Back to the Future: Should the "Consumer Welfare" Standard Be Replaced in U.S. M&A Antitrust Enforcement?

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Commentators across the political spectrum have asserted that failures in the current U.S. antitrust paradigm are the cause of broad societal issues, including income inequality, low wage growth, and sluggish corporate investment spending[1]—with a few even claiming that it has created a threat to democracy. In addition, some are arguing that the antitrust laws are ill-equipped to address the current competitive dynamics, with a minority suggesting a refocus from "consumer welfare" objectives to broader policy goals. U.S. Senate Democrats responded to these concerns by vowing "to revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come[s] before big corporations."[2] The recent elections make it more likely that the debate will continue rather than end, particularly as the candidates begin campaigning for the 2020 Presidential elections. The Federal Trade Commission ("FTC" or "Commission") has held public hearings to discuss "whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy."[3] Although replacement of the consumer welfare standard does *not* appear to be a focus of the FTC, these hearings may impact *how* the consumer welfare standard is applied in the future.

The current broader attacks on consumer welfare are not only misguided, but to deviate from a consumer welfare focus may do more harm than good. Adopting such political objectives would be a step backwards to the populist era when transactions were blocked simply because they

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[1] An August 25, 2018 *New York Times* article begins with the following: "Two of the most important economic facts of the last few decades are that more industries are being dominated by a handful of extraordinarily successful companies and that wages, inflation and growth have remained stubbornly low. Many of the world's most powerful economic policymakers are now taking seriously the possibility that the first of those facts is a cause of the second—and that the growing concentration of corporate power has confounded the efforts of central banks to keep economies healthy." Neil Irwin, *Are Superstar Firms and Amazon Effects Reshaping the Economy?*, N.Y. TIMES (Aug. 25, 2018), *available at* https://www.nytimes.com/2018/08/25/upshot/big-corporations-influence-economy-central-bank.html ("Irwin"). The topic has become prominent enough that leaders of the Federal Reserve and other central banks have discussed whether corporate consolidation might have broader implications for economic policy.

[2] Policy Statement, U.S. Sen. Democrats, *A Better Deal: Cracking Down on Corporate Monopolies* (July 24, 2017), *available at* https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf ("A Better Deal"); *see also* Eric Kroh, *Sen. Klobuchar Unveils Bills To Beef Up Merger Enforcement*, LAW360 (Sept. 14, 2017), *available at* https://www.law360.com/articles/964180/sen-klobuchar-unveils-bills-to-beef-up-merger-enforcement.

[3] Press Release, Fed. Trade Comm'n, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

disadvantaged competitors even if they increased consumer welfare. United States antitrust law arose from such populist concerns, including concerns that small businesses would be harmed. During the last four decades, economic principles have fine-tuned the application of the antitrust laws to ensure that the interest of consumers is now paramount. A return to the less-disciplined and politically charged objectives of yesteryear would be a mistake: consistent with what philosopher George Santayana warned, "[t]hose who cannot remember the past are condemned to repeat it."[4] Let us not make that mistake, but rather, continue to apply the well-conceived modern antitrust paradigm in a way that promotes consumer welfare above all other objectives.

Within the current antitrust regime, there is, of course, room for improvement *if* the enforcement policies are not addressing conduct—including transactions—that is counter to consumer welfare objectives. The FTC's hearings included a discussion of whether there need to be changes in enforcement and policy guidance in areas such as privacy, big data, and competition, monopsony power (including labor markets), and the adequacy of the FTC's investigation, enforcement, and remedial processes. Again, care should be taken not to deviate from the status quo unless there are systemic errors in the agency decisions under the current policies and a thoughtful determination that any such changes will not harm consumers and innovation.

Moreover, there may be more effective fora involving economic policy that could supplement antitrust policy in addressing the broader societal issues. As discussed in the August 25, 2018 *New York Times* article, *Are Superstar Firms and Amazon Effects Reshaping the Economy?*,[5] until recently research has focused on questions of monopoly power without linking market concentration to the broader issues that animate economic policy outside of the antitrust context. For instance, Federal Reserve policy might factor into the impact of concentrated corporate power in suppressing wage growth in deciding whether to keep interest rates lower for longer without having undesirable inflationary effects. Similarly, the low interest rate policies may not have fostered capital investment spending by corporations because of banking policy disfavoring counting intellectual property or other intangible items as collateral against loans. In addition, pricing algorithms used by online retailers may help to insulate retail prices from common nationwide shocks due to fuel prices, exchange-rate fluctuations or other forces that impact costs. Central banks—and other federal regulatory agencies—may choose to include in their tool kit the macroeconomic and industrial organization economic tools used by antitrust agencies in rendering their policy decisions. Adoption of a more holistic approach is clearly more likely to be successful than trying to use antitrust enforcement alone to address the broader societal issues and further obviates the desirability of altering the well-established consumer welfare standard.

1-I. Antitrust Law's Populist Roots and Evolution

A. Early Grassroots Concerns

United States antitrust enforcement by the U.S. Department of Justice ("DOJ") commenced with the passage of the Sherman Act in 1890.[6] The political origins of this legislation derived from over a decade of labor violence and agrarian unrest, including strikes and

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[4] George Santayana, THE LIFE OF REASON: REASON IN COMMON SENSE (Charles Scribner's Sons 1905) 284.

[5] *See Irwin*, *supra* note 1.

[6] The Interstate Commerce Act of 1887 made certain cartel behaviors illegal, but it was the Sherman Act that contained the seeds of federal merger and monopoly enforcement.

anarchist movements during the 1870s and 1880s.[7] At least one major theme in the legislative history was the desire to improve the free market system to stem direct regulation or Marxist solutions. Small businesses and farmers blamed the trusts for the falling prices of the commodities they sold and the artificially stable prices of the goods they needed to buy.[8] This grassroots sentiment against the evils of economic concentration climaxed in the 1888 presidential election, when both President Grover Cleveland and challenger Benjamin Harrison campaigned on platforms supporting the enactment of federal antitrust laws. Shortly thereafter, U.S. Senator John Sherman (R. Ohio) and others in the 51st Congress introduced antitrust bills that were referred to Sherman's Senate Finance Committee. In support of the legislation, Senator Sherman noted the following:

> It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty, and lies at the foundation of all rights and privileges.[9]

The majority of economists in the late 19th century did not favor the Sherman Act. At best, it seemed a harmless political gesture that could not prevent firms from inevitably attaining larger scale and scope; at worst, it could serve as a real impediment to the efficiencies of industrial reorganization.[10] Thus, from the outset of the federal legislation, a tension existed between the populist fear of market concentration that politically drove its passage and the economic recognition that efficiencies can result from certain combinations and concentrations.

Prior to his appointment to the U.S. Supreme Court, Louis Brandeis was a powerful and outspoken advocate against what he labeled as the "curse of bigness."[11] In the 1912 presidential election, all three candidates—Theodore Roosevelt, Woodrow Wilson, and William Howard Taft—agreed on one thing: the importance of restraining monopolies. But they disagreed as to how such corporate power should be addressed. Taft wanted to increase antitrust enforcement; Roosevelt advocated active supervision and control of industrial concentration by administrative regulatory agencies; and Wilson (with the input of Brandeis, his economic advisor) sought to break up the banks and the financial interests they controlled, but warned of the need to distinguish between businesses attaining scale through efficiency and business practices leading to monopoly.[12] Wilson also warned that "[t]he

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[7] *See* A.D. Neale, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW 12 (2d ed. 1970) ("Neale").

[8] *See id.*

[9] 21 Cong. Rec. 2457 (1890), *available at* http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.

[10] *See* William E. Kovacic & Carl Shapiro, ANTITRUST POLICY: A CENTURY OF ECONOMIC AND LEGAL THINKING 2 Competition Policy Ctr., Univ. of Cal., Berkeley, Working Paper No. CPC99-09 (Oct. 1999), *available at* http://repositories.cdlib.org/iber/cpc/CPC99-009/ ("Kovacic & Shapiro"); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, Ch. 16 (Richard Schmalensee & Robert D. Willig, eds. 1989) ("Schmalensee").

[11] Justice Brandeis had published a series of articles, which were then compiled into his 1914 book, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, *available at* http://manybooks.net/titles/brandeislother09other_peoples_money. Brandeis was concerned not only about the effect of monopoly on the economy, but also its effect on democracy.

[12] Ky P. Ewing, Jr., COMPETITION RULES FOR THE 21ST CENTURY 91 (2003) (quoting Tony Freyer,

government, which was designed for the people, has got into the hands of bosses and their employers, the special interests. An invisible empire has been set up above the forms of democracy."[13] Wilson believed that making the antimonopoly laws work and using them to reestablish a system of open and competitive markets was part of the solution. As a result, upon his election, Wilson pushed his antitrust agenda by calling "for legislation in such terms as will practically eliminate uncertainty."[14] Congress responded with the passage of both the Clayton Act and the Federal Trade Commission Act in 1914. The Clayton Act sought to open markets " 'to scores of men who had been obliged to serve when their abilities entitled them to direct.' "[15] The Clayton Act, therefore, made ensuring economic opportunity for competitors a priority and reflected only an ancillary concern for consumer welfare.[16]

As originally promulgated, Section 7 of the Clayton Act applied only to stock acquisitions. Congress intended to block the trusts by preventing monopolies from gaining power through the purchase of voting control of ostensibly public companies, which they exercised through holding companies, a practice discussed in early Sherman Act cases.[17] The Clayton Act imposes an "incipiency" standard, which prohibits combinations where the effect is "substantially to lessen competition, or to tend to create a monopoly."[18] The incipiency standard provided antitrust enforcers with statutory authority to prevent prospective combinations as well as to attack existing monopolies and concentrations. There is effectively no statute of limitations for Clayton Act violations; enforcers may challenge anticompetitive transactions even decades after consummation.[19]

REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA 1880–1990, 117 (1992)) ("Ewing").

[13] Woodrow Wilson, THE NEW FREEDOM 36 (Prentice-Hall, Inc. 1912).

[14] Neale, *supra* note 7, at 179 (internal quotations omitted).

[15] Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1149 (1981) (quoting Address by President Wilson on Trusts and Monopolies Before the Joint Session of Congress (Jan. 20, 1914)), *available at* https://scholarship.law.cornell.edu/clr/vol66/iss6/3/.

[16] *Id.* The FTC's concern regarding the ability of an individual to enter into a business can be seen in the early Annual Reports that the FTC submitted to Congress. For example, the 1923 FTC Annual Report reflects the FTC's response to a congressional mandate directing the Commission:

> [T]o make an inquiry into and to compile data concerning the total amount of the chief kinds of wealth in the United States, to ascertain the ownership thereof and the encumbrances thereon, including both public and private indebtedness, and to secure statistics for recent years covering the amount of the annual increase in the national wealth in different lines of economic activity and by different classes of the population. . . .

Annual Report of the Fed. Trade Comm'n for the Fiscal Year Ended June 30, 1923, at 77 (1923), *available at* http://www.ftc.gov/os/annualreports/ar1923.pdf.

[17] *See* Neale, *supra* note 7, at 178.

[18] 15 U.S.C. § 18 (2018).

