ANTITRUST IN THE INTERNET ERA: THE LEGACY OF *UNITED STATES V. A&P*

Timothy J. Muris & Jonathan E. Nuechterlein

ABSTRACT

Critics from both the right and the left claim that modern antitrust doctrine, rooted in consumer welfare, is inadequate to handle the challenges of the twenty-first century economy. They express nostalgia for 1960s antitrust, when the field had no clear objectives and cases were decided on impressionistic notions of "fairness" and good corporate citizenship.

This paper exposes the intellectual void at the heart of this new populist movement and begins by following Justice Holmes' tenet that "a page of history is worth a volume of logic." More than 80 years ago, the A&P grocery chain was a vertically integrated retailer that made use of unprecedented scale and innovation to offer consumers a wider range of products than the competition and at lower prices. Yet A&P's very success, which came at the expense of smaller and less efficient competitors, triggered a backlash: first from Congress, in the form of the Robinson-Patman Act, and then from the Justice Department, in the form of successful prosecution under the Sherman Act.

These attacks on A&P bear an eerie resemblance to attacks today on leading online innovators. Increasingly integrated and efficient retailers—first A&P, then "big box" brick-and-mortar stores, and now online retailers—have challenged traditional retail models by offering consumers lower prices and greater convenience. For decades, critics across the political spectrum have reacted to such disruption by urging Congress, the courts, and the enforcement agencies to stop these American success stories by revising antitrust doctrine to protect small businesses rather than the interests of consumers. Using antitrust law to punish pro-competitive behavior makes no more sense today than it did when the government attacked A&P for cutting consumers too good a deal on groceries.

In addition, antitrust doctrine does not need an overhaul. It is shaped by many economic perspectives, follows no one "School," and is flexible enough to address any monopoly abuses in today's economy. It is also well-calibrated to serve its central function: promoting consumer welfare. It does so not only by prohibiting conduct that harms consumers in the long run, but also by avoiding interference with conduct that might appear problematic to non-economists but that demonstrably benefits consumers over time. Antitrust remains a work in progress, but it is far superior to any alternative the critics propose.

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Increasingly one hears that current antitrust doctrine is ill-equipped to address the competitive dynamics of the internet age and should be fundamentally altered to address the putative "monopoly" power of large technology companies. The *Economist*, normally a beacon of journalistic sobriety, worries that internet "titans—Alphabet (Google's parent company), Amazon, Apple, Facebook and Microsoft—look unstoppable.… Old ways of thinking about competition, devised in the era of oil, look outdated in what has come to be called the 'data economy.'… A new approach is needed."[1] Various advocacy groups call for a dramatic overhaul of antitrust doctrine.[2] Senate Democrats vow to "revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come[s] before big corporations."[3] And on the other end of the political spectrum, the *American Conservative* urges its readers "to break from the principles of free market fundamentalism" and join "in a bipartisan war" against "modern-day robber barons" on the West Coast.[4]

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[1] *The World's Most Valuable Resource Is No Longer Oil, But Data*, THE ECONOMIST, May 6, 2017.

[2] *See*, *e.g.*, Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, Roosevelt Institute (Dec. 11, 2017); Russell Brandom, *The Anti-Monopoly Case Against Google: A Conversation with Open Markets' Barry Lynn*, THE VERGE (Sept. 5, 2017); *see also* Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017).

[3] U.S. Senate Democrats, *A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power* 1 (July 2017); *see also* David Weigel, *Breaking from Tech Giants, Democrats Consider Becoming an Antimonopoly Party*, WASH. POST, Sept. 4, 2017.

[4] Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, THE AM. CONSERVATIVE, Sept. 19, 2017; *see also* Robert Verbruggen, *Google, Facebook, Amazon: Our Digital Overlords*, NAT'L REV., Dec. 12, 2017.

