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TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT

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Abstract

Antitrust enforcement is back in the spotlight with advocates from both the political left and the populist political right demanding fundamental competition policy changes. While there are differences among those calling for such changes, several common beliefs generally unite them. This includes a contention that the writings and interpretations of Robert Bork and the Chicago School of economics have led antitrust astray in a manner fundamentally inconsistent with the original intent of the Sherman Act. Further, they are united by a belief that recent empirical, economic studies indicate the economy is becoming overly concentrated, that market power has been increasing dramatically, that performance in many, if not most, markets has been deficient, and that too much profit is going to too few firms. In this article, we identify and detail twelve fallacies of what we call the "neo-antitrust movement" and their associated claims. At the heart of these fallacies is a fundamental misunderstanding of economics and the consumer welfare standard that has been at the heart of competition policy since at least the 1960s. Additionally, there is a heavy reliance on studies that, upon closer scrutiny, do not support the positions of those who cite them. While competition law should be amenable to change, many of the proposals of the neo-antitrust movement would make antitrust less effective in its core mission without achieving the goal of ameliorating other possible injustices about which they are concerned.

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Introduction

Antitrust is back in the spotlight with both the political left and the populist right offering critiques and tendering proposals that would revert antitrust to its purported historic origins. Some have given the moniker "hipster antitrust" to these advocates of change,[1] while many of these advocates themselves prefer the title "Neo-Brandeisians."[2] Since both of these phrases appear judgmental regarding the merits of this somewhat amorphous movement, we adopt the term "neo-antitrust" to delineate this group. We refer to the current antitrust framework, primarily demarcated through its focus on protecting the competitive process as defined by its effect on consumers and their welfare, as "modern antitrust."

While neo-antitrust is neither a homogenous movement, nor a fully worked-out policy program, there are a number of common threads. This article lists twelve fallacies of thought associated with at least some aspects of the neo-antitrust movement.[3] Some proponents of the neo-antitrust school expressly invoke some of these fallacies. Others are simply implicit errors. Not all of these fallacies apply to all proponents, but each applies to more than a few.

By pointing out these fallacies, we do not mean to imply that there cannot be reasonable debate concerning antitrust enforcement and its goals. There is a long and healthy history of such debate in academia, the courts, and competition agencies as well as in the business community and society more broadly.[4] Moreover, there are legitimate concerns about various

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[1] *See, e.g.*, Joshua D. Wright, Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, ARIZONA STATE LAW JOURNAL, *forthcoming*.
[2] *See*, *e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 JOURNAL OF COMPETITION LAW & PRACTICE 131 (2018).
[3] We use the term fallacy in its more colloquial sense as a false or misleading idea and not in the strictly logical sense of an error of reasoning, although some of the fallacies we list would accord with this definition as well.
[4] *See, e.g.,* William H. Page, *The Ideological Origins and Evolution of U.S. Antitrust Law (2008)*, *in* ISSUES IN COMPETITION LAW AND POLICY 1, ABA SECTION OF ANTITRUST LAW.

phenomena that may be causing harm to the lives of Americans that the advocates of the neo-antitrust movement want to redress by bringing under the purview of a more interventionist competition regime. This includes issues such as the distribution of wealth; difficulties faced by small business owners and the communities they serve; or abuse of political power. However, a key theme of this paper is that many of the proposals of the neo-antitrust movement would make antitrust less effective in its core mission without achieving the goal of ameliorating other possible injustices about which they are concerned. It is our hope that this paper will contribute to a more reasoned and fruitful debate regarding the proper objectives and role of antitrust.

I. *Fallacy One: Competition in the United States is clearly declining.*

Some members of the neo-antitrust movement point to several studies that, in their view, demonstrate a decline in competition. These studies purport to show, *inter alia*, that (1) market concentration is increasing and (2) corporate profits and margins have been increasing.[5] Moreover, they assign causality for these trends to supposedly lax antitrust standards and enforcement. They do not consider or caveat that these studies suffer from potentially serious deficiencies—including the fact that the observed outcomes cannot be tied closely to any alleged failings of antitrust policy.

It is worth noting at the outset that high concentration, by itself, does not demonstrate a failure of antitrust policy or imply an outcome that is bad for consumers or for society as a

[5] *See*, *e.g.*, Council of Economic Advisors, Benefits of Competition and Indicators of Market Power (Council of Economic Advisors Issue Brief updated May 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications,* NBER Working Paper No. 23687, August 2017; Robert Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the US Economy,* NBER Working Paper No. 24574, May 2018; Grullon, Gustavo and Larkin, Yelena and Michaely, Roni, *Are U.S. Industries Becoming More Concentrated?* (October 25, 2018), forthcoming, Review of Finance, available at: https://ssrn.com/abstract=2612047 or http://dx.doi.org/10.2139/ssrn.2612047.

whole. Even if it were true that overall concentration in properly measured antitrust markets was increasing, and even if it were also true that many firms were earning a very high return, this is not direct evidence of a decline in competition. In other words, concentration and competition are not the same thing.

Competition is about the process. If firms grow organically to have high market shares because they are more efficient and offer low prices and beneficial new products and—due to economies of scale and/or networks effects—earn very high returns, then the economy and consumers are better off. In such a situation the market may appear to have high concentration and high profits. However, it is not the high concentration that has led to the high profits. Rather, a few firms grow to positions of leadership and earn high profits either because they reduce costs or provide goods that consumer prefer or both.[6] Ultimately, market performance is the point of competition, while counting the number of players is not. Thus, an undue focus on concentration is seriously flawed regardless of any shortcomings of the studies at issue.

First, consider studies finding that industry concentration is increasing. Perhaps the first, and certainly the most well-known, of these is a study by the Council of Economic Advisers (CEA) from 2016.[7] There have also been similar studies and statistics in the popular press.[8] The main conclusion of the CEA study is that "[s]everal indicators suggest that competition may be decreasing in many economic sectors, including…increases in industry-specific measures of

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[6] *See, e.g.*, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 JOURNAL OF LAW AND ECONOMICS 1 (1973). This hypothesis was treated skeptically by many economists until statistical studies confirmed that market share effects on profitability dominate industry concentration effects. (*See, e.g.*, David J. Ravenscraft, *Structure-Profit Relationship at the Line of Business and Industry Level,* 65 REVIEW OF ECONOMICS AND STATISTICS 31 (1983)).

[7] Council of Economic Advisors, Benefits of Competition and Indicators of Market Power (Council of Economic Advisors Issue Brief updated May 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf).

[8] *See, e.g.*, "Corporation Concentration: The Creep of Consolidation Across America's Corporate Landscape," available at https://www.economist.com/blogs/graphicdetail/2016/03/daily-chart-13, 24 March 2016.

concentration."[9] The first major problem with the CEA and similar studies is that they use highly aggregated data such as Census data. For example, the CEA study uses a fifty-firm concentration ratio (CR50) in thirteen broad sectors such as "Wholesale Trade" and "Utilities."[10] It does not take more than a moment to realize that such aggregations have no real relevance to competition.[11] For example, many of the firms operating in "wholesale trade" are not competitors of one another (they do different things, and may not even operate in the same geographic areas). An electricity producer in Northern California does not compete with one in Florida, but both would be included in the "utilities" sector.

Relevantly, in its report, the CEA acknowledges the fundamental difference between aggregated concentration measures and antitrust market power.[12] This critical qualification is frequently ignored by those using the CEA's (and other, similar, studies') findings in the service of their particular agendas.[13] For instance, Khan (2017) cites the CEA report, among others, and concludes, "A growing body of work shows that the consumer welfare frame has failed even on its own terms—namely, by leading to higher prices without any clear efficiency gains."[14]

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[9] CEA, p. 1.

[10] *See* CEA Report, Table 1.

[11] A crucial and widely agreed upon antitrust principle is that relevant markets are defined based on the substitutes to which consumers will turn in response to a price increase or a corresponding non-price change such as a reduction in product quality. There is little relevance in suggesting that concentration may be increasing in an industry comprised of producers whose products are not viewed by consumers as substitutes for one another.

[12] *See* CEA, p. 4 ("The statistics presented in Table 1 are national statistics across broad aggregates of industries, and an increase in revenue concentration at the national level is neither a necessary nor sufficient condition to indicate an increase in market power").

[13] Additionally, the Chairman of the Council of Economic Advisors when the CEA Report was published, Jason Furman, recently chaired a panel to advise the United Kingdom on digital competition issues. Among the other recommendations, the panel firmly supports the consumer welfare standard, which is the regime that the neo-antitrust movement believes is at the heart of the problem and responsible for the alleged increases in concentration. *See* Unlocking Digital Competition, Report of the Digital Competition Expert Panel, March 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf ("Consumer welfare is the appropriate perspective to motivate competition policy and a completely new approach is not needed. This approach is flexible and can take into account broader considerations than price, narrowly defined, and also include choice, quality and innovation, among other areas," p. 5).

[14] Lina Khan, *Amazon's Antitrust Paradox,* 3 THE YALE LAW JOURNAL 564 (2017) footnote 148.

Froeb & Werden (2018) further explain why increases in concentration in such broad aggregates need not bear any relationship to increases in concentration in relevant antitrust markets.[15] For example, if the more highly concentrated antitrust markets are growing more quickly than the less concentrated ones within these broad aggregates, this can lead to increasing Herfindahl-Hirschman Indexes (HHIs) (in the broad aggregates) even if there has been no actual increase in concentration (in the relevant antitrust markets). Indeed, there can be increases in concentration in the broad aggregates even if there have been decreases in concentration in the underlying relevant antitrust market.[16]

Shapiro (2018) notes, to the extent increases in concentration in these broad aggregates reflect actual increases in concentration, it would appear the increases and levels of concentration are modest.[17] For example, the weighted average HHI in the various sectors mentioned in a widely publicized study in *The Economist* is no more than 700. This is equivalent to the concentration level of a market with around fourteen equal sized competitors.

In addition to relying on studies that use concentration measures for aggregations that are not actual antitrust markets, many advocates of neo-antitrust point to studies purporting to show that mark-ups are increasing (higher markups presumably being evidence of greater market power and less competition).[18] However, a number of studies question the validity of these results. For example, Traina (2018) finds that when measures of mark-ups broader than the ratio of price to the cost of goods sold are used, *i.e.*, if one includes costs such as marketing and

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[15] Gregory Werden and Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration,* ANTITRUST MAGAZINE, Fall 2018.

[16] This result obtains if both the highly concentrated antitrust markets and the less concentrated markets within the broader aggregates experience a drop-in concentration due to entry but the more highly concentrated markets grow faster than the less concentrated ones.

[17] *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 714 (2018).

[18] *See* De Loecker & Eeckhout.

management costs, there is no discernible trend pointing to increasing mark-ups.[19] This result is consistent with the increasing importance of intangibles in the economy. Similarly, to the extent the economy is shifting towards industries and markets in which fixed costs are very high, such as in high tech industries where there are large upfront development costs, then even vibrant competition would tend to produce outcomes where price-cost margins, though not actual economic profits, are increasing.[20]

Even if margins across the economy are on average rising, this hardly evidences either reduced competition or any failure of antitrust.[21] For example, a study by Hall (2018) finds that margins have been increasing over time, but the margin increases are greatest in highly regulated industries such as finance, utilities, and healthcare.[22] It is problematic to argue that such results are primarily the result of lax antitrust enforcement. Finally, as noted in other contexts, measures of mark-ups and profitability, as used in these studies, can often provide a poor measure of a firm's market power and a poor measure of performance in an industry.[23]

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[19] James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* (February 8, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120849. *See also* John Van Reenen, *Increasing Differences between Firms: Market Power and the Macro-Economy* (August 31, 2018), available at https://mitsloan.mit.edu/shared/ods/documents/?DocumentID=5041.