[19] *See, e.g.*, *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 622 (1957) (allowing suit brought approximately 30 years after challenged acquisition). *But see Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004) (applying statute of limitation to private litigation under Section 7 of the Clayton Act). Despite the ability to challenge mergers post-consummation under the statute, the federal antitrust agencies have rarely done so since the adoption of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"), 15 U.S.C. § 18a (2000), which instituted mandatory premerger notifications and a waiting period. In the vast majority of cases, the agencies utilize the HSR Act process and seek to enjoin anticompetitive mergers before consummation and the majority of post-consummation challenges have tended to involve mergers

Continued congressional fear of the effects of concentration on competitors resulted in the passage of the Robinson-Patman Act of 1936, which protects small businesses by forbidding price discrimination by suppliers in favor of larger competitors. In 1950, Congress broadened the scope of Section 7 of the Clayton Act to include asset acquisitions, through the passage of the Celler-Kefauver Act.[20] Former FTC Chairman Robert Pitofsky opined that the amendments "exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder [as in Nazi Germany], facilitate the overthrow of democratic institutions and the installation of a totalitarian regime."[21] Clayton Act enforcement evolved from President Wilson's idea of opening business opportunities to smaller competitors to focusing on consumer protection as well. During the late 1940s and 1950s, economist Joe Bain conducted and published "inter-industry" studies in an effort to prove his hypothesis that higher industry concentration correlated with higher prices to consumers,[22] generally referred to as the "structure-conduct-performance" paradigm.[23] Other industrial organizational economists directed their attention to empirical evidence linking market statistics to market performance.[24]

Early cases brought under the Clayton Act challenged mergers solely on the basis of corporate concentration or to maximize various other societal and political goals. In the iconic *Brown Shoe Co. v. United States*,[25] the U.S. Supreme Court "invalidated a merger that would have yielded a horizontal market share of 5 percent and generated a vertical foreclosure of under 2 percent."[26] The Court also considered populist factors, such as preservation of small firms, even if the result was higher costs and prices.[27] Decisions such as *United States v. Philadelphia National Bank*[28] and *United States v. Von's Grocery Co.*[29]

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that were not HSR Act-reportable. *But see* Complaint, *In re Chicago Bridge & Iron Co. N.V.*, FTC Dkt. No. 9300 (Oct. 25, 2001), *available at* https://www.ftc.gov/system/files/documents/cases/chicagoadmincomplaint.pdf; Complaint, *In re MSC.Software Corp.*, FTC Dkt. No. 9299 (Oct. 9, 2001), *available at* https://www.ftc.gov/system/files/ documents/cases/001_0077.pdf; Ilene Knable Gotts & Phillip A. Proger, *Closed But Not Safe? Agencies Challenge Consummated Transactions*, THE M&A LAWYER (Apr. 2002), at 17.

[20] 64 Stat. 1125 (1950).

[21] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1054 (1979) ("Pitofsky").

[22] *See, e.g.*, Joe S. Bain, BARRIERS TO COMPETITION (1956).

[23] *See also* Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104 (1979), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4870&context=penn_law_review.

[24] *See* Kovacic & Shapiro, *supra* note 10; Schmalensee, *supra* note 10.

[25] 370 U.S. 294 (1962).

[26] Kovacic & Shapiro, *supra* note 10, at 11.

[27] *Brown Shoe*, 370 U.S. at 344 ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). Previously, the U.S. Supreme Court had similarly ruled against mergers that would have lowered consumer prices in favor of smaller firms. *See, e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1899) (antitrust laws to protect "small dealers and worthy men"); *United States v. Aluminum Co. of America*, 148 F.2d 416, 428–29 (2d Cir. 1945) (antitrust to end aggregations of capital to protect helpless individuals).

[28] 374 U.S. 321 (1963).

similarly noted U.S. antitrust law's preference for small producers and determined that even horizontal mergers with low market shares could be blocked as anticompetitive under the incipiency standard.[30]

B. Antitrust Modernization and the Consumer Welfare Standard

The populist fear of big business at the root of early federal antitrust enforcement eventually evolved into a dynamic standard that is focused on "consumer welfare," *i.e.*, that antitrust enforcement should seek "to make consumers better off, by condemning conduct that raises prices, reduces output, etc.—even if doing so means some less efficient competitors are driven from the market."[31] Professors Kovacic and Shapiro credit the rise of prominent "Chicago School" legal scholars such as Professors Robert Bork and Richard Posner in the 1970s and 1980s with translating economic "analytical precepts" into "operational principles that judges readily could apply."[32] However, the proponents for the adoption of economic rigor and a consumer welfare focus were not limited to one particular "school." Then-UCLA Economics Professor Harold Demsetz, for example, largely debunked the conventional wisdom of the "structure-conduct-performance" paradigm, explaining that fewer, more efficient competitors, rather than a lack of competition, may explain why industries with fewer firms earn higher profits.[33] Courts implemented this new approach by focusing on efficiency and consumer welfare as the twin guiding beacons of antitrust analysis.[34] Although, even a few decades later, there remains an academic debate over whether the goal of U.S. antitrust enforcement is to maximize consumer surplus or to optimize allocative efficiency,[35] this debate has remained firmly tied to economic theory and the best available empirical evidence.

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[29] 384 U.S. 270 (1966).

[30] The Court's majority opinion in *Philadelphia National Bank* states that "intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects." 374 U.S. at 363. Evidence of sufficient concentration alone was enough to shift the burden of proof to the merging parties to show that no anticompetitive effects would occur as a result of the transaction. *Id*.

[31] *See* Testimony of Joshua D. Wright, *Hearing on The Consumer Welfare Standard in Antitrust Law: Outdated or a Harbor in a Sea of Doubt?*, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Dec. 13, 2017), at 8, *available at* https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Wright%20Testimony.pdf ("Wright Senate Testimony"); Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 245–49 (2012), *available at* https://ssrn.com/abstract=2050531.

[32] Kovacic & Shapiro, *supra* note 10, at 13.

[33] *See generally* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. LAW & ECON. 1 (1973).

[34] *See generally* Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) ("Bork").

[35] *See* Richard M. Steuer, *The Horizons of Antitrust*, 91 ST. JOHN'S L. REV. 177 (Spring 2017) ("Steuer"), *available at* https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=http://r.duckduckgo.com/&httpsredir=1&article=6788&context=lawreview; Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, THE ANTITRUST SOURCE (Aug. 2015), *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_jacobson_7_21f.authcheckdam.pdf ("Jacobson"); *see also* Calvin S.

While the courts were gradually incorporating new economic ideas into an evolving antitrust jurisprudence, the federal agencies were developing enforcement guidelines reflecting these same concepts. When the DOJ originally promulgated its Horizontal Merger Guidelines in 1968,[36] they were stringently based on market shares and focused on clarifying the rules for defining markets. The DOJ defined a "highly concentrated market" as one in which the four largest firms had a combined share of 75 percent. The DOJ indicated that it would ordinarily challenge a merger in such a market where the acquiring firm had a 15 percent or higher share and the acquired firm had 1 percent, among other situations.[37] For markets where the four-firm concentration was below 75 percent, the DOJ would challenge mergers where the acquiring firm had a 25 percent or higher share and the acquired firm had 1 percent.[38] Moreover, the 1968 Guidelines indicated that:

> [T]he Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (*i.e.*, improvements in efficiency).[39]

The DOJ revised its 1968 Horizontal Merger Guidelines in 1982 to incorporate new techniques for market definition and analysis. The 1982 Guidelines, for example, did away with the notion that mergers that led to concentration above a certain threshold were presumptively unlawful; concentration benchmarks, however, retained their very significant role in the analysis.[40] The FTC released a Horizontal Merger Statement that same year, endorsing the DOJ's 1982 Guidelines and stating that the Guidelines would be given considerable weight by the FTC.[41] The FTC indicated, however, that it would give "greater consideration of evidence beyond mere market shares when such evidence [was] available and in a reliable form."[42] The DOJ Guidelines were revised again in 1984 and subsequently in 1992, 1997, and 2010, with the FTC joining the DOJ in jointly issuing all of these

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Goldman, Ilene Knable Gotts & Michael E. Piaskoski, *The Role of Efficiencies in Telecommunications Merger Review*, 56 FED. COMM. L.J. 87, 135 (Dec. 2003); Bork, *supra* note 34, at 91.

[36] U.S. Dep't of Justice, Antitrust Div., *1968 Merger Guidelines*, *available at* http://www.usdoj.gov/atr/hmerger/11247.htm ("*1968 Guidelines*").

[37] In concentrated markets under the *1968 Guidelines*, *supra* note 36, the DOJ indicated that it would also challenge a 10% acquirer's acquisition of a 2% target and a 4% acquirer's acquisition of a 4% target. *Id*. at § 5.

[38] Under the *1968 Guidelines*, *supra* note 36, in less concentrated markets, acquirers with shares of 20%, 15%, 10%, and 5% were to be respectively prevented from acquiring firms with 2%, 3%, 4%, and 5% shares. *Id*. at § 6.

[39] *Id*. at § 10.

[40] The 1982 Merger Guidelines introduced the Herfindahl-Hirschman Index ("HHI"), which measures market concentration by summing the squares of the individual market shares of all participants in a market. The HHI for a given market can range from close to zero if each participant has a very small share to 10,000 in the case of a monopolist with a 100 percent share. U.S. Dep't of Justice, Antitrust Div., *1982 Merger Guidelines*, *available at* https://www.justice.gov/archives/atr/1982-merger-guidelines ("*1982 Merger Guidelines*").

[41] David Scheffman, Malcolm Coate & Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 4, 5 (2002), *available at* http://www.usdoj.gov/atr/hmerger/12881.pdf (quoting the 1982 Statement of Federal Trade Commission Concerning Horizontal Mergers).

[42] *Id.* at 5.

versions.[43] Notably, by the time of the 1982 Guidelines, the agencies recognized that efficiency-producing mergers were beneficial to the economy.[44]

The 2010 Guidelines incorporate: (1) theories of anticompetitive effects (unilateral and coordinated); (2) demand-side and supply-side factors in market definition (uncommitted and committed entrants); (3) a three-part test for entry barriers (timely, likely and sufficient); (4) a recognition of cognizable, merger-specific efficiencies; and (5) failing firm and failing division considerations.[45] In short, the current Guidelines reflect input from economists and demonstrate a concerted effort to ensure that the agencies' analysis is firmly grounded in sound economic principles rather than in general sentiment about the size of the market participants.[46]

State-of-the-art merger analysis has moved well beyond a simplistic view that high concentration leads to anticompetitive effects. The number of competitors is certainly important—four-to-three gets attention more quickly than six-to-five—but current merger practice does not elevate a single fact or number to dispositive significance.[47] Rather, weakening the standard presumption over time in the Horizontal Merger Guidelines properly reflects advances in economic learning during the intervening 50 years.[48] The Court's (and the agencies') adoption of the consumer welfare standard[49] "transformed antitrust from a lost and rambling area of law to a coherent, principled tool for advancing consumer outcomes."[50]

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[43] *Id.* at 9, 10.

[44] *1982 Merger Guidelines*, *supra* note 40.

[45] U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug. 19, 2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[46] For an excellent discussion of how the Merger Guidelines have gradually evolved from a mere codification of concentration theory to embrace a more dynamic view of market analysis, *see* Ewing, *supra* note 12, at 104–47.

