
NOTE

ENSURING INDEFINITE ADHERENCE TO ANTITRUST LAW'S CONSUMER WELFARE STANDARD: A CALL FOR THE "CONSUMER TRUST" GOAL

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ABSTRACT

Since the rise of the Chicago School, the consumer welfare standard has governed antitrust policy and run like clockwork, with few hiccups over several decades. However, the emergence of Big Tech and firms in similarly concentrated industries has led to bipartisan calls for stricter antitrust enforcement. This Note maintains that the consumer welfare standard remains superior to its alternatives in addressing anticompetitive harm, or lack thereof, arising out of increasing concentration in the U.S. economy. Moreover, this Note reiterates the flaws of the populist approach to antitrust enforcement. But most importantly, this Note proposes a third goal to operate in tandem with antitrust enforcement's current goals of protecting consumers from the adverse effects of anticompetitive conduct and promoting competition in the economy: the "consumer trust" goal. At bottom, the consumer trust goal requires that antitrust enforcement agencies instill and maintain consumers' trust in the government's ability to protect consumers from the adverse effects of anticompetitive conduct. To ensure compliance with the consumer trust goal, this Note calls on Congress to base discretionary funding decisions for the Department of Justice's Antitrust Division and Federal Trade Commission on a proposed set of benchmarks—the antitrust enforcement agencies' success rate in antitrust cases, and an ex ante evaluation of the government's complaints filed in antitrust cases by an independent, objective board of antitrust law scholars, economists, and former judges—that collectively measure whether the goal is achieved. As this Note argues, the adoption of the consumer trust goal to ensure adherence to the consumer welfare standard benefits consumers, firms, antitrust enforcement agencies, and the judicial system.

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INTRODUCTION

In the late 1970s, antitrust policy was largely informed by the “consumer welfare standard” popularized in Robert Bork’s seminal book and by the Chicago School.¹ Interestingly, the term “consumer welfare,” as Bork used it, was not in reference to consumer surplus (or consumer wealth) alone, but rather to the sum of consumer surplus and producer surplus.² This sum, for Bork, is “merely another term for the wealth of the nation.”³

A central tenet of the consumer welfare standard is that the outcomes of antitrust cases should turn on the purported anticompetitive conduct’s impact on consumer welfare, as evidenced through rigorous economic analysis.⁴ In making that determination, productive efficiency and the alleged conduct’s impact on price, output, quality, and innovation are the foremost considerations.⁵ Under

¹ See generally ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976). As of 2012, over one hundred court cases, including eighteen Supreme Court cases, have cited Bork’s seminal book. Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 476 & n.23 (2012). Some scholars have characterized the Chicago School’s key contributions as “both advanc[ing] the Consumer Welfare Standard . . . and a basic positive microeconomic theory to show how much of the conduct previously considered anticompetitive was justified on ‘efficiency’ grounds.” Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who Is Right in Light of Modern Economics?*, 30 GEO. MASON L. REV. 935, 935 (2023). For a detailed description of the rise of the Chicago School in the 1970s, see Daniel A. Crane, *A Premature Postmortem on the Chicago School of Antitrust*, 93 BUS. HIST. REV. 759, 761-67 (2019).

² See Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 65 (2019) (“Bork did not use the term ‘consumer welfare’ in the same way that most people use it today. For Bork, ‘consumer welfare’ referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers.”).

³ BORK, *supra* note 1, at 90.

⁴ See Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 862 (2020) (“[A]ntitrust evolved the elegant ‘consumer welfare standard’ that simplified the core issue of what constitutes harm to competition into a straightforward question: does the conduct at issue harm consumers?”); Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 305 (2019) (“[T]he Chicago School insights led to the conclusion that economic theory, empirical evidence, and the error-cost framework should guide antitrust enforcement decisions.”); Murat C. Mungan & John M. Yun, *A Reputational View of Antitrust’s Consumer Welfare Standard*, 61 HOU. L. REV. 569, 573-74 (2023) (explaining defendant’s victory in antitrust case signals careful consideration of alleged conduct revealed no harm to consumers on net).

⁵ See Wright et al., *supra* note 4, at 305 (asserting antitrust laws promote consumer welfare by preserving “competition’s ability to lower prices, increase output, [and] enhance quality and innovation”); William S. Comanor & Donald I. Baker, *The Issue of Consumer Welfare in the Government Complaints Against Google & Facebook*, 67 ANTITRUST BULL. 12, 12-13 (2022) (“Consumer welfare is not just about setting low consumer prices. It also embodies the welfare gains from quality competition.”).

the consumer welfare standard, the enforcement of antitrust laws ran like clockwork, with few hiccups over several decades.⁶

However, the recent emergence of “Big Tech” firms—Amazon, Apple, Meta, Google, and more to come—has thrust antitrust enforcement onto the center stage and called the consumer welfare standard into question.⁷ The last several years have witnessed bipartisan calls for more aggressive antitrust regulation, especially of large firms in the technology sector.⁸ In a February 2021 press release, Republican Senator Mike Lee asserted that “there appears to be a broad consensus that the status quo isn’t working.”⁹ In Senator Lee’s view, “[t]he actions of Big Tech continue to divide the nation, undermine fundamental liberties, and distort the market” because “our antitrust enforcers were asleep at the wheel while Silicon Valley transformed from a center of innovation into a center of acquisition.”¹⁰ In July 2021, Democratic President Joe Biden signed an executive order committing “the federal government to full and aggressive enforcement of our antitrust laws. No more tolerance for abusive actions by monopolies. No more bad mergers that lead to mass layoffs, higher prices, fewer options for workers and consumers alike.”¹¹

Certainly, the former chair of the FTC, Professor Lina Khan, and former Assistant Attorney General for the United States Department of Justice Antitrust Division (“DOJ”), Jonathan Kanter, were up for the task mandated in President Biden’s executive order. The DOJ and FTC (collectively, “the Agencies”) brought more merger challenges in the 2022 fiscal year than in any other year since 1976, when pre-merger review was instituted.¹² And in 2020, more

⁶ See, e.g., Dorsey et al., *supra* note 4, at 863 (“[A]bandoning decades of experience and economic learning . . . would turn back the hands of time and return us to an era where antitrust enforcement was incoherent and deleterious.”).

⁷ See, e.g., A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 269 (2020) (citing rise of Big Tech as one significant factor igniting recent wave of criticism levied on antitrust policy).

⁸ 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, 741 (2019) (contending calls for anti-monopoly agenda from established political figures in both major political parties have contributed to “age of populism” in antitrust).

⁹ Press Release, Sen. Mike Lee, Sen. Lee Sets Senate Republican Antitrust Agenda for 117th Congress (Feb. 16, 2021), <https://www.lee.senate.gov/2021/2/sen-lee-sets-senate-republican-antitrust-agenda-for-117th-congress> [<https://perma.cc/8M6P-9T3X>].

¹⁰ *Id.*

¹¹ President Joe Biden, Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy> [<https://perma.cc/YM4Q-KE2N>]; see also Exec. Order No. 14036, 3 C.F.R. 609 (2022) (promulgating policy of promoting robust competition).

¹² Leah Nylen, *Biden Antitrust Enforcers Set New Record for Merger Challenges*, BLOOMBERG L. (Dec. 18, 2023, at 09:30 ET), <https://news.bloomberglaw.com/mergers-and-acquisitions/biden-antitrust-enforcers-set-new-record-for-merger-challenges>. Aside from private litigants and state attorneys general, the DOJ and FTC share the responsibility of

antitrust cases were filed in federal district courts than in any year during the last two decades.¹³

In her prominent student note, Professor Khan argued that the consumer welfare framework should be replaced with “an approach oriented around preserving a competitive process and market structure.”¹⁴ Professor Khan’s artfully advocated approach revitalized a body of scholarship that “peg[s] the distinction between permissible and impermissible conduct to firm size.”¹⁵ Further, the most recent antitrust enforcement regime at the Agencies embraced Professor Khan’s approach—which has been referred to as the “populist approach” to antitrust policy—seemingly at wholesale.¹⁶ Indeed, the populist approach’s infiltration into the antitrust policy landscape is evident in the 2023 Merger Guidelines, which have persisted to this point in the Trump Administration, and some of the Agencies’ recent case filings.¹⁷

There are two longstanding goals of antitrust enforcement: to promote competition and to protect consumers from the adverse effects of

enforcing United States antitrust laws. *See The Enforcers*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> [<https://perma.cc/XXX9-8Z2A>] (last visited Apr. 11, 2026).

¹³ *See* Daniel B. Asimow et al., *Developments in US Antitrust Litigation—2021 Year in Review*, ARNOLD & PORTER (Jan. 26, 2022), <https://www.arnoldporter.com/en/perspectives/advisories/2022/01/developments-in-us-antitrust-litigation-2021> [<https://perma.cc/N4ZY-LFBF>] (“While [the 340 antitrust cases filed in federal district courts in 2021] was roughly a 20% decline from 2020, when federal courts saw the most antitrust cases filed (426) in a given year since 2007, 2021 was still the third highest antitrust filing year during that fourteen-year span.”).

¹⁴ Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 803 (2017).

¹⁵ Dorsey et al., *supra* note 4, at 873.

¹⁶ *See* Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L.J. 393, 393 (2020) (describing critics of modern antitrust policy as “antitrust populists” within “New Brandeis School”); D. Daniel Sokol & Abraham L. Wickelgren, *Populism at the FTC Undermines Antitrust Enforcement*, PROMARKET (Dec. 13, 2021), <https://www.promarket.org/2021/12/13/ftc-populism-antitrust-enforcement-sokol-wickelgren> [<https://perma.cc/LLA7-AQHH>] (arguing “FTC is undermining its ability to effectively enforce our antitrust laws” through “hostility to large corporations,” by prioritizing “economic populism,” and by “minimizing the importance of expertise, democratic accountability, and due process”).

¹⁷ The 2023 Merger Guidelines, jointly issued by the FTC and DOJ, reflect the government’s aggressive policy approach over the last few years, such as through the lowered thresholds for the presumption of merger illegality. *See* U.S. DOJ & FTC, MERGER GUIDELINES 6 n.15 (2023) [hereinafter 2023 GUIDELINES], https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [<https://perma.cc/U82T-R77H>]; *see also infra* Section I.A (discussing recent changes in federal enforcers’ publicly issued antitrust guidelines). The Agencies make their antitrust case filings publicly available. *See Antitrust Case Filings*, U.S. DOJ, <https://www.justice.gov/atr/antitrust-case-filings> [<https://perma.cc/R95F-JUP5>] (last visited Apr. 11, 2026); *Legal Library: Browse*, FTC, <https://www.ftc.gov/legal-library/browse> [<https://perma.cc/XBD7-NWVL>] (last visited Apr. 11, 2026).

anticompetitive conduct.¹⁸ Presumably, these goals animate the government's decisions to challenge, or to not challenge, firms' conduct on a case-by-case basis. But no concrete measures exist to guarantee successful attainment of these goals.

This Note shows why the consumer welfare standard is superior to the populist approach as an analytical framework through which antitrust policy should operate and argues for the addition of a third goal of antitrust enforcement—the “consumer trust” goal—to ensure indefinite adherence to the consumer welfare standard and to relegate the populist approach to the past.

Part I briefly recounts the development of antitrust law, beginning with the enactment of the Sherman Act in 1890. It also explains the economic principles underlying antitrust law, including the differences between types of market structures.

Part II explores the origins and evolutions of the consumer welfare standard and populist approach. It focuses on the superiority of the consumer welfare standard, and the flawed nature of the populist approach, in governing antitrust enforcement and evaluating alleged conduct in antitrust cases. In so doing, this Part examines the praise for and critiques of these antitrust schools of thought in scholarship and case law.

Part III sets forth a third overarching goal for antitrust policy: the consumer trust goal. At bottom, the proposed consumer trust goal requires that antitrust enforcement instill and maintain consumers' trust in the government's ability to actually protect consumers from the adverse effects of anticompetitive conduct. To satisfy the consumer trust goal, the Agencies must increase their rates of success in antitrust cases and secure favorable settlements—not maximize the number of cases brought. To ensure compliance with the consumer trust goal, Congress should adjust discretionary funding for the Agencies pursuant to a proposed set of benchmarks that measure whether the goal is achieved. In turn, Part III outlines the numerous benefits and limited costs of adopting the consumer trust goal and shows that, upon the goal's adoption, the government, consumers, firms, and the judicial system will all be better off than they are today.

I. BACKGROUND

A. *Development of Antitrust Law*

The first federal antitrust law, the Sherman Act, was enacted in 1890.¹⁹ The impetus for its enactment is debatable given the array of political influences at

¹⁸ See *Guide to Antitrust Laws*, FTC [hereinafter *Guide to Antitrust Laws*], <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws> [https://perma.cc/T2GZ-5ALQ] (last visited Apr. 11, 2026) (“[Antitrust] laws promote vigorous competition and protect consumers from anticompetitive mergers and business practices.”).

¹⁹ Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7). Many antitrust principles are rooted in the common law. For a thoughtful discussion on

play, though the most plausible view is that Congress acted in the public interest.²⁰ At the time, large “trusts” had gained control over key pillars of the American economy, namely railroads, steel, and oil.²¹ These firms contributed greatly to the country’s economic output.²² But these firms concomitantly amassed influence over political processes, at least as perceived by policymakers. John Sherman, the senator after whom the Sherman Act was named, was an “outspoken critic” of large businesses, especially the trust in the oil industry, Standard Oil.²³ Senator Sherman received numerous letters from small businesses, and as one historian noted, small oil companies likely exerted the most pressure on Sherman to act.²⁴

Two sections of the Sherman Act are particularly important. Section 1 prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”²⁵ Section 2 declares that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize . . . shall be deemed guilty of a felony.”²⁶ In other words, the Sherman Act sent a clear message to firms: do not conspire to fix prices, and do not monopolize.²⁷ From the perspective of those who were skeptical of or harbored animus against the trusts in 1890, Section 2 was probably the most prudent component of the Sherman Act. However, legislators also acted on a more long-term concern: small firms combining or conspiring to create a monopoly.

At the outset, courts grappled with the breadth of the Sherman Act.²⁸ Surely, not all monopolies in and of themselves could be unlawful. What judicial standards or rules should be applied to evaluate a dominant firm’s

common law restraints of trade, monopoly, criminal conspiracy, and market interference before the enactment of the Sherman Act, see KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION* 34-37 (2003).

²⁰ See HYLTON, *supra* note 19, at 37 (“Congress was sincerely trying to do something to bring monopolies under control, to inject more competition into the economy, and to reassert the value of the individual consumer over that of the large conglomerate firm.”).

²¹ See *id.* at 38 (“Many individuals, including legislators, considered the railroads and the trusts . . . too powerful.”).

²² See James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93, 101 (1990) (“In the decades following the Civil War, an expanded national transportation and communications network aided the geographic extension of markets.”).

