CRITICS

Conversations that policy wonks and technocrats love do not often get wide public attention. The antitrust conversation that has gotten attention is that initiated by those who might be called antitrust's populist critics. They include both legal scholars and others with more eclectic backgrounds.

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use of structural presumptions in merger analysis); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015) (same).

58 Seth B. Sacher & John M. Yun, *Twelve Fallacies of the "Neo-Antitrust" Movement*, GEO. MASON L. REV. (forthcoming 2020) (manuscript at 4–10).

59 Autor et al., *supra* note 26, at 185.

60 Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 166 (2012).

61 Ginsburg & Wright, *supra* note 6, at 380.

62 *Id.* at 393–94.

63 Some commentators have suggested that certain antitrust conservatives are motivated more by libertarian values and normative notions of property rights, especially involving intellectual property, than by promotion of consumer welfare. *See generally* Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, U. PA. L. REV. (forthcoming) (Jan. 2020 draft, papers.ssrn.com/sol3/Papers.cfm?abstract_id=3481388). These commentators seem to have in mind a fourth group, a rough conservative analogue to the populist critics on the left. But even those extreme conservatives are engaged in the lawyerly enterprise of trying to support their arguments within the normative framework of an antitrust law focused on economic welfare. If their arguments are tendentious and flawed because motivated by other objectives, they can be assessed by how well they serve the economic welfare objective. There is, therefore, no need for present purposes to identify such a fourth group.

Three recent books illustrate the critics' concerns. Tim Wu's *The Curse of Bigness* focuses most directly on antitrust law. To oversimplify, Wu argues that antitrust law needs to be "updated to face the challenges of our time" posed by "extreme levels of industrial concentration" and "concentrated private power . . . with too much influence over government."[64] For this, Wu argues, antitrust law needs to return to the broader noneconomic goals originally intended by Congress.[65] Wu's short book is imprecise in important respects, perhaps because Wu appears to claim the mantle of "public advocate" fighting about matters of principle against powerful vested interests,[66] and misstates contemporary antitrust law in places.[67] Wu does, though, make clear that he longs for a robust antitrust law that will both restore the "big case tradition"[68] to challenge the "tech trusts" in particular[69]and deal aggressively with problems that arise in the "age of oligopoly."[70]

In *The Myth of Capitalism*, Jonathan Tepper and Denise Hearn argue more broadly that competition is essential for capitalism but "remains an ideal that is receding further from our reach."[71] The government, they argue, "has not enforced rules that would increase competition, and through regulatory capture has created rules that limit competition."[72] Their book collects a diverse range of high-level data from which the authors draw broad conclusions about the failures of capitalism, which the data do not always support. As to antitrust law in particular, which the authors misstate in important respects, they argue that, since the election of President Reagan in 1980, "no president has enforced the spirit or the letter of the Sherman and Clayton Acts."[73]

Radical Markets is, well, more radical, and more imaginative. To authors Eric Posner and Glen Weyl, the "most significant problem of our time is the rising inequality within wealthy countries."[74] They argue that markets must be "strengthened, expanded, and purified" but that the solution lies neither in "Market Fundamentalism," which "is little more than a nostalgic commitment to an idealized version of markets as they existed in the Anglo-Saxon world in the nineteenth century," nor "reliance on the discretionary power of govern-

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[64] WU, *supra* note 1, at 16.

[65] *Id.* at 135–39.

[66] *See id.* at 43 n.*.

[67] *See* A. Douglas Melamed & Nicolas Petit, *Before "After Consumer Welfare"—A Response to Professor Wu*, COMPETITION POL'Y INT'L: N. AM. COLUMN (July 1, 2018).

[68] *Id.* at 93–101.

[69] *Id.* at 119–26.

[70] *Id.* at 14–23.

[71] TEPPER & HEARN, *supra* note 1, at xvi.

[72] *Id.* at xviii.

[73] *Id.* at 160.