[47] Timothy J. Muris, Fmr. Chairman, Fed. Trade Comm'n, Prepared Remarks at the Workshop on Horizontal Merger Guidelines, Fed. Trade Comm'n/U.S. Dep't of Justice 2 (Feb. 17, 2004), *available at* http://www.ftc.gov/speeches/muris/040217hmgwksp.htm. *See also* Deborah Platt Majoras, *Looking Forward: Merger and Other Policy Initiatives at the FTC*, Remarks Before the ABA Antitrust Section Fall Forum 5 (Nov. 18, 2004), *available at* http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf (announcing initiative to publish comments on the Merger Guidelines). For an empirical study of how market structure has affected FTC enforcement decisions, see Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996–2003* (2005), *available at* https://www.ftc.gov/sites/default/files/documents/reports/request-mailed-copy-transparency-federal-trade-commission-horizontal-merger-review-process-1996-2003/0502economicissues-1.pdf.

[48] *See* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. [at 6] (May 2018) ("Hovenkamp & Shapiro"), *available at* https://www.yalelawjournal.org/feature/horizontal-mergers-market-structure-and-burdens-of-proof; *accord* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 276 (2015), *available at* https://ssrn.com/abstract=2375354.

[49] *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 340 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' ").

[50] Wright Senate Testimony, *supra* note 31, at 9, citing Deborah A. Garza, U.S. Dep't of Justice, Deputy Assistant Attorney Gen., Antitrust Div., *Remarks On "Modernization Of Antitrust Law—Private And Public Enforcement And Abuses—Europe And The U.S."* (May 29, 2008), *available at* https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and ("Even the

The standard "provides a clear, economically-based rule that when anticompetitive effects outweigh procompetitive benefits, the conduct is unlawful . . . . Today, this standard is flexible enough to allow antitrust jurisprudence to evolve alongside our economic understanding and the introduction of new business models and high-tech industries."[51]

The above discussion, however, should not be read to suggest that during the time of transition to empirical, economically based analysis there were not well-respected critics expressing concerns. For instance, in 1977, then-FTC Chairman Michael Pertschuk stated that "[n]o responsive competition policy can neglect the social and environmental harms . . . : resource depletion, energy waste, environmental contamination, worker alienation, [and] the psychological and social consequences of marketing-stimulated demands."[52] Similarly, former FTC Chairman and Georgetown University Law Center Professor Robert Pitofsky wrote in 1979 that "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[53] "Political values" are:

> [F]irst, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third . . . concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.[54]

More recently, Northeastern Economics Professor John Kwoka, in his MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY, argues that most of the mergers he studied resulted in competitive harm, usually in the form of higher product prices, but also on non-price outcomes.[55] Questions, however, have been raised regarding Kwoka's findings. FTC economists Michael Vita and David Osinski, for example, noted that:

> Kwoka has drawn inferences and reached conclusions . . . that are unjustified by his data and his methods . . . . We review both the evidence and his empirical methods, and conclude that

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most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning . . . . We won't return to what antitrust enforcement looked like 40 years ago.").

[51] Wright Senate Testimony, *supra* note 31, at 9–10. The record for vertical mergers followed a similar path, though recently there has been renewed focus on potential harms. For a historical discussion, see Herbert Hovenkamp, *Progressive Antitrust*, U. Penn Inst. for Law & Econ. Research Paper No. 17-25 (Jan. 2018) ("Hovenkamp Progressive Paper"), *available at* http://ssrn.com/abstract=2892336.

[52] Michael Pertschuk, Chairman, Fed. Trade Comm'n, *New Directions for the FTC*, Remarks Before the Eleventh New England Antitrust Conference (Nov. 18, 1977), *reprinted in* 308 Trade Reg. Rep. F-2 (CCH) (Supp. 1977).

[53] *Pitofsky*, *supra* note 21, at 1051.

[54] *Id.*

[55] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). *See also* Robert A. Skitol, *A Harsh Report Card on the Merger Enforcement Process*, THE ANTITRUST SOURCE (Feb. 2015), *available at* http://www.antitrustinstitute.org/sites/default/files/Book%20Review%20by%20Robert%20A.%20Skitol.pdf.

serious deficiencies in both undermine the basis for those conclusions.[56]

Moreover, not all concentrated industries with high profit margins and large firms are the result of poor competitive outcomes. As Professors Hovenkamp and Shapiro note, "high levels of concentration and high price-cost margins can result quite naturally in today's economy from competitive processes playing out in ways that benefit consumers"[57] under two scenarios. First, in markets where there are substantial economies of scale, the process of competition can lead to high concentration levels. Thus, higher concentration levels and high price/cost margins do not in and of themselves reflect a competitive enforcement problem. Second, the competitive process itself can result in "winner-take-all" situations in which a few firms have large "market shares" due to their being more efficient than their rivals or having had innovative success. Consistent with modern, industrial organizational economics, "antitrust policy must always be careful not to discourage firms, even large firms, from competing on the merits to attract more customers and thus grow."[58]

1-II. The Present Debate: Back to the Future?

In what Professor Hovenkamp labels "Progressivism," lax antitrust enforcement is depicted as the cause of—and the answer to—the ills of society on the basis that "markets are fragile and in need of repair, that certain interest groups require greater protection, or in some cases, that antitrust policy is an extended arm of regulation."[59] Progressives advocate for significant changes in antitrust policy and enforcement as a means to address economic inequality. This section will focus on the present debate, including special concerns raised involving labor issues and the success of high-tech firms.

A. Antitrust and Income/Political Inequality

The recent overarching political unrest in the country is not surprising. Median income and wealth both declined in real terms from 2010 to 2013. Over the same time period, the real income of the top 1 percent grew by 31.4 percent, and the income share of the top 1 percent increased from 17.2 percent to 19.8 percent.[60] The divergence in economic prosperity between those at the very top and the rest of society is not limited to the years following the 2008 Great Recession, but has been a trend since the 1980s.

Inequality concerns were the basis of the Occupy movement's protests against Wall Street in 2011.[61] It was a central issue raised by Elizabeth Warren in her 2012 election campaign

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[56] Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review* at Abstract, 1 (Dec. 21, 2016), *available at* https://ssrn.com/abstract=2888485.

[57] Hovenkamp & Shapiro, *supra* note 48, at 8.

[58] *Id.* at 8.

[59] Hovenkamp Progressive Paper, *supra* note 51.

[60] *See* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEORGETOWN L.J. 1, 1–2 (2015) ("Baker & Salop"), *available at* https://georgetownlawjournal.org/articles/164/antitrust-competition-policy-inequality/pdf.

[61] Roger Lowenstein, *Occupy Wall Street: It's Not a Hippie Thing*, BLOOMBERG BUS. WK. (Oct. 27, 2011), *available at* http://www.bloomberg.com/bw/magazine/occupy-wall-street-its-not-a-hippie-thing-10272011.html.

for the U.S. Senate.[62] Inequality was a central theme of President Obama's 2015 State of the Union Address.[63] Hillary Clinton[64] focused on the issue as part of her presidential campaign, as did the Democratic Party.[65] The leading Republican presidential contenders, including President Trump, spoke on the inequality problem in the United States as well.[66] As one 2016 article discusses, "bigness" has become a bipartisan cause on Capitol Hill.[67]

But what does income inequality have to do with antitrust enforcement generally, and with M&A activity specifically? Some Progressive think tanks, scholars, advocates, and others have issued reports blaming inadequate antitrust enforcement for high profits, concentration, and, ultimately, inequality effects.[68] University of Chicago Economics Professor Luigi

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[62] *See* Baker & Salop, *supra* note 60, at 3, citing *Elizabeth Warren: What happened to the middle class?*, CNN (May 1, 2014), *available at* http://www.cnn.com/2014/05/01/opinion/warren-middle-class.

[63] President Barack Obama, State of the Union Address (Jan. 20, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015.

[64] In October 2015, Secretary of State Clinton stated: "Economists, including President Obama's Council of Economic Advisers, have put their finger on what's going on: large corporations are concentrating control over markets." *Hillary Clinton: Being pro-business doesn't mean hanging consumers out to dry*, QUARTZ (Oct. 20, 2015), *available at* https://qz.com/529303/hillary-clinton-being-pro-business-doesnt-mean-hanging-consumers-out-to-dry/. On October 3, 2016, her campaign website pledged: "A new commitment to promote competition, address excessive concentration and the abuse of economic power, and strengthen antitrust laws and enforcement." In addition, the campaign identified as one of its goals "prevent[ing] the inappropriate exploitation of excessive market power where it already exists." *See* Jay Levine, *Trump vs. Clinton: Some Antitrust Predictions*, LAW360 (Nov. 6, 2016), *available at* https://www.law360.com/articles/858581/trump-vs-clinton-some-antitrust-predictions.

[65] The 2016 Democratic Party Platform contained a section, entitled "Promoting Competition by Stopping Corporate Concentration," which stated that "Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. . . . We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy," at 11, *available at* https://www.democrats.org/party-platform.

[66] Catherine Rampell, *Republicans have started to care about income inequality*, WASH. POST (Jan. 22, 2015), *available at* https://www.washingtonpost.com/opinions/catherine-rampell-republicans-have-started-to-care-about-income-inequality/2015/01/22/f1ee7686-a276-11e4-903f-9f2faf7cd9fe_story.html?utm_term=.f7b044d6b376.

[67] Haley Sweetland Edwards, *Why Bigness Became a Bipartisan Cause on Capitol Hill*, TIME (July 5, 2016), *available at* http://time.com/4389698/elizabeth-warren-antitrust-2016-election/.

[68] *See, e.g.*, K. Sabeel Rahman & Lina Khan, *Restoring Competition in the U.S. Economy*, in *Untamed: How to Check Corporate, Financial, and Monopoly Power*, ROOSEVELT INST. 18 (Nell Abernathy, Mike Konczal & Katy Milani, eds., June 2016), *available at* http://rooseveltinstitute.org/untamed-how-check-corporate-financial-and-monopoly-power/ ("Increasing market concentration across the American economy has been a driver of declining economic opportunity and widening inequality in recent decades. In industries ranging from hospitals and airlines to agriculture and cable, markets are now more concentrated and less competitive than at any point since the Gilded Age."); Joseph Stiglitz, *Towards a Broader View of Competition Policy*, ROOSEVELT INST., Working Paper 2 (June 2017), *available at* http://rooseveltinstitute.org/towards-broader-view-competition-policy/ (there is "the increase in market power across many important sectors of the U.S. economy and persistent higher rates of return to capital than seem consistent with competition . . . . These monopoly rents may, in turn, play an important role in the country's growing inequality."). *See also* Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency*, Board of Governors of the Federal Reserve System

Zingales similarly has indicated that there is "a direct connection between economic power, bigness, and political power."[69] The University of Chicago's Booth School of Business held a conference in March 2017, entitled "*Is There a Concentration Problem in America?*." Many of the speakers at the conference endorsed the need for antitrust enforcement to be strengthened: The *Economist* article on the conference is accurately entitled "*The University of Chicago worries about a lack of competition. Its economists used to champion big firms, but the mood has shifted.*"[70]

So, too, did the Obama Administration's leaders of the antitrust authorities express concerns. For instance, Renata Hesse, while Acting Assistant Attorney General ("AAG") in September 2016, said that the "legislative history of the Sherman Act makes it clear that the antitrust laws were intended to benefit participants in the American economy broadly—not just in their capacity as consumers of goods and services."[71]

The data may not actually support the claim that increased concentration is the source of political and economic inequality. More fundamentally, as DOJ economist Greg Werden and Vanderbilt University Economics Professor Luke Froeb point out, none of the Progressive advocates have demonstrated increased concentration of antitrust cognizable markets, but instead make these claims based on data that are far too aggregated.[72] In addition, Werden and Froeb indicate that, even where market concentration has increased, that does not mean that there has been a failure of antitrust law or its enforcement; market concentration naturally increases when the most innovative and efficient firms grow, and correlates with the conclusions on concentration, as well as whether such an increase in concentration necessarily proves a decline in competition.[73] However, assuming that both of the concentration concerns were true, Professor Carl Shapiro indicates:

> Antitrust policy can address concerns about rising concentration and high corporate profits

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(Oct. 2016), *available at* https://doi.org/10.17016/FEDS.2016.082.