²³ Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 REV. AUSTRIAN ECON. 275, 276-78 (2002).

²⁴ See *id.* at 291 (describing lobbying pressures exerted on Senator Sherman leading up to introduction of Sherman Act).

²⁵ 15 U.S.C. § 1.

²⁶ 15 U.S.C. § 2.

²⁷ See Keith N. Hylton, *On Simple Competition Policy*, NETWORK L. REV. (June 13, 2025), <https://www.networklawreview.org/hylton-competition> [<https://perma.cc/3SQB-ZG2M>].

²⁸ See HYLTON, *supra* note 19, at 39 (noting ambiguity inherent in rule of reason as crafted in landmark 1911 Supreme Court case).

anticompetitive conduct? In this regard, Congress left courts in the dark. After the Supreme Court crafted a “reasonableness” test to assess defendants’ conduct in antitrust cases brought under Section 1,²⁹ Congress passed the Clayton Act³⁰ and FTC Act³¹ in 1914.³² Congress was clearly concerned that certain conduct perceived to be anticompetitive could slip through the cracks under any sort of reasonableness inquiry, the precise contours of which were gradually being defined by courts.³³ The FTC Act—specifically Section 5, the source of much controversy to be discussed—created the FTC and vested in it the authority to snuff out “unfair methods of competition.”³⁴ Such “unfair methods” encompass conduct proscribed under the Sherman Act and more. But just how much “more” conduct constitutes “unfair methods” is, in large part, an open question.³⁵

The DOJ and FTC share the authority to enforce federal antitrust laws.³⁶ Specifically, the DOJ prosecutes criminal and civil violations. Unlike the DOJ, however, the FTC is unable to enforce the Sherman Act, so the FTC invokes Section 5 of the FTC Act instead.³⁷ No matter, defendants who are convicted of antitrust violations must pay treble damage penalties under Section 4 of the

²⁹ See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911) (“If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide.”).

³⁰ Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27).

³¹ Ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58).

³² See HYLTON, *supra* note 19, at 39 (identifying *Standard Oil* as impetus for enactment of Clayton Act and FTC Act).

³³ See *id.* (“Pro-regulation interest groups thought [*Standard Oil*] would emasculate enforcement.”); *Standard Oil*, 221 U.S. at 66 (crafting reasonableness test to analyze purportedly unlawful trade restraints in violation of Sherman Act); *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (holding lawfulness of restraint of trade should turn on whether conduct increases or decreases competition on net).

³⁴ 15 U.S.C. § 45(a)(1).

³⁵ See Amy Marshak, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 86 N.Y.U. L. REV. 1121, 1127 (2011) (“Congress gave the Commission limited enforcement mechanisms coupled with broad substantive authority beyond the narrow judicially created rules of the Sherman Act.”).

³⁶ The focus of this Note is primarily cabined to federal antitrust claims. However, state attorneys general also play a crucial role in enforcing state antitrust laws, many of which are analogs to the federal antitrust laws. For more information on state antitrust lawsuits and settlements, see *State Antitrust Litigation and Settlement Database Results*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/issues/antitrust/state-antitrust-litigation-and-settlement-database/results> [<https://perma.cc/LH9A-JQ4X>] (last visited Apr. 11, 2026).

³⁷ For example, the FTC brought a landmark case, *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), under Section 5 of the FTC Act. *Id.* at 145. The case involved pay-for-delay agreements, a burgeoning practice among pharmaceutical firms. See *id.* at 140-41. Similar claims are typically brought under Section 1 of the Sherman Act, though, in lawsuits between firms. See, e.g., *King Drug Co. of Florence v. SmithKline Beecham Corp.*, 791 F.3d 388, 393 (3d Cir. 2015).

Clayton Act.³⁸ Of course, treble damages serve an important deterrent function in many contexts, but as will be discussed, potentially in some more than others.

Over time, courts crafted three standards to evaluate the legality of alleged anticompetitive conduct under Section 1 of the Sherman Act: the per se rule, the rule of reason, and the quick-look rule of reason. First, the per se rule is applied to certain types of nakedly anticompetitive conduct, such as price fixing, market allocation schemes, and bid rigging among horizontal competitors.³⁹ When the per se rule is applied, no inquiry is made into any proffered “reasonableness” of the restraint of trade at issue—the restraints subject to the per se rule “are all banned because of their actual or potential threat to the central nervous system of the economy.”⁴⁰ Because of the harsh penalties that accompany convictions, “[i]t is only after considerable experience with certain business [practices] that courts classify them as per se violations of the Sherman Act.”⁴¹

Second, and in stark contrast to the first, the rule of reason is applied to most of the Section 1 conduct not subject to the per se rule. Under the rule of reason, courts attempt to weigh the procompetitive and anticompetitive effects of the disputed restraint of trade. Typically, plaintiffs must initially show the restraint engendered an anticompetitive effect—an increase in price, decrease in output, or reduction in quality of the product or service in question.⁴² In turn, defendants are permitted to offer a procompetitive justification for the restraint, like heightened innovation prospects.⁴³ If defendants set forth a valid, non-pretextual procompetitive justification, then the burden shifts back to plaintiffs to show that the anticompetitive effects outweigh the procompetitive effects.⁴⁴

Third, in the mid-1980s, and shortly after the rise of the Chicago School, courts found a middle ground between the per se rule and rule of reason: the quick-look standard of review. The quick-look standard applies whenever “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets.”⁴⁵ Essentially, under this standard, the burden of proof is more

³⁸ 15 U.S.C. § 15(a) (“[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . .”).

³⁹ See *Antitrust Resource Manual*, U.S. DOJ (Nov. 2017), <https://www.justice.gov/archive/s/jm/antitrust-resource-manual-1-attorney-generals-policy-statement> [<https://perma.cc/CH9C-XRZB>] (providing examples of conduct subject to per se condemnation under Section 1 of Sherman Act).

⁴⁰ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

⁴¹ *United States v. Topco Assocs.*, 405 U.S. 596, 607-08 (1972).

⁴² See, e.g., *Ohio v. Am. Express Co.*, 585 U.S. 529, 547 (2018) (“[P]laintiffs must prove that [Defendant]’s antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the two-sided credit-card market.”).

⁴³ See, e.g., *id.* at 541.

⁴⁴ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

⁴⁵ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999). For seminal cases that employed

swiftly placed on defendants to assert a procompetitive justification. When appropriately applied, the quick-look standard preserves judicial resources relative to the rule of reason.

Whereas Section 1 of the Sherman Act covers coordinated conduct among two or more firms, Section 2 encompasses unilateral conduct of a single firm. To prevail on a monopolization claim, a plaintiff must show: (1) the defendant possesses monopoly power in a relevant market; and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."⁴⁶

The Clayton Act was far more detailed than the Sherman Act and addressed multiple types of conduct that, from Congress's viewpoint, was anticompetitive and not expressly covered by the Sherman Act.⁴⁷ Perhaps the most prominent section of the Clayton Act is Section 7, which prohibits any merger that substantially lessens competition or tends toward the creation of a monopoly.⁴⁸ However, the Clayton Act also bans other practices, including certain types of price discrimination, sales conditioned on halting dealing with a seller's competitors, and interlocking corporate directorates.⁴⁹

Congress later amended the Clayton Act in 1936 with the Robinson-Patman Act,⁵⁰ which addressed discriminatory pricing practices and was designed to protect small businesses from manufacturers' disparate price offerings to retailers, chain outlets, and small firms.⁵¹ In effect, the Robinson-Patman Act reflected paternalistic treatment of small businesses, under the assumption that large businesses would drive them out of the market.⁵²

the quick-look rule of reason standard, see, for example, *NCAA v. Bd. of Regents*, 468 U.S. 85, 109-10 & n.39 (1984); and *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

⁴⁶ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization is another charge brought under Section 2 of the Sherman Act. To prevail on an attempted monopolization claim, the plaintiff must show specific intent to monopolize and a dangerous probability of success. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

⁴⁷ See HYLTON, *supra* note 19, at 39.

⁴⁸ Clayton Act § 7, 15 U.S.C. § 18 (prohibiting all mergers where "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly").

⁴⁹ See PHILLIP AREEDA, LOUIS KAPLOW, AARON EDLIN & C. SCOTT HEMPHILL, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 42-43 (8th ed. 2022).

⁵⁰ Ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13).

⁵¹ See 15 U.S.C. § 13 (banning price discrimination that served "substantially to lessen competition or tend to create a monopoly"); AREEDA ET AL., *supra* note 49, at 831 (explaining Robinson-Patman Act "focuses not immediately on consumers but on the rivals of the discriminating seller or of the buyer receiving lower prices"); see also Greenfield et al., *supra* note 16, at 396 n.9 (citing examples of cases reflecting Court's paternalistic outlook on small firms).

⁵² See AREEDA ET AL., *supra* note 49, at 835 (noting "[c]ompetition was often seen to threaten the survival of small businesses" when Robinson-Patman Act was passed).

In 1968, the DOJ began publishing “Merger Guidelines,” which provided clarity to firms regarding the types of mergers that may be challenged.⁵³ And in 1992, the Agencies jointly published the first “Horizontal Merger Guidelines” (“Guidelines”).⁵⁴ These Guidelines are published irregularly, about every decade or so.⁵⁵

The 2023 Guidelines reflected a more aggressive approach to antitrust enforcement. For example, under the 2010 Guidelines, mergers in highly concentrated markets that entailed an increase in the Herfindahl-Hirschman Index (“HHI”)⁵⁶ of more than 200 points from pre-merger levels (or post-merger HHIs of over 2,500) were presumed to be anticompetitive, but pursuant to the 2023 Guidelines, the same presumption is reached for mergers that involve an increase of merely 100 points from pre-merger levels (or post-merger HHIs of over 1,800).⁵⁷ Despite musings that the current FTC regime under President

⁵³ See U.S. DOJ, 1968 MERGER GUIDELINES 1 (2015) [hereinafter 1968 GUIDELINES], <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf> [<https://perma.cc/8QTY-DMCS>] (“The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act.”); see also 2023 Merger Guidelines, U.S. DOJ, <https://www.justice.gov/atr/2023-merger-guidelines> [<https://perma.cc/B8QZ-7R27>] (last visited Apr. 11, 2026) (describing Merger Guidelines as “non-binding statement that provides transparency on aspects of the deliberations the Agencies undertake in individual cases under the antitrust laws”).

⁵⁴ See Press Release, U.S. DOJ, Just. Dep’t & Fed. Trade Comm’n Issue Horizontal Merger Guidelines, at i (Apr. 2, 1992), https://www.justice.gov/archive/atr/public/press_releases/1992/0270.htm [<https://perma.cc/X29W-4BNR>].

⁵⁵ For the collective set of Guidelines, see generally 1968 GUIDELINES, *supra* note 53; U.S. DOJ, 1982 MERGER GUIDELINES (1982), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf> [<https://perma.cc/79AP-UH36>]; U.S. DOJ, 1984 MERGER GUIDELINES (2015), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf> [<https://perma.cc/7RHB-SNSS>]; U.S. DOJ & FTC, 1992 MERGER GUIDELINES (2015), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf> [<https://perma.cc/E6PD-CNSV>]; U.S. DOJ & FTC, 1997 MERGER GUIDELINES (2015), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf> [<https://perma.cc/2GDG-FMVF>]; U.S. DOJ & FTC, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 GUIDELINES], <https://www.justice.gov/atr/file/810276/dl?inline> [<https://perma.cc/58T6-8BFQ>]; and 2023 GUIDELINES, *supra* note 17.

⁵⁶ The HHI is calculated by squaring the market shares of each firm in the relevant market. See HYLTON, *supra* note 19, at 328-30. For example, if the relevant market contains two firms (a “duopoly”), each with a 50% market share, and the firms attempt to merge, the pre-merger HHI is equal to 5,000 and the post-merger HHI is equal to 10,000, the highest possible HHI (since the post-merger entity would possess a market share of 100%).

⁵⁷ Contrast 2010 GUIDELINES, *supra* note 55, at 19 (“Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.”), with 2023 GUIDELINES, *supra* note 17, at 5-6 (“A merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly.” (footnote omitted)).

Donald Trump would revise or replace the 2023 Guidelines, it has not done so to date.

Various changes were made to the Guidelines across their 1968, 1982, 1984, 1992, 1997, 2010, and 2023 iterations.⁵⁸ An intriguing empirical question involves assessing the correlation between competition policies established in the Guidelines and the Agencies' success rate in their antitrust cases initiated over those periods. Empirical analysis of lawsuits is an albatross, though there is an emerging body of literature that may enable more rigorous empirical analysis of antitrust cases brought by the Agencies.⁵⁹

In the meantime, the "error-cost framework" sheds knowledge on the implications of excessively aggressive versus excessively lax antitrust enforcement for welfare.⁶⁰ The cost of an erroneous conviction, or an antitrust conviction for conduct that is not anticompetitive (i.e., overdeterrence), is foregone consumer welfare; the cost of failing to convict anticompetitive conduct (i.e., underdeterrence) is deadweight loss.⁶¹ The costs of excessively aggressive enforcement seem to outweigh those of excessively lax antitrust enforcement in some circumstances, but not in others.⁶² Specifically, covert anticompetitive activity, such as price fixing, is likely to be underdeterred given

⁵⁸ See sources cited *supra* note 55 for a collective list of Guidelines.

⁵⁹ See, e.g., Keith N. Hylton & Sanghoon Kim, *Trial Selection and Estimating Damages Equations*, 20 REV. L. & ECON. 1, 2-3 (2024) (discussing limitations of using court cases as data sources in empirical analyses, including relatively small sample sizes and settlements impeding ability to draw random samples from underlying bases of disputes); Jeffrey T. Macher, John W. Mayo, David E.M. Sappington & Mark Whitener, *The Evolution of Judicial Standards: Evidence from Litigated Merger Trials*, J.L. ECON. & ORG., 2024, at 1, 1 (analyzing evolution of judicial standards as applied to proposed mergers using empirical methods).

⁶⁰ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15-17 (1984) (discussing error-cost framework); Wright et al., *supra* note 4, at 305-08 (remarking on dangerous effects of false positives, which "equate to erroneously condemning procompetitive or competitively neutral conduct," and arguing "courts and enforcers should . . . condemn as anticompetitive only that conduct that we can be sure has harmed consumer welfare").

⁶¹ See HYLTON, *supra* note 19, at 43-47; see also *infra* note 84 and accompanying text (explaining deadweight loss).

⁶² For example, in patent-antitrust cases (e.g., product hopping, reverse-payment agreements), the costs of excessively aggressive antitrust enforcement seemingly outweigh the costs of excessively lax enforcement. See Keith N. Hylton & Wendy Xu, *Error Costs, Ratio Tests, and Patent Antitrust Law*, 56 REV. INDUS. ORG. 563, 579 (2020) (finding in antitrust cases involving patent disputes, rules and standards should be constructed so as to favor patent holders).

the difficulty of detecting such conduct.⁶³ The same cannot be said for other types of anticompetitive behavior.⁶⁴

B. *Economic Principles and Theory*

Various economic principles underpin antitrust law and policy.⁶⁵ In the words of Louis Kaplow and Carl Shapiro, “the role of economics in shaping antitrust law has evolved greatly” in recent decades, coinciding with the rise of the Chicago School.⁶⁶ This Section provides a brief account of the central economic principles and theory necessary to understand what follows in this Note.