[20] *See, e.g.,* Sharat Ganapati, *Oligopolies, Price, Output, and Productivity* (October 19, 2018), available at SSRN: https://ssrn.com/abstract=3030966.

[21] Yet some in the neo-antitrust movement are quick to assign causality without sufficient support. *See, e.g.,* Khan (2018), "The New Brandeis Movement: America's Antimonopoly Debate" ("The resulting system is so warped that enforcement efforts geared around 'consumer welfare' have, according to important recent studies, resulted in higher prices and markups, meaning that this philosophy is failing even on its own terms," p. 132).

[22] See Hall *supra* note 5.

[23] *See, e.g.*, Franklin M. Fisher, *On the misuse of the profit-sales ratio to infer monopoly power,* 18 THE RAND JOURNAL OF ECONOMICS 384 (1987). There is also a vast economic literature that sought to relate various measures of industry performance, such as rates of return or price-cost margins, to economic structure. For critical reviews of this literature see Harold Demsetz, *Industry structure, market rivalry, and public policy*, 16 THE JOURNAL OF LAW AND ECONOMICS 1 (1973); Richard Schmalensse, *Inter-Industry Studies of Structure and Performance,* Chapter 16 in R. Schmalensee & R. Willig (eds.): HANDBOOK OF INDUSTRIAL ORGANIZATION, VOL 2 (1989); Michael Salinger, Richard E. Caves, & Sam Peltzman, *The Concentration-Margins Relationship Reconsidered,* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 287 (1990). More recently, Raval has recently called into question the usefulness of the margin measures used in markup studies (Devesh Raval, *Examining the Sensitivity of the Production Approach to Markup Estimation,* January 14, 2019 (mimeo) available at http://www.devesh-raval.com/markupTest.pdf).

Given these shortcomings, advocates of neo-antitrust will often point to Kwoka's (2015) meta-analysis of merger retrospectives.[24] This study purportedly showed that agencies were approving numerous anticompetitive mergers. The study, however, has a number of weaknesses. Vita & Osinski (2018) explain its limited usefulness as a criticism of *current* antitrust policy.[25] These problems include, *inter alia*, the fact that Kwoka's merger sample consists primarily of transactions *before* 2000 and none later than 2006; the majority of the included mergers are a very limited representation of the industries evaluated by the antitrust agencies; and that the study does not use generally accepted meta-analytic techniques.

Another significant issue is that several of the largest price increases in Kwoka's sample are from FTC studies of consummated mergers where remedies were imposed.[26] The studies reflect post-merger, but pre-remedy, situations. Kwoka nevertheless uses the pre-remedy price increases to bolster his claim that enforcement policy is too lenient. Had he examined the relevant markets after the FTC remedies took effect, he may well have found that antitrust enforcement prevented, rather than condoned, anticompetitive outcomes.

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[24] John Kwoka, *Mergers, Merger Control, and Remedies*. Cambridge (MA): MIT Press, (2015). *See, e.g.,* Khan (2017) ("A growing body of work shows that the consumer welfare frame has failed even on its own terms—namely, by leading to higher prices without any clear efficiency gains.") *See* John Kwoka," footnote 148); Markus Dertwinkel-Kalt & Christian Wey, Evidence Production in Merger Control: The Role of Remedies 5 (Düsseldorf Inst. Competition Econ., Discussion Paper No. 217, 2016), available at http://hdl.handle.net/10419/130192, ("Kwoka present[s] empirical evidence for the EU and the US which questions whether remedies effectively counter anti-competitive merger effects," p. 5).

[25] *See* Michael Vita & David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review,* 361 ANTITRUST LAW JOURNAL 82 (2018).

[26] These include the *Scott Graphics/Xidex and Kalvar/Xidex* mergers described in D. Barton & R. Sherman, *The Price and Profit Effects of Horizontal Merger: A Case Study,* 33 JOURNAL OF INDUSTRIAL ECONOMICS 165 (1984) and the *Evanston/Highland Park* merger described in D. Hass-Wilson & C. Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses,* 18 INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS 1 (2011).

In sum, while there should be continuous assessment of antitrust policy,[27] the evidence cited by proponents of the new antitrust movement, including the finding of higher aggregate concentration ratios in broad industries and the Kwoka study of merger outcomes, do not support claims that antitrust enforcement has been too lax and there is need for a new standard or paradigm.

II. Fallacy Two: The evolution of antitrust to the consumer welfare standard is a betrayal of legislative intent.

There is a view among certain members of the neo-antitrust group that they are returning antitrust to the original intent of the legislators when the Sherman, Clayton, and FTC Acts were passed into law in the late 19th and early 20th century. As a corollary, they argue that the consumer welfare standard is a betrayal of that original intent.[28] Specifically, the argument is that the federal antitrust statutes were implemented in order to support populist goals such as

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[27] Indeed, FTC economists have produced 29 retrospective merger studies to date (https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf).

[28] *See, e.g.,* Lina Khan, *Amazon's Antitrust Paradox,* 3 THE YALE LAW JOURNAL 564 (2017) at 737 ("[T]he undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e., whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e., whether consumers are materially better off). Antitrust law and competition policy should promote not welfare but competitive markets. *By refocusing attention back on process and structure, this approach would be faithful to the legislative history of major antitrust laws*"). (Emphasis added.) *See also*, Russell Brandom, *The Anti-Monopoly Case Against Google: A conversation with Open Markets' Barry Lynn,* The Verge, September 5, 2017 (available at https://www.theverge.com/2017/9/5/16243868/google-monopoly-antitrust-open-markets-barry-lynn) ("We created antitrust laws originally to protect our liberties, often as producers of stuff. Say I've grown a bushel of wheat and I want to bring my wheat to market. I want there to be no corporation standing between me and the person who's buying my wheat so I can engage in an open negotiation in a competitive environment against other farmers for the favor of these buyers.…The second purpose was to protect our democracy against huge concentrations of wealth and power. To protect our democratic institutions. And the third purpose [was] to protect your community.…Those were the goals. They're political goals. [But] in the late 1970s and 1980s, the Chicago School came along and said all those political considerations are very wasteful, and what we should really do is remake monopoly law so it focuses on serving the welfare of the consumer." *See, also*, Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?,* 127 YALE L.J. 980 (2018) ("The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.")

combatting the influence of trusts on the American political system. Moreover, economic concepts such as efficiency and welfare were not the primary considerations—rather objectives such as protecting small businesses and others based on notions of "fairness" were at the forefront.

The reality is that there was no uniform approach to antitrust from its inception throughout the early to mid-20th century, and characterizations to the contrary involve a selective view of the complexity and lack of coherence in early antitrust jurisprudence.[29] Indeed, as noted by Gellhorn & Kovacic:

> [L]ike many legislative watersheds, the debates and events surrounding the passage of the Sherman Act contain something for everyone. To generations of observers, the Sherman Act's legislative record has supplied a wishing well into which one can peer to glimpse evidence that supports preferred policies.[30]

What is clear, however, is that, by design, the antitrust laws have always had an evolutionary character that recognizes the need to adjust to new learnings.[31]

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[29] *See, e.g.,* R. Hofstadter, *The Paranoid Style in American Politics and Other Essays* (1965) at199-200 ("The goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition, and at least some members of Congress must have been under the spell of this intellectually elegant model, insofar as they were able to formulate their economic intentions in abstract terms. The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people-the fundamental stimulus to national morale—was believed to need protection."). For a walk-through of the various eras of antitrust enforcement from an economic perspective, *see* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 JOURNAL OF ECONOMIC PERSPECTIVES 43 (2000). *See also* Douglas H. Ginsburg (2014), "Bork's 'Legislative Intent' and the Courts," *Antitrust Law Journal* 79 (3), pp. 941-951; William H. Page, *The Ideological Origins and Evolution of U.S. Antitrust Law (2008), in* ISSUES IN COMPETITION LAW AND POLICY 1, ABA SECTION OF ANTITRUST LAW.

[30] Ernest Gellhorn & William Kovacic, Antitrust Law and Economics (1994), p. 20.

[31] *See, e.g.,* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360 (1933) ("As a charter of freedom in the public interest, the [Sherman] act has a generality and adaptability comparable to that found to be desirable in constitutional provisions"). *See also,* Justice O'Connor, writing for a unanimous court in *State Oil Co. v. Khan (1997)* in overturning the *per se* condemnation of maximum resale price maintenance ("the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition,'" p. 284).

Regarding this evolution, Hofstadter noted that in its early history, antitrust had a powerful movement quality but very few accomplishments in the courts.[32] Later, in the 1940s through the 1960s, it ceased to be a movement just as it was attaining litigation success: "Antitrust had gone from a movement without prosecutions to prosecutions without a movement."[33] Thus, when adherents of the neo-antitrust movement bemoan that current antitrust enforcement ignores original intent, they also ignore that the period closest to the enactment of the statutes was a period of limited interventionism. Indeed, in the first ten years or so of the Sherman Act, the vast majority of antitrust cases prosecuted labor unions rather than businesses[34]—a fact that might come as a surprise to some in the neo-antitrust movement.

On the other hand, antitrust's most interventionist period (the 1940s through the 1960s) was fundamentally not a populist era. As noted by Kovacic and Shapiro (2000), this era got much of its impetus from the work of an earlier generation of University of Chicago economists like Henry Simons, Jacob Viner, and Frank Knight.[35] Later judicial decisions, if not entirely due to the influence of economics, were at least very consistent with the learnings of economists such as Joe Bain, and the structure-conduct-performance paradigm.[36] Economists like Jesse Markham, Henry Simons, Maurice Clarke and even a young George Stigler also played a role in this era of activism. Thus, a diverse range of antitrust scholars agree that even before the formal adoption of the consumer welfare standard in the 1970s, economic criteria were a major, if not the primary, objective of the antitrust laws since their inception.

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[32] *See* Hofstadter, *supra* note 29.
[33] *Ibid*.
[34] *See, e.g.,* Ralph K. Winter Jr., 73 YALE L.J. 14 (1963) at 30-31 ("But however hesitant and tentative the federal courts may have been initially in applying the statute to business activities, no such reluctance was evidenced when the defendant was a union. Between passage of the statute in 1890 and the decision of the Supreme Court in the *Trans-Missouri Freight* case in 1897, lower federal courts found unions in violation twelve times while only one violation was found involving a business.")
[35] *See* Kovacic & Shapiro, *supra* note 29.
[36] Joe S. Bain, INDUSTRIAL ORGANIZATION (1959).