[69] Virginia Postrel, *U.S. Antitrust Law Is Not Broken*, BLOOMBERG (Sept. 29, 2017), *available at* https://www.bloomberg.com/view/articles/2017-09-29/u-s-antitrust-law-is-not-broken.

[70] Schumpeter, *The University of Chicago worries about a lack of competition*, ECONOMIST (Apr. 12, 2017), *available at* https://www.economist.com/news/business/21720657-its-economists-used-champion-big-firms-mood-has-shifted-university-chicago ("Economist").

[71] Renata Hesse, U.S. Dep't of Justice, Acting Assistant Attorney Gen. of the Antitrust Div., *And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement*, Opening Remarks at 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.

[72] Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST MAGAZINE (Forthcoming 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912.

[73] Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. 3–4 (Forthcoming; draft dated Oct. 24, 2017), *available at* http://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf ("Shapiro"). *See also* Jacob S. Hacker & Paul Pierson, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); Joseph E. Stiglitz, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012); Lawrence H. Summers, *The Inequality Puzzle*, 33 DEMOCRACY J. 91 (Summer 2014) (reviewing Thomas Piketty's CAPITAL IN THE TWENTY-FIRST CENTURY); Bill Gates, *Why Inequality Matters*, GATESNOTES: THE BLOG OF BILL GATES (Oct. 13, 2014), *available at* http://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-review.

> (a) by increasing cartel enforcement efforts; (b) by imposing tighter controls on mergers; and (c) by taking a tougher approach to exclusionary conduct by dominant firms. Looking at competition policy more broadly, additional tools can come into play: (d) adopting policies that reduce entry barriers;[74] (e) actively breaking up large firms in concentrated markets;[75] and (f) regulating firms deemed to have substantial market power.[76]

Professor Shapiro stops short of suggesting that the last three of these actions be undertaken as a part of antitrust enforcement.

Professor Herbert Hovenkamp further argues that an antitrust policy that focuses on wealth inequality could actually harm consumers.[77] For instance, a policy that condemned firms that produce lower prices or higher quality than rivals might "improve" distribution of wealth or protect smaller competitors, but at what cost to consumers? Or, for that matter, at what cost to the creation of new jobs from the increased output achieved by the efficient firm?

B. High-Technology-Focused Concerns

Although the Democratic congressional leadership's "Better Deal" Platform discussed in Section IV, *infra*, specifically mentions the airline, beer, and eyeglass industries *rather than* high technology, many of the advocates for stronger antitrust enforcement are focused on the largest high-tech firms—Facebook, Amazon, Apple, Microsoft, and Google—which they view as having political and economic power.[78] Prime targets of the so-called "antitrust hipsters"[79]—who believe that U.S. antitrust officials have for the past four decades viewed the question of anticompetitive M&A and industries too narrowly—are the high-technology companies, often referred to as the "FAANGs"[80] or the "FAMGAs."[81] The value of the five

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[74] Professor Shapiro recommends reducing occupational licensing requirements that protect incumbents rather than consumers and eliminating governmental regulations that protect incumbents.

[75] Professor Shapiro indicates that the calls to break up tech giants may be motivated by concerns about political power.

[76] Shapiro, *supra* note 73, at 21.

[77] Hovenkamp Progressive Paper, *supra* note 51; Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI ANTITRUST CHRONICLE (2017) ("Hovenkamp Inequality Paper"), *available at* https://pdfs.semanticscholar.org/74b2/42c7847f104cbfd20a6e7dc035a9627abdbe.pdf.

[78] Sometimes Netflix is left out of the mix. *See, e.g.*, Farhad Manjoo, *Tech's 'Frightful 5' Will Dominate Digital Life for Foreseeable Future*, N.Y. TIMES (Jan. 20, 2016), *available at* https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html; Farhad Manjoo, *Tech's Frightful Five: They've Got Us*, N.Y. TIMES (May 10, 2017), *available at* https://www.nytimes.com/ 2017/05/10/technology/techs-frightful-five-theyve-got-us.html; Farhad Manjoo, *How the Frightful Five Put Start-Ups in a Lose-Lose Situation*, N.Y. TIMES (Oct. 18, 2017), *available at* https://www.nytimes.com/2017/10/18/technology/frightful-five-start-ups.html; *The Superstar Company, A giant problem: The rise of the corporate colossus threatens both competition and the legitimacy of business*, ECONOMIST (Sept. 17, 2016), *available at* https://www.economist.com/news/leaders/21707210-rise-corporate-colossus-threatens-both-competition-and-legitimacy-business ("2016 Economist").

[79] Professor Joshua Wright is among the critics who have referred to the advocates for changing the applicable antitrust standard from consumer welfare to broader public interest objectives as "antitrust hipsters." Kostya Medvedovsky originally coined the term.

[80] CNBC's Jim Cramer introduced the "FANG" acronym originally for Facebook, Amazon, Netflix, and Google. The acronym "FAANG" is for Facebook, Amazon, Apple, Netflix, and Google.

largest tech companies—Apple, Alphabet (Google's parent company), Amazon, Facebook, and Microsoft—has doubled in the last three years, to more than $3 trillion, and Apple, Alphabet, Microsoft, and Facebook are the top four most valuable companies in the world. On August 2, 2018, Apple became the first company to achieve a market capitalization of $1 trillion.[82] As indicated in the introduction, the sheer size of the FAMGAs has raised concerns of certain academics and critics as fostering both income and political inequality.[83]

A September 2016 *Economist* article notes:

> DISRUPTION may be the buzzword in the boardrooms, but the most striking feature of business today is not the overturning of the established order. It is the entrenchment of a group of superstar companies at the heart of the global economy . . . . The elite of the elite are the high-tech wizards—Google, Apple, Facebook and the rest—that have conjured up corporate empires from the bits and bytes.
>
> . . . [T]he superstars are admirable in many ways . . . . But they have two big faults. They are squashing competition, and they are using the darker arts of management to stay ahead. Neither is easy to solve. But failing to do so risks a backlash which will be bad for everyone.[84]

Another 2016 *Economist* article posited on the question of "why [the world's best-known tech company] giants thrive," and concluded that it is based on them having achieved vast scale.[85]

Apple's achievement of the $1 trillion market cap has added fuel to the fire of the Progressives. The surrounding press accounts have expanded the discussion beyond Apple, to a focus on "how a group of enormous companies have come to dominate the United States economy . . . [as] a small cluster of American companies command a larger share of total corporate profits than since at least the 1970s."[86] *New York Times* reporter Matt Phillips concludes that "[t]he consolidation [of corporate concentration] is especially pronounced in

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[81] The acronym "FAMGA" is for Facebook, Amazon, Microsoft, Google, and Apple.

[82] Matt Phillips, *Apple's $1 Trillion Milestone Reflects Rise of Powerful Megacompanies*, N.Y. TIMES (Aug. 2, 2018), *available at* https://www.nytimes.com/2018/08/02/business/apple-trillion.html ("Phillips").

[83] *See, e.g.*, Jonathan Taplin, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017).

[84] 2016 Economist, *supra* note 78.

[85] Driving Forces: *Why giants thrive*, ECONOMIST (Sept. 15, 2016), *available at* https://www.economist.com/news/special-report/21707049-power-technology-globalisation-and-regulation-why-giants-thrive. In contrast, Baker and Salop discuss how market power contributes to growing inequality. They cite Microsoft, Oracle, Google, Facebook, and Bloomberg as examples of companies that may have obtained market power through intellectual property or network effects and suggest that "[t]he adoption of more permissive antitrust rules during the past quarter century has also likely increased the prevalence of market power." Baker & Salop, *supra* note 60, at 11. In addition, they look at the Forbes 300 richest people and the potential sources of market power from the business models of the firms associated with names among the top 20. They conclude that firms such as Walmart and Amazon have succeeded due to economies of scale and firms like Mars and Nike from product differentiation. *Id.* at 11 n.45.

[86] Phillips, *supra* note 82.

the technology sector, where a group of large, efficient companies now lord over the fastest-growing and most dynamic parts of the United States economy."[87]

Some in the Progressive movement are not content with using the existing antitrust paradigm to address their concerns. For instance, Professors Ariel Ezrachi and Maurice Stucke believe that the "lack of online competition between the leading platforms affects offline welfare and democracy."[88] *Washington Post* columnist Steven Pearlstein (based on an article by a Yale Law student)[89] posited "*Is Amazon Getting Too Big?*," premised on market power fear potentially posing a threat to consumers and competition.[90] Christoffer Hernaes further stated that:

> [t]he disparity between the rich and everyone else is larger than ever in the United States, and few places is this skewed wealth distribution more visible than in and around Silicon Valley. The chasm between tech multibillionaires and the rest of the population in Northern California—where an estimated 31 percent of jobs pay $16 per hour or less and the median income in the U.S. today is about the same as it was in 1995—has led to the conclusion that the tech sector is greatly contributing to increased inequality.[91]

Hernaes blames the "winner-takes-all dynamics" for creating monopolistic markets, which enables wealth creation. He advocates that initiatives be taken to ensure that everyone shares the benefits gained by productivity. Even the other end of the political spectrum, the *American Conservative*, advocates a "bipartisan war" against "modern-day robber barons."[92]

Open Markets Institute's Executive Director Barry Lynn, among others, would call for the breaking up of these firms or for treating them as the equivalent of "public utilities."[93]

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[87] *Id.*

[88] "*Our New Economy Enables the Winners to Capture Much More of the Welfare*," PROMARKET (Apr. 4, 2017), *available at* https://promarket.org/new-economy-enables-winners-capture-much-welfare/.

[89] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016).

[90] Steven Pearlstein, *Is Amazon Getting Too Big?*, WASH. POST (July 28, 2017), *available at* https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html?utm_term=.b07869ae7602.

[91] Christoffer Hernaes, *Is technology contributing to increased inequality?*, TECHCRUNCH (Mar. 29, 2017), *available at* https://techcrunch.com/2017/03/29/is-technology-contributing-to-increased-inequality/; *see also* David Rotman, *Technology and Inequality*, MIT TECH. REV. (Oct. 21, 2014), *available at* https://www.technologyreview.com/s/531726/technology-and-inequality/; Katie Allen, *Big Tech's big problem—its role in rising inequality*, GUARDIAN (Aug. 2, 2015), *available at* https://www.theguardian.com/business/economics-blog/2015/aug/02/big-techs-big-problem-rising-inequality.