For centuries, economic theory has relied on models of market structures.⁶⁷ Two of these models are perfectly competitive and monopolistic markets. In reality, markets do not precisely mirror these models, which are nonetheless informative and serve as useful benchmarks for understanding any analysis of antitrust law and policy.⁶⁸

Consumer surplus (also referred to in economic literature as “consumer welfare”) represents the difference between the price a consumer is willing to pay for a good or service and the price that consumer actually pays for that good or service.⁶⁹ For instance, if a consumer is willing to pay \$150 for a pair of fancy new shoes, but ends up purchasing those shoes for \$100, the consumer welfare generated from that consumer’s purchase is \$50. Producer surplus (also referred to in economic literature as “producer welfare”) represents the difference between the price at which a firm sells a good or service and the cost incurred by that firm in producing that good or service.⁷⁰ So, if the fancy new shoes from the previous example cost the firm \$60 to produce, \$40 in producer welfare is generated by the consumer’s purchase.

⁶³ See HYLTON, *supra* note 19, at 43 (“[T]he penalty provisions and the rules governing damages, when viewed in isolation, are likely to underdeter covert anticompetitive activity, such as price-fixing.”).

⁶⁴ See *id.* (“[I]t is difficult to say whether the antitrust laws, viewed in their entirety, underdeter or overdeter.”).

⁶⁵ See Louis Kaplow & Carl Shapiro, *Antitrust*, in 2 HANDBOOK OF LAW AND ECONOMICS 1077, 1077 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“Since the passage of the Sherman Act in 1890, antitrust law has always revolved around the core economic concepts of competition and market power.”).

⁶⁶ See *id.*

⁶⁷ See William G. Shepherd, *The Elements of Market Structure*, 54 REV. ECON. & STAT. 25, 25 (1972).

⁶⁸ See ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 32 (6th ed. 2012) (“Economists distinguish additional market structures that are intermediate between the extremes of perfect competition and monopoly. The most important among these are oligopoly and imperfect competition.”).

⁶⁹ See DAVID C. COLANDER, MICROECONOMICS 144-45 (12th ed. 2024).

⁷⁰ See *id.* at 145.

The sum of consumer and producer surplus yields, in standard microeconomics, the total welfare in a market.⁷¹ Like much commentary on antitrust law, this Note defines, “consumer welfare” as total welfare, rather than consumer surplus alone.⁷² This sum may be drastically affected by market structure and varies with the number of firms in the market.⁷³

A perfectly competitive market is characterized as a market in which there are numerous consumers and firms, such that no one utility-maximizing consumer can affect market demand, and no one profit-maximizing firm can affect market supply.⁷⁴ Total welfare is maximized in a perfectly competitive market.⁷⁵ In economics jargon, a perfectly competitive market efficiently allocates resources, meaning no reallocation of resources can make one market participant better off without making another worse off.⁷⁶ The equilibrium in a perfectly competitive market is characterized by the price-quantity combination at which the quantity of goods or services supplied equals the quantity of goods or services demanded.⁷⁷ Theoretically, should a firm in a perfectly competitive market charge a price greater than the market equilibrium price, that firm would lose all of its customers to another firm in the market.⁷⁸ In other words, perfectly competitive firms are “price takers”—they take the market price as given and produce accordingly.⁷⁹

Unlike a perfectly competitive market, a monopolistic market features only one firm that maintains its position in the presence of barriers to entry.⁸⁰ Because of these barriers, rivals are unable to profitably enter the industry. Not all entry barriers are the same. Some are “natural,” like economies of scale, and others are “artificial,” such as patents granting patent holders temporarily lawful monopolies and the right to exclude rivals from the market.⁸¹ The monopoly price is greater than the equilibrium price under perfect competition, and the

⁷¹ See *id.*

⁷² See *supra* note 2 and accompanying text (noting Bork’s use of term).

⁷³ See F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 57-58, 80 (3d ed. 1990) (explaining relationship of concentration and firm size to market structure).

⁷⁴ See COOTER & ULEN, *supra* note 68, at 28.

⁷⁵ See DAVID A. BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS 418-19 (6th ed. 2020) (explaining mathematics underlying consumer and producer surplus maximization in perfectly competitive market).

⁷⁶ See *id.*

⁷⁷ See THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 336-37 (3d ed. 2004).

⁷⁸ See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 151-52 (19th ed. 2010) (explaining perfectly competitive firm does not charge price for product or service exceeding firm’s marginal cost of production, which equals market equilibrium price).

⁷⁹ See MICELI, *supra* note 77, at 336 (attributing inability to affect market price to large numbers of firms and consumers).

⁸⁰ See COOTER & ULEN, *supra* note 68, at 29.

⁸¹ See JEREMY PETRANKA, INTERMEDIATE MICROECONOMICS: THE SCIENCE OF CHOICE 229-30 (2011) (detailing ways firms gain monopoly power and juxtaposing natural and strategic barriers to entry).

monopoly quantity is less than the equilibrium quantity under perfect competition. Monopolists are able to charge the monopoly price because of their “monopoly power,” or ability to profitably raise the price of a good or service without losing customers to a rival.⁸² As opposed to a perfectly competitive market, some of the social welfare in a monopoly market is usurped by deadweight loss.⁸³ In essence, deadweight loss represents waste, or a loss in total welfare arising from an inefficient allocation of resources.⁸⁴ Recall that any allocation of resources other than that in a perfectly competitive market is technically an inefficient allocation.

Probably the most controversial type of market structure from an antitrust perspective is an oligopolistic market. Such a market is characterized by: (1) a few firms, each possessing some degree of market power and thus an ability to influence the market price; and (2) firms’ interdependent pricing and output decisions.⁸⁵ In contrast to monopoly power, “market power” means the ability to raise the price of a firm’s good or service without losing enough customers to a rival so as to make the price increase unprofitable (of course, an unprofitable price increase runs counter to a firm’s self-interest in maximizing profit).⁸⁶ “Interdependence” means that a firm’s optimal price and output decision depends not only on its marginal cost and consumer demand for the firm’s product or service, but also on the pricing and output decisions of rivals in the market.⁸⁷ Oligopolistic markets are frequently referred to as “concentrated.”⁸⁸ With these economic principles in tow, and with background in the origin and evolution of antitrust law, this Note now turns to the consumer welfare standard and populist approach.

⁸² See AUSTAN GOOLSBEE, STEVEN LEVITT & CHAD SYVERSON, *MICROECONOMICS* 331 (2d ed. 2016) (identifying sole control over market supply as source of monopolists’ price-setting power).

⁸³ See BESANKO & BRAEUTIGAM, *supra* note 75, at 469 (illustrating monopoly equilibrium creating deadweight loss detracting from consumer surplus).

⁸⁴ Consumer surplus is undoubtedly lower in a monopolistic market relative to that in a perfectly competitive market. As more firms enter the industry and undercut the monopolist’s price, the price trends toward the perfectly competitive price and consumer surplus increases. See, e.g., BESANKO & BRAEUTIGAM, *supra* note 75, at 469 fig. 11.16.

⁸⁵ See COOTER & ULEN, *supra* note 68, at 32.

⁸⁶ See R. GLENN HUBBARD & ANTHONY PATRICK O’BRIEN, *MICROECONOMICS* 475-76 (3d ed. 2010) (discussing market power and diverging views as to its desirability).

⁸⁷ See COOTER & ULEN, *supra* note 68, at 32; SCHERER & ROSS, *supra* note 73, at 199 (noting oligopolistic firms’ decisions depend on assumptions about rivals’ decisions and reactions).

⁸⁸ See PAUL BELLEFLAMME & MARTIN PEITZ, *INDUSTRIAL ORGANIZATION: MARKETS AND STRATEGIES* 34-36 (2d ed. 2015) (describing concentration indices as way to measure market power in oligopolistic settings).

II. SUPERIORITY OF THE CONSUMER WELFARE STANDARD

There is a direct conflict between the consumer welfare standard and the populist approach. This Part explains both schools of thought, and why the consumer welfare standard is superior to its alternatives—and certainly to the populist approach—in governing antitrust policy and courts’ evaluation of antitrust claims.

A. *Antitrust Schools of Thought*

There may be numerous “antitrust schools of thought,” meaning one’s beliefs in this area of law may not neatly fall into the two to be discussed. Although this Note advocates for the consumer welfare standard, that is not to say the populist approach is entirely devoid of merit. To be sure, some highly respected scholars, including Professors Tim Wu and Lina Khan, present well-thought-out arguments in support of their positions. The populist approach, at least, contributes to healthy intellectual debate and is a useful pedagogical tool. That said, given the stark differences between the two schools of thought, descriptions of the positions taken by those that subscribe to these schools of thought are in order.

1. Consumer Welfare Standard

What is the “consumer welfare standard” in antitrust law?⁸⁹ To understand Robert Bork’s theory (and to assert any sensible critiques of it), it is important to understand how and why the Chicago School developed. The Chicago School’s rise can be attributed to antitrust policy leading up to the mid-1970s.⁹⁰ The term “Chicago School” refers to a body of literature produced by scholars who were professors at or attended the University of Chicago from the 1950s to the mid-1970s.⁹¹ Bork graduated from the University of Chicago Law School in 1953 and paid homage to Professors Aaron Director and Edward Levi, among others, for their influence on his work.⁹² The Chicago School’s most influential publication was Bork’s seminal book, *The Antitrust Paradox*.

⁸⁹ See *supra* notes 4-5 and accompanying text (discussing key tenets of consumer welfare standard). For a succinct summary of how the consumer welfare standard works in practice, see Hovenkamp, *supra* note 2, at 67. As Professor Hovenkamp asserted, “[a]ntitrust’s [consumer welfare] principle is best regarded as taking a ‘middle run’ approach to markets, reacting aggressively to unambiguous harms such as naked price fixing, and more circumspectly to single-firm conduct or other practices that have a significant potential to benefit consumers.” *Id.*

⁹⁰ See Crane, *supra* note 1, at 761-67 (discussing rise of Chicago School, largely in response to Brandeisian and structuralist antitrust policy); Wright et al., *supra* note 4, at 302-08 (detailing development of Chicago School in response to “unprincipled, socio-political approach to antitrust law” that “lacked any semblance of coherence”).

⁹¹ See Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495, 498-99 (2020).

⁹² *Id.* at 499.

Surprisingly, no one definition of the consumer welfare standard exists. “[I]f you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers,” according to Kanter.⁹³ As Professor Herbert Hovenkamp and other scholars have written, Bork did not intend the term “consumer welfare” to exclude producer welfare.⁹⁴ Instead, the term “consumer welfare” stands for total welfare—that is, consumer welfare plus producer welfare.⁹⁵

Bork’s arguments in *The Antitrust Paradox* can be summarized as follows. First, consumer welfare is “[t]he only goal that should guide interpretation of the antitrust laws.”⁹⁶ In Bork’s view, departures from that goal cut against the consistency and predictability of the law, do not comport with legislative intent, and “damage the integrity of the judicial process by involving the courts in grossly political choices.”⁹⁷

Second, in examining consumer welfare, the most significant contributor to that welfare is productive efficiency, meaning the efficient use of resources (e.g., capital) such that those resources are not wasted or put to less productive uses.⁹⁸ Thus, failure to consider productive efficiency alongside allocative or distributive efficiency, or to consider productive efficiency as a deleterious barrier to entry or competitive advantage, deforms antitrust doctrines.⁹⁹

Third, antitrust law should be reformed so that it strikes only at: (1) horizontal agreements to suppress competition; (2) horizontal mergers that produce “very large” market shares and leave less than three significant rivals in the market; and (3) predatory behavior with the intent to destroy a rival’s business, or bar or forestall a rival’s entry.¹⁰⁰

Fourth, perhaps the most controversial:

The law should permit agreements on prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary, in the sense discussed, to an integration of productive economic activity. It should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, “predatory” price cutting, price “discrimination,” and the like.

⁹³ Jonathan Kanter, Assistant Att’y Gen., U.S. DOJ, Antitrust Div., Remarks at New York City Bar Association’s Milton Handler Lecture (May 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association> [<https://perma.cc/W38Y-8REP>].

⁹⁴ See *supra* note 2 and accompanying text (noting Bork’s definition).

⁹⁵ See *supra* notes 2, 71-73 and accompanying text (defining total welfare).

⁹⁶ BORK, *supra* note 1, at 405.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 405-06.

Antitrust should have no concern with any firm size or industry structure created by internal growth or by a merger more than ten years old.¹⁰¹

All of the conduct delineated here—agreements that are ancillary to carry out principal lawful objectives, small horizontal mergers, vertical price maintenance, tying arrangements, and the like—is not per se unlawful today. At first blush, a wholesale adoption of Bork's argument may leave antitrust enforcers out of work. Or, maybe, firms are permitted to run wild. But upon further examination, these interpretations mischaracterize Bork's position. In Bork's words, "[t]hese are not prescriptions for the nonenforcement of the antitrust laws, but rather for their enforcement in a way that advances . . . competition and consumer welfare."¹⁰² In fact, Bork was not pleased with the paucity of resources available to the DOJ's Antitrust Division to detect price-fixing agreements.¹⁰³ He expressly advocated for the dispersal of federal antitrust enforcers, who remain concentrated in Washington, D.C., to this day, to additional field offices.¹⁰⁴

Another standout contributor to the Chicago School's development was Richard Posner. Similar to other members of the Chicago School, Posner believed that "[t]he time has come to rethink antitrust with the aid of economics."¹⁰⁵ Like Bork, Posner posited that the current organization of antitrust enforcers was ill-suited to combat anticompetitive practices.¹⁰⁶ In this vein, Posner remarked: "Trial lawyers [at the DOJ Antitrust Division] tend to be combative rather than reflective, . . . are relatively poorly paid, tend to be young or mediocre, or to be zealots . . . [and] are not the right people to be custodians of the government's antitrust policy."¹⁰⁷

Posner advanced a couple of proposals for antitrust enforcement, and in his view, the adoption of those proposals would result in a decrease in the number of frivolous cases filed.¹⁰⁸ First, treble damages should be held over a defendant's head only in cases brought by the defendant's customer or supplier, not a competitor.¹⁰⁹ A competitor, Posner reasoned, is likely privy to any

¹⁰¹ *Id.* at 406.

¹⁰² *Id.*

¹⁰³ *Id.* ("Experience with antitrust suggests that there is far more price fixing in the economy than the enforcement authorities detect.").