For example, Robert Pitofsky (1979), a former FTC Chairman and an ardent advocate for more interventionist antitrust policies,[37] states: "Although the political forces that produced the major antitrust statutes—in 1890, 1914, 1936, and 1950—varied widely, those statutes once enacted have almost always been enforced and interpreted so that economic considerations were paramount. The issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale, but rather whether they had any role to play at all, and if so, how they should be defined and measured."[38]

Pitofsky also indicates that neither the legislative history of the Sherman Act, nor subsequent jurisprudence, intended to undermine monopoly power obtained through superior business acumen—arguably one of the primary goals of the neo-antitrust movement given their focus on the "tech giants." Moreover, Pitofsky noted a number of non-economic concerns that should not play a role in antitrust enforcement, including some at the heart of the neo-antitrust movement such as protection for small businesses against the rigors of competition, and income redistribution.

Likewise, Herbert Hovenkamp (1990), who co-authored the most widely used legal treatise on antitrust, states: "One of the great myths about American antitrust policy is that courts first began to adopt an 'economic approach' to antitrust problems in the relatively recent past. At most, this 'revolution' in antitrust policy represented a change in economic models. Antitrust policy has been forged by economic ideology since its inception."[39] Page (2008) adds that the early goal of antitrust laws was "the restoration of a competitive market rather than the

[37] *See, e.g.,* Robert Pitofsky, How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (2008).
[38] Robert Pitofsky *Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).
[39] Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: A Historical Perspective*, 59 ANTITRUST LAW JOURNAL 75 (1990) at 75.

establishment of fair outcomes."[40] Similarly, Jacobs (1995) finds that "[i]n almost every era of antitrust history, policymakers have employed economic models to explain or modify the state of the law and the rationale for its enforcement."[41]

Consequently, the current era, with its emphasis on consumer welfare, is just the latest stage in the built-in evolutionary nature of antitrust. There has been a move away from some of the heavily interventionist holdings of the prior era (*e.g.*, *Alcoa*, *Brown Shoe*) because economic learnings have evolved and the antitrust laws were designed to incorporate such new learnings.

As for Justice Brandeis himself, while he was clearly concerned that monopolies threatened democracy and limited the scope of individual opportunity (which is consistent with modern antitrust), he also believed that firm economic principles should support antitrust enforcement.[42] Moreover, while he believed that legislators could incorporate goals such as individual opportunity in the shaping of the antitrust laws, the application of the legal standard differentiates the role of the lawyer, enforcer and judge from that of the legislator. As noted by Sallet (2018):

> "The laws Brandeis proposed and supported did not ask a federal antitrust agency to decide whether a company was too politically powerful…Rather Brandeis favored standards that looked directly at economic…outcomes such as a firm's market share or the use by dominant firms of practices like tying or exclusive contracts. His approach in other words, was to find enforceable legal standard that identify industrial conduct in a manner that vindicates social and democratic values."[43]

Further, Werden finds that much of what Brandeis wrote and advocated for are in the mainstream of antitrust today.[44] For example, Brandeis stated, "There is nothing in our

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[40] *See* Page, *supra* note 4 at 5.
[41] Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 226 (1995).
[42] Jonathan Sallet, *Louis Brandeis: A Man for All Seasons,* 16 COLO. TECH. L.J. 365 (2018).
[43] *Ibid*.
[44] Gregory J. Werden (2018), "Back to School: What the Chicago School and New Brandeis School Get Right," working paper, Section III.

industrial history to indicate that there is any need whatever to limit the natural growth of a business in order to preserve competition."[45] Further, Werden notes "As a justice of the Supreme Court, Brandeis was less interventionist than nearly all of his brethren, even though he was motivated to protect small business. One of his majority antitrust opinions, reversing a judgment for the government in a patent-related case, held that 'there must be a definite factual showing of illegality.' That sensible view seems more consistent with the Chicago School than with the New Brandeis School."[46]

In sum, by design, the antitrust laws were crafted with open ended language and have always had an evolutionary, common law, character that allows them to adapt to changing understandings in the law and economics. This is a fact that spans the entire history of antitrust enforcement in the U.S., and not just the modern era.

Whatever one's view regarding the true *intent* of antitrust legislation, a perhaps more fundamental policy issue is what the role of antitrust *should* be. As maintained throughout this paper, regardless of the purity of its pedigree, the modern approach is superior to the proposals of the neo-antitrust movement in terms of its coherence, effectiveness in promoting market competition and administrability.

III. *Fallacy Three: Modern antitrust is overly beholden to Robert Bork and to a radical Chicago School view that markets are self-correcting and that only highly concentrating mergers are potentially objectionable.*

Many advocates of the neo-antitrust movement contend that current antitrust practice, especially its strong focus on economics, is overly beholden to the so-called "Chicago School"

[45] Louis D. Brandeis, *Competition*, Am Legal News 5 (Jan 1913) at 6.
[46] Werden (2018), p. 12.

and in particular to the thinking of Robert Bork.[47] There is no doubt that Bork's work was part of an important intellectual movement to bring more economic reasoning into antitrust.[48] That being said, while the "Chicago School" is more varied and complex than the caricature painted by many of these critics,[49] what appears to primarily be meant by this contention is that under the influence of the Chicago School, antitrust enforcers and the courts find only highly concentrating horizontal transactions objectionable and consider virtually all vertical arrangements to be either efficient or competitively neutral.[50]

While the Chicago School has been influential regarding antitrust in many ways, this caricature ignores numerous aspects of modern antitrust enforcement and various developments that have taken place over the last fifty years or more. For one, as previously discussed, the primary objective of modern antitrust is the consumer welfare standard. It may come as a surprise to some antitrust observers, but while Bork certainly supported a careful application of economic analysis and explicitly used the term "consumer welfare" for what he claimed should be the proper standard for antitrust policy, the *actual* consumer welfare standard is not what Bork himself advocated. What Bork meant was what we today call a "total welfare" or "social

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[47] *See, e.g.*, Khan, *supra* note 28; Tim Wu (2018), *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, COMPETITION POL'Y INST. ANTITRUST CHRON., April 2018, pp. 12-20.
[48] *See, e.g.*, Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7 (1966).
[49] For a more accurate description of the Chicago School's contributions to antitrust, *see* Joshua D. Wright (2007), "The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond," Competition Policy International 3, pp. 24-57 ("Unfortunately, the Chicago/Post-Chicago narrative has also tempted commentators to adopt extreme and misleading descriptions of one camp or the other—but most frequently of the Chicago School. These descriptions often paint the Chicago School as monolithic, ideological, and extreme in its views. It is none of those things. Chicago authors have documented some of the only empirical examples of raising rivals' costs theories, contributed to the theory of collusion, and explored the use of tying and other practices to monopolize adjacent markets. These caricature-like descriptions of the Chicago movement, however, threaten to nonsensically turn 'Chicago School' into a pejorative and have no place in a meaningful dialogue about antitrust policy," p. 32).
[50] *See, e.g.*, Lina Khan and Sandeep Vaheesan (2017), "Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents," Harvard Law & Policy Review 11, pp. 235-294 ("For example, courts had historically treated horizontal mergers in concentrated markets, tying, and vertical restraints as competitively suspect. Along with Baxter, Miller, and other new federal antitrust officials, judges on the federal bench—such as Bork himself, Frank Easterbrook, and Richard Posner—abandoned this traditional approach," p. 271).

welfare" standard.[51] Bork argued for a broad efficiency standard that would give weight to both consumer and producer welfare. That is generally not what antitrust agencies or courts do. Under current antitrust enforcement and jurisprudence, efficiency claims as they apply to producer welfare are held to a very high standard. To the extent such claims are considered, they are dismissed unless it can be shown that they are not achievable through less anticompetitive means and will ultimately be passed on to consumers.[52] Such treatment of efficiencies has little in common with what Bork himself advocated.

As for the allegedly outsized role of the "stylized" version of the Chicago School, many of the tools that the agencies currently use in their analytical techniques and enforcement policies are certainly not from Chicago such as the unilateral effects revolution that has taken place in merger enforcement over the past quarter century. Unilateral effects theories, which can readily discern potential competitive problems from mergers in only moderately concentrated markets, started being applied to antitrust long after the advent of the Chicago School. Decidedly non-Chicago scholars, such as Robert Willig, Jonathan Baker, Carl Shapiro, and Joseph Farrell, who hail from places such as Princeton and Berkeley championed these theories. Such "non-Chicago" theories have played a leading role in merger enforcement for over two decades,[53] and many would argue that such theories have resulted in a more aggressive posture for the antitrust

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[51] *See, e.g.*, Kenneth Heyer, *Legacy of Robert Bork*, 57 JOURNAL OF LAW AND ECONOMICS, UNIVERSITY OF CHICAGO PRESS, S19 (2014); Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy,* Information Technology & Innovation Foundation (October 2018), https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf ("Bork himself downplayed the focus on consumers, instead stressing the importance of maximizing overall public welfare and economic efficiency in general," pp. 4-5).

[52] *See Merger Guidelines,* §10.

[53] *See, e.g.*, Carl Shapiro, *Mergers with Differentiated Products,* ANTITRUST 23 (Spring 1996) ("It is fair to say that economic analysis of differentiated-products mergers at the Division typically focuses on unilateral effects, unless there are structural factors facilitating collusion or there is a history of collusion in the industry"). *See also* Coate, Malcolm B., The Merger Review Process at the Federal Trade Commission from 1989 to 2016 (February 28, 2018). Available at SSRN: https://ssrn.com/abstract=2955987 ("A trend toward unilateral effects analysis is observed…One can point to a noticeable decline in the application of the collusion theory over time").

agencies and plaintiffs.[54] For example, in his review of FTC staff analyses from 1989 through 2016, Coate (2018) finds "something of an upward trend in horizontal merger challenges."[55] While measuring enforcement intensity across time and geographies is a potentially fraught activity,[56] it is notable that Coate finds declining staff support for considerations that tend to mitigate a finding of competitive harm such as ease of entry or cognizable efficiencies. While he finds increasing recognition of power buyer theories, the effect does not seem to impact the merger challenge decision.

Characterizing modern antitrust theory as captive to the Chicago School also ignores many other developments involving the application of game theory and theories of information to antitrust. For example, the agencies have successfully used bargaining theory to revive their enforcement program in the health care area, and recently the DOJ relied on it heavily in an ultimately unsuccessful challenge to the merger of AT&T and Time Warner.