[92] Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, THE AM. CONSERVATIVE (Sept. 19, 2017), *available at* https://www.theamericanconservative.com/articles/amazon-facebook-google-conservative-anti-monopoly-movement/; *see also* Robert VerBruggen, *Google, Facebook, Amazon: Our Digital Overlords*, NAT'L REV. (Dec. 12, 2017), *available at* https://www.nationalreview.com/2017/12/google-facebook-amazon-big-tech-becoming-problem/.

[93] Jonathan Taplin, *Is It Time to Break Up Google?*, N.Y. TIMES (Apr. 22, 2017), *available at* https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html. *See also* Alexei Alexis, *New Antitrust Group Targets Tech 'Super Monopolies,'* BLOOMBERG LAW (Sept. 20, 2017), *available at* https://www.bna.com/new-antitrust-group-n57982088243/; Paula Dwyer, *Should America's Tech Giants Be Broken Up?*, BLOOMBERG BUS. WK. (July 20, 2017), *available at* https://www.bloomberg.com/news/articles/2017-07-20/should-america-s-tech-giants-be-broken-up.

Not so fast though. As University of Chicago Economics Professor Steven Kaplan warns:

> I suspect the major reason for the rise in concentration is technological change, particularly in information technology. The most visible examples are in the technology sector—Apple, Facebook, Google, etc. But technology likely has contributed to increased concentration elsewhere—retail (Amazon and Wal-Mart have made early and wide use of technology) and financial services (the large banks and the large asset managers have invested heavily in technology). The increase in concentration from technology has almost certainly been positive . . . .
>
> It is not clear there is an antitrust problem with Amazon, Apple, Facebook, and Google. Their businesses benefit from network effects, meaning that they become more efficient the more people use them. All four have been spectacularly successful. It also is not at all clear that some other companies will be able to compete with them in the future.
>
> Microsoft came under similar antitrust attack in the late 1990s. Microsoft was, in fact, more vulnerable than most IO economists believed at the time. I'd guess that will be true of today's tech giants as well.[94]

Moreover, a September 2017 report by Progressive Policy Institute's Chief Economic Strategist, Michael Mandel, argues that the expansion of, for instance, ecommerce, has created jobs and reduced income inequality.[95] For instance, in the last decade, jobs in fulfillment centers rose by 400,000. These jobs pay more than brick-and-mortar retail jobs in the same areas. In addition, households are saving 64 million hours a week in shopping time because of ecommerce, and some of these saved hours are being shifted into market work, further benefitting these workers.

The *Economist* advocates for more moderate change based on a perceived "need to revamp antitrust policy" for a world based on information networks:

> Antitrust authorities need to start setting the agenda by examining the ways that digital companies are using network effects to crowd out potential competitors, or inventing new ways of extracting rents by repackaging other people's content. But the regulators must also beware of trying to load too much onto the rules: the point of antitrust policy is to promote competition and hence economic efficiency, not to solve problems such as inequality.[96]

A more moderate approach, using the existing antitrust laws and the consumer welfare standards—and not using antitrust to address other societal issues—makes sense. After all, it does not necessarily follow that, just because consumers choose to use these firms, each of the FAMGAs has market power in the respective markets in which it participates. The raw size of a company does not, in and of itself, violate the U.S. antitrust laws or confer market

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[94] *I Suspect the Major Reason for the Rise in Concentration Is Technological Change, Particularly in IT*, PROMARKET (Apr. 7, 2017), *available at* https://promarket.org/suspect-major-reason-rise-concentration-technological-change-particularly/. *See also* Steven N. Kaplan and Joshua Rauh, *It's the Market: The Broad-Based Rise in the Return to Top Talent*, 27 J. ECON. PERSPECTIVES 3 (2013), *available at* http://faculty.chicagobooth.edu/steven.kaplan/research/krtop.pdf.

[95] Michael Mandel, *How Ecommerce Creates Jobs and Reduces Income Inequality*, PROGRESSIVE POLICY INST. (Sept. 2017), *available at* http://www.progressivepolicy.org/wp-content/uploads/2017/09/PPI_ECommerceInequality-final.pdf.

[96] Future Policy, *A delicate balance*, ECONOMIST (Sept. 15, 2016), *available at* https://www.economist.com/special-report/2016/09/15/a-delicate-balance.

power. As FTC economist Patrick DeGraba (who served as the Federal Communications Commission's Chief Economist at the Wireless Bureau prior to joining the FTC) indicated in a recent speech, "just because Google is many people's go-to online search engine does not mean that the company has market power—and that the same applies for Amazon in online shopping."[97] Consumers are not locked in, and can switch the next day. Similarly, nothing stops consumers from shopping at, for instance, Walmart instead of Amazon, *except* that Amazon may offer better prices, service, and selection.

C. Labor and Other Societal Concerns

"No-poach" arrangements at the very top levels of Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar were the subject of a very public DOJ challenge in 2012.[98] Similarly, in 2007, the DOJ challenged the coordination of nurses' wages in Arizona.[99] The FTC also brought two cases relating to competition for employees.[100] However, with the exception of these few enforcement actions, there were no challenges by either agency to unilateral or coordinated actions of employers (so-called "monopsony" or "oligopsony" conduct).[101]

An October 2016 report by the White House Council of Economic Advisers, entitled "*Labor Market Monopsony: Trends, Consequences, and Policy Responses*," contains a chart that shows that labor share of income decreased from about 65 percent in the 1940s and 1950s to about 58 percent in 2016. The sharpest decline has occurred since the turn of the century. However, according to Sandra Black, an Economics Professor at the University of Texas and formerly a member of the White House Council of Economic Advisers that issued the report, this chart hides a deeper issue: the rise in income inequality. "Over the past several decades . . . only the highest earners have seen steady wage gains; for most workers, wage growth has been sluggish and has failed to keep pace with gains in productivity."[102] Professor

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[97] Charles McConnell, *Google and Amazon lack market power, says FTC economist*, GCR (Jan. 26, 2018), *available at* https://globalcompetitionreview.com/article/usa/1153117/google-and-amazon-lack-market-power-says-ftc-economist?utm_source=Law%20Business.

[98] Final Judgment, *United States v. eBay, Inc.*, No. 12-cv-05869-EJD (N.D. Cal. Sept. 2, 2014), *available at* https://www.justice.gov/atr/case-document/file/494626/download; *see also* case filings, *U.S. v. eBay, Inc.*, *available at* https://www.justice.gov/atr/case/us-v-ebay-inc. A subsequent class action suit resulted in Adobe, Apple, Google, and Intel paying $415 million in fines, Pixar and Lucasfilm paying $9 million in fines, and Intuit paying $11 million in fines. Public Notice, *High-Tech Employee Antitrust Settlement*, No. 11-cv-02509-LHK (N.D. Cal. 2015), *available at* http://www.hightechemployeelawsuit.com/.

[99] Final Judgment, *United States v. Arizona Hosp. and Healthcare Ass'n*, No. 07-cv-1030-PHX (D. Ariz. Sept. 12, 2007), *available at* https://www.justice.gov/atr/case-document/final-judgment-17.

[100] Consent Order, Fed. Trade Comm'n, *In the Matter of Debes Corp.*, 115 F.T.C. 701, Dkt. No. C-3390 (Aug. 4, 1992), *available at* https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf; Press Release, Fed. Trade Comm'n, *Counsel of Fashion Designers of America* (June 9, 1995), *available at* https://www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america.

[101] Some enforcement actions against trade and professional associations involved the sharing of nonpublic prospective wage information. *See, e.g.*, *United States v. Utah Soc'y for Healthcare Human Res. Admin.*, Civ. A. No. 94-C-282G (D. Utah Sept. 9, 1994), *available at* https://www.justice.gov/atr/case-document/file/628496/download.

[102] Guy Rolnik, *Labor Market Monopsonies and the Decline of the Labor Share: Q&A with Sandra Black*,

Black indicates that wages falling behind increases in productivity can point to wage-setting power by employers. In addition, the report cites other evidence of labor market monopsony.

In the very last days of the Obama Administration's leadership of the U.S. antitrust agencies, the FTC and the DOJ responded to these monopsony and improper conduct concerns by jointly issuing *Antitrust Guidance for Human Resource Professionals*.[103] These *HR Guidelines* put HR professionals on notice that agreements "among employers not to recruit certain employees or not to compete on terms of compensation are illegal."[104] Moreover, the *HR Guidelines* indicate that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing and no-poaching agreements."[105] In addition, the *HR Guidelines* provide that "[e]ven if participants in an agreement are parties to a proposed merger or acquisition, or are otherwise involved in a joint venture or other collaborative activity, there is antitrust risk if they share information about terms and conditions of employment."[106] The DOJ's recent investigation and settlement with rail equipment suppliers Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation over their years' long no-poach agreement reflect the agency's commitment to challenging anticompetitive practices that affect workers, although in that case, the agency used its prosecutorial discretion to pursue the matter civilly rather than criminally.[107]

To the extent there was previously any doubt, these statements clarify that the DOJ intends for labor markets to be subject to antitrust scrutiny just like any other market, and that the U.S. antitrust agencies already have the ability to address improper coordinated conduct among employers. But this is not viewed as sufficient for certain progressives. Barry Lynn, for instance, believes that government should use its antitrust powers broadly to structure industries to meet societal goals. For Progressive groups such as Open Markets, there is a need to restructure markets to promote competition. As *Politico* summarizes it:

> [Matt] Stoller [a Fellow at the Open Markets Institute] draws a direct line from the Bork revolution to the election of Donald Trump. Rising concentration, in this view, has led to a litany of economic and social ills, enabling corporations to amass huge amounts of power over working Americans and fostering a deep-seated anger at the political establishment. "The New Dealers were very worried about autocracy and financial autocracy," he said. "They would've understood that Trump is a result of a society that has lost control of its ability to manage its commercial institutions."
>
> [Stoller] added, "We're trying to bring this tradition back."[108]

PROMARKET (Jan. 6, 2017), *available at* https://promarket.org/labor-market-monopsonies-decline-labor-share-qa-sandra-black/.

[103] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), *available at* https://www.justice.gov/atr/file/903511/download.

[104] *Id.* at 3.

[105] *Id.* at 4.

[106] *Id.* at 5.

[107] Press Release, U.S. Dep't of Justice, *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (Apr. 3, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[108] Danny Vinik, *Inside the new battle against Google*, POLITICO (Sept. 17, 2017), *available at* https://www.

Thus, Lynn would require different market structures depending on the industry involved, with industries producing mass-manufactured goods—such as chemicals, cars, or metals—being able to vertically integrate so long as they have "real competitors," while farming, retail, and service industries should be structured to promote individual ownership. In 2006, for instance, Lynn called for the breaking up of Walmart on the basis that the retailer had too much power over its suppliers and workers.[109] Such thinking accords with that of former Deputy AAG Jonathan Sallet, who endorses a broader mission statement and a more aggressive approach by the antitrust institutions, goals he argues are in the tradition of Louis Brandeis.[110]

Open Markets' scholars have similarly "focused on concentration in the airline and poultry industries and blamed monopolies for the decline in African-American-owned businesses and the rise in regional inequality."[111] Not surprisingly, these same critics were against the *Amazon/Whole Foods* transaction, even though it demonstrably will reduce prices for consumers.[112]

Again, care must be taken not to do more harm than good. As discussed in Section I, *supra*, some progressives attack the high-tech firms as being "job killers" and think this is an antitrust problem. However, to the extent that such firms are able to lower prices, output may increase, which will lead to greater unemployment.[113] Thus, such social engineering as is suggested by the progressives may ultimately adversely impact U.S. jobs.