¹⁰⁴ *Id.* (arguing dispersing antitrust enforcement personnel would not only punish price fixing, which "deliver[s] more consumer welfare for the enforcement dollar than any other kind of prosecution," but also curb predatory misuse of judicial system).

¹⁰⁵ POSNER, *supra* note 1, at 236; *see also* Crane, *supra* note 1, at 769 ("What bound Bork, Posner, and other Chicago School figures together was the insistence that antitrust principles should be focused on efficiency and consumer welfare rather than populist political ideology.").

¹⁰⁶ *See* POSNER, *supra* note 1, at 231 (outlining issues inherent to antitrust policy initiatives spearheaded by DOJ trial lawyers).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 231-32.

¹⁰⁹ *Id.* at 231.

anticompetitive conduct directed its way, but a customer or supplier is not so fortunate and has difficulty distinguishing between a competitive and monopolistic price.¹¹⁰

Posner's second proposal stems from the fact that plaintiffs who win antitrust cases are entitled to recover reasonable attorneys' fees, whereas defendants who prevail in the same cases are not. According to Posner, the resolution of this asymmetrical treatment of parties in antitrust matters would force antitrust enforcement to more selectively consider which cases to prosecute.¹¹¹ Posner also advocated for a reformulation of procedure in antitrust cases, though this proposal is not as relevant (or as feasible) as the others.¹¹²

The consumer welfare standard is easily operationalized: The outcome of antitrust cases should turn on whether defendants' conduct, if true, increased or decreased consumer welfare. Making that determination requires rigorous application of economic principles and reliance on expert economists' testimony.¹¹³

2. Populist Approach

What is the populist approach to antitrust law?¹¹⁴ Again, to assert any critiques of the populist approach, one must understand its development and principal arguments. As discussed above, there was general hostility to big businesses when the Sherman Act was enacted in 1890.¹¹⁵ As some scholars observed, "[t]he U.S. antitrust laws were rooted in 'populism.'"¹¹⁶ Per se prohibitions of agreements between competitors at the turn of the twentieth century, and court decisions in the 1940s and 1950s that held merely circumstantial evidence would suffice to establish proof of a Sherman Act Section 1 conspiracy charge, mirrored the normative outlook on the U.S. economy's competitive landscape before the Chicago School emerged.¹¹⁷

¹¹⁰ *Id.*

¹¹¹ *Id.* at 231-32.

¹¹² *See id.* at 232-36 (emphasizing principle that antitrust trial record should be "factual narrative introduced without any backup materials, and binding on the trier of facts").

¹¹³ *See* Einer Elhauge, *Introduction and Overview to Current Issues in Antitrust Economics*, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 1, 1 (Einer Elhauge ed., 2012) (observing antitrust cases often entail at least one economic expert testifying on behalf of each side).

¹¹⁴ *See* Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 1, 6 (2017) (referring to populism in antitrust as "voices hostile to large businesses" and populism in general as "mobilizing the animosity of 'the people' against the 'corrupt elites' and the 'establishment'"); Melamed & Petit, *supra* note 8, at 741 (observing populist criticism of oligopoly firms for contributing to "high prices, low wages, income inequality, and slow productivity growth"); Muris & Nuechterlein, *supra* note 91, at 495-96 ("Antitrust populists rally around two basic themes: big is bad, and 'the Chicago School' is to blame for letting big companies do bad things.").

¹¹⁵ *See supra* Section I.B (summarizing antitrust environment surrounding Sherman Act).

¹¹⁶ Greenfield et al., *supra* note 16, at 395.

¹¹⁷ *See* HYLTON, *supra* note 19, at 132.

Justice Louis Brandeis's *A Curse of Bigness* is often cited as backing for the populist approach.¹¹⁸ That is for good reason. In Justice Brandeis's view, large corporations were "inherently undesirable."¹¹⁹ This is so, according to Justice Brandeis, because very large firms not only wielded economic power, but also political power that could adversely affect the public.¹²⁰ It follows that such power should be supplanted and distributed amongst many small firms.

Following the Chicago School's rise, the resurgence of the populist approach was seemingly prompted by the emergence of Big Tech and critical examination of platform markets.¹²¹ Perhaps the spark for the populist approach's resurgence was Professor Khan's note, *Amazon's Antitrust Paradox*, written in 2017 during her time as a student at Yale Law School.¹²² In turn, Professor Tim Wu's work buttressed Professor Khan's advocacy for the populist approach.¹²³ The arguments advanced by both Professors Khan and Wu convey the crux of the populist approach.

In *Amazon's Antitrust Paradox*, Professor Khan outlined two models for addressing platforms' market power. The first proposed governing these firms—primarily Amazon, but by extension any Big Tech company—through competition policy, and the second proposed using other regulatory levers.¹²⁴ Both models rely on the premise that the consumer welfare standard is

¹¹⁸ See generally LOUIS D. BRANDEIS, *A Curse of Bigness*, in OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 169 (1914) (arguing railroad combination concentrated financial power and harmed public); LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1934) (compiling anthology on Brandeisian thought). For details on the historical prominence and core tenets of antitrust's Brandeisian and structuralist schools of thought from the 1950s to 1970s, see Crane, *supra* note 1, at 761-65.

¹¹⁹ Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 5 (2015).

¹²⁰ See *id.* at 2 (noting Brandeis's concern with economic, "political and sociological effects of having fewer, larger companies").

¹²¹ Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J.L. BUS. & FIN. 131, 131 (2020) (stating recent rise of antitrust populist approach was in response to difficulties posed by digital economy); Melamed, *supra* note 7, at 269 (listing perceived factors contributing to recent criticism of antitrust law including rise of Big Tech); Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087, 1088-92 (2022) (describing resurgence of populist approach and criticizing approach's assumptions).

¹²² See Alexi Horowitz-Ghazi, Jeff Guo, Jess Jiang & Dave Blanchard, *FTC Chair Lina Khan on Antitrust in the Age of Amazon*, NPR (Nov. 3, 2023, at 17:45 ET), <https://www.npr.org/2023/11/03/1197954506/lina-khan-interview-amazon-ftc-antitrust-paradox-monopoly> [<https://perma.cc/US4Q-3Z9L>] ("Lina Khan . . . wrote a law review article called 'Amazon's Antitrust Paradox,' that went kinda viral in policy circles.").

¹²³ See Sheelah Kolhatkar, *Lina Khan's Battle to Rein In Big Tech*, NEW YORKER (Nov. 29, 2021), <https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech> [<https://perma.cc/R6RM-HQ6C>].

¹²⁴ See Khan, *supra* note 14, at 710.

insufficient to address the purported anticompetitive effects generated by dominant platforms.¹²⁵

Central to Professor Khan's first proposed model is the notion that predatory pricing claims, which have all but disappeared from antitrust case law in the past couple of decades, should be revived and used to dismantle Big Tech firms. Specifically, Professor Khan advocated for a presumption of predation if dominant platforms price below cost.¹²⁶ Three reasons were offered in support of this presumption: (1) where a dominant platform raises prices on its own or unrelated products years after the inception of its predatory conduct, the government faces an uphill battle in meeting its burden of proof in predation cases; (2) it is difficult to detect unlawful instances of a dominant platform's price discrimination; and (3) a dominant platform perpetuates anticompetitive harms regardless of whether the firm imposes price increases.¹²⁷

Amazon's vertical integration deeply troubled Professor Khan. "Limiting Amazon's reach through prophylactic bans on vertical integration—and thereby forcing it to split up its retail and Marketplace operation, for example—would help mitigate this concern," Professor Khan wrote.¹²⁸ It follows, in Professor Khan's view:

In order to capture these anticompetitive concerns, we should replace the consumer welfare framework with an approach oriented around preserving a competitive process and market structure. Applying this idea involves, for example, assessing whether a company's structure creates anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the economics of online platform markets incentivizes predatory conduct and capital markets permit it. More specifically, restoring traditional antitrust principles to create a presumption of predation and to ban vertical integration by dominant platforms could help maintain competition in these markets. If, instead, we accept dominant online platforms as natural monopolies or oligopolies, then applying elements of a public utility regime or essential facilities obligations would maintain the benefits of scale while limiting the ability of dominant platforms to abuse the power that comes with it.¹²⁹

Moving on, Professor Wu set forth several arguments in his book, *The Curse of Bigness: Antitrust in the New Gilded Age*, that established the core tenets of a

¹²⁵ See *id.* (arguing consumer welfare standard is "unequipped to capture the architecture of market power").

¹²⁶ See *id.* at 791. Professor Khan correctly noted that the Supreme Court has yet to identify what cost measurement to use, but that average variable cost serves as a useful proxy (and indeed, is a cost measure historically adopted in predation cases). See *id.* at 791-92.

¹²⁷ See *id.*

¹²⁸ *Id.* at 797.

¹²⁹ *Id.* at 803.

“Neo-Brandeisian Agenda.”¹³⁰ First, Professor Wu argued for revamping the merger process and suggested that mergers resulting in three or fewer “major” firms should be per se unlawful.¹³¹

Second, Professor Wu contended that “the incredibly secretive and technical nature” of the merger process influences the decision whether to attempt to halt a merger.¹³² Professor Wu envisioned a far more transparent merger review process, one in which industry comments are filed publicly and members of the public are encouraged to submit comments on a proposed major merger.¹³³ Further, in the major merger context, the DOJ or FTC (whichever agency plans on a consent decree) should circulate its proposed remedy for “meaningful public comment.”¹³⁴

Third, the United States should follow the European Union’s model and not be afraid to “bring big cases [against Big Tech firms] when competition is clearly under threat.”¹³⁵ Recently, the European Union has cracked down on Big Tech firms and has launched various investigations and lawsuits against them.¹³⁶ By “big” or “major” cases, Professor Wu presumably meant cases with Sherman Act Section 2 claims in which the DOJ or FTC would advocate for the dissolution of a Big Tech firm.¹³⁷

Fourth, related to the third argument, consent decrees should be disfavored as the primary antitrust remedy in lieu of breakups and structural remedies. Despite the fact that breakups of large firms have occurred only a handful of times since the Sherman Act’s enactment, Professor Wu claimed that “[b]reakups and the blocking of mergers . . . are at the historic core of the antitrust program, and should not be shied away from unduly.”¹³⁸

Fifth, Professor Wu argued that the United States should adopt a “market investigations law” similar to the one utilized in the United Kingdom and bestow the FTC with the power to enforce that law.¹³⁹ Such a law would permit the FTC

¹³⁰ See generally TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

¹³¹ *Id.* at 129.

¹³² *Id.* (“It is hard for the public or the press to care without any opportunity to know what is going on.”).

¹³³ See *id.* at 130 (“[M]erger reviews are too important to the public to be so secret.”).

¹³⁴ *Id.*

¹³⁵ *Id.* at 131.

¹³⁶ For a compilation of measures taken by the European Union’s competition authorities, see *European Regulators Crack Down on Big Tech*, REUTERS (Feb. 17, 2026), <https://www.reuters.com/technology/european-regulators-crack-down-big-tech-2026-02-17>.

¹³⁷ See WU, *supra* note 130, at 131 (“The last major [Sherman Act] Section 2 case seeking dissolution of an industrywide firm was the Microsoft trial; the last major breakup was the AT&T litigation.”).

¹³⁸ *Id.* at 132.

¹³⁹ *Id.* at 133-34 (discussing United Kingdom’s use of “market investigation” device to propose divestiture of joint ownership of four major airports, yielding superior service quality and efficiency).

to designate concentrated industries as “under investigation,” and to commence an investigation that may result in the imposition of structural remedies.¹⁴⁰ To qualify for this investigatory process, an industry must meet four prerequisites: (1) ten or more years of firms’ persistent dominance; (2) an indication that no structural remedy is on the horizon; (3) “proof” of no procompetitive or public justifications for the industry’s extant structure; and (4) prototypical market forces are incapable of shaking up the industry’s extant structure.¹⁴¹

Sixth, courts should evaluate allegedly anticompetitive conduct under a “protection of competition” test that turns on whether the conduct “promotes competition or whether it is such as may suppress or even destroy competition.”¹⁴² The test Professor Wu outlined resounds in an early-stage prototype of the modern-day rule of reason that Justice Brandeis employed in 1918’s landmark *Chicago Board of Trade* case.¹⁴³ According to Professor Wu, whereas the modern-day rule of reason focuses on the maximization of value, the protection of competition test examines the protection of a process,¹⁴⁴ echoing Professor Khan’s proposal of “an approach oriented around preserving a competitive process and market structure.”¹⁴⁵

B. *Disparate Paths Forward: Consumer Welfare Standard and Populist Approach*

Antitrust enforcement is faced with disparate paths forward, and a wealth of information on which to base a decision as to the better path. A rich literature with contributions from lawyers, judges, and economists has embraced the consumer welfare standard, even if implicitly, for decades after the rise of the Chicago School. A resurgent body of literature, in contrast, embraces populist antitrust notions and levies criticism on the consumer welfare standard.¹⁴⁶

The populist approach has received ample criticism from legal scholars, judges, and economists because, inter alia, the approach: (1) is reliant on an overly simplistic, “big is bad” notion to initiate lawsuits buoyed by misguided and outdated theories of harm; (2) is incompatible with well-accepted economic principles; (3) functions as a deterrent to investment and innovation; and (4) obscures the source of liability for “violations” of antitrust laws.¹⁴⁷

¹⁴⁰ See *id.* at 134.

¹⁴¹ *Id.*

¹⁴² *Id.* at 135-39 (quoting *Bd. of Trade v. United States (Chicago Board of Trade)*, 246 U.S. 231, 238 (1918)).

¹⁴³ *Chicago Board of Trade*, 246 U.S. at 238.

¹⁴⁴ See Wu, *supra* note 130, at 136 (“The ‘protection of competition’ test is focused on protection of a *process*, as opposed to the maximization of a *value*.”).

¹⁴⁵ Khan, *supra* note 14, at 803.

¹⁴⁶ See sources cited *infra* note 158 (listing examples of scholarly work embracing populist approach).

¹⁴⁷ See, e.g., Dorsey et al., *supra* note 4, at 862 (highlighting “unifying theme” of populist antitrust policies is “returning antitrust to the ‘big-is-bad’ enforcement era prevalent in the first half of the twentieth century”); Portuese, *supra* note 121, at 1087 (asserting antitrust

The first critique of the populist approach is that it coaxes antitrust enforcers to initiate lawsuits against firms based on size and other factors untethered to modern antitrust precedent. Scholars have opined on the implications of the populist approach's guiding "big is bad" notion: "Among other things, [enforcement guided by the populist approach] would ban broad categories of procompetitive mergers, forbid businesses from pursuing commercial arrangements that benefit consumers, and protect inefficient high-cost producers from precisely the type of competition the antitrust laws are intended to foster."¹⁴⁸ Case law is abundantly clear that size in and of itself does not constitute a monopolization offense. To prevail in a monopolization case, a plaintiff must demonstrate that a firm with monopoly power used that power in an exclusionary manner.¹⁴⁹

Relatedly, the second critique of the populist approach is that it shuns economic theory and empirical methods. Today, these are cornerstones of antitrust analysis.¹⁵⁰ Indeed, "[o]vert political antitrust considerations (i.e. those not based on antitrust economics) are no longer part of the [pre-Khan] antitrust policy discourse within the case law or agency practices."¹⁵¹ So, were the populist approach to be adopted, it would conceivably require uprooting what has come to be the normal course at the Agencies and in the judiciary when evaluating antitrust cases.