Similarly, the view that antitrust has gone astray by condoning virtually all vertical practices ignores general developments in both theory and enforcement policy in this area. "Post-Chicago" models have shown that by breaking down certain strict assumptions, vertical restraints by a dominant firm can (although not necessarily) produce anticompetitive results. Such theories can play a prominent role at the U.S. antitrust agencies. Indeed, Bruce Hoffman, Director of the Bureau of Competition at the FTC has noted that the antitrust agencies have challenged 22 vertical mergers between 2000 and the start of 2018.[57] Rhetorical claims by some

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[54] *See, e.g.*, William McConnell, *Obama Administration Most Aggressive Ever in Regulating Mergers and Acquisitions,* TheStreet (April 28, 2016) (TheStreet has discovered a pattern of increased regulatory actions challenging mergers that dates back to the Reagan administration).
[55] *See* Coate, supra note 53.
[56] *See, e.g.*, Timothy Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST 22 (Summer 2008) 37-38.
[57] *See* D. Bruce Hoffman, Acting Director, Bureau of Competition, Federal Trade Commission, speech before the Credit Suisse 2018 Washington Perspectives Conference, January 10, 2018.

that antitrust condones all manner of dominant firm conduct also ignores recent enforcement in the area of vertical restraints, as evidenced by the Qualcomm, McWane, Intel, Dentsply, Transitions, and Microsoft matters.[58] While current policy towards vertical mergers or vertical restraints may not be as prominent a focus of antitrust enforcement as are more problematic activities such as criminal price fixing or horizontal mergers in concentrated markets, policy in the vertical area hardly resembles the caricaturized Chicago School approach, where almost all vertical arrangements, with the exception of regulatory evasion, are seen as efficient and *per se* legal.[59]

Moreover, while it may be true that the trend in antitrust enforcement since the 1960s has been more lenient towards many horizontal transactions, vertical practices, and certain dominant firm behaviors, this is not solely the product of the Chicago School. Kovacic (2007) has noted that many such developments were actually due to the impact of scholars associated with the more interventionist "Harvard School" including Donald Turner, Philip Areeda and Supreme Court Justice Stephen Breyer.[60] The most obvious example of this would be the influential Areeda-Turner standard for predatory pricing.

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[58]*See* FTC's Complaint for Equitable Relief, FTC v. Qualcomm, Inc., No. 5:17- cv-00220 (N.D. Cal. Jan. 17, 2017), available www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.; *McWane, Inc.*, Docket No. 9351, (F.T.C. Jan. 30, 2014); Complaint, *In the Matter of Intel Corporation* FTC Docket No. 9341 (Dec. 16, 20009), available at https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf; U.S. v. Dentsply International, Inc. 190 F.R.D. 140 (D. Del. 1999); and Complaint, *In the Matter of Transitions Optical, Inc.,* FTC Docket No. C-4289 (April 22, 2010); United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001).

[59] That being said, sound theoretical and empirical support exist for having greater scrutiny over horizontal mergers relative to vertical mergers, integration, and restrictions. *See, e.g*., Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. OF ECON. LIT. 629 (2007); James C. Cooper *et al.*, Vertical Antitrust Policy as a Problem of Inference, 23 INT'L J. INDUS. ORG. 639, 648 (2005); Daniel P. O'Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40-101 Konkurrensverket, Swedish Competition Authority (2008); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, (filed Sept. 6, 2018).

[60] Bill Kovacic, The Antitrust Double Helix, 2007 COLUMBIA BUSINESS LAW REVIEW 1. *See also* Einer Elhauge, Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions, 3 COMP POLICY INTERNATIONAL 59 (2007).

The contention that modern antitrust is beholden to the Chicago School also ignores a number of important Supreme Court decisions that had a broad consensus and reflect diverse origins. For example, the *Trinko* decision, that limited the applicability of the essential facilities doctrine, was unanimous including justices Ruth Bader Ginsberg and Stephen Breyer.[61] As noted by Kovacic, while the *Trinko* opinion was written by Justice Scalia, Scalia relied heavily on ideas formulated by Justice Breyer when he was an appeals court judge in cases such as *Town of Concord*[62] to articulate the decision's rationale. Other cases include: *Credit Suisse,*[63] with a decision written by Justice Breyer with only Justice Thomas dissenting that dismissed claims brought by investors against underwriters and which may have narrowed the scope of antitrust in regulated industries; *Weyerhauser*[64] a unanimous decision which extended the *Brooke Group*[65] standard for predatory pricing to predatory buying; and *LinkLine,* a unanimous decision that held against plaintiffs' price squeeze claims.[66]

Naturally, pointing out that a considerable fraction of current antitrust enforcement and jurisprudence has roots outside of the Chicago School does not mean that one should see the influence of the scholars associated with this movement as detrimental to antitrust. The important issue is not whether the Chicago School is responsible for antitrust being too lax—but whether antitrust is *actually* too lax. In the era prior to the consumer welfare standard, scholars within antitrust almost universally agree that antitrust enforcement was overly interventionist. Indeed, Robert Pitofsky, an antitrust scholar that few would associate with the Chicago School, is heavily critical of the structural standards created by cases such as *Von's* or *Brown Shoe*.[67]

[61] *Verizon v. Trinko*, 540 U.S. 398 (2004).
[62] *Town of Concord v. Boston Edison Co*., 915 F.2d 17 (1st Cir. 1990).
[63] *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).
[64] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).
[65] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
[66] *Pacific Bell Telephone Co. v. LinkLine Communications, Inc*., 555 U.S. 438 (2009)
[67] *See* Pitofsky, *supra* note 38 at 1070.

Thus, far from being captive to Robert Bork and the Chicago School, antitrust enforcement has a healthy history of incorporating economic learning from all "schools" of thought. It is simply not credible to contend that antitrust analysis and enforcement is bound to one theory or another.

IV. Fallacy Four: The consumer welfare standard focuses monomaniacally on price, to the exclusion of more important economic considerations such as quality and innovation.

Many advocates of neo-antitrust argue that modern antitrust focuses too much on price and that this results in too low a level of enforcement.[68] This is simply wrong. There is abundant evidence that the agencies and antitrust generally are concerned with non-price factors in addition to price factors.[69] Since at least 1982, the *Horizontal Merger Guidelines* have noted that adverse impacts on beneficial non-price attributes is a concern of horizontal merger policy, and indeed the focus of the agencies on such issues has increased as these *Guidelines* have gone through subsequent iterations and updates.[70] Further, in 1995, the U.S. issued guidelines concerning licensing agreements that directly integrate innovation concerns into competition law assessment.[71]

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[68] *See, e.g.*, Khan, *supra* note 28, ("Due to a change in legal thinking and practice in the 1970s and 1980s, antitrust law now assesses competition largely with an eye to the short-term interests of consumers, not producers or the health of the market as a whole; antitrust doctrine views low consumer prices, alone, to be evidence of sound competition").

[69] *See, e.g., Merger Guidelines* ("Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence," Section 1).

[70] The 1968 version of the Horizontal Merger Guidelines does not mention non-price factors, but given its emphasis on industry structure, it does not really consider competitive effects at all. (1968 U.S. Dep't of Justice, Merger Guidelines, available at http://www.justice.gov/atr/hmerger/11247.pdf).

[71] US DOJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (April 6, 1995). These guidelines have most recently been updated in 2017. *See* US DOJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (January 12, 2017).

Moreover, an examination of the actual enforcement activities of the agencies indicate that non-price concerns play a significant role in agency enforcement. These include cases having been brought in a variety of industries, including medical treatments and devices[72] but has also included tech firms,[73] cellular providers,[74] as well as other industries.[75] Wright (2017) notes that, between 2004 and 2014, the FTC challenged 164 mergers of which *at least* 54 alleged harm to innovation.[76] Further, it bears remembering that the most important exclusion case of the last several decades, the Microsoft case, focused almost exclusively on non-price harms. More recently, the extensive multi-year Google search bias investigation at the FTC involved a market with a zero price and concerned issues of quality.[77]

Advocates of neo-antitrust sometimes point to what appears to be the greater number of European cases focused on non-price factors as evidence that U.S. antitrust enforcement is lax in this regard.[78] Even if this were true (and we have seen no compelling empirical research

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[72] *See, e.g.,* Complaint, In the Matter of Otto Bock Dkt. No. 9378 ¶42 (Dec.20, 2017) (noting that both defendants responded to the other's innovations in product features and functionality of their microprocessor prosthetic knees); FTC v. Steris Corp., No. 15-cv-1080, 2015 WL 5657294 (N.D. Ohio Sept. 24, 2015) (alleging that the merger would harm future competition by putting an end to Synergy's plans to enter the U.S. market with a promising new x-ray sterilization technology).

[73] *See, e.g.,* Complaint, U.S. v. Bazaarvoice, Inc., C-13-0133 ¶¶ 8, 62 (N.D. Cal. Jan. 10, 2013) (alleging that prior to the merger, the two companies had engaged in "feature driven one-upmanship" and that the transaction "significantly reduced incentives to…invest in innovation); Statement of Commissioners Ohlhausen, Wright, and McSweeny Concerning Zillow, Inc./Trulia, Inc., File No. 141-0214 (Feb. 19, 2015) (discussing how staff considered whether the combined entity's incentives to innovate by developing new features attractive to consumers on the free side of the market would be affected).

[74] *See, e.g.*, Complaint, U.S. v. AT&T, 1:11-cv-01560 ¶ 1 (D.D.C. Aug. 31, 2011) (alleged that consumers would face not only higher prices and less variety – but less innovation post-merger).

[75] Complaint, In the Matter of Verisk Analytics, Inc., and EagleView Technology Corp., Dkt. No. 9363 ¶ 40 (Dec.16, 2014) (concerning competition in the development of high-resolution aerial images for roof reports).

[76] Joshua Wright, *Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality,* George Mason University Law and Economics Research Paper Series 17-35 (2017).

[77] *See* Fed. Trade Comm'n, File No. 111-0163, Statement Regarding Google's Search Practices, *In the Matter of Google Inc.* (Jan. 3, 2013). *See also* John M. Yun (2018), "Understanding Google's Search Platform and the Implications for Antitrust Analyses," *Journal of Competition Law & Economics* 24 (2), pp. 311-329.

[78] For instance, there have been numerous EU cases involving the elimination of pipeline products. (*See* COMP/ M.6166– Deutsche Börse/NYSE Euronext, Commission decision of 1 February 2012, section 11.2.1.3.4, confirmed by Case T-175/12, Deutsche Börse AG v Commission, ECLI:EU:T:2015:148; Case No COMP/ M.7326, Medtronic/Covidien, Commission decision of 28 November 2014; Case No COMP/M.7275, Novartis/GlaxoSmithKline's oncology business, Commission decision of 28 January 2015 ; Case No COMP/ M.7559, Pfizer/Hospira, Commission decision of 4 August 2015 Case No COMP/ M.7278, General

demonstrating it to be the case), this would not be evidence of any shortcomings of the consumer welfare standard, since both U.S. and EU antitrust authorities employ the standard. This merely illustrates there can be legitimate debate about the ideal level of enforcement within the contours of the consumer welfare standard.[79]

Further, with respect to non-price factors, it is also important to note that careful attention to these dimensions will not necessarily lead to more enforcement. It is widely acknowledged by economists and competition agencies themselves that under certain conditions, higher concentration or cooperative efforts among firms (both horizontal and vertical) can lead to *more* innovation and product variety.[80]

V. Fallacy Five: Large market capitalization is an antitrust problem, a.k.a., "big is bad."

A number of proponents of neo-antitrust have pointed to the large capitalization of several firms, particularly the so-called "tech giants," as evidence of the flaccidity of current antitrust policy and the need for sterner action.[81] Indeed, Sen. Amy Klobuchar (D-MN) has

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Electric/Alstom (Thermal Power- Renewable Power & Grid Business), Commission decision of 8 September 2015.) There have also been EU cases motivated by concerns regarding harm to the ability of potential rivals to innovate. (*See* Case COMP/ M.5984 – Intel/McAfee, Commission decision of 26 January 2011; Case COMP/ M.6564 –ARM/GIESECKE & DEVRIENT/GEMALTO JV, Commission decision of 6 November 2012; Case No COMP/M.7688 – Intel/Altera, Commission decision of 14 October 2015.)