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These proposals to overhaul antitrust doctrine share a few key attributes. First, advocates of radical change express nostalgia for 1960s antitrust, when the field had no clear objectives and cases were decided on impressionistic notions of "fairness." During that pre-economic era, conduct was punished and mergers blocked simply because they disadvantaged *competitors*, even if they also increased consumer welfare.[5] Second, the critics identify modern antitrust with "the Chicago School," which they lampoon and excoriate. Barry Lynn writes in the *Nation*: "A generation ago, when a small crew within the Reagan administration set out to clear the way for a radical reconcentration of power, they did so not by openly assailing our antimonopoly laws but by altering the intellectual frames that guide how we enforce them.… [T]he new goal was 'efficiency.' Rather than protect the 'opportunity' of the citizen producer, the new goal was to promote the 'welfare' of the 'consumer.'"[6] According to Lynn, these developments were somehow malign. Third, the adherents of this new movement argue that so-called "tech giants need to be cut down to size, immediately," because they are "killing competitors and other industries" and are poised to "destroy … democracy itself."[7]

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[5] *E.g.*, Khan, *supra* note 2, at 723-36 (discussing, *inter alia*, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), and *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)). In *Brown Shoe*, the Supreme Court rejected a merger between a shoe manufacturer and a shoe distributor because (*inter alia*) the merger "foreclosed" competitors from a tiny percentage (2%-5%) of the relevant markets, which were unconcentrated. The Court acknowledged that such consolidation can be "beneficial to consumers" but ultimately deemed it more important "to promote competition through the protection of viable, small, locally owned business[es]" even though "occasional higher costs and prices might result from the maintenance of fragmented industries and markets." 370 U.S. at 344. In *Utah Pie*, the Court upheld a treble-damages award against national frozen pie manufacturers for selectively lowering prices in the Salt Lake City market to undersell a local company that occupied two-thirds of the market there. 386 U.S. at 702. As one Yale scholar observed at the time, the case illustrated the Court's "disregard for the central purpose of antitrust, the promotion of consumer welfare through the promotion of a competitive market process." Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 70 (1967).

[6] Barry Lynn, *No Free Parking for Monopoly Players: Time to Revive Anti-Trust Law*, THE NATION, June 8, 2011.

[7] Heather Timmons, *The Tiny, Passionate Group Battling Google, Facebook, and Amazon's Grip on US Minds and Wallets*, QUARTZ, Nov. 16, 2017. A broad variety of publications have analyzed this movement, some critically and some less so. *See*, *e.g.*, Greg Ip, *The Antitrust Case Against Facebook, Google, and Amazon*, WALL ST. J., Jan. 16, 2018; SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND

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This paper exposes the intellectual void at the heart of this populist antitrust movement. In Part I, we begin by following Justice Holmes' tenet that "a page of history is worth a volume of logic."[8] More than 80 years ago, the A&P grocery chain was a vertically integrated retailer that made use of unprecedented scale and innovation to offer consumers a wider range of products than the competition and at lower prices. Like today's leading online companies, A&P was exceptionally popular with consumers, making it harder for smaller rivals to maintain their margins. Yet A&P's very popularity triggered a backlash. First, Congress passed the now-notorious Robinson-Patman Act to handicap A&P and other growing chain stores. Then the Justice Department criminally prosecuted A&P and its senior executives for offering consumers too good a deal and, having secured their convictions, filed another case to break up the largest and most innovative retailer in American history. Although that case was ultimately unsuccessful, A&P's management spent years fending off the government's relentless pursuit, while new companies—not so burdened—ultimately eclipsed it.

This paper recounts the attacks on A&P in some detail because, as discussed in Part II below, they bear an eerie resemblance to attacks today on leading online innovators. Increasingly integrated and efficient retailers—first A&P, then "big box" brick-and-mortar stores, and now online retailers—have challenged traditional retail models by offering consumers lower prices and greater convenience. For decades, critics on the right and left have reacted to