The third critique of the populist approach is that it deters innovation. As Professor Aurelien Portuese noted, "[t]he [populist approach's] aggressive stance on mergers assumes that mergers are detrimental to the economy, that merger-specific efficiencies never materialize, and that mergers undermine innovation without propelling it."¹⁵² The more often vertical mergers are challenged, the greater the chance that such challenges will inhibit or prevent a merged entity's prospective innovations.¹⁵³ Granted, innovation is difficult to

populism "paradox[ically] . . . will distort and decrease competition in the name of a competition policy disparaging disruptive innovation"); D. Daniel Sokol, *Antitrust, Industrial Policy, and Economic Populism*, in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 281, 284 (Damien Gerard & Ioannis Lianos eds., 2019) (emphasizing importance of embracing economic principles in antitrust law to promote consumer welfare, which antitrust "does best"); Mungan & Yun, *supra* note 4, at 570 (noting antitrust enforcers moving away from consumer welfare standard "could increase, rather than decrease, the frequency of conduct they seek to deter" and "can produce effects contrary to the stated goals of their proponents").

¹⁴⁸ Dorsey et al., *supra* note 4, at 865.

¹⁴⁹ See *supra* note 46 and accompanying text (listing required elements of Sherman Act Section 2 claims).

¹⁵⁰ See Sokol, *supra* note 147, at 286 ("In the United States, antitrust liability has narrowed due to a better understanding of economics, and antitrust analysis is now driven by economic analysis.").

¹⁵¹ *Id.*

¹⁵² Portuese, *supra* note 121, at 1104.

¹⁵³ In other words, the risk of false positives increases as more non-horizontal mergers (and even mergers at large) are challenged. See *id.*

forecast, and at the time the Agencies must decide whether to challenge a merger, a post-merger entity's innovations are typically speculative. However, without a clear roadmap for deciding whether to halt vertical integration, or sound reasoning behind outright banning vertical integration, the populist approach is prone to this critique.¹⁵⁴

The fourth critique of the populist approach is that, if adopted, it would obscure the source of liability for antitrust violations. When a firm is found guilty of violating the antitrust laws, the firm suffers a reputational impact, which throws the company's valuation into flux.¹⁵⁵ This impact may be reduced under the populist approach's amorphous standards, which muddy the public's ability to identify a source of liability justifying adverse judgments and the resulting reputational effects. As some scholars posed: "[I]f the business conduct's legality is assessed using a host of factors, such as the impact on rivals, political groups, employment levels, the environment, diversity, and income distribution, then what precisely gives rise to the firm's liability?"¹⁵⁶ It follows that the reputational impact under the populist approach is "materially less significant than a verdict under the consumer welfare standard."¹⁵⁷

Shifting gears, the consumer welfare standard has received criticism because it purportedly (1) relies on false assumptions regarding how markets operate and how firms act; (2) is unable to address unique concerns posed by Big Tech and platform markets; and (3) functions as an impediment to productivity growth and income equality, among other ills that plague consumers and that critics impute to the lack of antitrust scrutiny of large firms.¹⁵⁸

The consumer welfare standard focuses on productive efficiency—in particular, how such efficiency is enhanced through vertical mergers, and therefore, non-horizontal mergers should not be impeded at will. The first

¹⁵⁴ See *id.* at 1112.

¹⁵⁵ See Mungan & Yun, *supra* note 4, at 577.

¹⁵⁶ *Id.* at 577-78.

¹⁵⁷ *Id.* at 578 ("[E]mpirical studies suggest that firms suffer large reputational sanctions due to findings that they have harmed consumers but not due to similar conduct harming third parties.").

¹⁵⁸ See, e.g., Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479, 479-80 (2019) (arguing consumer welfare standard "is built on a bed of sand" and requires fundamental reconstruction given its historical distortion, market misconceptions, and false assumptions about firm conduct); Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495, 495 (2019) ("Without the fiction that economists can establish that in the short run lower price and higher output measurably increase welfare more than other goals, recent defenses of the [consumer welfare] standard resolve down to arguments based on unsupported assumptions."); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 714 (2018) ("[A]ntitrust law and antitrust institutions are ill suited to directly address concerns associated with the political power of large corporations or other public policy goals such as income inequality or job creation."); Khan, *supra* note 14, at 804 ("Animating these critiques is not a concern about harms to consumer welfare, but the broader set of ills and hazards that a lack of competition breeds." (footnote omitted)).

critique of the consumer welfare standard essentially argues that this is a faulty assumption. Scholars have pointed to retroactive empirical studies on vertical mergers that concluded these mergers actually generate inefficiencies.¹⁵⁹ Moreover, these scholars maintain that predatory pricing does not benefit consumers to the extent alleged by proponents of the consumer welfare standard. Instead, they contend that in certain industries, firms take advantage of antitrust law's lenience toward predatory pricing and "use[] temporary below-cost pricing to eliminate or discipline rivals and protect their own market power."¹⁶⁰

The second critique of the consumer welfare standard is that it is ill-equipped to police the contemporary U.S. economy and specifically Big Tech firms. Consequently, the consumer welfare standard must be overhauled because it cannot be used to govern several dominant firms in the economy that *could* produce especially large anticompetitive effects. Vertical mergers and predatory pricing are but one means through which firms could obtain a dominant market position. Yet since *Brooke Group v. Brown & Williamson Tobacco Corp.*¹⁶¹ was decided in 1993, predatory pricing claims are practically nonexistent (or doomed to fail) because of the difficulty of meeting the recoupment prong.¹⁶² Thus, *under the assumption* that Big Tech firms or firms in other concentrated industries gain their positions as a result of certain types of exclusionary conduct, the consumer welfare standard and its influence on the Supreme Court's predatory pricing doctrine are to blame.¹⁶³

The third critique of the consumer welfare standard is that it has dampened antitrust enforcement, coinciding with diminished startup growth and exacerbated economic inequality.¹⁶⁴ This critique argues that the consumer

¹⁵⁹ For example, "[e]xamining the empirical research on corporate mergers, economist Melissa Schilling wrote, 'A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal.'" Vaheesan, *supra* note 158, at 489-90 (quoting Melissa Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183, 183 (2018)).

¹⁶⁰ *Id.* at 490-91 (highlighting firms in airline, coffee, telecommunications, tobacco, and ocean shipping industries engaging in predatory pricing).

¹⁶¹ 509 U.S. 209 (1993).

¹⁶² *See id.* at 222-24 (holding "plaintiff . . . must prove that the prices complained of are below an appropriate measure of its rival's cost" and demonstrate "the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices"); Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271, 277 (2007) (stating *Brooke Group* test provides difficult evidentiary burden for predation plaintiffs).

¹⁶³ *See supra* Section II.A.2 (outlining Professors Khan and Wu's criticism of Big Tech firms).

¹⁶⁴ *See* Khan, *supra* note 14, at 803-04 (contextualizing populist argument as part of larger debate about "whether the current paradigm in antitrust has failed" due to harms resulting from decline of competition).

welfare standard was causally linked to these sociopolitical ills.¹⁶⁵ It suggests that firms' behavior that gives rise to anticompetitive effects goes unnoticed, or no case is brought to curb such conduct, because of the consumer welfare standard.

The consumer welfare standard is not perfect. To be sure, courts have not embraced the standard precisely as Bork depicted. For example, less than a decade after Bork published *The Antitrust Paradox*, the Supreme Court decided *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*¹⁶⁶ Whereas Bork believed that antitrust law should not sink its claws into refusal to deal claims, the Court crafted an exception to a dominant firm's choice to deal with whomever it pleases.¹⁶⁷ Further, antitrust law has not "abandon[ed] its concern" with small horizontal mergers, vertical mergers, and other types of conduct that Bork thought should be permitted.¹⁶⁸

Nonetheless, the consumer welfare standard stands for a more fundamental proposition and sets forth the best path forward for antitrust enforcement: Cases should be filed against firms whose conduct generates anticompetitive effects that, on net, diminish consumer welfare.

Certain conduct, namely price fixing, market allocation schemes, and bid rigging, produces pernicious effects on consumer welfare. This conduct deserves the application of the per se rule. Other conduct does not have unambiguously harmful effects on consumer welfare and therefore deserves the benefit of the rule of reason. And some conduct that, time and time again, has proven to produce beneficial effects on consumer welfare should not be subject to any antitrust scrutiny.

Since the consumer welfare standard's emergence, the Supreme Court has explicitly, and more often implicitly, relied on it in multiple antitrust cases. Most notably, in *Reiter v. Sonotone Corp.*,¹⁶⁹ a case involving horizontal and vertical price-fixing allegations, the Court, citing *The Antitrust Paradox*, asserted that

¹⁶⁵ See Dorsey et al., *supra* note 4, at 903 (summarizing populist intuition that "lenient antitrust enforcement allows firms to obtain market power . . . increas[ing] the wealth of the wealthiest and, thus, inequality" (footnote omitted)).

¹⁶⁶ 472 U.S. 585 (1985).

¹⁶⁷ See *id.* at 601-04 (recognizing limited duty to deal under Sherman Act Section 2 where monopolist ends prior profitable course of dealing and forgoes short-run benefits to disadvantage competitor).

¹⁶⁸ Contrast BORK, *supra* note 1, at 406 ("[Antitrust law] should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, 'predatory' price cutting, price 'discrimination,' and the like."), with D. Bruce Hoffman, Acting Dir., Bureau of Competition, FTC, Vertical Merger Enforcement at the FTC, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf [<https://perma.cc/8BNE-KQ4J>] ("[S]ince 2000, the FTC and DOJ have challenged 22 vertical mergers—about one per year.").

¹⁶⁹ 442 U.S. 330 (1979).

“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”¹⁷⁰ The Court went on: “[L]eading proponents of the legislation perceived the treble-damages remedy of what is now [Clayton Act] § 4 as a means of protecting consumers from overcharges resulting from price fixing.”¹⁷¹ As aforementioned in Section II.A.1, Bork explicitly addressed price fixing and reasoned the application of the per se rule is undoubtedly appropriate in those cases.¹⁷²

The Supreme Court relied on the notion of consumer welfare in other cases, including *Brooke Group*,¹⁷³ *NCAA v. Board of Regents*,¹⁷⁴ *Leegin*,¹⁷⁵ *Ohio v. American Express Co.*,¹⁷⁶ and *NCAA v. Alston*.¹⁷⁷ In *Brooke Group*, a case brought under the Robinson-Patman Act surrounding predatory pricing practices, the Court referenced the antitrust laws’ “traditional concern for consumer welfare.”¹⁷⁸ It reasoned the word “predatory” in this context refers to harm to competitors, not end consumers; in fact, consumers may benefit from predatory pricing in the form of lower prices.¹⁷⁹ Because antitrust protects consumers, not competitors, the Court established a high bar for plaintiffs to succeed on predatory pricing claims.¹⁸⁰

In *Board of Regents*, a quick-look rule of reason case, the Court addressed the NCAA’s restraint on college football television rights that “eliminate[d] competitors from the market, since only those broadcasters able to bid on

¹⁷⁰ *Id.* at 343 (quoting BORK, *supra* note 1, at 66); *see also* *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (reasoning predatory pricing may increase consumer welfare and “low standards of competitive injury are at odds with the antitrust laws’ traditional concern for consumer welfare and price competition”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (remarking in dicta that state fair trade laws “designed to save inefficient small retailers from their inability to compete” are “foreign to the Sherman Act” and “[d]ivorced from competition and consumer welfare”).

¹⁷¹ *Reiter*, 442 U.S. at 343 (citing BORK, *supra* note 1, at 66).

¹⁷² *See* BORK, *supra* note 1, at 67 (“The per se rule against naked price fixing and similar agreements not to compete is the oldest and clearest of antitrust doctrines, and its existence can be explained only by a preference for consumer welfare as the exclusive goal of antitrust.”).

¹⁷³ *Brooke Grp.*, 509 U.S. at 219-27.

¹⁷⁴ 468 U.S. 85, 106-07 (1984).

¹⁷⁵ *Leegin*, 551 U.S. at 907.

¹⁷⁶ 585 U.S. 529, 551 (2018).

¹⁷⁷ 141 S. Ct. 2141, 2165-66 (2021).

¹⁷⁸ *Brooke Grp.*, 509 U.S. at 221.

¹⁷⁹ *See id.* at 223-24 (“[W]hen a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut.”).

¹⁸⁰ *See id.* at 226 (“[P]rerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury.”).

television rights covering the entire NCAA can compete.”¹⁸¹ The Court remarked:

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”¹⁸²

In *Leegin*, the Court overruled a nearly century-old precedent in holding that vertical minimum resale price maintenance should be judged under the rule of reason given the potentially large benefits accruing to consumers from such an arrangement. Plainly, the Court said, “economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance.”¹⁸³ Along those lines, the Court justified its departure from precedent on the per se prohibition on minimum resale price maintenance, which “hinders competition and *consumer welfare* because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.”¹⁸⁴

Then, in *American Express*, the Court relied on *Leegin* to find there was nothing anticompetitive in American Express’s antisteering provisions, and that such provisions generally carried potential to enhance consumer welfare.¹⁸⁵ Most recently, in *Alston*, the Court asserted that “[j]udges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing *consumer welfare*.”¹⁸⁶

Aside from prominent majority opinions highlighting the importance of consumer welfare in analyzing the competitive effects of a restraint, several of the Court’s dissenting and concurring opinions did the same. For example, in *Eastman Kodak Co. v. Image Technical Services, Inc.*,¹⁸⁷ Justice Scalia warned that a per se rule on tying arrangements condemns conduct without “*any inquiry into the practice’s actual effect on competition and consumer welfare*.”¹⁸⁸ And

¹⁸¹ *NCAA v. Bd. of Regents*, 468 U.S. 85, 108 (1984).

¹⁸² *Id.* at 106-07 (emphasis added) (footnotes omitted) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

¹⁸³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

¹⁸⁴ *Id.* at 902 (emphasis added).

¹⁸⁵ *Ohio v. Am. Express Co.*, 585 U.S. 529, 551 (2018) (“[American Express’s] antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance.”).

¹⁸⁶ *NCAA v. Alston*, 141 S. Ct. 2141, 2165-66 (2021) (emphasis added) (affirming rule of reason analysis striking down NCAA rules limiting education-related benefits schools may offer student-athletes).

¹⁸⁷ 504 U.S. 451 (1992).