[74] POSNER & WEYL, *supra* note 1, at 4.

ment bureaucratic elites to fix social ills."[75] Instead, they propose a variety of broad rules. These include, to ameliorate the "monopoly" power inherent in all property, requiring property owners to state the value of their property, which would provide both the basis for determining the amount of property tax owed and the price at which anyone else could buy the property;[76] prohibiting institutional investors in almost all circumstances from diversifying their holdings within industries;[77] and blocking mergers that increase political influence by concentrating lobbying capacity.[78]

On the surface, the populist critics, like the conservatives and mainstream progressives, are talking at least in part about whether antitrust law is well suited to promote its economic-welfare objective. They argue, in particular, that the "consumer-welfare standard" that has defined contemporary antitrust law is much narrower than suggested above and that it prevents antitrust law from effectively promoting economic welfare. They say, for example, that the consumer-welfare standard requires courts to pursue outcomes, a task for which they are not well-suited, instead of calling balls and strikes;[79] confines antitrust law to a singular focus on consumer prices;[80] is not able to address conduct that reduces innovation;[81] and focuses solely on consumers and ignores harm to suppliers.[82]

Nicolas Petit and I have argued elsewhere that each of these criticisms is incorrect.[83] In brief, antitrust is about proscribing anticompetitive conduct and does not call upon courts to measure or regulate welfare outcomes. Antitrust law has in the past effectively addressed harms to innovation; harms to suppliers, including in labor markets; and anticompetitive conduct that had nothing to do with prices and involved products sold for a zero monetary price. The common focus on pricing data and other perceived problems reflect limitations on available data and difficult problems of proof, not any conceptual restrictions arising from the consumer-welfare standard. These limitations and problems have been, and no doubt will continue to be, ameliorated by advances in economists' toolkit and legal doctrine.

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[75] *Id.* at xvi.

[76] *Id.* at 60–62.

[77] *See id.* at 191–96.

[78] *Id.* at 203.

[79] WU, *supra* note 1, at 135–36; Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI ANTITRUST CHRON. (Apr. 18, 2018).

[80] TEPPER & HEARN, *supra* note 1, at 158–59; WU, *supra* note 1, at 85–86.

[81] Wu, *supra* note 79.

[82] POSNER & WEYL, *supra* note 1, at 201; *see also* Wu, *supra* note 79.

[83] *See* A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019).

The important point for present purposes, however, is not whether the populists' criticisms are correct or incorrect. It is that the criticisms are largely unrelated to what the critics are really saying. The critics do not respond to arguments that their criticisms of the consumer-welfare standard are incorrect or otherwise explain how antitrust law should be changed in order to better promote economic welfare. To the contrary, they think that antitrust law focuses too narrowly on economic welfare and unduly privileges efficiency at the expense of other objectives. Their criticisms of the consumer-welfare standard are not the criticisms of technocrats with a shared objective but rather are a rhetorical device in aid of an argument for replacing economically focused antitrust law with a law aimed more broadly at attacking concentrations of economic and resulting political power. As Tepper and Hearn put it, "Antimonopoly is more than antitrust."[84]

While the populist critics broadly share a concern about concentrations of power, they have various and potentially conflicting objectives. Many are concerned about the political power of big corporations.[85] Some want to protect liberty and autonomy.[86] Fewer are concerned about economic inequality.[87] Tim Wu wants to protect competition and rivalry and to protect consumers from deception and manipulation.[88]

The critics point to a variety of indicia of what they regard as undesirable concentrations of power and inequality, but the various indicia have quite different implications. Critics complain about what they see as evidence of increased market concentration, which is most relevant to economic welfare. They also complain about evidence of economic power more broadly,[89] but that evidence is most relevant to issues of economic inequality. And they point to indications of increasing industry concentration, which they argue makes industry-wide lobbying more likely and effective and thus increases inequality in political power.[90] The mainstream progressives have also pointed to a variety of indicia that do not directly show increases in the market power with which they are concerned, but they explain how those indicia are suggestive of increased market power. The populist critics paint with a broader brush.

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[84] TEPPER & HEARN, *supra* note 1, at 244.

[85] POSNER & WEYL, *supra* note 1, at xv, 203; WU, *supra* note 1, at 16, 18; *cf.* Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. (forthcoming 2020) (manuscript at 1) (arguing, based on a study of the rise of Nazi Germany, that "extreme concentration of economic power enables extreme concentration of political power").

[86] POSNER & WEYL, *supra* note 1, at xv; WU, *supra* note 1, at 16, 40–41.

[87] POSNER & WEYL, *supra* note 1, at 4–8.

[88] WU, *supra* note 1, at 130, 137.

[89] TEPPER & HEARN, *supra* note 1, at xv, 31, 37, 197, 216–17, 221–24; WU, *supra* note 1, at 15–19.