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GOOGLE (2017); Eve Smith, *The Techlash Against Amazon, Facebook and Google—and What They Can Do*, THE ECONOMIST, Jan. 20, 2018; Steven Pearlstein, *Is Amazon Getting Too Big?*, WASH. POST, July 28, 2017; Franklin Foer, *Amazon Must Be Stopped*, THE NEW REPUBLIC, Oct. 9, 2014; Kevin Maney, *Big Tech: Hate Amazon, Apple, Facebook and Google? Get in Line*, NEWSWEEK, Nov. 6, 2017; Peter Coy, *How to Tame Google, Facebook, Amazon, and Apple*, BLOOMBERG, Nov. 29, 2017; *see also* James Heskett, *Is It Time to Break Up Amazon, Apple, Facebook, or Google?*, HARV. BUS. SCH. WORKING KNOWLEDGE (Dec. 6, 2017), https://hbswk.hbs.edu/item/is-it-time-to-break-up-amazon-apple-facebook-or-google?cid=wk-rss.

[8] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

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such disruption by urging Congress, the courts, and the enforcement agencies to stop these American success stories by revising antitrust doctrine to protect small businesses rather than the interests of consumers. Using antitrust law to punish pro-competitive behavior makes no more sense today than it did when the government attacked A&P for cutting consumers too good a deal on groceries.

Finally, as discussed in Part III, antitrust doctrine does not need an overhaul. It is shaped by many economic perspectives, follows no one "School," and is flexible enough to address any monopoly abuses in the twenty-first century.[9] It is also well-calibrated to serve its central function: promoting consumer welfare. It does so not only by prohibiting conduct that harms consumers in the long run, but also by *avoiding* interference with conduct that might appear problematic to non-economists but that demonstrably benefits consumers over time. The advocates of doctrinal overhaul cannot show that *consumers* would benefit if we ripped up the current antitrust rulebook and replaced it with a more impressionistic "big is bad" doctrine. They argue instead that antitrust should be redesigned to promote objectives in addition to (and often in conflict with) consumer welfare, such as protecting existing jobs from dislocation, preserving the profit margins of inefficiently small businesses, and shielding the political system from influence by large corporations. But it is folly to pursue those non-consumer-oriented objectives, whatever their policy merits, through case-by-case antitrust litigation. Doing so would harm consumers, offer little guidance to successful businesses, hinder economic growth, and make antitrust enforcement more subjective and susceptible to charges of political manipulation. Antitrust remains a work in progress, but it is far superior to any alternative the critics propose.

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[9] *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

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I. The Lessons of Robinson-Patman and *United States v. A&P*.

Think of a company—past or present—that uses scale, vertical integration, and innovation to transform retailing; that becomes America's largest retailer by giving consumers a wider range of products than the competition and at lower prices; and whose very success prompts calls for radical changes to the nation's antitrust laws. Who is this behemoth? Amazon fits this description except in one respect: it is not the leading U.S. retailer, and indeed half a dozen U.S. brick-and-mortar chains have greater sales revenues.[10] Instead, the company we describe is the now-defunct Great Atlantic and Pacific Tea Company—A&P, where one of us bagged groceries as a teenager.[11] A&P was the largest American retailer for more than 40 years, pioneering the large retail chain and later the supermarket. A&P brought enormous benefits to consumers, especially the less affluent, through lower prices, greater variety, and opportunities for improved nutrition. But those consumer benefits did not go unpunished.

A. The Rise of A&P.

Although A&P is no longer a going concern and is rapidly passing from public memory, it was once a disruptive juggernaut of American retailing. From humble beginnings in the mid-nineteenth century, it emerged by the 1920s as the largest American retail chain by far, vertically integrating into multiple stages of food production, distribution, and retail sales. As recounted by Marc Levinson, A&P's leading biographer:

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[10] Those companies are Wal-Mart ($362.8 billion in 2016 retail sales), Kroger ($110.2 billion), Costco ($85.8 billion), Home Depot ($85.1 billion), CVS ($81.4 billion), and Walgreens ($79.3 billion). Amazon is in seventh place, with $77 billion. *Top 100 Retailers: The Nation's Retail Power Players 2017*, STORES, https://stores.org/stores-top-retailers-2017/ (visited May 22, 2018).