¹⁸⁸ *Id.* at 487 (Scalia, J., dissenting) (second emphasis added).

in *FTC v. Actavis, Inc.*,¹⁸⁹ Chief Justice Roberts observed that “[t]he point of antitrust law is to encourage competitive markets to promote *consumer welfare*.”¹⁹⁰

More broadly, the Court retreated from applying the per se standard in matters involving vertical restraints of trade. Coinciding with the height of the Chicago School was *Continental T.V., Inc. v. GTE Sylvania Inc.*¹⁹¹ The case involved a vertical territorial agreement, a nonprice restraint.¹⁹² Central to the Court’s holding was the tradeoff between intrabrand and interbrand competition.¹⁹³ Historically in this context, balancing a restraint’s effects on intrabrand and interbrand competition was a nonstarter.¹⁹⁴ However, the Court held in *GTE Sylvania* that nonprice vertical restraints may enhance interbrand competition at the expense of intrabrand competition and be judged under the rule of reason.¹⁹⁵ Both Bork and Posner were cited for their economic reasoning in support of the Court’s decision.¹⁹⁶

Just before the turn of the century, the Court decided a case surrounding retail price maintenance, *State Oil Co. v. Khan*.¹⁹⁷ There, the Court recognized potentially beneficial effects on consumer welfare resulting from vertical maximum resale price maintenance.¹⁹⁸ Not long after, the Supreme Court expressed its concern with false convictions in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.¹⁹⁹ In that case, the Court asserted that “[m]istaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’ The cost of false positives counsels against an undue expansion of [Sherman Act] § 2 liability.”²⁰⁰

Is there any way to reconcile the two schools of thought? Interestingly, proponents of both positions point to historical accounts in support of their

¹⁸⁹ 570 U.S. 136 (2013).

¹⁹⁰ *Id.* at 161 (Roberts, C.J., dissenting) (emphasis added).

¹⁹¹ 433 U.S. 36 (1977).

¹⁹² *See id.* at 42 (describing manufacturer’s distribution system with territorial and location limits on distributors and franchised retailers).

¹⁹³ *See id.* at 51-52.

¹⁹⁴ *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 381-82 (1967), *overruled by* *GTE Sylvania*, 433 U.S. at 57-59.

¹⁹⁵ *See GTE Sylvania*, 433 U.S. at 53-56.

¹⁹⁶ *See id.* at 56 (reasoning manufacturers’ incentives to preserve intrabrand competition can align with efficient distribution and public interest).

¹⁹⁷ 522 U.S. 3 (1997).

¹⁹⁸ *See id.* at 15 (finding in light of recent decisions and scholarship “difficult to maintain that vertically imposed maximum prices could harm consumers or competition . . . to justify their *per se* invalidation”).

¹⁹⁹ 540 U.S. 398 (2004).

²⁰⁰ *Id.* at 399-400 (citation omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

positions but interpret those accounts in different ways.²⁰¹ Although common ground between the schools of thought is far from evident, steps can be taken to heighten intellectual discourse on antitrust policy. Potentially, the populist approach is useful in viewing how antitrust can regulate some sectors of the modern economy. As some scholars remarked:

Mainstream commentators should recognize that addressing some antitrust-populist proposals requires more than simply defending the consumer welfare standard. Instead, mainstream commentators must evaluate these proposals on their merits, using the consumer welfare benchmark. Conversely, populists should recognize that overheated rhetoric or a shortage of specifics may cause mainstream commentators to dismiss their proposals too quickly or on grounds unmoored to the proposals' merits. Populist proposals that truly depart from the consumer welfare standard would benefit from specificity and a rigorous explanation of why consumer welfare is not up to the job. And if populists would address concentration of economic power through non-antitrust solutions—e.g., sector specific regulation—they should clearly distinguish those solutions from an antitrust approach.²⁰²

C. *Consumer Welfare Standard's Superiority*

The consumer welfare standard is superior to its alternatives. For one, no other viable framework has been proposed, in part due to the standard's inherent flexibility and adaptability to practically any antitrust case.

The crucial role of economic analysis in antitrust cases cannot be overstated.²⁰³ Deviating from the consumer welfare standard is akin to shunning economic analysis, without which anticompetitive harm is speculative. Professor Einer Elhauge noted that because “the courts and enforcement agencies have grounded antitrust legal doctrines explicitly in concepts of antitrust economics . . . every antitrust case of significance has at least one (often more) testifying expert on antitrust economics on each side.”²⁰⁴ Indeed, the DOJ's Antitrust Division houses an “Expert Analysis Group” that “plays a central role in enforcement efforts.”²⁰⁵ And the FTC's attorneys typically

²⁰¹ For example, Bork argued that the legislative histories of the antitrust statutes treat the Sherman Act as a “consumer welfare prescription” and do not reflect any congressional decision to sacrifice consumer welfare in favor of other goals. *See* BORK, *supra* note 1, at 66. Proponents of the populist approach have argued that Bork used a “Trojan Horse” to mask his antitrust policy preferences as those of Sherman Act drafters. *See* Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1215-18.

²⁰² Greenfield et al., *supra* note 16, at 395.

²⁰³ *See* Elhauge, *supra* note 113, at 1 (“Antitrust law is thus unusual not only in the extent to which it turns on economics, but also in the extent to which that economics is vigorously debated in each case.”).

²⁰⁴ *Id.*

²⁰⁵ *Expert Analysis Group*, U.S. DOJ, <https://www.justice.gov/atr/expert-analysis-group> [<https://perma.cc/YF6P-ENHY>] (last visited Apr. 11, 2026) (describing Expert Analysis

delegate tasks like conducting harms analyses for mergers and defining relevant markets to economists.²⁰⁶

Though we cannot *always* take economists' words at face value, safeguards exist. Courts listen to economists for both plaintiffs and defendants, and these experts often advance conflicting views based on their findings using different empirical methods.²⁰⁷ On the off chance that an economist presents analyses totally out of left field, a *Daubert* motion could be filed.²⁰⁸

The evaluation of alleged conduct in antitrust cases has trended toward the rule of reason, clearly to defendants' benefit. Consider *GTE Sylvania*,²⁰⁹ *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,²¹⁰ *Khan*,²¹¹ *Brooke*

Group's crucial role as group of about fifty economists analyzing potential anticompetitive effects of mergers and business practices).

²⁰⁶ See *Bureau of Economics*, FTC, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics> [<https://perma.cc/8Z7M-7ZCM>] (last visited Apr. 11, 2026) ("The FTC's Bureau of Economics helps the FTC evaluate the economic impact of its actions by providing economic analysis for competition and consumer protection investigations and rulemakings, and analyzing the economic impact of government regulations on businesses and consumers."); see also Michael Vita et al., *Economics at the FTC: Estimating Harm from Deception and Analyzing Mergers*, 61 REV. INDUS. ORG. 405, 416 (2022) (noting role FTC economists played in attempted NVIDIA-Arm merger).

While not terribly important for this Note's purposes, the "SSNIP test" is the state-of-the-art standard for determining relevant markets, which are often hotly debated in antitrust litigation. Consider a firm with one location, say Boston, that sells widgets to computer manufacturers. If the relevant market is defined as the market for those widgets, within a one-mile radius of the firm's sole location, then the firm is likely a "monopolist" that owns 100% of the market. On the other hand, if the market is defined as the market for those widgets *and* other widgets necessary to manufacture a computer, across the entire United States, chances are the idea that the firm is a "monopolist" is fanciful. See generally John D. Harkrider, *Operationalizing the Hypothetical Monopolist Test*, U.S. DOJ (Dec. 19, 2023), <https://www.justice.gov/archives/atr/operationalizing-hypothetical-monopolist-test> [<https://perma.cc/U8F2-2 LDS>].

²⁰⁷ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595-97 (1993) (reasoning conventional devices, such as cross-examination and presentation of contrary evidence, rather than wholesale exclusion, are appropriate safeguards for scientific testimony).

²⁰⁸ A *Daubert* motion could be filed to exclude an economist's expert testimony insofar as it is scientifically invalid and cannot be applied to the facts at issue. See *id.* at 594-95.

²⁰⁹ See *supra* notes 191-96 and accompanying text (discussing invalidation of per se standard for nonprice vertical restraints).

²¹⁰ 475 U.S. 574, 594-98 (1986) (holding ambiguous evidence and lack of rational motive cannot support predatory-pricing conspiracy at summary judgment stage).

²¹¹ See *supra* notes 197-98 and accompanying text (discussing invalidation of per se standard for vertical maximum resale price maintenance cases).

Group,²¹² and *Leegin*²¹³ (as well as *Bell Atlantic Corp. v. Twombly*,²¹⁴ albeit in the procedural realm of cases). Regardless of one's view on the trend, the argument that precedent should be overturned or legal standards should be relaxed simply for the sake of combating rising concentration in many industries is folly. Oligopolistic firms should not be permitted to run rampant, colluding with one another to restrict output or engaging in some other nakedly anticompetitive conduct. However, bringing antitrust cases under concocted theories of harm with no precedential backing and in conflict with the consumer welfare standard should be discouraged.

Criticism of antitrust theories divorced from the consumer welfare standard is abundant in scholarship and case law, as previously discussed at length in this Note.²¹⁵ Some of the Agencies' recently filed cases call for similar judicial criticism, and for good reason—the populist approach is inherently flawed.

Consider Professor Wu's six main arguments in *The Curse of Bigness*.²¹⁶ Professor Wu's first argument—that mergers leaving three or fewer "major" firms should be per se unlawful—sets aside procompetitive effects and efficiencies as matters to be ignored.²¹⁷ Professor Wu's second argument regarding the "secretive" and "technical" nature of the merger review process is seriously flawed.²¹⁸ Does commentary submitted by a trained economist, a Managing Partner of a law firm's antitrust practice, and a high school student receive equal weight? How are the Agencies supposed to screen public commentary on proposed mergers? Would commentary be sourced from a biased sample of the public?

The questions posed here are merely threshold questions that leave much to be desired. Fortunately, these questions can be left unanswered because public commentary should not receive any weight whatsoever in the merger review process. Assuming, arguendo, that Professor Wu's characterization of the merger review process as "secretive" and "technical" is accurate and his proposal to source public commentary at each stage of the process is theoretically desirable, the implementation of this proposal would be a practical nightmare.

²¹² See *supra* notes 178-80 and accompanying text (noting high bar for plaintiffs to succeed in predatory pricing antitrust claims).

²¹³ See *supra* notes 183-84 and accompanying text (discussing invalidation of per se standard for minimum resale price maintenance cases).

²¹⁴ 550 U.S. 544, 569 (2007) (dismissing conspiracy complaint for failure to plead facts making agreement plausible rather than merely conceivable).

²¹⁵ See *supra* notes 147-57 and accompanying text (discussing criticism of populist approach).

²¹⁶ See *supra* notes 130-45 and accompanying text (delineating Professor Wu's six arguments comprising "Neo-Brandeisian Agenda").

²¹⁷ See Wu, *supra* note 130, at 129 (asserting giant mergers of great concern to public, implicating consolidation, inequality, and state of capitalism itself).

²¹⁸ See *id.*

Furthermore, if public commentary is so desirable, why not source the public's views before filing any antitrust case? Maybe consumers like seeing "blue texts" that would disappear if Apple was found in violation of Sherman Act Section 2 and the court ordered a divestiture, an outcome that probably would be lauded by the populist approach's proponents.²¹⁹ That is not to say that consumers should have a say in whether to file an antitrust case. To be sure, this would also be infeasible as a practical matter.

Professor Wu's third argument basically advocates for the dissolution of Big Tech firms because they are Big Tech firms. Professor Wu coaxes antitrust enforcement in the United States to mirror the enforcement approach in the European Union.²²⁰ Given the relatively aggressive enforcement in the European Union at present, it is no surprise that proponents of the populist approach implore the United States to follow suit.²²¹ Particularly relevant here is that, in predation cases, the European Union does not observe *Brooke Group*'s two-part test; the European Union lacks a recoupment requirement and presumes predation where price falls below a measure of cost.²²² This is precisely the approach to predation cases for which Professor Khan advocated.²²³

The implications of Professor Wu's argument are as far-fetched as they are startling. *Brooke Group* and *Matsushita* put all but an end to predatory pricing claims.²²⁴ The chance of the Supreme Court reversing course again anytime soon is incredibly unlikely. Moreover, forming hostile *ex ante* beliefs as to whether a firm, type of firm, or firms in certain industries should be prosecuted for violating antitrust laws taints what should be an objective consideration of an antitrust case's merits before a case is filed.

Professor Wu's fourth argument relates to remedies—basically, that consent decrees should take a backseat to structural remedies.²²⁵ This proposal flouts antitrust precedent. Structural remedies are rarely fashioned and have only been imposed a few times over the course of the last century, in all likelihood because such remedies have proven to be largely ineffective in achieving antitrust

²¹⁹ See *United States v. Apple, Inc.*, No. 24-CV-4055, 2025 WL 1829127, at *3 (D.N.J. June 30, 2025) (explaining Apple's alleged constraints on cross-platform messaging as part of anticompetitive strategy favoring iMessage and iPhones).

²²⁰ See WU, *supra* note 130, at 131 ("European antitrust is far from perfect, but its leadership and willingness to bring big cases when competition is clearly under threat should serve as a model for American enforcers . . .").

²²¹ See *supra* notes 135-36 and accompanying text (conveying European Union's aggressive approach to antitrust enforcement against Big Tech).

²²² See Hylton & Deng, *supra* note 162, at 277.

²²³ See *supra* notes 124-29 and accompanying text (discussing Professor Khan's models for addressing platforms' market power).

²²⁴ See John B. Kirkwood, *The Paradox of Predatory Pricing*, CPI ANTITRUST CHRON., Jan. 2022, at 3 (arguing predatory pricing is "antitrust paradox" because no such claims have been successful for over a generation).

²²⁵ See WU, *supra* note 130, at 132 (contending dissolution should be default antitrust remedy and rejecting objections to breakups based on corporate personhood).

goals.²²⁶ Dissolution orders were imposed in *Standard Oil Co. of New Jersey v. United States*²²⁷ and *United States v. American Tobacco Co.*,²²⁸ and a dissolution by consent decree was imposed on AT&T.²²⁹ A more desirable option is regulatory and behavioral remedies, like restrictions imposed in *United States v. United Shoe Machinery Corp.*²³⁰ and the consent decree at the end of the *United States v. Microsoft Corp.*²³¹ litigation.²³² In some scenarios, only mild remedies are appropriate. For example, the court considered the time lapse and fundamental change in market structure when considering what remedies to impose in *United States v. Aluminum Co. of America*.²³³

A universal proposal to practically abolish behavioral remedies is dubious and misses the forest for the trees. Arguably, Professor Wu's focus on Big Tech firms may have obscured his vision of the economy as a whole. This is a more general problem with the populist approach. Even if it had merit in certain sectors of the economy, that merit does not translate into a viable enforcement framework for the economy at large, unlike the more flexible consumer welfare standard.