[90] WU, *supra* note 1, at 25, 57–58.

Not surprisingly, the policy proposals of the populist critics are less specific than those of Jon Baker and other mainstream progressives, and the populists' proposals are not consistent with one another. Tim Wu, for example argues that the law should simply prohibit anticompetitive conduct without requiring that it be shown to create market power in an antitrust market.[91] Senator Warren and others, by contrast, seem to favor structural intervention to reduce the size of big companies or to restrict the scope of their dealings even without proof that they engaged in anticompetitive conduct.[92] Posner and Weyl would block mergers likely to increase the lobbying clout of the merged firm.[93]

It seems reasonable to assume that substantial and increasing inequality of wealth and economic and political power is a serious problem.[94] Some might object to such inequality on moral grounds, but the case against the current inequality does not depend on moral concerns. Even if the wealthy and powerful can be said to have earned their rewards by some theory of just deserts, substantial and increasing inequality erodes community and political stability. This is especially so if, as evidence suggests, wealth and power, and their absence, are passed on to progeny.[95] Government policies that are likely to reduce such inequality would thus seem to warrant careful consideration.

That does not mean, however, that antitrust law would be improved if it were expected both to promote economic welfare and to reduce some forms of inequality.[96] There are substantial reasons to think that revising antitrust laws to further additional objectives would be unwise.

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[91] *See* Wu, *supra* note 79. As noted, proof of market power effects is not required by the antitrust laws when the defendant engages in conduct that is deemed to be unlawful per se. But per se prohibition is based on the premise that likely economic injury can be inferred from the conduct itself, not on the idea that economic injury is immaterial.

[92] *See, e.g.*, Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

[93] POSNER & WEYL, *supra* note 1, at 203.

[94] *See* Angus Deaton, *Today's Inequalities Are Signs That Democratic Capitalism Is Under Threat*, UNIV. OF CHI. BOOTH SCH. OF BUS.: PROMARKET (June 26, 2019), promarket.org/todays-inequalities-are-signs-that-democratic-capitalism-is-under-threat/.

[95] *See, e.g.*, Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017).

[96] The populist critics argue that Congress did not intend the antitrust statutes to be focused exclusively on economic welfare and that a revised antitrust law that focused also on other objectives would be more faithful to Congress's intent. While the debate about Congressional intent is not entirely settled, it is clear that antitrust law has long been regarded as a common law-like discipline that is given an evolving meaning through the litigation process. *E.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2412 (2015) ("Congress . . . intended [antitrust] law's reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'" (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988))); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). The discussion in the text focuses entirely on the policy issues raised by the critics.

In the first place, broadening the objectives of antitrust law would necessarily impair its ability to promote economic welfare. The equality and power-dispersion objectives would frequently conflict with the economic-welfare objective. Indeed, adding objectives matters only when the additional objectives would lead to outcomes different from those realized by a singular focus on economic welfare.

Consider, for example, Wal-Mart's innovation in supply-chain management, Apple's introduction of the smart phone, and Microsoft's licensing model for expanding the then-nascent personal computer industry. The companies that made those innovations gained economic and political power, and their major shareholders and executives became very wealthy as a result. Similar stories could be told on a smaller scale about countless forms of aggressive conduct and more modest innovations. Antitrust law regards such conduct as efficient, not anticompetitive, and the resulting market power as a deserved reward for welfare-increasing conduct. The prospect of such rewards is thought to be a valuable incentive for innovation and other forms of efficient conduct in the future. Such conduct does not violate the antitrust laws.

Now, imagine an antitrust law charged with taking into account the harmful contribution of such conduct to rising inequality of one form or another. If antitrust law were to prohibit welfare-enhancing conduct because of its effect on inequality, it would reduce economic welfare. The same would be true if the court ruled for a defendant in order to promote non-economic objectives. Suppose, for example, that a small firm sought to enter a market dominated by Amazon and orchestrated a price-fixing cartel among input suppliers to facilitate that entry. An antitrust law focused on multiple objectives might overlook the defendant's anticompetitive conduct in order to further the objective of diminishing Amazon's size. Antitrust law has long rejected such "marketplace vigilantism."[97]

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighing inequality or political power, on the one hand, against economic welfare, on the

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[97] United States v. Apple, Inc., 791 F.3d 290, 298, 327–29 (2d Cir. 2015) (holding that Apple violated the antitrust laws when it orchestrated a cartel among book publishers in order to facilitate its entry into the e-book business, which was then dominated by Amazon); *see also* United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927) (holding that price-fixing conspiracy is illegal even if the prices are "reasonable"); United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) (noting that courts "set sail on a sea of doubt" when they try to determine which restraints on competition are in the public interest), *modified*, 175 U.S. 211 (1899).

other.[98] There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary.