[79] *See* Ken Heyer (2005), "A World of Uncertainty: Economics and the Globalization of Antitrust," *Antitrust Law Journal* 72 (2), pp. 375-422. Importantly, Heyer details the role that uncertainty plays in antitrust enforcement and the need to more systematically incorporate a decision's expected value over all possible outcomes. This explicit recognition can perhaps explain some of the seemingly dramatic differences in antitrust outcomes between the U.S. and the EU.

[80] Ultimately, the relationship between innovation and market structure is not straight-forward and is a fact-intensive inquiry. *See, e.g.,* Michael L. Katz and Howard Shelanski (2007), "Mergers and Innovation," *Antitrust Law Journal* 74 (1), pp. 1-85 ("[I]n markets in which innovation is significant, the traditional concentration-competition relationship is on weaker or more nuanced empirical and theoretical footing than otherwise"); Carl Shapiro (2012), "Competition and Innovation: Did Arrow Hit the Bull's Eye," chapter in *The Rate and Direction of Inventive Activity Revisited*, Josh Lerner and Scott Stern (eds.), University of Chicago Press.

[81] *See, e.g.*, Adonis Hoffman, *New Congress Should Start Regulating Big Tech,* THE HILL (November 7, 2018) (available at https://thehill.com/opinion/technology/415256-its-time-congress-started-regulating-big-tech) ("Given the massive size and market capitalization of Facebook, Amazon, Apple, Netflix and Google alone, it is not heresy to ask whether an antitrust review is in order"); Ganesh Sitaraman, *Taking Antitrust Away From the Courts: A*

introduced a bill that would ban significant acquisitions by any company with a market cap higher than $100 billion unless the acquirer could demonstrate that the transaction would not lessen competition by more than a *de minimis* amount.[82] As of this writing, some 90 companies would fall under these strictures.[83] Along these lines, as part of her presidential campaign for 2020, Senator Elizabeth Warren has proposed legislation that would prevent companies with global revenue of $25 billion or more from owning both a "platform utility" and any participant on that platform.[84]

Basing antitrust violations on capitalization is largely a reversion to the "big is bad" error of antitrust.[85] The mere size of a company says nothing about its market share in any relevant antitrust market. Further, and more importantly, it says nothing about whether a very large and successful firm—even one with a dominant share of an economic market—is harmful to consumers. Indeed, given the dot.com bubble and the recent "unicorn" phenomenon,[86] tying high market capitalization to antitrust issues appears even *more* problematic than the earlier "big is bad" era. There are numerous reasons a company can have a high valuation, including an innovative business model, high profits across a breadth of different markets, high growth, and simply speculative bubbles. The latter importantly shows that high capitalization can result from

Structural Approach to Reversing the Second Age of Monopoly Power (September 1, 2018), Vanderbilt Law Research Paper No. 19-02, available at SSRN: https://ssrn.com/abstract=3278415 ("Any merger involving a company with more than 1,000 employees, that has a significant market capitalization ($1 billion), or that impacts sectors of significant public concern, should have to be affirmatively justified with an open period for public comment and participation").

[82] https://www.congress.gov/bill/115th-congress/senate-bill/1812/text?r=22.

[83] *See* https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value.

[84] *See* Elizabeth Warren, *Here's how we can break up Big Tech*, MEDIUM, March 8, 2019 (available at https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c). Warren defines a "platform utility" as "an online marketplace, an exchange, or a platform for connecting third parties."

[85] *See* Sokol & Comerford (2016), *Antitrust and Regulating Big Data*, 23 GEORGE MASON LAW REVIEW 1129 at 1130 ("'Big is bad' has been a bogeyman of antitrust since the time of *Standard Oil*. However, bigness is not an antitrust offense. Rather, antitrust focuses on consumer welfare loss and there has not been a decided merger or litigated conduce case that has said otherwise for at least a generation.").

[86] *See, e.g.,* Aileen Lee, *Welcome to the Unicorn Club: Learning from Billion-Dollar Startups,* TECHCRUNCH, November 2, 2013 (available at https://techcrunch.com/2013/11/02/welcome-to-the-unicorn-club/).

flawed expectations, which make them especially problematic for inferring monopoly problems. This is to say nothing of the extremely high volatility in market capitalization rates often due to rumors or general market gyrations.[87]

The excessive focus on firm size and market capitalization also belies a fundamental misunderstanding of market economies. The dynamic incentives to become successful, even "dominant," are activities that should be encouraged. As noted by Judge Learned Hand, "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry…The successful competitor, having been urged to compete, must not be turned upon when he wins."[88] Further, as previously quoted, Brandeis stated, "There is nothing in our industrial history to indicate that there is any need whatever to limit the natural growth of a business in order to preserve competition."[89] The idea of heavily regulating or cavalierly breaking up firms because they are successful in satisfying consumer demand has no basis in sound economic analysis. The reality is that some markets may justify only a handful of firms. This is not evidence of monopoly power, let alone lax antitrust enforcement, but of efficient markets. The notion that breaking up an Amazon or heavily regulating it based on perceived and conjectured theories of harm is not only reckless—it destroys incentives and lowers the wealth of nations. The chilling effect on innovation would be immediate and deep. Notably, Microsoft, which was at least as feared as Amazon and other "tech giants" today, was

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[87] *See also* Richard Epstein, "Beware of Populist Antitrust Law," Forbes.com, January 23, 2019, available at https://www.forbes.com/sites/richardepstein/2019/01/23/beware-of-populist-antitrust-law ("[H]istory is littered with dominant firms that have lost their way, some of which have returned to greatness, but most not. Just think of other changes in the DJIA. Gone from the Dow are former household names as Goodyear, Alcoa, Eastman Kodak, Bethlehem Steel, Union Carbide. In their place are the likes of Apple, Boeing, Johnson & Johnson, Nike and Pfizer. Any firm that thinks it is too big to fail is one step closer to failure.").
[88] United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).
[89] Louis D. Brandeis, *Competition*, Am Legal News 5 (Jan 1913) at 6.

decidedly not condemned for being a rich monopolist but for anticompetitive conduct after a careful investigation.

Indeed, it is unclear whether a focus on market capitalization will result in fewer false negatives, as these advocates appear to hope. Ignoring real indicia of market power in favor of looking at revenue or capitalization may actually result in less enforcement where market power truly exists. Finally, it is unclear what the effects of such rules may have on innovation, as undoubtedly a desire to be bought out forms a large impetus for innovation in today's tech sector.[90]

VI. Fallacy Six: Not recognizing that abandoning an economic welfare framework and relying more on populist goals to guide antitrust will lead antitrust to depend more on rhetoric and rules of thumb.

Amidst all the criticism of the consumer welfare standard and the role of economic reasoning in antitrust, it may pay to step back and consider some of the advantages of the standard. One is that it is a standard grounded in economic reasoning and microeconomic foundations. Given its basis in economic reasoning, the consumer welfare standard forces antitrust to rely on rigorous models of consumer and firm behavior. What economic models do is allow practitioners to focus on the most important explanations for particular phenomena. Models enable one to input relevant and available evidence and see the likely consequences. Moreover, models are transparent, replicable, and result in testable implications. This does not mean that they are always simple to understand or apply. Transparency and replicability,

[90] *See, e.g.,* Brett Hollenbeck, *Horizontal Mergers and Innovation in Concentrated Industries* (December 19, 2018) available at https://bretthollenbeckcom.files.wordpress.com/2018/12/mergers_spring18.pdf (finding that the prospect of being bought out results in significantly higher rates of innovation),

however, forces practitioners to be explicit about their assumptions, which allows others to evaluate those assumptions and how they affect the implications of the model.

Additionally, the consumer welfare standard, as an economic standard, relies on scientific reasoning. This merely means that it provides a means for falsifiability and self-correction. By forcing practitioners to be explicit regarding theories and assumptions, it facilitates testing those theories and assumptions against real world experience and data. If the facts do not support the theories, new theories will emerge and then be tested. It is undeniable that, in this light, antitrust has seen and continues to see enormous changes and improvements in its methodologies.[91]

A real danger of unmooring antitrust from an economic approach based on foundational welfare concepts and replacing it with a vague reliance on populist goals is that antitrust will become reliant on rhetoric and various rules of thumb rather than scientific reasoning. Examples of rhetoric and rules of thumb in the neo-antitrust movement, as well as in antitrust decisions before the explicit formalization on the consumer welfare standard, are not difficult to locate. For example, in discussing Amazon's highly effective distribution system, which it allows third-party merchants to use, Khan states:

> The conflicts of interest that arise from Amazon both competing with merchants and delivering their wares pose a hazard to competition, particularly in light of Amazon's entrenched position as an online platform. Amazon's conflicts of interest tarnish the neutrality of the competitive process. The thousands of retailers and independent businesses that must ride Amazon's rails to reach market are increasingly dependent on their biggest competitor.[92]

There certainly can be a viable anticompetitive theory regarding Amazon's behavior. An example may be that, under certain conditions, Amazon could leverage its power as a selling platform into related markets. Indeed, such a theory is already part of the current antitrust

[91] *See* Section III.
[92] Khan, *supra* note 28.

toolkit. In order to result in a violation, the theory would also require evidence of likely or actual competitive harm. The concern is not that there is not a viable theory of harm; rather it is that Khan seems to be convicting Amazon with no such evidence. Her contention involves no discussion of harm to consumers or competition, merely a rhetorical display arguing that the neutrality of the competitive process has somehow been "tarnished." As pointed out by Muris & Nuechterlein, such rhetorical flourishes against A&P underlays much of the jurisprudence behind the Robinson-Patman Act, which the vast majority of observers agree has been a particularly misguided area of antitrust.[93]

Dangerously, rhetoric and rules of thumb can support almost any position. As with many of the concerns expressed above, this will lead to increased unpredictability in antitrust. Indeed, with sufficiently powerful sounding rhetoric, antitrust can be led to take positions that contradict its prime mission to ensure competition is based on the merits. Finally, many of the benefits of relying on economic reasoning in antitrust can be lost, such as forcing practitioners to be explicit in regard to their assumptions. Given that rhetoric is more art than science, it is also likely that antitrust will lose much of its transparency and ability to self-correct.

VII. Fallacy Seven: Not recognizing that their proposals will strain competition agency resources; increase uncertainty; and make these agencies more political and subject to capture.