Next, Professor Wu highlighted the efficacy of a "market investigations law" along the lines of the United Kingdom's. Recall the suggested four-pronged test to determine whether a firm should be put "under investigation" and be subjected to a breakup at the FTC's discretion: (1) ten or more years of the firm's persistent dominance; (2) an indication that no structural remedy is on the horizon;

²²⁶ See Richard A. Epstein, James Parker Hall Distinguished Serv. Professor of L., Univ. of Chi., Structural Remedies in Section 2 Cases: Remarks at the Joint Committee of the Department of Justice and the Federal Trade Commission (Mar. 28, 2007), <https://www.justice.gov/archives/atr/structural-remedies-section-2-cases> [<https://perma.cc/LKM5-U5PV>] (citing historical examples of futile structural remedies and advocating for cautious approach to imposing them in Sherman Act Section 2 cases).

²²⁷ 221 U.S. 1, 78-79 (1911) (holding Standard Oil ownership structure unlawful and affirming dissolution order).

²²⁸ 221 U.S. 106, 184-88 (1911) (ordering dissolution of unlawful combination and instructing lower court to devise and supervise dissolution plan).

²²⁹ See Jake Kobrick, *The Breakup of "Ma Bell"*: *United States v. AT&T*, FED. JUD. CTR., <https://www.fjc.gov/history/spotlight-judicial-history/breakup-ma-bell> [<https://perma.cc/3Z74-8BS9>] (last visited Apr. 11, 2026) (discussing 1956 consent decree imposing line-of-business limits and patent-licensing obligations on AT&T in lieu of divestiture).

²³⁰ 110 F. Supp. 295, 348 (D. Mass. 1953) (rejecting dissolution and opting for lease reform, mandatory sales, and compulsory licensing to erode shoe-machinery monopoly), *aff'd per curiam*, 347 U.S. 521 (1954).

²³¹ 253 F.3d 34, 106 (D.C. Cir. 2001) (observing difficulty in dissolving unitary firms like Microsoft given logistical difficulty and efficiency loss in dismembering integrated operations).

²³² See generally *U.S. v. Microsoft Corporation Information on the Settlement*, U.S. DOJ (Nov. 20, 2015), <https://www.justice.gov/atr/usdoj-antitrust-division-us-v-microsoft-corporation-information-settlement> [<https://perma.cc/XSX7-L3GY>] (reporting details of settlement to resolve DOJ's 2001 case against Microsoft).

²³³ See 148 F.2d 416, 445-48 (2d Cir. 1945) (rejecting automatic dissolution and remanding for later remedy determination based on postwar market realities).

(3) "proof" of no procompetitive or public justifications for the industry's extant structure; and (4) prototypical market forces are incapable of shaking up the industry's extant structure.²³⁴

This test is untenable. Every prong is flawed in one way or another. Taken as a whole, the test affords far too much discretion and could be hijacked for political purposes. Such hijacking claims have been asserted against both the Biden and Trump FTC regimes.²³⁵ The investigatory process would likely be challenged in court to boot.

The first prong is arbitrary—why ten years? Even if empirical evidence supported this timeline, the question then becomes what constitutes "persistent dominance"? Market shares do not do the trick.²³⁶ Or, if "persistent dominance" is evidenced through anticompetitive conduct, then go file an antitrust claim based on a recognized theory of anticompetitive harm.

The second prong is similarly arbitrary and apparently is an offshoot of the first prong. Since structural remedies are so rarely imposed,²³⁷ the second prong might as well not exist because the FTC could always point to the fact that no structural remedy was imposed in the relevant market over the past decade. To the extent the second prong does not turn on what has occurred in the market in the last ten years, this prong is wholly speculative.

The third prong is problematic in that without cognizable antitrust injury, no procompetitive justifications need to be offered. Indeed, no lawsuit should be brought to begin with under such circumstances. Otherwise, firms are dragged into court simply for possessing a dominant market position, which could arise due to natural market forces (e.g., consumers are enamored with a dominant firm's product due to its far superior quality to competitors') or happenstance. Perhaps Professor Wu envisioned the determination of "proof" to be made by the FTC before litigation commences, in which case this prong is just as arbitrary as the second prong. The fourth prong is backward-looking and disregards the dynamic nature of the market, especially the Big Tech sector that has drawn so much attention. Nonetheless, this prong suffers from the same pitfalls as the second prong.

²³⁴ See WU, *supra* note 130, at 134.

²³⁵ See Justin Wise, *Trump's FTC Dismissals Threaten Agency's Bipartisan Bona Fides*, BLOOMBERG L. (Mar. 19, 2025, at 12:53 ET), <https://news.bloomberglaw.com/antitrust/trump-s-ftc-dismissals-threaten-agencys-bipartisan-bona-fides> (reporting President Trump's recent firing of two Democratic FTC commissioners imperils FTC's longstanding independence); *New FTC Commissioners to Take Office Next Week*, COMPETITION POL'Y INT'L (Mar. 13, 2024), <https://www.pymnts.com/cpi-posts/new-ftc-commissioners-to-take-office-next-week> [<https://perma.cc/5L2V-E9G7>] (highlighting criticism of FTC under President Biden for departing from traditional antitrust policy to advance politicized agenda).

²³⁶ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (establishing proof of monopoly power standing alone does not make out monopolization claim under Sherman Act Section 2).

²³⁷ See *supra* notes 227-29 and accompanying text (highlighting rare instances of structural remedies imposed).

Last is Professor Wu's proposed "protection of competition" test, a reformulation of the skeletal rule of reason announced in *Chicago Board of Trade*.²³⁸ Since 1918, numerous cases have added flesh to the rule of reason.²³⁹ So, while Professor Wu's proposed test is not untethered from antitrust precedent, it is outdated.

The populist approach's flaws are evident from other sources, too. During a congressional hearing, then-FTC Chair Khan was lambasted with questions regarding, among other things, the FTC's success rate in antitrust litigation.²⁴⁰ Notably, Chair Khan suggested that winning cases may appropriately go by the wayside in the process of bringing more antitrust cases.²⁴¹ Despite the FTC's then 0-for-4 success rate in merger challenges during her tenure at the agency, Chair Khan believed that those losses highlight the need for congressional responses to competition in the digital age.²⁴² The Agencies' actions reflected this belief. In fiscal year 2022, the Agencies hit a record in filing fifty actions to block deals and were not shy in expressing their intention to set this precedent.²⁴³

Societal inequality and its effects on democracy are, of course, important concerns. But antitrust law is not the vehicle through which these issues should be addressed, partially because of the dubious causal link between antitrust policy and inequality.²⁴⁴

III. THE CONSUMER TRUST GOAL

There are two long-standing goals of antitrust enforcement: to promote competition in the economy and to protect consumers from the adverse effects

²³⁸ See *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

²³⁹ See *supra* notes 209-14 and accompanying text (discussing evolution of rule of reason).

²⁴⁰ See Cecilia Kang, *F.T.C. Chair Faces Criticism in Congressional Hearing*, N.Y. TIMES (July 13, 2023), <https://www.nytimes.com/2023/07/13/technology/ftc-lina-khan-hearing.html> (detailing skepticism expressed by many members of Congress of FTC's antitrust case filings and concern regarding FTC's overarching litigation strategy).

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See Leah Nylen, *FTC's Khan and DOJ's Kanter Beat Back Deals at Fastest Clip in Decades*, BLOOMBERG (Dec. 18, 2023), <https://www.bloomberg.com/news/articles/2023-12-18/biden-antitrust-enforcers-set-new-record-for-merger-challenges> (reporting FTC's twenty-four enforcement actions and DOJ's twenty-six such actions); FTC, No. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 2-4 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [<https://perma.cc/ZGH4-AFEV>] (announcing intention to expand use of FTC Act Section 5 and claiming "Congress evinced a clear aim that 'unfair methods of competition' need not require a showing of current anticompetitive harm or anticompetitive intent in every case").

²⁴⁴ See Dorsey et al., *supra* note 4, at 902-05 (debunking causal link between antitrust enforcement and inequality given lack of empirical evidence).

of anticompetitive conduct.²⁴⁵ This Part proposes a third goal of antitrust enforcement: the consumer trust goal, which assists in assuring compliance with the consumer welfare standard and complements enforcement's current goals.

Essentially, the consumer trust goal calls on the Agencies to instill consumers' trust in the government's ability to protect consumers from the adverse effects of anticompetitive conduct. These effects may manifest as higher prices, lower product quality, fewer consumer choices, less availability of substitutes, and lower wages. None of these effects are desirable in the abstract, so ensuring that business practices do not unreasonably produce such effects is of great significance. Because the Agencies are tasked with preventing consumers from feeling the brunt of anticompetitive effects, it is important that consumers trust the Agencies to fulfill their obligations.

To satisfy the consumer trust goal, the Agencies need to win antitrust cases and secure favorable settlements, which requires more serious consideration of whether the cases brought are likely to succeed on the merits. It also requires reconsideration of whether prolific invocations of FTC Act Section 5 to cover conduct not subject to antitrust scrutiny under Sherman Act Sections 1 and 2 should be curbed. Congress should adjust funding, in either direction, for antitrust authorities at the DOJ and FTC based on the achievement (or lack of achievement) of the consumer trust goal. As discussed below, the consumer trust goal requires consideration of (1) the Agencies' success rate in antitrust cases; and (2) the evaluation of the Agencies' antitrust cases by an independent, objective board of antitrust law scholars, economists, and former judges.

The consumer trust goal comports with the consumer welfare standard. By linking the Agencies' funding to their success and viability of claims, the consumer trust goal incentivizes initiating cases on well-established theories of antitrust harm, not on novel or unfounded theories unsupported by precedent, economic analysis, or common sense.²⁴⁶ For example, price fixing and territorial market division agreements between horizontal competitors should be prosecuted because there is no procompetitive justification for such agreements.²⁴⁷ Indeed, it is hard to imagine a scenario under which such agreements serve to increase consumer welfare—they restrict market output or increase market price, with no offsetting static or dynamic benefits to consumers.²⁴⁸ To reiterate Bork's view in this regard, prosecuting price-fixing

²⁴⁵ See *Guide to Antitrust Laws*, *supra* note 18.

²⁴⁶ As a cautionary tale, see *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984). There, the Second Circuit asserted: "A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be 'analogous' to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system." *Id.* at 137.

²⁴⁷ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (noting price fixing's "actual or potential threat to the central nervous system of the economy" justifying banning).

²⁴⁸ See U.S. DOJ, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR: AN ANTITRUST PRIMER 1 (2021), <https://>

agreements “deliver[s] more consumer welfare for the enforcement dollar than any other kind of prosecution.”²⁴⁹

For this reason, the Agencies should be rewarded with additional resources upon identifying nakedly anticompetitive conduct, bringing a case with well-substantiated claims, and prevailing in litigation. These additional resources may be used to hire additional antitrust attorneys. Or, the resources could be used to establish field offices dispersed across the United States, an outcome Bork suggested is desirable.²⁵⁰

A. *Implementation of the Consumer Trust Goal*

Each year, Congress works on the federal budget for the upcoming fiscal year.²⁵¹ Funding for the Agencies falls into the category of discretionary spending.²⁵² Pursuant to the Appropriations Clause of the U.S. Constitution, “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”²⁵³ In other words, the “power of the purse” is vested in Congress. Therefore, implementing the consumer trust goal ultimately is at Congress’s mercy. This Note does not purport to establish an exact formula for determining whether the consumer trust goal has been satisfied but considers some potential benchmarks that could collectively contribute to that determination.

It should be evident that what should certainly *not* be a benchmark is the number of cases filed, absent some extremely compelling justification that is hard to envision at present. When appropriate, Congress has enacted antitrust legislation to respond to judicial decisions, namely the Clayton Act and FTC Act after *Standard Oil*.²⁵⁴ Some hypothesized that similar congressional action, which never came to fruition, could legislatively overrule *Brooke Group*.²⁵⁵

www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf [https://perma.cc/8YMF-FSNQ] (opining price fixing and market division impede free and open competition and cause price inflation).

²⁴⁹ BORK, *supra* note 1, at 406.

²⁵⁰ See *supra* note 104 and accompanying text (describing Bork’s view that antitrust enforcers at DOJ should be dispersed to field offices).

²⁵¹ *The Federal Budget Process*, USAGOV (Mar. 2, 2026), <https://www.usa.gov/federal-budget-process> [https://perma.cc/WJ7H-C8F9].

²⁵² *Id.*

²⁵³ U.S. CONST. art. I, § 9, cl. 7.

²⁵⁴ See *supra* notes 28-33 and accompanying text (describing how 1914 legislation was passed in response to Supreme Court’s creation of rule of reason).

²⁵⁵ See Steven J. Cernak, *Classic Antitrust Cases: Will Congress Override Brooke Group, Matsushita, and Weyerhaeuser—and Resurrect Utah Pie?*, BONA LAW PC (Jan. 5, 2021), <https://www.theantitrustattorney.com/classic-antitrust-cases-will-congress-override-brooke-group-matsushita-and-weyerhaeuser-and-resurrect-utah-pie> [https://perma.cc/H8WV-R5KG] (discussing prospective effects of Congress overturning recoupment prong in predatory pricing cases established by *Brooke Group*).

Never has Congress jumped at passing antitrust legislation simply because one of the Agencies wanted it to do so. In the last several years, such advocacy has been expressed not through typical avenues, but through filing antitrust cases against large firms.²⁵⁶

The first prong of the consumer trust goal is the Agencies' "win" percentage in antitrust cases. Obviously, it is easy to observe the verdict in cases tried to their merits. However, very few antitrust cases are tried on the merits; most result in settlements or consent decrees.²⁵⁷ Therefore, some threshold must be devised to evaluate whether a settlement constitutes a "win" or "loss" for the Agencies.²⁵⁸

One argument is that any form of settlement is a win for the Agencies in that the average consumer may view it as such when they read a headline in the newspaper associating a large firm with some type of antitrust violation. Though perhaps the average consumer either does not view settlements as "wins" due to the nominal figure of the settlement, or thinks settlements indicate the defendants got off basically scot-free. Consumer surveys and natural experiments could prove immensely useful in revealing the average consumer's view of antitrust settlements. Above all else, a win must be conveyed with sufficient clarity so as to bolster consumers' trust in the Agencies' ability to protect them from anticompetitive conduct, especially in an era where consumers generally distrust government agencies.²⁵⁹

Another way to define a win is every outcome other than a loss. If a court grants defendants' motion to dismiss or motion for summary judgment, then the DOJ or FTC clearly loses the case. In this sense, determining a win appears to be a simple exercise. However, many complaints in antitrust cases feature multiple allegations. For instance, the DOJ's complaint against Google in 2023 contained allegations of monopolization, attempted monopolization, and tying.²⁶⁰ In cases with multiple alleged violations, if the majority of claims are dismissed, that should be deemed a loss.