That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than 100 years old. It is not an accident that populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

Second, if antitrust decisions are perceived as arbitrary, they will be more easily subject to regulatory capture because there will not be seemingly principled bases to cabin antitrust decision-making. The beneficiaries of a regime susceptible to capture are likely to be the powerful, not the powerless. Ironically, therefore, adding equality and dispersion of economic and political power to the objectives of the antitrust laws could prove detrimental to those very objectives.

The third and perhaps most important cost is rooted in the general application and decentralized enforcement of antitrust law.[99] Antitrust law applies to almost all businesses, and it can be enforced by at least 52 government entities and any entity that has been harmed by an antitrust violation. Antitrust law thus has a widespread effect on business conduct throughout the economy. Its principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law.

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[98] Antitrust law struggles today even with the much less daunting problem of deciding how to treat conduct that both excludes rivals and creates substantial efficiencies in the same market. Several solutions have been proposed. The two that seem to have been applied most frequently in the cases—defendant wins if the conduct has real efficiency benefits and plaintiff wins if the conduct would have made no business sense for the defendant but for its exclusion of rivals and creation of market power—are in effect algorithms that obviate case-by-case weighing. While courts pay lip service in other cases to ad hoc weighing or balancing economic harms and benefits, they rarely do such balancing. They usually avoid that difficult task by finding that the conduct did not harm competition, that it did not create efficiencies, or that the defendants could have achieved the asserted efficiencies through less restrictive means. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830–33 (2009).

[99] Some other nations' competition laws do include objectives in addition to economic welfare. It is not clear how often those other objectives actually change outcomes in competition law proceedings or whether, when they do change outcomes, they do so in a principled manner. *See generally* Harry First & Eleanor M. Fox, Philadelphia National Bank, *Globalization, and the Public Interest*, 80 ANTITRUST L.J. 307 (2015). The issues in the United States are in any event more complex because of the broad scope and decentralized enforcement of U.S. antitrust laws.

If antitrust law is perceived as arbitrary, it will provide a far less certain guide to business conduct. The effect might be disregard of antitrust law in circumstances in which it seems unpredictable. More likely, the effect will be excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition. The effectiveness of antitrust law in promoting competition and economic welfare will be seriously impaired.

These problems cannot be solved by legislative codification. To avoid arbitrariness, the codification would need to be precise. Simple, high-level rules (e.g., no company may have more than *X* employees or *Y* revenues) would serve their intended objectives very imperfectly and with substantial error costs. Because antitrust law applies to almost all industries and covers an infinite variety of market transactions, more detailed rules would need to be very complex. Complex rules would compound compliance problems for business entities and would be especially subject to rapid obsolescence and industry capture. Most important, any such rules would move antitrust law from a guardian of marketplace competition toward a vehicle for government regulation. Antitrust law would cease being either a prescription for economic welfare or "the Magna Carta of free enterprise."[100]

The populist critics are not talking about antitrust law as it has come to be understood. They are having a very different conversation. Insofar as they are talking about the problems associated with increasing inequality, it is an important conversation. But it is a conversation ill-suited for antitrust law—for a law of general application, enforced in a decentralized manner, and intended at least in large part to promote vigorous marketplace competition and economic welfare.

IV. PUTTING THE TWO CONVERSATIONS TOGETHER

These are potentially perilous times for antitrust law. If antitrust law does not adapt in response to the progressive and populist critics—if it seems irrelevant or, more worrisome, revanchist—it risks being sidelined in favor of other laws. But if antitrust law is used to promote a populist agenda, it will be less able to promote economic welfare. It will probably not do a very good job of promoting the populist agenda either, in part because it is enforced case-by-case and thus cannot provide a systematic antidote to inequality or concentrated power.