[11] A&P was so central to mid-century American life that John Updike made it both the setting and the title of his best-known short story. *See* John Updike, *A&P*, THE NEW YORKER, July 22, 1961, at 22. When Updike died in 2009, one journalist remarked: "I remember reading his short story 'A&P' in high school. Of course, everybody remembers reading 'A&P' in high school. It is perhaps Updike's most widely anthologized work, this brief, bright jewel of a story about a young grocery clerk and his pointless act of gallantry." Julia Keller, *John Updike at the A&P*, CHI. TRIB., Feb. 1, 2009.

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> By 1929, when it became the first retailer ever to sell $1 billion of merchandise in a single year, A&P owned nearly 16,000 grocery stores, 70 factories, and more than 100 warehouses. It was the country's largest coffee importer, the largest butter buyer, and the second-largest baker. Its sales were more than twice those of any other retailer.[12]

Levinson attributes A&P's success to the far-sightedness of its long-time owners, the brothers George and John Hartford: "At a time when most retailers worried about the profit margin on each item they sold, the Hartfords focused on their long-term return on investment. They understood that if their company kept its costs down and its prices low, more shoppers would come through its doors, producing more profit than if it kept prices high."[13]

Low costs were the linchpin of this strategy. First, A&P built its own distribution network to bypass "jobbers" and other profit-taking middlemen that mom-and-pop grocers relied upon for delivery. Eliminating these middlemen was highly efficient because, as the FTC observed in 1919, "[t]he cost of these individual delivery systems … [wa]s a large item to be figured into the wholesale prices."[14] For example, "[m]ost produce … was sold by individual farmers to small-town dealers who in turn sold to bigger dealers in nearby cities, creating a lengthy and circuitous route before perishable merchandise finally reached the retail store."[15] Instead, A&P or its affiliates bought directly from food producers and passed the wholesale savings to consumers through lower retail prices. The main "victims" of this practice were the bypassed middlemen and the smaller grocers who continued to rely on the middlemen's

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[12] Marc Levinson, *Monopoly in Chains: Antitrust and The Great A&P*, 12 CPI ANTITRUST CHRON. 2, 4 (2011) ("Levinson CPI").

[13] *Id.*

[14] REPORT OF THE FEDERAL TRADE COMMISSION ON THE WHOLESALE MARKETING OF FOOD 160 (June 30, 1919).

[15] MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA 83 (2011) ("LEVINSON").

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expensive services and thus found themselves undersold at retail. As discussed below, both groups would play a central role in goading the government into waging war against A&P.

Second, once it had eliminated the middlemen, A&P persuaded food producers to sell to it on highly advantageous terms. A&P won deeper discounts than other purchasers in part because, given its scale, it bought in such large and predictable volumes that it offered the producers major cost savings. No doubt some of those discounts were also attributable to A&P's bargaining strength. Any contractual transaction produces a "surplus"—value that the two sides agree to divide. The greater one side's leverage, the greater its portion of the surplus from the deal, but so long as a bargain is struck, both sides remain better off than in the absence of any deal.[16] In this case, A&P's purchasing clout enabled it to win a larger share of the surplus in the form of unusually deep discounts, of which consumers received the lion's share. Here, too, consumers were the winners; the main victims were the smaller grocers who lacked the bargaining clout to win similar discounts, and who thus could not meet A&P's low retail prices.[17]

Third, A&P kept costs low by vertically integrating—not only into distribution, but into food production as well. Like many forms of vertical integration today, A&P's produced major efficiencies, which again benefited consumers. For example, its baked goods were "delivered to stores in the same trucks that delivered other foods rather than by commissioned salesmen, a system that saved a penny per one-pound loaf at a time when the average loaf sold for a

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[16] This is a fundamental tenet of any market economy, as illustrated by the famous Edgeworth Box. *See generally* Thomas M. Humphrey, *The Early History of the Box Diagram*, 82 ECON. Q. 37 (1996).

[17] In absolute terms, A&P's cost advantages were modest. *See* MORRIS ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY 140-43 & app. IV (1959) ("ADELMAN"). But that was enough to make a competitive difference in this narrow-margin business featuring highly price-sensitive consumers. *See* LEVINSON, *supra* note 15, at 104.