Yet another way to define a win could be based on the difference between the relief outlined in the government's complaint and the relief awarded by the court

²⁵⁶ See *supra* Section II.A.2 (explaining development of populist approach).

²⁵⁷ See Christopher S. Yoo, Thomas Fetzer, Shan Jiang & Yong Huang, *Due Process in Antitrust Enforcement: Normative and Comparative Perspectives*, 94 S. CAL. L. REV. 843, 912 (2021) (noting DOJ settled 88% of civil antitrust cases from 2010 to 2019 and FTC settled 91% of civil antitrust cases from 2011 to 2016).

²⁵⁸ For a theoretical perspective on plaintiffs' win rates in antitrust cases, see Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1992).

²⁵⁹ See *Why Americans Distrust Government—and What to Do About It*, A.B.A. (Aug. 4, 2024), <https://www.americanbar.org/news/abanews/aba-news-archives/2024/08/why-americans-distrust-government-and-what-to-do> (noting opaque institutional practices, including court procedures, as contributors to public distrust).

²⁶⁰ Complaint at 132-39, *United States v. Google LLC*, 778 F. Supp. 3d 797 (E.D. Va. 2025) (No. 1:23-CV-00108).

or delineated in the settlement agreement or consent decree. Consider a case where, if the government obtains convictions on all claims alleged, the imposed monetary penalties (after trebling per statute) total \$1.5 billion. A win is tallied if the relief awarded by the court exceeds \$750 million, or half of the relief that would be awarded were the government to prevail in demonstrating all of the alleged antitrust violations. Of course, this 50% mark should be revised according to rigorous empirical analysis on the median relief awarded in cases or penalties paid pursuant to settlement agreements or consent decrees.

Given the Agencies' limited resources, this threshold must be adjusted to account for the identity—or perhaps more aptly put, *identities*—of defendants' attorneys. Seldom are defendants represented by solo practitioners in antitrust matters. Often, defendants in antitrust cases draw on vast financial resources to hire at least one large law firm. Though the Agencies shield their exact number of antitrust attorneys from the public, one can reasonably infer that large law firms have more manpower than do the Agencies on any antitrust matter. Consider the attorneys involved in some recent antitrust cases. In September 2025, *The New York Times* identified sixteen “major” cases initiated by the Agencies since 2020.²⁶¹ Just to name one example, Google retained attorneys at four large law firms to represent the company in its various cases against the DOJ.²⁶² Further consideration of how to balance the scales with regard to representation when considering what constitutes a “win” under the consumer trust goal is left to future research.

The second prong entails independent evaluation of the merits of cases filed by the Agencies. This could be accomplished through the establishment of a board of antitrust scholars, former judges, and economists (the “Board”) that, after reading the complaint, assigns a probability of success to the government's case. Because many enforcement officials opt to enter or return to their previously held positions in academia upon the expiration of their terms, just how “independent” such a board would be is a potential issue. However, scholars frequently evaluate each other's work in journals and other academic publications. Preserving objectivity probably does not pose any meaningful concern.

The quality of Board members is important, as is sample size. The Board should tentatively include at least forty antitrust scholars, former judges, and economists. Antitrust scholars who have published a certain number of scholarly antitrust articles in law or economics journals that garnered more than a certain

²⁶¹ See Danielle Kaye, David McCabe, Lazaro Gamio & Cecilia Kang, *Google, Meta, Visa: A Guide to a New Era of U.S. Antitrust Cases*, N.Y. TIMES (Sep. 3, 2025), <https://www.nytimes.com/interactive/2024/business/antitrust-case-tracker.html> (enumerating cases characterized as “aggressive efforts to block big mergers and rein in . . . monopolistic behavior by . . . valuable companies in tech, pharmaceuticals, finance and even groceries”).

²⁶² See Lauren Feiner, *Google Stacks Its Legal Team with Former DOJ Employees as It Faces Antitrust Cases*, CNBC (Mar. 17, 2023), <https://www.cnbc.com/2023/03/17/google-stacks-legal-team-with-former-doj-employees-as-it-faces-antitrust-cases.html> [<https://perma.cc/8XS9-GJXK>].

number of citations should be extended invitations to join the Board. Former judges on the Board should have ample experience with antitrust matters (e.g., Judge Easterbrook, once he retires from the Seventh Circuit). Likewise, economists on the Board should be well-versed in antitrust cases and could be sourced from academia, economic consulting shops, or the Agencies. Economists on the Board from academia should be subject to the same requirements as antitrust scholars; those from economic consulting firms should have testified in numerous antitrust cases of different types (e.g., price-fixing, monopolization, and industry-specific matters like pay-for-delay and product-hopping cases); and those from the Agencies should have worked there for an extended period.

By way of example, assume Congress is devising the Agencies' budgets based on the two prongs of the consumer trust goal. Assume the objective evaluation of cases' merits is on a scale from 1 through 10, where 10 indicates the case is practically certain to result in a conviction. The first hypothetical is presented in Table 1, below.

Table 1. First Hypothetical: Win Rates and Objective Evaluations of Cases.

Agency	"Win" Rates			Median Objective Evaluation of Case Merits Score		
	Year 1	Year 2	Year 3	Year 1	Year 2	Year 3
DOJ	60%	65%	70%	5.7	6.2	6.4
FTC	45%	40%	35%	5.3	4.5	3.8

This hypothetical is the most straightforward application of the consumer trust goal. In this scenario, the DOJ would obtain increases in funding in all three years—the agency's win rate and objective evaluation scores consistently moved favorably in tandem. However, the outcome is precisely the opposite for the FTC.

Consider a second hypothetical, presented in Table 2, below.

Table 2. Second Hypothetical: Win Rates and Objective Evaluations of Cases.

Agency	"Win" Rates			Median Objective Evaluation of Case Merits Score		
	Year 1	Year 2	Year 3	Year 1	Year 2	Year 3
DOJ	60%	65%	70%	5.7	5.2	4.6
FTC	45%	40%	35%	5.3	6.1	6.7

This hypothetical introduces a wrinkle. The Agencies' win rates remained constant between hypotheticals, but viewing the objective evaluation scores alone, one may conclude that the DOJ should obtain less funding and the FTC should obtain more in the coming year—the exact opposite conclusion to the one in the first hypothetical.

Two questions arise. First, which benchmark should predominate in funding decisions? And second, how much weight should be imputed to each benchmark? Of course, as more benchmarks are contemplated, these become thornier questions.

Moreover, should the DOJ and FTC be able to share funding for antitrust enforcement? Assume the DOJ brought a case against firms in the airline industry, and the FTC brought a case against firms in the pharmaceutical industry. Both cases are 90% likely to result in a conviction, and both cases should have been filed. As it turns out, the DOJ won its case and the FTC lost its case. Accordingly, while the DOJ sees an increase in funding for the upcoming year, the FTC sees a decrease. Could the DOJ gift some of its funding to the FTC?

Here is a more general example. Assume that in a particular fiscal year, firms in multiple industries under the FTC's purview happen to enter into detected price-fixing agreements. On the other hand, firms in the industries under the DOJ's supervision do not. Could the DOJ distribute some of its funding to the FTC to prosecute antitrust violations against firms in the industries under the latter's supervision? This Note does not attempt to answer these questions. However, an argument can be made that the Agencies should share a pool of funds for antitrust enforcement. After all, the Agencies jointly publish the Guidelines, and often collaborate and share enforcement ideology, with few exceptions.²⁶³

B. *Cost-Benefit Analysis of the Consumer Trust Goal*

The proposed third goal has many benefits. But no policy proposal is perfectly crafted; some unintended consequences are inescapable. The consumer trust goal should be implemented because its benefits outweigh its costs. In this context, a prudent cost-benefit analysis examines the impacts—some of which are interrelated—of the goal's adoption on the court system, the government, firms, and consumers.

Courts will not have to grapple with antitrust cases involving theories divorced from precedent. Further, dockets will not be bogged down with cases on which it is clear, according to precedent, that the government is unlikely to prevail. The downside is that if the government fails to bring a sufficient number of cases with, for example, attempted monopolization claims under Sherman Act Section 2, out of fear the claims will fail on the dangerous probability of success

²⁶³ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105790, DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT 15 (2023), <https://www.gao.gov/assets/gao-23-105790.pdf> (finding DOJ disagreed with FTC's position in less than 1% of 420 documents filed by Agencies in antitrust cases from 2000 to 2020).

requirement,²⁶⁴ courts may eventually find a dearth of contemporary decisions on which to rely in evaluating such claims.

The government wants to win the antitrust cases it brings and not waste time, energy, and resources on unsuccessful suits. The proposed third goal serves as a further incentive to bring cases in which the government is likely to prevail. Specifically, more resources should be allocated toward detecting and prosecuting nakedly anticompetitive conduct that violates Sherman Act Section 1. The plaintiff's relatively light burden in cases involving conduct that is per se unlawful makes those cases easier for the government to win.

Moreover, no additional resources are necessary to fulfill this additional goal. On the contrary, this additional goal brings about a more efficient allocation of resources at the Agencies. Assume the FTC obtains increased funding in the coming year. It may feel compelled to hire additional antitrust attorneys. Insofar as more staff strengthens the quality of enforcement, that is an obvious positive. On the flip side, to the extent more staff strengthens the urge to pursue unsupported antitrust theories of harm for the sake of testing the waters, that generates waste at the government level and in the judicial system. It also heightens firms' costs, which are likely to be passed onto consumers to some degree. In the following year, the Agencies would see a decrease in funding. Thus, over time, the efficient level of enforcement should result.

In turn, consumers will have a more favorable perception of the government's efficacy in protecting them from the adverse effects of anticompetitive behavior on prices, product quality and choice, and wages.²⁶⁵ These effects will be directly observable to consumers because nakedly anticompetitive conduct will be more often curbed if the consumer trust goal is adopted. Additionally, consumers will gain trust that the government will not interfere with markets and impose unnecessary costs where no cognizable antitrust harm exists.

Firms will be able to anchor their expectations on the antitrust policy front, not have their expectations in flux every time someone new is appointed to head the FTC, and not be discouraged from becoming "big," which in and of itself does not run afoul of antitrust laws.²⁶⁶ The proposed third goal serves as a further

²⁶⁴ See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (mandating plaintiffs must show defendant's specific intent to monopolize and dangerous probability of success to prevail on attempted monopolization claim).

²⁶⁵ See *Mission*, U.S. DOJ: ANTITRUST DIV. (Sep. 14, 2023), <https://www.justice.gov/atr/mission> [<https://perma.cc/Y8HE-K9C2>] ("Competition in a free market . . . provides consumers with lower prices, better quality, greater choice, and innovation. It provides workers with job opportunities, higher wages, better benefits, and other terms of employment."); *Guide to Antitrust Laws*, *supra* note 18 ("The FTC's competition mission is to enforce the rules of the competitive marketplace—the antitrust laws. These laws promote vigorous competition and protect consumers from anticompetitive mergers and business practices.").

²⁶⁶ See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911) (holding Sherman Act monopolization claims judged under rule of reason and high market share not per se unlawful).

disincentive to engage in nakedly anticompetitive conduct, which should be condemned under any operative theory of antitrust policy.

Some potential criticisms of the third proposed goal would be misguided or present downsides that do not outweigh the goal's benefits. One critique could be that conditioning funding for antitrust enforcement on the Agencies' success rates in antitrust cases may perpetuate the government's inability to win cases (i.e., if a decrease in funding results in layoffs of attorneys, fewer resources are able to be devoted to any one case). However, that suggests an even greater incentive for the Agencies to swiftly adopt the proposed third goal, which as established is to the government's own benefit, and also to the benefit of consumers, firms, and the judicial system.

Another critique may be that the pressure imposed on the Agencies to win cases could lead to more cases brought with Sherman Act Section 1 claims, which have greater potential to result in false convictions. If the government brings more cases with Sherman Act Section 1 claims of nakedly anticompetitive conduct, that implies the proposed third goal is serving its intended purpose. Although the possibility of false positives is a valid concern, courts have been and must continue to be wary of these instances.²⁶⁷

One criticism that merits attention is that it would be impractical to increase funding year after year without some cap. The practical dilemma is finding an optimal, inflation-adjusted annual increase such that the Agencies are sufficiently incentivized to meet the consumer trust goal. The optimal annual decrease in funding—an amount equal to the optimal annual increase in funding—must not discourage the Agencies from prosecuting *plausible* violations of Sherman Act Section 2 and FTC Act Section 5. Litigation is inherently uncertain and the potential of a judge disagreeing with the government's definition of a relevant market, for example, is always possible.

Notwithstanding some of the questionable uses of Sherman Act Section 2 and FTC Act Section 5 over the last several years, the Agencies' enforcement of these antitrust laws must not be rendered toothless out of fear that funding may be diminished in the coming year. That said, the Agencies still have a reputation to maintain. If a firm with the requisite market share clearly acts to exclude competition—erecting any barrier to entry previously recognized in the case law—then the Agencies have a duty to enforce Sherman Act Section 2 and FTC Act Section 5, as relevant depending on the agency. In the event they fail to do so, Congress could respond using more drastic methods than funding cuts.

Yet another critique, one that is obviously less reasonable than the others, could be that the reform does not incorporate the populist approach, and any reforms of antitrust law should take the populist approach into account. This critique lacks meaningful standing for all of the aforementioned reasons in Part II why the populist approach is impractical.

Ultimately, the consumer trust goal's pros outweigh its cons. Now is the time to proactively adopt the goal, while recent memory remains fresh and before a

²⁶⁷ See *supra* notes 62-64 and accompanying text (discussing false positive concerns).

forthcoming enforcement regime attempts to upend the consumer welfare standard.

CONCLUSION

The United States economy continues to boast large firms in increasingly concentrated industries.²⁶⁸ All indications are that more of these firms will emerge in the coming years, and further down the line, perhaps these businesses will find homes (or create homes) in currently nonexistent sectors of the American economy. Accordingly, the cacophony of voices that have called for stricter antitrust enforcement will become even more prominent, and inevitably, an antitrust enforcement regime bullish on dismantling big businesses will bring an unprecedented number of lawsuits relying on novel antitrust theories of harm. When that day comes, it is crucial that antitrust law remains true to its principles. The consumer welfare standard has persisted for decades for a reason: It is a workable framework superior to its alternatives and certainly anything resembling the populist approach.

Ensuring adherence to the consumer welfare standard in evaluating alleged antitrust violations—at the FTC, DOJ, and in courts—is of utmost importance. Doing so benefits the judicial system, government, firms, and most importantly, consumers. The addition of the consumer trust goal proposed in this Note does just that.

²⁶⁸ See Rose Jacobs, *Rising Corporate Concentration Continues a 100-Year Trend*, CHI. BOOTH REV. (Aug. 15, 2022), <https://www.chicagobooth.edu/review/rising-corporate-concentration-continues-100-year-trend> [<https://perma.cc/3TDM-U4CL>].