1-III. The Trump Administration's Antitrust Leadership's Response to the Concerns

Antitrust enforcement already reflects the concerns raised over declining competition. In the late Obama Administration era, there was clearly an uptick in enforcement. The DOJ and the FTC moved to challenge a number of large mergers.[114] AAG Makan Delrahim indicates that the DOJ will continue to focus on labor issues, noting that the DOJ "has been very active" in reviewing "no-poach" agreements as violations of the antitrust laws and to expect "announcements" of DOJ actions "in the coming couple of months."[115] As mentioned above,

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politico.com/agenda/story/2017/09/17/open-markets-google-antitrust-barry-lynn-000523 ("Battle Against Google").

[109] Barry C. Lynn, *The Case for Breaking Up Wal-Mart*, HARPER'S (July 23, 2006), *available at* https://www.alternet.org/story/39251/the_case_for_breaking_up_wal-mart. For an effective opposition view of this article, see Josh Wright, *The Unconvincing Antitrust Case Against Wal-Mart*, TRUTH ON THE MARKET (July 10, 2006), *available at* https://truthonthemarket.com/2006/07/10/the-unconvincing-antitrust-case-against-wal-mart/.

[110] *See* Jonathan Sallet, *Louis Brandeis: A Man for This Season*, COLO. TECH. L.J. 3 (Mar. 1, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132482.

[111] Battle Against Google, *supra* note 108.

[112] *See* Frank Bednarz, *Trump the Hipster? AT&T, Time Warner, and Hipster Antitrust*, COMPETITIVE ENTERPRISE INSTITUTE (Nov. 13, 2017), *available at* https://cei.org/blog/trump-hipster-att-time-warner-and-hipster-antitrust.

[113] Hovenkamp Inequality Paper, *supra* note 77.

[114] *E.g.*, Sysco-USFoods, Staples-Office Depot, Halliburton-Baker Hughes, Anthem-Cigna, Aetna-Humana, GE-Electrolux, and Comcast-Time Warner Cable.

[115] Katherine E. Perrelli, Andrew S. Boutros & John R. Schleppenbach, *Hunting Season Begins: DOJ Warns*

the FTC held hearings to discuss whether adjustments are required in antitrust enforcement. One of the broad areas discussed involved the framework to be applied to the existence and exercise of buyer monopsony or market power in properly defined markets, including by employers in labor markets.

Perhaps the greatest area of increased enforcement focus during the Obama Administration included vertical mergers—*i.e.*, ownership of some combination of inputs, production, and distribution. Modern theories of vertical harm relate to the potential for the merged firm to raise rivals' costs (input foreclosure), reduce rivals' revenues (customer foreclosure), and create barriers to entry by forcing potential entrants to enter both the upstream and downstream markets simultaneously.[116] Under the traditional Chicago School doctrine, vertical mergers have been typically viewed favorably because of their efficiency-enhancing potential through the reduction of double marginalization.[117] During the entire George W. Bush Administration, only a few transactions raising vertical concerns required relief. Enforcement activity involving vertical merger concerns during the Obama Administration increased some. For instance, in the combination of Comcast and NBC Universal ("NBCU"), the DOJ was concerned that Comcast could disadvantage its rivals in the provision of cable, as well as handicap its nascent online competitors, by withholding or raising the price of NBCU content, so it required Comcast to agree to license the content on similar or better terms than distributors have negotiated with NBCU's competitors, to refrain from unduly limiting NBCU content owners' ability to negotiate creative arrangements with Comcast competitors, and to refrain from retaliating against any broadcast network, affiliate, cable programmer, production studio, or content provider for licensing content to Comcast competitors.[118] The consent also required Comcast to adhere to the Federal Communications Commission's Open Internet provisions, even though such provisions no longer have the effect of law.

Similarly, when Google acquired ITA Software, an aggregator and provider of airline flight information used by travel companies, the DOJ was concerned that Google would withhold the critical input from rivals like Orbitz. To address those concerns, the DOJ required the merged firm to continue to license the software to other flight search companies on fair, reasonable, and nondiscriminatory ("FRAND") terms, to make any upgrades available to other flight search services, and to refrain from entering into any agreements with airlines that would inappropriately restrict the airlines' right to share information with competing flight search companies.[119]

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of Criminal Actions Against Companies with Agreements Not to Poach Competitors' Employees, BLOOMBERG LAW (Feb. 16, 2018), *available at* https://biglawbusiness.com/hunting-season-begins-doj-warns-of-criminal-actions-against-companies-with-agreements-not-to-poach-competitors-employees.

[116] *See* James Langenfeld, *Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up?*, 16 GEO. MASON L. REV., 851, 857–61 (2009), *available at* http://www.georgemasonlawreview.org/wp-content/uploads/2014/03/16-4_Langenfeld.pdf.

[117] *Id.*

[118] Final Judgment, U.S. Dep't of Justice, *United States v. Comcast Corp.*, No. 1:11-CV-00106-RJL (D.D.C. Sept. 1, 2011), *available at* https://www.justice.gov/atr/case-document/file/492196/download.

[119] *See* Final Judgment, *United States v. Google Inc. and ITA Software, Inc.*, No. 1:11-cv-00688-RLW

The current DOJ leadership challenged the proposed merger between AT&T/DirecTV ("AT&T") and Time Warner ("TW").[120] The concerns expressed by the DOJ were purely vertical in nature: the transaction parties do not compete; AT&T is a distributor of subscription television service, and TW is an owner of content, ncluding TV networks like TNT and CNN. The DOJ is concerned that AT&T will be empowered to hinder its rival distributors by raising the prices of TWC's content portfolio or by withholding such content entirely. The combined firm's overlap (and therefore its ability and incentive to harm rivals) is much larger than the Comcast-NBCU combination that the Obama Administration challenged.

On June 12, 2018, the Court denied the DOJ's request for a preliminary injunction.[121] The Court's decision marked an unequivocal victory for the defendants. The Court applied the traditional antitrust burden-shifting framework under which: (i) the DOJ must first show that the merger is likely to substantially lessen competition in the relevant market; (ii) the defendants must then rebut that burden by providing evidence of efficiencies that outweigh the merger's anticompetitive effects; and (iii) the DOJ replies with additional evidence of anticompetitive effects. The Court emphasized the dramatic changes that the video distribution and video programming industries were experiencing. It found ordinary course documents unpersuasive in light of these developments. Moreover, the Court rejected the DOJ's economic experts' use of an economic bargaining model that predicted content prices to increase because the DOJ used assumptions and critical inputs that the Court found were contradicted by the evidence. The Court found more persuasive the natural experiments supported by defendants' expert testimony that showed that prior vertical integration had not led to higher content prices.

On July 12, 2018, the DOJ filed its notice of appeal with the U.S. Court of Appeals for the D.C. Circuit. On August 6, 2018, the DOJ filed its brief: the government argued that the judge committed "fundamental errors of economic logic and reasoning" when he denied the preliminary injunction.[122] In addition, the DOJ alleged that the district court at trial "substantially constrained the government's presentation of evidence showing that the merged firm would have greater bargaining leverage," including AT&T's own documents of the potential competitive effects of vertical mergers.[123] It will be interesting to see whether the D.C. Circuit sets forth any legal principles with general applicability to vertical merger analysis.

Regardless of what happens during the D.C. Circuit appeal in the *ATT/TW* case, though, both agencies are likely to continue to be interested in vertical cases, and may develop new vertical merger guidelines. The FTC's hearings included a discussion of the economic and

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(D.D.C. Oct. 5, 2011), *available at* https://www.justice.gov/atr/case-document/file/497636/download.

[120] Complaint, *United States v. AT&T Inc.*, No. 17-cv-02511 (RJL) (D.D.C. Nov. 20, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012896/download.

[121] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), slip op., *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2511-146.

[122] Brief of Appellant, *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir. Aug. 6, 2018), *available at* https://www.justice.gov/atr/case-document/file/1085516/download.

[123] *Id*. at 20–21.

legal analysis of vertical mergers.[124] Thus, the development of precedent and policy involving vertical mergers is likely to be a focus of the agencies over the next couple of years.

As mentioned above, some of the assertions of lax antitrust enforcement involve the efficacy of the remedies imposed. Part of the DOJ's objections to the *ATT/TW* transaction was the belief that conduct remedies should not be accepted even in vertical mergers. Conduct remedies have been used frequently to resolve concerns in vertical mergers. As Obama Administration Deputy AAG Jon Sallet explained, however:

> In vertical transactions, observers sometimes assume that conduct remedies will always be available and sufficient. But that is not the current practice of the Division—if it ever was . . . . Some vertical transactions may present sufficiently serious risks of foreclosing rivals' access to critical inputs or customers, or otherwise threaten competitive harm, that they require some form of structural relief or even require that the transaction be blocked.[125]

The current DOJ leadership has indicated that although it has not ruled out behavioral remedies entirely, the standard for proving that any such remedy will cure the anticompetitive harm is high. However, the DOJ will typically require structural relief—rather than behavioral remedies—to remedy antitrust concerns. In a keynote speech at the ABA Fall Forum on November 16, 2017, AAG Delrahim explained that behavioral remedies are "fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market."[126] Such regulatory schemes "require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market."[127] In addition, such remedies are challenging to enforce, presuming "that the Justice Department should serve as a roving ombudsman of the affairs of business[;] even if we wanted to do that, we often don't have the skills or the tools to do so effectively."[128] Finally, AAG Delrahim indicated that:

> as 11 Senators wrote to the Attorney General earlier this year, the 'lack of enforceability and reliability of such conditions [can] render them insufficient' to protect consumers. As we reduce regulation across the government, I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to

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[124] Reserved.

[125] Jon Sallet, U.S. Dep't of Justice, Deputy Assistant Attorney Gen. of the Antitrust Div., *The Interesting Case of the Vertical Merger*, Remarks at the American Bar Association Fall Forum (Nov. 17, 2016), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

[126] Makan Delrahim, U.S. Dep't of Justice, Assistant Attorney Gen. of the Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar ("November 16, 2017 Delrahim"). *See also* Makan Delrahim, U.S. Dep't of Justice, Assistant Attorney Gen., *Improving the Antitrust Consensus*, Remarks Delivered at the New York State Bar Association (Jan. 25, 2018), *available at* https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.

[127] November 16, 2017 Delrahim, *supra* note 126.