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nickel."[18] More broadly, "A&P's manufacturing plants earned money because the company learned to use the flow of orders from its [retail] stores to run the plants steadily at full capacity, reducing the waste that comes from expensive factory equipment that is not fully utilized."[19]

A&P also succeeded because it did what many tech companies do today, albeit amid much controversy: use data to create greater consumer value. For example, A&P used such data to meet previously unrecognized regional preferences: "Philadelphians, it found, liked their butter lightly salted, with a light straw color, whereas New Englanders preferred more salt and a deeper yellow coloration."[20] And the company's "mass of sales data allowed A&P's bakeries to forecast demand with a high degree of accuracy, minimizing returns of stale bread and doughnuts" and thus reducing costs and ultimately retail prices.[21]

B. The Robinson-Patman Act.

These innovations enabled A&P to sell top-quality groceries at unusually low prices, winning the loyalty of consumers but also the enmity of undersold competitors and displaced wholesalers. Ultimately these disgruntled rivals prevailed on the government to give them what they could not win in the market: a way to blunt A&P's popularity with consumers. The first wave of government intervention came via state and federal taxes imposed only on chain stores like A&P, a transparent effort to prop up the profit margins of smaller and less efficient stores. "By the mid-1930s, 29 of the 48 states had taxes on chain stores, some of them so high as to capture half of the profits of an average chain grocery store."[22]

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[18] LEVINSON, *supra* note 15, at 92.

[19] *Id.* at 265.

[20] *Id.* at 105.

[21] *Id.* at 92.

[22] Levinson CPI, *supra* note 12, at 4.

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A second and longer-lasting attack on chain stores was the Robinson-Patman Act of 1936, originally—and more descriptively—entitled "the Wholesale Grocer's Protection Act."[23] The Act imposes a general prohibition on selling "commodities of like grade and quality" at different prices to different buyers, but is subject to various exceptions; for example, a seller may defend such differential pricing to buyers on the ground that it makes "due allowance for differences in the cost of manufacture, sale, or delivery" or is needed to "meet" competition.[24] The main effect of the Act on A&P and other chain stores was to keep them from obtaining goods at lower wholesale prices than their smaller competitors and thus from passing along the savings to consumers. As the Seventh Circuit recently remarked with notable understatement, the Act's "fit with [contemporary] antitrust policy is awkward, as it was principally designed to protect small businesses" at the expense of consumers.[25]

The Robinson-Patman Act had its intended effect, at least in the first decades after its enactment. As Levinson recounts, "[t]he average publicly traded grocery company lost 58 percent of its stock market value" over a two-and-a-half year period after the legislation was introduced, even while the broader stock market was gaining value, "suggest[ing] that investors expected the law to have a severe impact on profitability. That expectation proved correct."[26] A&P and other supermarket chains lost profits even as they raised retail prices to cover the

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[23] *See* Hugh Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1123 (1983).

[24] 15 U.S.C. § 13(a), (b).

[25] Woodman's Food Mkt. v. Clorox Co., 833 F.3d 743, 746 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1213 (2017).

[26] LEVINSON, *supra* note 15, at 165.

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higher cost of wholesale goods.[27] Again, the ultimate victims of the Act were the millions of ordinary consumers forced to pay higher prices for food and other necessities.

The Robinson-Patman Act remains on the books, and it has spawned eight decades of case law so arcane in its distinctions and so baroque in its complexity that it would have driven even the medieval scholastics to distraction. In the words of Robert Bork, the Act and its subsequent application are "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory."[28] To take one such example, what does it mean for a seller to make "due allowance for differences in … cost" when charging different amounts to different buyers?[29] That question has embroiled courts in intractable disputes about how to allocate savings in joint-and-common costs across product lines—a conceptual problem without an economically meaningful solution.[30] In the words of a Yale Law professor writing in 1937, the year after Robinson-Patman was enacted, "[n]o accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork," and "[t]rial is to proceed by the ordeal of cost accountancy."[31] The author concluded, presciently, that the Act "seems destined to raise more questions than it settles" and "presently will reveal its own defects and invite abandonment or amendment."[32]

Ultimately, the Act was indeed refined and partially abandoned, though by non-enforcement and creative judicial interpretation rather than legislative action. By the 1960s, the

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[27] *Id.*

[28] ROBERT BORK, THE ANTITRUST PARADOX 382 (1978) ("BORK").