Antitrust law should retain its singular focus on economic welfare. To do so effectively, it must remain faithful to its common law-like tradition of adapt-

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[100] United States v. Topco Assocs., 405 U.S. 596, 610 (1972); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

ing in light of new learning and new experience. Antitrust law, and the executive and judicial institutions that enforce it, must grapple seriously with worthy and empirically based ideas of the mainstream progressives; those of the conservatives; and, to the extent they are focused on promoting competition and economic welfare, those of the populists as well.

The conservatives and mainstream progressives can be expected to oppose the populist critics' arguments for adding non-economic objectives to antitrust law. That does not mean, however, that their various concerns cannot converge in a single conversation.

A. ANTITRUST LAW

The populist critics have proposed changes to antitrust doctrine. They have suggested both that antitrust law should focus entirely on prohibiting bad conduct, without requiring proof of market power or effects,[101] and that dominant firms should be broken up without proof that they engaged in anticompetitive conduct.[102] These critics could contribute to the discussion of antitrust reform by endeavoring to explain how those proposals would help antitrust law promote economic welfare.

Antitrust law already does the first—prohibit bad conduct without a market power screen—with its per se rules. There are few such rules because the conventional wisdom has been that a market power requirement usefully screens out unimportant cases, keeps antitrust law focused on harms to competition, and reduces both false positives and antitrust compliance costs. The populist critics should be invited to demonstrate how broadening the category of per se rules, or more frequent use of "quick look" methods of condemning conduct that is thought to have no efficiency properties and risks harm to competition, might enhance economic welfare. For example, populist critics might undertake a study that goes beyond Lina Khan's note about Amazon's aggressive pricing[103] and seeks to explain precisely how, if at all, Amazon's conduct was not efficiency-based competition on the merits, how current predatory-pricing law is inadequate to police such conduct, and how that law should be revised to prohibit such conduct in the future, taking into account error-cost analysis.

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[101] Wu, *supra* note 79.
[102] WU, *supra* note 1, at 132–33; Warren, *supra* note 9.
[103] Khan, *supra* note 9.

Proposals for no-fault antitrust remedies have a distinguished lineage; luminaries such as Donald Turner[104] and Nobel laureate Oliver Williamson[105] have embraced them. Antitrust law has never incorporated no-fault remedies, however, because no one has yet articulated workable criteria for identifying the circumstances in which such remedies would do more to enhance economic welfare by promoting competition than to reduce economic welfare by disrupting efficient business organizations and strategies and distorting economic incentives. No-fault antitrust intervention might also be difficult to reconcile with the apparently singular focus of the statutory language and law enforcement context of U.S. antitrust law on prohibiting anticompetitive conduct, rather than authorizing regulation of undesirable market conditions.

The populist critics who now propose such remedies might try to demonstrate the circumstances in which the creation and maintenance of market power by efficient conduct can reduce economic welfare and in which antitrust remedies could prudently be invoked without proof of anticompetitive conduct, taking into account error-cost analysis. Those circumstances would likely entail substantial prior returns to investors, so that the prospect of such intervention in the future would not deter entrepreneurship; substantial likely future costs from market power absent intervention; industry or corporate characteristics that imply relatively modest disruption costs and lost scope and scale economies from intervention; and little likelihood that the market would tip back to monopoly soon after the break-up. Arguably, the prospect of dominant digital platforms with possibly boundless scale economies and network efficiencies provides an occasion to revisit the issue of no-fault antitrust remedies. The populist critics could address that issue in the context of a law that seeks to promote economic welfare.

It is tempting to suggest a broadening of that invitation. In an intriguing passage, Tim Wu said that "[n]o one denies that economic considerations are what should govern any individual case."[106] Wu did not explain what he meant by that, but the comment suggests a world in which antitrust decision-makers decide cases, as they do now, with a singular, rigorous focus on economic welfare but in which the decision rules—the legal doctrine and proof standards—are informed by broader concerns about aggregation and inequality of power and wealth. That way, Wu might imagine, antitrust law can have it all—it can be crafted to serve a range of objectives having to do with eco-

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104 CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 110–19 (1959).

105 Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1514, 1516 (1972) ("persistent dominance of an industry by a single firm is not to be expected" and "should be regarded as an actionable manifestation of market failure").

106 WU, *supra* note 1, at 55.

nomic power but still leave judges with a clear enough mandate to guard against arbitrary decisions. Those broader concerns could then inform the discussion about elimination of market-power screens and no-fault intervention.