Most of those that have worked within, or before the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the

[93] *See* Muris & Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, (May 29, 2018), George Mason Law & Economics Research Paper No. 18-15 (available at https://ssrn.com/abstract=3186569).

high degree of skill, professionalism and dedication exhibited by the career staff.[94] As will be discussed more fully in the context of fallacy eleven below, in spite of the views of many who have had experience working within or before the antitrust agencies (on all sides of the political spectrum), many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. Third, they have a well-defined objective (*i.e.*, the consumer welfare standard). Finally, although antitrust is considered a form of regulation, it is distinct from some forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.[95]

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[94] *See*, *e.g.,* Remarks of Jon Leibowitz, November 17, 2011 (available at https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-ftc-chairman-jon-leibowitz-prepared-delivery/111117fallforum.pdf) ("A lot of things impressed me about the Commission when I got here: the range of issues that we saw every day, the amazing quality and dedication of the staff; just to name a few examples"); Address by Commissioner Edith Ramirez, 20th Annual Golden State Antitrust and Unfair Competition Law Institute, October 12, 2010 (available at https://www.ftc.gov/sites/default/files/documents/public_statements/address-commissioner-ramirez/101021goldenstate.pdf) ("But one thing that made this decision easier was the team of talented antitrust lawyers and economists at the agency. I came away from this investigation highly impressed with the level of in-house expertise at the Commission. The depth of their knowledge became increasingly evident during many briefings and the Commission's ongoing deliberations. Whether relating to cutting-edge apps or other markets, I quickly gained confidence that the agency's staff had the capacity to stay on top of marketplace developments, drill down into the specifics, and share their learning in ways that would enable me to make a well-informed decision in this and future cases").

[95] *See* Stephen Breyer, *Regulation and Its Reform* (1982) at 156-157.

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws as well as the consideration of issues beyond those currently within that purview. Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, will require significantly more active market supervision than is currently the case. While many proponents of modern antitrust would agree that the antitrust agencies are underfunded, there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Following the recommendations of neo-antitrust advocates to their fullest could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

Second, many of the above proposals would require not only more staff, but also staff with differing expertise from that held by most agency lawyers and economists. For example, monitoring of data sharing is far from straightforward as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve trade-offs beyond the expertise of mere law or economics, such as technology, ethics or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

Students of bureaucracies consider a visible and measurable output key for quality control in such organizations.[96] Currently, the consumer welfare standard provides such a

[96] *See, e.g.*, James Wilson, BUREAUCRACY (1989).

metric.[97] Abandoning this metric, as advocated by many proponents of the neo-antitrust movement, and replacing it with vague and numerous populist objectives, threatens to make the competition agencies more difficult to manage and assess.

For example, some have advocated that the competition agencies adopt a "public interest standard" similar to what is used by the Federal Communications Commission (FCC) and other agencies. However, after 90 years of use, many think the "public interest standard" remains ill defined.[98] For instance, the FCC's order related to the Comcast/NBCU merger included a number of conditions unrelated to the acquisition, including requirements to increase local news coverage, expand children's programming, broadcast public service announcements, enhance the diversity of programming available to Spanish-speaking viewers, offer discount broadband services to low-income Americans, and provide high-speed broadband to schools, libraries and underserved communities.[99] The danger here is that antitrust enforcement becomes less predictable and, consequently, creates uncertainty, which adversely impacts market activity and investments. Further, it also makes the competition agencies more "political" as the stakes of a practice or transaction become higher for both the parties involved and third parties as well.

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[97] A clear objective also facilitates the development of performance measures that help governments evaluate the effectiveness of national competition agencies, thereby promoting greater accountability to the public. *See, e.g.*, William E. Kovacic, Hugh M. Hollman, & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 EUROPEAN COMP. L.J. 25, 26 (2011) ("[w]ithout consistent, meaningful performance measures, it is difficult to make sound judgments about agency quality and to compare agency performance across different time periods, or to benchmark agencies with their counterparts in other jurisdictions. This obstacle impedes the identification of useful improvements in agency design or operations, and frustrates efforts to assess the efficacy of any single reform").

[98] *See, e.g.*, Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation,* Brookings (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation.

[99] Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd. 4238 at Appendix A (2011), available at transition.fcc.gov/FCC-11-4.pdf.

Observers have noted that agencies like media regulators tend to be more "political" than antitrust regulators for a number of such reasons.[100]

Finally, as noted above, the goal of antitrust enforcement is not to supervise firm or market behavior but rather to make infrequent interventions so that markets can more nearly achieve certain socially desirable objectives on their own. Other forms of regulation involve a continuing relationship between the firms being regulated and the regulator. The continuing relationship between regulators and the regulated often leads to what is called "regulatory capture."[101] Many of the proposals put forward by the neo-antitrust advocates would force the antitrust agencies into continuing relationships with certain firms and industries and thereby make them more susceptible to many of the phenomena they claim to eschew.

Further, asking competition agencies to consider issues beyond the competitive process and economic welfare can create discontinuities across firms and in the law.[102] Thus, expanding antitrust to encompass further limitations on firm behavior based on considerations such as income inequality, small business welfare, full employment, or viewpoint diversity can have a different emphasis depending on the political regime in force at a given moment. As a result, firms that have had a merger or other antitrust review may be subject to different restrictions relative to other similarly situated firms that either have not faced agency review, or were subject to antitrust restrictions during an administration with differing priorities.

In sum, while the proponents of neo-antitrust do not regard the antitrust agencies as particularly well-functioning now, many of their proposals have the potential to significantly and

[100] *See* Jonathan Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in the Communications Sector*, 9 COMPETITION POLICY INTERNATIONAL (2013).
[101] *See, e.g.,* George J. Stigler (1971), "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2 (1), pp. 3-21.
[102] *See, e.g.*, William Kovacic and David Hyman, *Regulatory Leveraging: Problem or Solution?* 23 GEO. MASON L. REV. 1164 (2016).

adversely affect their performance. They would strain resources by requiring involvement in areas that would expand the scale and scope of the agencies; increase uncertainty; and necessarily make agencies more political and subject to capture.

VIII. Fallacy Eight: Expanding the goals of antitrust comes at no cost in terms of managing tradeoffs.

As just noted, there are numerous proposals to expand the contours of antitrust beyond its current emphasis on consumer welfare in the context of the competitive process. These include considerations of inequality, protecting small business, protecting employment and wages, diversity of opinion and even environmental quality. Many of the proponents of the neo-antitrust movement also want to see a renewed emphasis on structural factors. Enforcing such myriad goals will lead to incompatible objectives.

This is not to suggest that there are no trade-offs within the current consumer welfare standard. One example is when a particular practice might increase prices but also promises more innovation. While these case-by-case challenges are inevitable, the consumer welfare standard provides a basis to evaluate this trade-off: the path that leads to more consumer welfare is the one chosen.

Now consider how adding objectives outside of the competitive process can complicate evaluating trade-offs. For example, goals like increased innovation may be the result of transactions or practices that allow for more automated processes in production. This may conflict with some of the other goals promoted by advocates of the new antitrust enumerated above, such as the promotion of employment and/or concerns with equality.

Unlike a trade-off between prices and innovation, which can be adjudicated through their net effect on consumers and the size of the economic pie, the conflicting goals among innovation

and lower prices on the one hand, and the effect on possibly low-skilled and low-income workers on the other would appear to be conflicting values with no similar adjudicatory framework. Moreover, it is not clear that adjusting enforcement standards in order to consider concerns related to workers affected by a transaction would even advance the goals of employment and equality. Lower prices can do more to promote equality than any putative concern with workers. It is not difficult to postulate similar unmanageable trade-offs that expanding the goals of antitrust will lead to. For example, should one reduce cancer by allowing anticompetitive tobacco mergers? Ease pollution by allowing all coal and steel plants to merge? Reduce inequality by preventing successful firms from becoming more efficient?

IX. Fallacy Nine: Neo-antitrust proposals can be efficiently implemented through the existing regulatory and legal framework.

As noted above, expanding the scope of antitrust into new areas beyond the confines of the relevant market or even beyond the economic field to concerns such as environmental quality will have costs for competition agencies as their resources are stretched more thinly. However, to the extent such areas are already or should be the concern of other governmental bodies or other areas of law, a number of additional harms can result beyond those relevant to the competition agency itself.

The primary harm is simply waste, as multiple agencies actively study and intervene in the exact same things. Nevertheless, there are numerous other concerns. For example, "overdeterrence" can result if competition agencies get involved in areas that are the province of other regulatory agencies, or handled through other means such as contracting, as is often the case with privacy concerns. While proponents of neo-antitrust seem to primarily be concerned

with issues of underdeterrence, the potential for overdeterrence is broadly recognized in both the legal and economic realms and the costs can be very real.[103]

Overdeterrence is somewhat related to the issue of false positives and both have similar effects. However, whereas false positives go more to the issue of the incorrect detection of a violation, overdeterrence goes more to the issue of the chilling effects from overly harsh punishment for a particular practice.[104] It is also the case that by imposing a second level of review, which may be less accurate than the primary level, the likelihood of false positives is also increased when competition agencies step into the areas already covered by regulators or other areas of the law.

Another key argument for limiting the role of competition agencies in non-competition issues is that other regulators may be led to believe they can shirk their responsibilities. In a sense, this may mitigate some of the concerns with overdeterrence state above. That is, if the regulator believes the competition agency will handle matters on its behalf, it may not start an investigation or impose a penalty. However, this is hardly an argument for allowing competition agencies to get involved in such matters since what this is doing is essentially impairing the effectiveness of the regulatory regime. This can be particularly harmful in less developed nations with emergent antitrust and regulatory institutions.[105]

On the other hand, with respect to detailed industry-specific knowledge, the regulatory agency may have informational advantages over the competition authority. (In the case of regulated industries, industry-specific knowledge often relates to a particular firm). Thus, the

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[103] *See, e.g.*, Frank H. Easterbrook (1984), "The Limits of Antitrust," *Texas Law Review* 1, 63.
[104] In jurisdictions such as the United States, with treble damages and class action suits, overdeterrence may prove particularly costly.
[105] *See* Alden Abbott & Seth Sacher, *Avoiding the "Robin Hood Syndrome" in Developing Antitrust Jurisdictions* in William E. Kovacic: An Antitrust Tribute–Liber Amicorum (Vol. I) (Charbit et al. eds., February 2013).

competition agency will often not be adding to the expertise of the regulator and could also be undermining the legitimacy of both agencies.[106]

None of this is to say that there cannot be antitrust intervention in regulated industries or that antitrust agencies should not intervene when firms use various forms of regulation in an anticompetitive manner. For example, in the *Unocal* matter, the FTC alleged that a company misrepresented its patent position to a state regulatory authority (the California Air Resources Board) during rulemaking proceedings.[107] However, that was primarily a competition issue and not a regulatory one.

We have been discussing the intervention of competition agencies in areas of law or regulation that are already the province of other agencies or statutes. Another argument is that antitrust should intervene in cases where there simply are no relevant laws or agencies. For example, in positing why competition agencies may have to pursue non-competition goals Lianos argues:

> "[T]he idea is that the competition law decision-maker lacks information about the structural position of the various actors in all other social spheres in which they may interact…this argument does not hold, simply because of the lack of other institutional options, such as the inability of the EU to employ fiscal instruments in order to systematically redistribute wealth across the Union, in contrast with the situation in the US, where there are adequate fiscal instruments to pursue redistribution at the federal level."[108]

A distinction needs to be made between the extension of antitrust liability to certain areas and the involvement of competition agencies in areas that have little or no intersection with antitrust. To the extent there is a pressing need for a remedy in some area for which there is no

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[106] To the extent there is particular expertise residing in the competition agency, such as a particularly knowledgeable staff member, this expertise can be shared without involving the entire competition agency as a redundant investigator and/or prosecutor.
[107] *In re* Union Oil Co. of Cal. (*Unocal*), 138 FTC 1 (2004).
[108] Ioannis Lianos, *Polycentric Competition Law,* UCL Centre for Law Economics and Society, Research Paper, September 2018.

solution, one is talking about the latter rather than the former. While there may be some argument for involving the competition agency if the need is particularly pressing, this still involves costs. Thus, intervention in such situations still strains the resources of the competition agency and hinders the development of the appropriate regulatory or other legal framework for dealing with the issue. Such interventions should only be undertaken reluctantly, given the costs.