[29] 15 U.S.C. § 13(a).

[30] *See*, *e.g.*, FTC v. Standard Motor Prods., Inc., 371 F.2d 613, 622 (2d Cir. 1967); *see generally* 1 ALFRED KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 150-53 (1988); MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1116 (7th Cir. 1983).

[31] Walton Hamilton, *Cost as a Standard for Price*, 4 L. & CONTEMP. PROBLEMS 321, 323, 328 (1937).

[32] *Id.* at 333.

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Act had come under increasing fire from practitioners, economists, legal scholars, and enforcement officials for both its indeterminacy and its anti-consumer orientation. The critics included practitioner Frederick Rowe, the author of a two-volume treatise on the Act's complexities and an influential 1957 article criticizing the Act;[33] Philip Elman, an FTC Commissioner who wrote key dissents in the 1960s from findings of liability under the Act;[34] Morris Adelman, an MIT economist who critiqued the objectives of the Robinson-Patman Act in his 1959 book condemning the government's Sherman Act case against A&P;[35] Robert Pitofsky, who condemned the FTC's Robinson-Patman case law as a key contributor to an American Bar Association Report in 1969, a quarter century before he became FTC Chairman;[36] and then-law professor Richard Posner, who wrote a critical analysis of the Act in 1976.[37] Significantly, of these five, only Posner could be labeled part of the "Chicago School" of antitrust, an epithet that populists today use to describe anyone who believes that antitrust doctrine should rest on economic analysis.[38] Each of the other Robinson-Patman critics either pre-dated the Chicago School by many years or, in Pitofsky's case, was an outspoken opponent of it.[39] What these five shared was a basic commitment to economic rigor and consumer welfare—a commitment that transcends any particular "School."

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[33] Frederick Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

[34] *See*, *e.g.*, Sunshine Biscuits, Inc., 59 F.T.C. 674 (1961) (Elman, Comm'r, dissenting from finding of Robinson-Patman violation), *rev'd,* 306 F.2d 48 (7th Cir. 1962) (adopting Elman's position).

[35] ADELMAN, *supra* note 17.

[36] ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

[37] RICHARD POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES (1976).

[38] *See infra* notes 79-80, 111-19 and accompanying text.

[39] HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Pitofsky ed., 2008). Rowe was also critical of some aspects of the Chicago School. *See* Frederick Rowe, *The Decline of Antitrust and Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984).

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In 1977, this growing criticism led the Department of Justice to publish a major attack on Robinson-Patman enforcement, calling the Act "protectionist" with a "deleterious impact on competition" and ultimately consumers.[40] The FTC, which had issued nearly 1400 Robinson-Patman complaints over the preceding four decades, soon reached the same conclusion, dramatically slowing enforcement efforts in the 1970s and all but ending them thereafter.[41] Private actions have continued, but here, too, the courts have heeded the intellectual consensus against the Act by creatively reinterpreting it, where possible, to align with the general consumer orientation of contemporary antitrust. A&P itself played a role in those judicial developments by persuading the Supreme Court in 1979 to reject "interpretations of the Robinson-Patman Act which … help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[42] The Supreme Court carried creative reinterpretation of the Act to new heights when, in 2006, it found that "[t]he Robinson-Patman Act signals no large departure from th[e] main concern of antitrust"—promoting consumer welfare—and lower courts should thus avoid applying the Act in ways "geared more to the protection of existing *competitors* than to the stimulation of *competition*."[43]

Of course, these developments were small comfort to A&P and other chain stores in mid-twentieth century America—and smaller comfort still to the millions of American consumers forced to pay the equivalent of a federal tax on groceries and other necessities to support inefficient retailers and middlemen. And for A&P in particular, the worst was yet to come.