But that dichotomy between crafting the rules and applying them does not work for antitrust law because, as explained above, the law cannot sensibly be fully codified and depends on a common-law like evolution of legal doctrine and standards. Sound antitrust law is made by judges on a case-by-case basis. Even in jury cases, it is judges who develop legal doctrine, resolve legal questions, and craft jury instructions. The lawmakers—the judges—must have a coherent objective so their decisions, and thus the law, are not arbitrary. Non-economic objectives cannot sensibly be inserted into antitrust doctrine by distinguishing creation of antitrust law from its application.

The populist critics do not need to confine their analysis of antitrust law to proposals to abandon the market-power or bad-conduct elements. Mainstream progressives have argued in part that the relative tolerance of the law for risks of false positives and false negatives should be recalibrated, in furtherance of the economic-welfare objective, in light of factors that suggest that the frequency and costs of false negatives are greater than previously thought and that the frequency and costs of false positives are lower than previously thought. The populist critics could join that conversation, even if only to respond to arguments that their proposals would reduce economic welfare.

B. REGULATION

Antitrust law has long been thought of as an alternative to—or, in a more forceful articulation, a means of obviating—regulation.[107] The idea is that market competition most efficiently allocates resources and maximizes economic welfare and that interference with competition, whether by private market power or government regulation, is inferior to the preservation of competition by enforcement of the antitrust laws. From this perspective, regulation is appropriate only to constrain natural monopolies, which competition cannot effectively discipline, or to achieve non-economic objectives. At the very least, effective antitrust enforcement can reduce the need for regulation.

It is perhaps surprising, therefore, that regulation seems to be very much on the minds of even members of the mainstream antitrust communities. In recent months, expert reports commissioned by competition law enforcement agencies in the United Kingdom and Australia have recommended the creation of sectoral regulators to deal with, among other things, competition

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[107] Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987).

problems raised by the big digital platforms.[108] The expert report commissioned by the competition law enforcement agency of the European Union did not go that far; but it made clear that it regarded regulation and competition law as complements, not substitutes, and characterized competition law as a "useful . . . 'background regime.'"[109] In the United States, a multidisciplinary expert group proposed more modestly that "the establishment of a sectoral regulator should be seriously considered."[110]

These recommendations might seem odd in a context that has traditionally seen antitrust law as a preferred alternative to regulation.[111] A serious argument can be made, however, that the economic-welfare objective of antitrust law would be best served by establishing a sectoral regulator to address competition issues in certain contexts, such as those raised by the large digital platforms. The argument is based on two premises. The first is that antitrust law is a law of general application and decentralized enforcement; the second is a judgment that large digital platforms, for example, present competition issues that cannot be adequately addressed by antitrust rules suitable for all industries or a decentralized enforcement regime and require instead specialized rules and centralized enforcement. For example, a digital platform might be barred from owning businesses that use the platform and compete against third parties that also use the platform if it were thought that harm to competition in the markets in which the businesses and the third parties compete cannot be adequately prevented by application of general antitrust rules governing vertical integration and dealing with rivals, that the risk of harm is great, and that the risk of lost efficiencies from the prohibition is small.[112]

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[108] DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (2019) (U.K.); AUSTRALIAN COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY (2019).

[109] EUR. COMM'N, DG COMPETITION, COMPETITION POLICY FOR THE DIGITAL ERA 5 (2019).

[110] UNIV. OF CHI. BOOTH SCH. OF BUS., STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, FINAL REPORT AND POLICY BRIEF OF THE STIGLER COMMITTEE ON DIGITAL PLATFORMS 100 (2019). The author of this article was a member of the subcommittee.

[111] Dicta in recent cases have called into question the current vitality of that preference. In *Trinko*, Justice Scalia famously reasoned that, where "a regulatory structure designed to deter and remedy anticompetitive harm . . . exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004); *see also* Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990). Given the unusual circumstances in those cases, however, those dicta might best be understood as reflecting views about judicial accommodation of legislative and executive authority, assessment of the factual context of a regulated industry, and perhaps a cautious view of antitrust law in general, rather than indicating a judicial preference for regulation.