As noted above, some of the arguments for extending antitrust liability proffered by advocates of neo-antitrust include extending antitrust liability to areas currently handled largely by contract law, such as privacy concerns. Substituting antitrust liability for contracts can have several costs. For example, just as regulators have advantages over competition enforcers in certain areas, contract law has clear advantages over antitrust. Thus, contract law often recognizes that circumstances can change in ways unforeseen by the parties and this may require good faith renegotiation of terms. Competition law, as applied in many jurisdictions, may not possess this flexibility. Trying to remedy contractual shortcomings through competition law can chill efficient contracting, as market participants may develop less efficient contracts than would otherwise be the case since they may now believe they face, or are able to bring, antitrust actions in the case of certain disputes.

X. Fallacy Ten: Abandoning the consumer welfare framework and replacing it with populist goals has limiting principles.

As noted above, the objective of modern antitrust is to protect the competitive process as defined by its effect on consumer welfare. Thus, this framework has two aspects: (1) that the welfare of consumers should be paramount and (2) antitrust should only intervene in situations involving abuses to the competitive process.

These principles provide an administrable framework for enforcing the antitrust laws. It allows businesses, the courts and the agencies to focus on variables on which firms compete to obtain consumers, namely, prices, innovation, and quality, where innovation and quality encompasses factors such as variety and the development of new and improved goods. If a transaction or practice, on net, improves these metrics from the perspective of consumers (*i.e.*, lower prices, improved quality) it passes antitrust muster. If the opposite holds, it does not.

Many advocates of the new antitrust want to abandon both the consumer harm and competitive process criteria. One problem here is that this can lead to antitrust having no limiting criteria in terms of the problems to which it can be applied and the evaluative criteria which can be used to adjudicate between states of the world.[109] In this vein, there have been proposals that antitrust consider issues, *inter alia*, related to income distribution, media diversity, global warming, privacy, the promotion of employment, wage growth, small business formation, and even "fake news."

In terms of objective standards, as noted previously, some have called for antitrust to adopt an FCC-like "public interest standard." Claassen and Gerbrandy have proposed that the "capability approach" developed by the economist Amartya Sen and the political philosopher Martha Nussbaum in the context of evaluating economic development be applied to antitrust.[110] This approach would focus on the "capability" of individuals to achieve certain "functionings." Functionings are defined "beings," such as being well-nourished, being undernourished, being safe, being able to participate to social and economic activities, but also being in bad health, and

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[109] As noted by Justice Lewis Powell in *Continental TV, Inc. v. GTE Sylvania, Inc.* (1977), "an antitrust policy divorced from market considerations would lack any objective benchmarks."

[110] Rutger Claassen &Anna Gerbrandy, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, 12 UTRECHT LAW REVIEW (2016), (available at http://doi.org/10.18352/ulr.321).

"doings," such as voting in an election, travelling, eating to your hunger, and consuming fuel to get warm.

Many of the problems that the lack of limiting principles will lead to were discussed in the context of the other fallacies examined above. Not the least of these is that myriad objectives and subject matters will likely strain the limited resources of the competition agencies and require the expansion of staff including the addition of staff with training in areas that currently have had little traditional relationship with antitrust. Secondly, the predictability of the enforcement process becomes more questionable as the factors that may be subject to investigation or liability may multiply. Third, the antitrust agencies will become more regulatory and bureaucratic given that an increased number of interest groups will have an interest in the outcome of an investigation or case. Further, as discussed more fully in the last fallacy, while there can often be trade-offs within the current objective of consumer welfare, adding objectives beyond the consumer welfare standard has the potential to greatly increase the difficulty of adjudicating among various potential trade-offs.

XI. *Fallacy Eleven: Those that adhere to modern antitrust do so because they have been captured by corrupt interest groups.*

While by no means a universal conviction among proponents of neo-antitrust, there have been more than a few allegations that the motivations behind those that support modern antitrust, as well as practitioners at the antitrust agencies themselves, are compromised and are not being intellectually honest. One set of allegations is that advocates of modern antitrust take certain positions because they are in the employ of, or are beholden to, some group whose interests are

at odds with those of consumers.[111] In addition, there are allegations that the antitrust agencies broadly are "captured" by various interest groups[112] or that specific decisions are the result of outside pressures, primarily from the so-called "tech industry."[113] This is a fallacy both regarding the nature of those that practice or support modern antitrust as well as the nature of the neo-antitrust movement itself.

First, judging by associations alone, it is unclear that neo-antitrust should be considered any more authentic in of itself. Among antitrust consultants and lawyers, there clearly is money to be made on both sides of this debate. At the recent FTC Hearings on Competition and Consumer Protection in the 21st Century and at many conferences,[114] it is not unusual to find

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[111] *See, e.g.*, Vaheesan, *supra* note 28 ("[I]n the words of Harry First and Spencer Waller, 'an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.' Although proponents of technocratic antitrust may characterize it as 'pure' or 'scientific,' the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise" at 989-990); Martin Schmalz (@martinschmalz), "Remarkable to see Dan O'Brien, whose two recent papers on the topic were sponsored by the institutional investor lobby @ICI to be included on the program, without even disclosing his conflict of interest." November 30, 2018, 10:35AM, Twitter.com.

[112] *See* Asher Schechter, *US Regulators Have Essentially Become Do-Nothing Institutions,* Promarket, December 6, 2018 (available at https://promarket.org/regulators-do-nothing) ("What really happened is basically what I call an orgy of influence-peddling, with people moving in and out of the top of the FTC and the DOJ essentially green-lighting mergers and helping make them happen once they're out of government."); *Crafting Effective Rules for Internet Platforms Part 1,* Roosevelt Institute Event, Nov. 13, 2018 (available at http://rooseveltinstitute.org/wp-content/uploads/2019/01/Crafting-Effective-Rules-for-Internet-Platforms_Pt.-1_final-1.pdf) ("Upton Sinclair said that it's very difficult to get a man to understand something if his salary depends on him not understanding it. If you look at sort of the revolving door between K Street, the FTC, and George Mason University, for example, and it's one of many universities—you can go to Berkeley and find Carl Shapiro—and Google.").

[113] *See* Jonathan Tepper, *Why Regulators Went Soft on Monopolies,* THE AMERICAN CONSERVATIVE January 9, 2019 (available at https://www.theamericanconservative.com/articles/why-the-regulators-went-soft-on-monopolies/) ("Or consider the recent FTC enforcement action against 1-800 CONTACTS. The FTC's opinion isn't bashful about who benefits from this enforcement—the very first part in the agency's 'proof' of anticompetitive effects was that the challenged conduct results in fewer Google ad sales, as if Google's welfare were a proxy for consumer welfare. The two cases demonstrate that the FTC is reluctant to take on the corporate giants—presumably a future spot of employment—yet is willing to assume great legal risks to bring enforcement actions against small competitors at the behest of monopolists.") Jonathan Taplin, *Why Europe Got Tough on Google but the U.S. Couldn't,* THE WASHINGTON POST, June 28, 2017 (available at https://www.washingtonpost.com/news/posteverything/wp/2017/06/28/why-europe-got-tough-on-google-but-the-u-s-couldnt) ("But the political appointees overrode the staff recommendation, an action rarely taken by the FTC…The Journal pointed out that Google, whose executives donated more money to the Obama campaign than any company, had held scores of meetings at the White House between the time the staff filed its report and the ultimate decision to drop the enforcement action.").

[114] Beginning in 2018 and continuing into 2019, the FTC has held a serious of public hearings "examining whether broad-based changes in the economy, evolving business practices, new technologies, or international developments

attorneys and consultants, as well as lobbyists for trade associations and corporate counsels, advocating both modern and neo-antitrust positions. Well-funded firms have hired antitrust lawyers and economists to support neo-antitrust type positions presumably based on their own desires for increased profits.[115]

Further, academics seeking to gain tenure have their own motivations. Clearly, they want to produce publications that are well cited, gain attention, and attract funding for future research.[116] At least at the margin, one way to increase the likelihood of citations and attention is to be provocative and dramatic. One could attribute such motives to many writings in the neo-antitrust vein; although, without more information, such allegations would appear prejudicial. Nevertheless, some advocates of neo-antitrust seem to be attributing such motives to modern antitrust advocates and agency practitioners based on similarly limited information.

Further, some advocates of the neo-antitrust movement have argued that the staff at antitrust agencies are lax because they are hoodwinked by sophisticated analyses produced by consulting firms.[117] It is undeniable that advocates of particular points of view hire skilled and high-priced attorneys, consultants, and others to advocate for their positions before the agencies. However, the contention that staff are deceived by flawed analyses reflects a complete lack of

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might require adjustments to competition and consumer protection law, enforcement priorities, and policy." *See* https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[115] For example, Microsoft had been prominent in urging antitrust actions against Google. Thus, it publicly advocated in opposition to the Google/Doubleclick merger in congressional testimony. (Larry Dignant, *Google v. Microsoft: Dueling DoubleClick Testimony,* ZDNet (September 27, 2007 (available at https://www.zdnet.com/article/google-vs-microsoft-dueling-doubleclick-testimony/). It was also a prominent complainant in both the U.S.'s and the EU's search case against Google. (Steve Lohr, *Antitrust Cry from Microsoft,* March 31, 2011, available at https://www.nytimes.com/2011/03/31/technology/companies/31google.html).

[116] *See, e.g.*, Brian A. Nosek, Jeffrey R. Spies and Matt Motyl, *Scientific Utopia: II. Restructuring Incentives and Practices to Promote Truth Over Publishability*, (November 7, 2012) PERSPECTIVES ON PSYCHOLOGICAL SCIENCE (available at https://journals.sagepub.com/doi/abs/10.1177/1745691612459058).