[128] *Id.*

> remedy mergers that violate the law and harm the American consumer.[129]

It is unclear to what extent the FTC will diverge from the DOJ by accepting conduct remedies in the future.[130] FTC Competition Bureau Director Bruce Hoffman indicated "the FTC prefers structural remedies to structural problems, even with vertical mergers."[131] But, at the same time, the FTC recognizes that:

> in some cases . . . a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration . . . if the FTC looks closely at a vertical merger that raises the concerns . . . , no one should be surprised if the FTC requires structural relief. . . . If that can't be achieved without sacrificing the efficiencies that motivate the merger, then [it] can look at conduct remedies. If those won't work—or will be too difficult and problematic . . . to be confident that they will work without an excessive commitment of FTC resources where [it is] effectively turned into a regulator—then there should be no surprise if [the FTC were to] seek to block the merger.[132]

Moreover, in *Northrop Grumman/Orbital ATK*, the FTC recently accepted behavioral—rather than imposing structural—remedies, noting that it "typically disfavors behavioral remedies," but permitted their use in this transaction "given the special characteristics of the defense industry."[133]

In a February 21, 2018 speech, AAG Delrahim also provided some guidance on his views of unilateral conduct by the "dominant" market players, particularly in digital markets.[134]

Again, the FTC's agenda for the hearings included a variety of topics that relate to high technology, digital markets and big data. In the discussion of market power and entry barriers, the FTC focused on "platform businesses," including whether and how the presence of "network effects" should affect the Commission's analysis of competition and consumer protection in these markets. Under the topic of the intersection of privacy, big data and competition, the FTC considered big data as a dimension of competition and/or an impediment to entry into or expansion within a relevant market and competition on privacy and data security attributes. In addition, in the discussion of the analysis to be applied in evaluating the competitive effects of mergers, the FTC considered the identification and

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[129] *Id.*

[130] D. Bruce Hoffman, Fed. Trade Comm'n, Acting Director, Bureau of Competition, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

[131] *Id.* at 7.

[132] *Id.* at 8–9.

[133] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.* (June 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

[134] Makan Delrahim, U.S. Dep't of Justice, Assistant Attorney Gen., *Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels*, Remarks at the College of Europe in Brussels (Feb. 21, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-college-europe-brussels.

evaluation of differentiated but potentially competing technologies, and of disruptive or generational changes in technology, and how such technologies affect the competitive effects analysis.

Finally, the FTC's hearings covered some of the other areas that have been identified as suffering from lax enforcement. These included the review of conglomerate mergers and non-controlling ownership interests in competing companies and the question of whether the doctrine of potential competition is sufficient to identify and analyze the competitive effects associated with the acquisition of a firm that may be a nascent competitive effect. The hearings not only covered substantive issues, but also the analytical tools used to evaluate acquisitions and mergers. The broad-ranging scope of these topics could result in substantive recommendations from the FTC regarding future antitrust enforcement and policy, although hopefully within the current consumer welfare paradigm.

1-IV. Congressional Response to the Concerns

In March 2017, U.S. Senator Amy Klobuchar (the ranking member of the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights) spoke at the Center for American Progress about:

> the growing concentration of economic power; the broad economic benefits vigorous antitrust enforcement can provide to workers, consumers, and small businesses; the Trump Administration's retreat from aggressive enforcement; and unveiled a package of legislative proposals that would strengthen antitrust enforcement in our country.[135]

In July 2017, the Democratic congressional leadership officially released the legislative package referenced in Senator Klobuchar's March 2017 speech. Referred to as "A Better Deal: Better Jobs, Better Wages, Better Future," the legislation includes: (1) "new standards to limit large mergers that unfairly consolidate corporate power"; (2) "tough post-merger review"; and (3) "a new consumer competition advocate."[136] On September 14, 2017, Senator Klobuchar introduced the two bills that would implement these three elements and substantially change the process and substantive standards for antitrust merger review in the United States. The proposals, which have been endorsed by several other Democratic senators, are the latest and most definitive legislative expression of a desire for tougher merger enforcement.

The first of these bills,[137] the Merger Enforcement Improvement Act, S.1811, would increase procedural costs and burdens for large mergers and companies. The bill would

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[135] Press Release, U.S. Senator Amy Klobuchar, *In Speech at Center for American Progress, Klobuchar Discusses How Vigorous Antitrust Enforcement Can Strengthen U.S. Economy* (Mar. 13, 2017), *available at* https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=8A14F9C9-A2D1-441C-8693-CBC303F31A4D.

[136] A Better Deal, *supra* note 2. *See also* Eric Kroh, *Dems' 'Better Deal' Antitrust Plan Would Entail Sea Change*, LAW360 (Aug. 2, 2017), *available at* https://www.law360.com/articles/950589/dems-better-deal-antitrust-plan-would-entail-sea-change; *A Better Deal: Better Jobs, Better Wages, Better Future*, *available at* https://dpcc.house.gov/abetterdeal. The phrase "A Better Deal" is an allusion to President Teddy Roosevelt's "Square Deal" and President Franklin Roosevelt's "New Deal."

[137] Merger Enforcement Improvement Act, S.1811, 115th Cong. (proposed Sept. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1811.

require higher HSR Act filing fees for large transactions,[138] annual reports by parties to consent decrees detailing consumer benefits, agency investigations into holdings by institutional investors,[139] and the effectiveness of merger settlements. It would also provide for a study on the impact of mergers on wages, innovation, and new business formation to determine whether the consumer welfare analysis should include these factors.

The second bill, the Consolidation Prevention and Competition Promotion Act, S.1812, would change the substantive injunctive standard from the current requirement that has been in effect for over a century, whereby the agencies must prove that a merger would substantially lessen competition or tend to create a monopoly to a lesser standard such that a transaction is "materially likely" to cause more than *de minimis* harm to competition.[140] Under the revised standard, a transaction would be illegal if it would lead to a significant increase in market concentration *unless* the transaction parties establish by a preponderance of the evidence that the effect of the acquisition will not tend to materially lessen competition or create a monopoly or a monopsony. Notably, the bill does not specify the level or increase in concentration required for the presumption to apply. In "mega-mergers,"[141] the bill would further shift the burden of proof from the agencies to the transaction parties, making the merger presumptively unlawful unless the parties establish by a preponderance of the evidence that the merger will not have an anticompetitive result. This provision does not require that the firms be competitors or potential competitors or have a vertical relationship. This change could potentially be used to address market power and inequality concerns and, therefore, would be troubling if adopted without limitation or clarification. Finally, the legislation would create yet another regulator, an independent "Competition Advocate," with a mission to make recommendations to the FTC and the DOJ.

Judicial precedent in governmental challenges to mergers and the antitrust agencies' enforcement guidelines reflect a strong consensus among public and private sector economists, lawyers, consumer advocates, and the business community—a mainstream

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[138] For transactions valued at $5 billion or more, the HSR Act filing fee would increase to $2.25 million.

[139] Some recent scholarship suggests that competitive firms in concentrated markets charge higher prices if they have significant institutional shareholders in common that are "active" in governance. *See, e.g.*, José Azar, Martin Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, JOURNAL OF FINANCE (Apr. 22, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345; *but see* John R. Woodbury, *Can Institutional Investors Soften Downstream Product Market Competition?*, CPI ANTITRUST CHRONICLE (June 2017), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2017/06/CPI-Woodbury.pdf. During the second Obama Administration term, the DOJ conducted an investigation of the airline industry based on these theories, but did not find sufficient evidence to bring an enforcement action. Brent Kendall & Susan Carey, *Obama Antitrust Enforcers Won't Bring Action in Airline Probe*, WALL ST. J. (Jan. 11, 2017), *available at* https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781.

[140] Hovenkamp and Shapiro advocate the strengthening of the structural presumptions that have been in effect since *Philadelphia National Bank*, while keeping the consumer welfare standard intact. Hovenkamp & Shapiro, *supra* note 48.

[141] Consolidation Prevention and Competition Promotion Act of 2017, S.1812, 115th Cong. (proposed Sept. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1812. The bill does not define what would constitute a "mega-merger." The extra scrutiny would apply to transactions in which the value of the acquired business exceeds $5 billion.

approach to antitrust enforcement that gives weight to the economic benefits of efficiency-enhancing transactions, while guarding against potential harms from excessive concentration. The agencies' enforcement policies have remained largely constant and effective across a range of administrations. The proposed legislation would alter that, and be a potential source of divergence between the policies of the United States and other mature antitrust enforcement agencies.

On August 3, 2017, U.S. Senator Orrin Hatch, the senior Republican in the Senate, responded to the "Better Deal" Platform, stating:

> America has always been—and, I haven't a doubt, will remain—the economic and technological marvel of the world . . . .
>
> . . . Some in academia insist that recent market concentration and technological progress compel a return to bold, persistent experimentation. Many in the media call for antitrust to pursue everything from industrial democracy to campaign finance reform to material levelling. Above all else, we hear again the old, lazy mantras that big is bad, disruption is suspect, and public utility designation is welcome.
>
> Professor and former FTC Commissioner Joshua Wright has referred to this peculiar set of proposals as "hipster antitrust" . . . I'll go ahead and call it the progressive standard. From what I can tell, it amounts to little more than pseudo-economic demagoguery and anti-corporate paranoia . . . .
>
> What we need is the consumer welfare standard. It carefully examines the basic and critical question of whether such a deal helps consumers, or whether it hurts consumers. It relies on a coherent doctrine to strike a balance between the merger's pro-competitive effects—such as integrative efficiencies and innovation—and the anticompetitive potential—such as market domination by one firm or facilitated price coordination by the few that remain.
>
> What we absolutely do not need, on the other hand, is the progressive standard. Under no doctrinal limitations to cabin discretion, antitrust officials would be left to follow vague intuitions and shifting inclinations. And with a broad mandate to pursue aims far grander than mere market efficiency, officials would be free to engage in ad hoc theorizing about whether corporate consolidation, writ large, can be squared with universal justice, common fairness, community values, or of whatever else their creativity recommends.[142]

Similarly, a senior aide to U.S. Senator Mike Lee is cited as noting that "[t]here's momentum in some quarters on the left to revise how we do antitrust and to use it to shape markets to better fit certain people's aesthetic preferences . . . . If we follow through on those ideas, it will hurt consumers and will hurt American businesses."[143]

As referenced above, one of the key elements of antitrust jurisprudence being challenged today is the consumer welfare standard.[144] Hearings were held before the Senate Committee

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[142] Press Release, U.S. Senator Orrin Hatch, *Hatch Speaks on Growing Controversy Over Antitrust Law in the Tech Sector* (Aug. 3, 2017), *available at* https://www.hatch.senate.gov/public/index.cfm/2017/8/hatch-speaks-on-growing-controversy-over-antitrust-law-in-the-tech-sector; *see also* Press Release, U.S. Senator Orrin Hatch, *Hatch Speaks Again on 'Hipster Antitrust,' Delrahim Confirmation* (Sept. 25, 2017), *available at* https://www.hatch.senate.gov/public/index.cfm/2017/9/hatch-speaks-again-on-hipster-antitrust-delrahim-confirmation.

[143] Battle Against Google, *supra* note 108.

[144] *See* Steuer, *supra* note 35; Jacobson, *supra* note 35; and Baker & Salop, *supra* note 60, for a discussion

on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights on December 13, 2017 concerning the consumer welfare standard.