[112] It is important in analyzing this issue to distinguish efficiencies from harms. Critics of Amazon, for example, complain that Amazon uses data about sales of third-party products on its platform to inform its proprietary product strategies to the detriment of the third-party sellers. Harm to third parties can harm competition in the market in which the third parties would other-

Alternatively, unwinding mergers that were reviewed and cleared by the antitrust agencies years earlier might be bad for antitrust law in general because unwinding them might both create uncertainty and perverse incentives for egg scrambling and generate substantial disruption costs; but doing so with some of the acquisitions by the big tech platforms might on balance be thought desirable because of the unique aspects of digital commerce and, in particular, the common development in that sector of competition in unforeseen markets and, perhaps, the resulting inadequacy of ex ante merger review in that sector. A complete assessment of this possibility would require analysis of the disruption costs and lost efficiencies from unwinding such mergers, the administrative costs of overseeing the unwinding, and the likelihood that the unwinding would actually increase competition and economic welfare.

Certain kinds of above-cost price predation might be prohibited when platforms are willing to sacrifice profits to exclude rivals, even if a profit sacrifice or no economic sense test were not thought suitable for predatory-pricing law in general. Or more aggressive standards, unsuitable for antitrust law in general, might be adopted for required portability or licensing of data or interoperation among platforms in order to reduce entry barriers to new competition. A regulator might be better able than an antitrust court to fashion such a requirement that takes account of both the competition interests at stake and the privacy risks that such a requirement might create.

Importantly, the regulation need not be the kind of comprehensive, "public interest" regulation used in the past for natural monopolies, with rate setting, entry restriction, and broad line-of-business limitations. It might instead be a kind of industry-specific competition law aimed primarily, like the antitrust laws, at preserving competition to the maximum extent possible.

It may well be that none of these or similar ideas is sound. The competition problems might be less serious than critics of the big digital platforms believe. Perhaps more important are the well understood, inevitable problems of regulation. Regulation can require more industry knowledge and understanding than regulators are likely to have. It often leads to expansion of the scope of regulation by a kind of inexorable mission creep. Regulation that initially makes sense can rapidly become obsolete yet ossified by bureaucratic inertia and industry investment in regulatory compliance and industry features and structures caused by the regulation. Regulation can impose costly compliance burdens that favor large firms and handicap small firms and new entrants. And sectoral regulation can lead to regulatory capture, usually for the benefit of the very commercial interests that were intended to be constrained for the

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wise compete, but Amazon's use of data lawfully obtained from any source to improve its proprietary products is itself an efficiency benefit.

benefit of others. Not surprisingly, both conservatives and progressives have begun to push back against calls to regulate the digital platforms.[113]

The debate about regulation is nevertheless underway; and the mainstream progressives, conservatives, and populist critics can all participate in that debate. The first two groups can help assess both the adequacy of general antitrust principles to address the concerns about the impact of digital platforms on economic welfare and how, if at all, sectoral regulation might supplement or improve upon antitrust law for that purpose. They might also focus on how, if sectoral regulation is to address non-economic concerns, it might do so with no or minimal cost to economic welfare. For their part, the populist critics might focus on how sectoral regulation will further their objectives while also promoting, or at least not undermining, economic welfare. To the extent that the critics are focused on sectoral regulation, they will have no need to appropriate the language and goodwill of antitrust law for non-economic objectives or to seek to refocus antitrust law itself on those objectives. The now-disparate conversations can become one.

V. CONCLUSION

The Antitrust Paradigm, The Curse of Bigness, The Myth of Capitalism, and other new books and articles have provoked an important rethinking of competition policy, but the thinking thus far has taken place in two separate conversations. The conservatives, progressives, and populists could join in a single conversation if all acknowledged, first, that antitrust law is not well suited to address concerns beyond protecting competition in order to further economic welfare and, second, that serious thought should be given to the possibility of new laws and regulations to serve other objectives and, perhaps, to supplement antitrust law in protecting competition and economic welfare in certain sectors.

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113 *E.g.*, Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Address at the British Institute of International and Comparative Law, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019).

AMERICAN BAR ASSOCIATION
Antitrust Law Section

Antitrust Law Journal

Volume 83 Issue 2 (2020)

ANTITRUST LAW SECTION
AMERICAN BAR ASSOCIATION

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Antitrust Law Journal (ISSN 0003-6056) is a peer-reviewed law review published three times each year by the American Bar Association Antitrust Law Section as a service to its members and for the benefit of lawyers practicing antitrust and consumer protection law. The *Journal* publishes, among other things, original articles and essays on significant current issues of antitrust and consumer protection law.

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Cite items in this volume to 83 ANTITRUST L.J. __ (2020).