[117] *See, e.g.,* Crafting Effective Rules for Internet Platforms Part 1, Roosevelt Institute Event, Nov. 13, 2018 (available at http://rooseveltinstitute.org/wp-content/uploads/2019/01/Crafting-Effective-Rules-for-Internet-Platforms_Pt.-1_final-1.pdf). ("So generally, what happens is, you promise that you won't raise prices. You hire…Charles River Associates. You then pay them to do a model, and then they say that prices will magically fall in these wonderful synergy like shares of the consumer.")

knowledge both of the integrity and the caliber of the staff at these agencies as well as the role that such reports play in an investigation.[118]

For one, while the lawyers and economists at private law firms are undoubtedly highly skilled, the economists and attorneys at the Agencies are also highly skilled. While many spend their entire careers at the agencies, a number go on to great success in consulting (or academia) and are often supervised by prominent academics whose caliber is at least as high as the very best consultants hired by the parties under investigation.[119] Further, if the advocacy made by economic consultants is to be given any consideration by the staff and decision makers at antitrust agencies, it must consist of more than a simple endorsement by a prestigious professor. Rather, advocacy consists of reports and other analyses that are subject to vetting. If an advocate is not willing to produce all the analyses underlying such reports (consisting not only of the data but also the programs and descriptions of what they have done), give sufficient time for vetting, and be willing to engage in a continual dialogue regarding those analyses, they are likely to be given virtually no weight.[120] Indeed, Luke Froeb, an academic and former Director of the Bureau of Economics at the FTC and former Chief Economist at the DOJ, has discussed how in many ways the standard for advocacy is higher than that regarding academic research, given the

[118] For detailed discussions of how staff at antitrust agencies actually consider various pieces of evidence from the parties, including economic studies, *see* Darren S. Tucker and Amanda P. Reeves (2010), *Effective Advocacy Before the Commission*, *Antitrust*, Summer, pp. 52-57; Michael J. Perry and Stephen Weissman (2018), *The First Cut is the Deepest: Use of Economics Before the Antitrust Agencies and the Courts*, *Antitrust* 32, Spring, pp. 44-48.
[119] For a recent list of former Bureau of Economics directors at the FTC, *see* https://www.ftc.gov/about-ftc/biographies/former-bureau-office-directors. For a list of past Deputy Assistant Attorneys General for the Economic Analysis Group at the Department of Justice, Antitrust Division, *see* https://www.justice.gov/atr/about-division/economic-analysis-group/past-deputy-assistant-attorneys-general-economic-analysis.
[120] *See, e.g.*, *Sources of Information and Evidence on Merger Investigations,* Address by David Scheffman (June 14, 2002) (available at https://www.ftc.gov/sites/default/files/documents/public_statements/sources-information-and-evidence-merger-investigations/scheffmanabanycbar.pdf). *See* Perry and Weissman (2018) stating that "[i]f an economic expert's testimony does not fit closely with the qualitative evidence, the court is unlikely to afford it much, if any weight" (p. 47).

high stakes.[121] This is pertinent to analyses produced by parties subject to an investigation as well as third-parties that advocate their own perspectives before the agencies. Moreover, the economic models or econometric analyses produced by staff are given far more weight than anything produced by outside parties, not least of all because staff will have access to more information, through its investigatory and subpoena powers.[122]

Some proponents of the new antitrust use "regulatory capture" arguments regarding the staff of the antitrust agencies, stating that they go easy on monopolists because they hope to work on their behalf in the future as either consultants or private-sector attorneys.[123] This also reflects a fundamental misunderstanding of the relationship between consulting and law firms and agency staff. Consulting firms and law firms want to hire staff because of their agency expertise and reputations for effectiveness and rigor, not because of the positions they took.[124]

Indeed, a substantial portion of antitrust work at consulting and law firms involves advocacy on behalf of plaintiffs in private antitrust suits. Such work usually involves supporting various vertical theories or other interventionist actions that are akin to many of the interventionist policies promoted by many neo-antitrust advocates. Similarly, a large part of the agency work at such firms involves assisting complainants in their advocacy before the agencies

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[121] *See, e.g.*, Froeb, *Whither Merger Simulation?,* The Antitrust Source (May 2004) (available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/may04.pdf) ("As academics, you get peer review. I've got five of these sitting on my desk, and I'm probably going to devote a little bit of time to each one of them. But if you use one of these models in a damage case, you'll get a $100,000 referee report. In many ways, I think that the legal standard is higher.")

[122] Heyer argues, convincingly, that in certain instances the agencies can have more information regarding an alleged anticompetitive practice or market than the actual market participants. *See* Ken Heyer (2007), "Predicting the Competitive Effects of Mergers by Listening to Customers," *Antitrust Law Journal* 74 (1), pp. 87-127.

[123] *See* Noah Smith, The Battle Over Monopoly Power is Just Beginning, Bloomberg Opinion, December 10, 2018 (available at https://www.bloomberg.com/opinion/articles/2018-12-10/the-battle-over-monopoly-power-is-just-beginning: "But some say that the FTC's neutrality is compromised. Tepper, for example, has argued that a revolving door between companies, lobbyists and the government gives FTC staffers an incentive to go easy on monopolists…").

[124] *See* Baker, *supra* note 100 ("In both the antitrust and communications fields, moreover, the professional culture generally does not encourage lawyers to 'take sides' for their entire career, the culture in some other legal fields, like labor law, appears to differ.")

regarding mergers or investigations of various firm behaviors. The so-called revolving door, to the extent it even exists, also helps bring good people into agencies, both at the start of their careers, when they may value the option of leaving later, and later in their careers, when they can use skills and experience developed outside on behalf of the public interest. This serves the purpose of helping the agencies employ staff that is comparable in its skills to those of outside attorneys and consultants.

Finally, the fact the antitrust agencies have litigated against and/or sought serious remedies in matters involving companies such as Google, Microsoft, large oil companies, AT&T, the credit card agencies, Intel, Apple, Qualcomm and others belies the claim that the antitrust agencies are corrupted and are working in the service of the rich and powerful.

The best one can say is that there are multiple motivations to all sides of the debate in antitrust and neither side is free of self-interest. While it may seem clichéd, ultimately the merits of such advocacy rise and fall on the strengths of the analysis—not on contentions that one side is pure and the other is corrupt.[125] One final point; it is interesting to ask why, if the supporters of modern antitrust actually are so corrupt, many advocates of neo-antitrust want to so greatly expand the role of antitrust agencies.

XII. Fallacy Twelve: The failure to achieve certain populist goals is a failure of modern antitrust's view of competition.

[125] *See, e.g.*, Ariel Ezrachi & Maurice E Stucke, *The fight over antitrust's soul,* 9 Journal of European Competition Law & Practice 1(2018) ("Not surprisingly, with so much profit (and power) at stake, corporate interests are fueling the debate. On the one hand, some who favour a narrow technocratic antitrust policy—including some dominant firms, their investment bankers, and their legal and economic experts—want to keep the M&A pipeline open and minimise the relevance of ex post intervention. For them competition policy has evolved to its optimal point. On the other hand, some who favour more intervention do so selectively when it promotes their commercial interest: Encouraging a particular enforcement action which may help improve their or their client's market position and profitability, but not society overall…In an environment so captured, those in search of purity should look elsewhere.").

Many proponents of neo-antitrust believe that modern antitrust has failed to promote enough "competition." They define modern antitrust's failure to promote enough competition in a multiplicity of ways, such as not enough emphasis on market concentration or a lack of concern with innovation as well as other goals. They argue there are a number of sources of modern antitrust's failure in this regard including the consumer welfare standard and its putative emphasis on price as well as philosophical reasons such as the outsized influence of a radical Chicago School approach to antitrust. However, a failure to achieve many of their goals is not a failure of competition. Indeed, in certain cases, competition actually makes their goals harder to achieve.

This point was touched on in Fallacy IV *supra* in which it was noted that it is widely acknowledged by economists and competition agencies that under certain conditions, higher concentration or cooperative efforts among firms (both horizontal and vertical) can lead to *more* innovation and product variety. Another area where this point has relevance are certain concerns expressed by some neo-antitrust advocates about "mass manipulation" by the so-called tech giants.[126] The ability of advertisers and other firms to manipulate customers is a highly controversial proposition. Nevertheless, even taking such an ability as given, it is unclear whether more competition results in more or less of such putative manipulation. More competition may mean firms compete to be better manipulators to attract more clients or for

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[126] *See, e.g.*, *America's antitrust apparatus prepares to act against big tech,* ECONOMIST, (April 26, 2018) (available at https://www.economist.com/business/2018/04/26/americas-antitrust-apparatus-prepares-to-act-against-big-tech) ("The five biggest American tech firms together make about a tenth of all corporate profits. Second, the externalities they may impose on their users, including a loss of privacy and tech addiction. And third, their probable pollution of the public sphere with fake news, mass manipulation and lobbying"). *See also*, Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust,* Mimeo, The Roosevelt Institute, (September 2018) (available at http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf), p. 46 "[C]ongress would either amend Section 2 of the Clayton Act or add a new provision to prohibit price discrimination where it generally harms consumers overall. Such would be case with behavioral discrimination where firms use the data accumulated on individuals to get them to purchase things they otherwise wouldn't buy at the highest price they are willing to pay.").

other reasons of profitability.[127] For example, Miravete (2004) found that as competition in U.S. telecommunications markets increased, telecommunications providers offered more complicated price plans that offered poorer values.[128] Hannak *et al.* (2014) indicated that in reasonably competitive markets, such as travel websites with six major market participants, firms heavily engaged in price steering which is the practice of showing different prices to customers in different demographic groupings.[129]

Similarly, consider the phenomenon of fake news which some in the neo-antitrust movement have argued is an antitrust issue.[130] In terms of fake news, more competition could also make any putative problem worse.[131] Consider that a consumer has an array of options—one of them might be a fake news article but other choices include legitimate news articles, other activities on the Internet, or even activities off the Internet. Now suppose the consumer chooses to engage with the fake news article. For some reason, the fake news item has gained the reader's attention among all these other possible things to which he or she could have devoted their attention. Given that the very essence of media competition is to gain the consumer's attention, increased competition may very well lead to *more* fake news dissemination, not less.

This does not mean that fake news should be a matter of indifference and that consumers have not been defrauded. It only means that since firms' profit from satisfying consumer

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[127] *See, e.g.*, Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition,* Harvard University Press (2016) at 122: "Firms will *compete* in more accurately segmenting customers into subgroups to optimize pricing and profits." (Emphasis added.)

[128] Eugenio J. Miravete, The Doubtful Profitability of Foggy Pricing (October 2004). NET Institute Working Paper No. 04-07. (Available at SSRN: https://ssrn.com/abstract=618465.).

[129] Aniko Hannak, Gary Soeller, David Lazer, Alan Mislove, & Christo Wilson, *Measuring Price Discrimination and Steering on E-commerce Web Sites*, Proceedings of the 2014 Conference on Internet Measurement Conference, pp. 305-318.

[130] *See* Sally Hubbard, Fake News is a Real Antitrust Problem, 3 COMPETITION POL'Y INST. ANTITRUST CHRON., Dec. 2017, at 16. For a response to this assertion, *see* Seth B. Sacher & John M. Yun, Fake News is Not an Antitrust Problem, 3 COMPETITION POL'Y INST. ANTITRUST CHRON., Dec. 2017, at 28.

[131] We do not consider fundamental issues such as whether antitrust even has a role to play in regulating speech. For a further discussion of this issue see Sacher & Yun *supra* note 130.

preferences, one flaw in the argument that fake news is a competition problem is that greater competition could lead to *more* production of fake news rather than less.

Conclusion

The proponents of neo-antitrust are asking antitrust paradoxically to both do too much and too little. They ask too much in that they want competition law to focus on objectives beyond its core competencies and to use nebulous evaluative criteria. They are asking too little in that much of what they advocate amount to calls for antitrust to abandon much of the analytical rigor that it has come to apply over the past fifty to sixty years in favor of various presumptions and rules of thumb.

Among other problems, these proposals can strain limited enforcement resources as well as make enforcement less predictable. Ultimately, these changes would make antitrust less, rather than more, effective in its core mission, while doing little to ameliorate the other problems with which they are concerned. While competition law should certainly be amenable to change, only those changes based on firm principles and evidence should be embraced.