In the clear minority in blaming the consumer welfare standard for today's economic concerns at the December 13 hearing was Open Markets Institute's Executive Director Barry Lynn. As reflected in his testimony, he champions what he calls the "New Brandeis movement."[145] Lynn argues that antitrust officials have for the past 35 years viewed anticompetitive mergers and industries too narrowly, guided by the consumer welfare standard, which—he argues—has adversely impacted wages, suppliers, quality of services, regional inequality, economic dynamism, and democracy itself. According to Lynn, "just about every sector of the American political economy is vastly more concentrated than [it was] a generation ago . . . . [C]itizens perceive monopolization as a loss of control over their own lives, and of being manipulated by powerful corporations."[146] He advocates the abandonment of the consumer welfare standard for three reasons: (1) that the philosophy "warps" how the law is applied and will not explicitly bring income distribution into the antitrust analysis; (2) that the consumer welfare standard was intended to promote particular outcomes that are limited to efficiencies; and (3) that consumer welfare "continues to blind antitrust professionals both to the magnitude and nature of America's antimonopoly problem and to many of the tools we can use to fight the problem."[147] Lynn's perspective accords at least in part with that of Columbia University Law Professor Tim Wu, who advocates abandoning the consumer welfare standard and replacing it with a "protection of competition standard."[148] Under Wu's proposed standard, the inquiry involved in any antitrust case should focus upon a single question: "Is the complained-of conduct (or merger) merely part of the competitive process, or is it meant to suppress or even destroy competition?"[149]

American Antitrust Institute ("AAI") President Diana Moss also testified.[150] AAI is an organization that advocates for more aggressive antitrust enforcement by the federal

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of the consumer welfare standard and possible alternative approaches.

[145] As discussed *supra* notes 11 and 110, Justice Louis Brandeis was an early spokesman for using the antitrust laws to address the concentration of wealth.

[146] Testimony of Barry C. Lynn, *Hearing on The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?*, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Dec. 13, 2017), *available at* https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf, p. 82.

[147] *Id*. Some Progressive think tanks similarly argue that the consumer welfare standard is insufficient to ensure that the economy is fully competitive. *See* Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, ROOSEVELT INST. (Dec. 11, 2017), *available at* http://rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory.

[148] Tim Wu, *After Consumer Welfare, Now What? The "Protection Of Competition Standard" In Practice*, CPI ANTITRUST CHRONICLE (Apr. 2018), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf.

[149] *Id.*

[150] Testimony of Diana Moss, Ph.D., *Hearing on The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?*, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Dec. 13, 2017), *available at* https://www.antitrustinstitute.org/content/diana-moss-testify-antitrust-and-consumer-welfare-standard ("Moss Senate Testimony").

government. In September 2016, it issued its "National Competition Policy,"[151] which discusses what it perceives as the "ill effects of a decline in competition, due in large part to three decades of relatively lax antitrust enforcement."[152] Dr. Moss believes, however, that:[153]

> the consumer welfare standard can capture non-price effects, such as quality, by employing direct measures or using quality-adjusted prices. . . .
>
> On the important issue of workers, enforcers have taken on monopsony issues.

Dr. Moss believes that what is needed is "*more* enforcement that explicitly recognizes the full scope of cognizable competitive harms under a consumer welfare standard, including price and non-price competition." In addition, she posits that such "enforcement would benefit from a more skeptical attitude toward efficiencies defenses, which have been a driving force behind lax enforcement for many years."[154] Finally, focusing on the "dynamics of more modern and complex technologies and markets," Dr. Moss indicates:

> The consumer welfare standard is able to tackle the manifestation and exercise of market power in these settings. For example, "data" can, in appropriate circumstances, be defined not only as a market for antitrust purposes, but also as a strategic competitive asset. Digital online markets are more complex "ecosystems" of exchange and collaboration. But they might be viewed in some instances as competing on services and value, such as advertising and information/attention-based experiences, through differentiated complementary offerings. Antitrust can and should address concerns over that competitive process, just as it does in more traditional markets.[155]

University of California at Berkeley Economics Professor Carl Shapiro also testified in support of keeping the consumer welfare standard but increasing antitrust enforcement:[156]

> *I have seen no evidence whatsoever that the "consumer welfare" standard is somehow outdated, so long as one accepts that the goal of antitrust is to promote competition.*
>
> . . . As I embrace the "consumer welfare" standard, I would like to be very clear: *adopting the "consumer welfare" standard absolutely does not mean that one is assuming that market power is rare or transitory*. Those who claim or insinuate that anyone adopting the "consumer welfare" standard is necessarily in favor of a laissez-faire antitrust policy are simply incorrect. I put my own career forward as Exhibit A on that point. In my view, durable market power is quite common in the U.S. economy, which is why I favor vigorous antitrust enforcement. And I am hardly alone. During the 40 years that I have been studying and practicing antitrust, there has been a broad consensus among antitrust scholars and

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[151] *A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward*, AM. ANTITRUST INST. (Sept. 28, 2016), *available at* http://www.antitrustinstitute.org/sites/default/files/AAINatlCompPolicy.pdf.

[152] Moss Senate Testimony, *supra* note 150, at 1.

[153] *Id.* at 6–7 (citations omitted).

[154] *Id.* at 8.

[155] *Id.*

[156] Testimony of Carl Shapiro, *Hearing on The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?*, Before the U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Dec. 13, 2017), *available at* https://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf. ("Shapiro Senate Testimony").

> practitioners in favor of the "consumer welfare" standard. No evidence whatsoever has been put forward calling this consensus into question. Indeed, I know of no serious antitrust experts who favor abandoning the "consumer welfare" standard, and no workable alternative has been proposed.[157]

Moreover, Professor Shapiro believes that asking antitrust agencies to solve concerns about the political power of large corporations, or about the extreme levels of inequality in income and wealth, "is very likely to be counterproductive." He adds:

> Antitrust enforcement agencies and courts are ill suited to handle these broader problems. Worse yet, *the core mission of antitrust, to promote competition, could easily be undermined if we ask antitrust to solve problems unrelated to competition*. For example, asking the DOJ to block mergers that enhance political power, as distinct from economic power, would necessarily politicize antitrust enforcement, which strikes me as extremely dangerous and unwise.[158]

Both Dr. Moss and Professor Shapiro also note that there are non-antitrust policies that can promote some of these public interest considerations in specific sectors without adversely impacting antitrust enforcement policy.[159]

Professor Joshua Wright also testified at the hearing.[160] An advocate of the consumer welfare standard, he warns against adopting:

> a standard that would reduce consumer welfare—that is, to diminish the well-being of consumers and their ability to consume everyday goods and services—in exchange for advancing some combination of other, vague goals ranging from increasing fairness, to reducing income inequality, to protecting specific national interests or markets, or to protecting particular jobs. Specifically, critics of the consumer welfare standard have proposed steps, including that we ban all vertical mergers, make *per se* unlawful horizontal mergers based solely upon the a [sic] firm's size—*i.e.*, return to the "big-is-bad" enforcement style of early antitrust—and even prohibit Amazon from selling groceries. These proposals

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[157] *Id*. at pp. 3–4 (emphasis in original).

[158] *Id*. at 4. Similarly, George Mason University Professor Abbott B. Lipsky testified that careful application of the consumer welfare standard has the best chance of maximizing long-run economic productivity in a competitive economy (Testimony, *Hearing on The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?*, Before the U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Dec. 13 2017)), *available at* https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lipsky%20Testimony.pdf, and broader social objectives, such as employment or equitable distribution of wealth to antitrust law "threatens to drag antitrust into a political enforcement arena where accountability will be impossible." Alexei Alexis, *'Hipster Antitrust' Comes Under Senate Spotlight*, BLOOMBERG LAW (Dec. 13, 2017), *available at* https://www.bna.com/hipster-antitrust-comes-n73014473208/.

[159] *See* Shapiro Senate Testimony, *supra* note 156, at 4; Wright Senate Testimony, *supra* note 31, at 9. In addition, Public Knowledge President Gene Kimmelman submitted a statement into the committee hearing record advocating the promotion of non-economic values, particularly in the communications sector, and the use of non-antitrust regimes to achieve this objective. Shiva Stella, *Public Knowledge President Gene Kimmelman Submits Statement for Antitrust Hearing*, PUBLIC KNOWLEDGE (Dec. 12, 2017), *available at* https://www.publicknowledge.org/press-release/public-knowledge-president-gene-kimmelman-submits-statement-for-antitrust-h.

[160] Wright Senate Testimony, *supra* note 31.

> come despite that the economic evidence makes quite clear that such moves would make consumers worse off.[161]

Professor Wright further believes "that the consumer welfare standard is agile enough to accommodate advances in our knowledge of the world around us, developments in new business models, and the emergence of new types of industries."[162]

At this point, based on the testimony, it seems unlikely that the consumer welfare standard will be abandoned. Assuming that the consumer welfare standard remains the operative test of competitive harm, the challenge will be to obtain the right balance in factoring concerns regarding the effects of concentration, including the extent to which labor concerns, such as stagnating wages and rising income inequality, are appropriate. United States Senator Cory Booker joined the Senate Judiciary Committee in January 2018, and soon thereafter, issued the following statement:

> I look forward to using my position on the committee to actively address and check monopoly and monopsony power and shape an economy that is better for workers, better for innovation, and better for our democracy[.] . . . Our economy is not working for most Americans, and corporate concentration across sectors—from agriculture to tech to telecom—is one critical reason why.[163]

Senator Booker had previously criticized the antitrust agencies for not addressing the effects of market concentration on workers in a November 1, 2017 letter.[164] Then-acting FTC Chairman Maureen Ohlhausen responded in a December 1, 2017 letter that the antitrust laws do not provide a mechanism to address many of these labor concerns, such as stagnating wages and rising income inequality.[165]

As mentioned above, the 2018 election outcome made it more likely that the debate will continue on how to strike the right balance rather than having these issues dropped. House Democrats will now have a platform to push their progressive antitrust initiatives. Rep. Jerrold Nadler (D-N.Y.) will become the chair of the House Judiciary Committee and Rep. David Cicilline (D-R.I.) will chair the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. Both congressmen have been active on antitrust issues, including progressive bills focused on employment practices. Although the House acting alone is unable to pass reform measures, the debate is likely to keep the pressure on the agencies to be aggressive enforcers and, at a minimum, to consider whether, within the consumer welfare standard, antitrust policy should be changed.

1-V. Conclusion

Since the enactment of the Sherman Act, the goals of antitrust have evolved from the indictment of bigness to the promotion of economic efficiency and consumer welfare, all by

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[161] *Id.* at 2.

[162] *Id.* at 14.

[163] Alexei Alexis, *Cory Booker, 'Hipster Antitrust' Ally, Joins Key Senate Panel*, BLOOMBERG LAW (Feb. 5, 2018), *available at* https://www.bna.com/cory-booker-hipster-n57982088365/.

[164] *Id.*

[165] *Id.*

reinforcing the workings of the free market. To these ends, the antitrust laws are genuine success stories, but today, some politicians and scholars have come to view the antitrust laws as natural vehicles for pursuit of other, unrelated societal objectives. For instance, many public policies impact the distribution of wealth. For most of these policies, wealth distribution is not the main objective, or even an explicit one. It would be unwise to use the antitrust laws for this purpose, regardless of the underlying merits of those objectives. Such an approach risks reducing the predictability of review for transaction parties and may even cause confusion for the reviewing agencies by insisting that they apply unrelated, and maybe even contradictory, considerations. To the extent that Congress (and American voters) decide that these non-competition goals should be pursued, there are other fora besides the competition review for their inclusion. As discussed above, central bank and other federal monetary policy makers could, for instance, take into account market performance in setting their policies. A holistic approach that looks beyond antitrust policy to address these broader societal issues is more likely to be successful and is clearly preferable to reliance on antitrust policy alone—under any standard.

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