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[40] DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 250 (1977).

[41] *See* Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. W. L. REV. 2064, 2075-76 (2015).

[42] Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 (1979). The losing party in that case was the FTC, which was represented by Frank Easterbrook, then an attorney in the Office of the Solicitor General. Easterbrook would paradoxically go on to become a leading light of the Chicago School.

[43] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180-81 (2006).

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C. The Criminal Prosecution of A&P.

A&P was already burdened by the Robinson-Patman Act and anti-chain taxation laws when, in 1944, the federal government indicted the company and its key executives, including the Hartford brothers, for criminal violations of the Sherman Act.[44] After a lengthy bench trial, a federal district court convicted all defendants, and the court of appeals affirmed.[45] Viewed from the perspective of contemporary antitrust theory, the courts' opinions are a bracing comedy of economic errors, and they illustrate just how unpredictable and arbitrary antitrust can become when unmoored from its current foundations in consumer welfare analysis.

The district court's opinion occupies some 54 double-columned pages in the Federal Supplement, but one studies it in vain to uncover any business practice that could plausibly harm consumers. There are vague assertions that A&P had priced below cost in various product lines and places, thereby committing a form of predatory pricing—a plan to drive competitors from the market and thereafter raise retail prices to monopoly levels.[46] On inspection, however, the government's claims of below-cost pricing rested on accounting tricks rather than economic realities.[47] More fundamentally, as Morris Adelman subsequently explained, the government had identified no scenario in which A&P could ever hope to recover its short-term losses through long-term monopoly prices. Anticipating the *Brooke Group* recoupment test by more than a quarter century, Adelman explained that "[n]o reasonable and prudent A&P management would

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[44] The 1944 indictment followed an earlier indictment in 1942, which was dismissed by a federal district court in Dallas. Although the court of appeals reinstated most the indictment, the Justice Department was disinclined to proceed before a presumptively hostile judge. It thus dismissed the original indictment and filed new charges against A&P in the Eastern District of Illinois, where the case was ultimately tried in 1945. LEVINSON, *supra* note 15, at 226-27.

[45] United States v. N.Y. Great Atl. & Pac. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

[46] *See*, *e.g.*, *id.* at 630-31.

[47] ADELMAN, *supra* note 17, at 15; *see also* Section I.D, infra (discussing Donald Turner's similar analysis).

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have incurred losses to drive out competition because it would have been impossible to claim the pay-off," given that "[e]ntry into the food trade was so cheap and easy that any attempt to raise prices would immediately have resurrected competition."[48]

The government fared no better when it tried to tie A&P's supposed buying power to consumer harm. It argued that, because A&P forced suppliers to give it such deep discounts, those suppliers responded by raising prices to other grocery stores, such that—in the words of the prosecution—"[t]he consumers who buy food in stores competing with A&P pay part of the low cost of A&P's operations."[49] As Levinson points out, though, this theory of consumer harm nonsensically "implies that manufacturers met their profit targets by raising prices to other stores to compensate for their price breaks to A&P. But why would manufacturers have charged other retailers less if only A&P had paid more?"[50] In this and other respects, Adelman suggests, "the government lawyers, although competent in their profession, were so sadly illiterate in economic facts and economic analysis that they simply did not realize what they were saying."[51]

The prosecution and district court also impugned A&P for vertically integrating into food production and distribution, but here, too, one struggles to find any connection between the practices described and any harm to consumers. The district court was particularly perturbed

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[48] ADELMAN, *supra* note 17, at 14; *cf.* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23 (1993). A&P had made the same point at trial, calling Harvard Business School professor Malcolm McNair to explain: "The business of food distribution is just about the last business I can think of in which it would be feasible for anybody to develop a monopoly." LEVINSON, *supra* note 15, at 232.

[49] *Id.* at 231.

[50] *Id.* In a variation on this theme, the court of appeals affirmed the convictions in part on the ground that "[w]hen the gross profit rate is reduced in Area X [to meet competition], it is an almost irresistible conclusion that A&P had the power to compensate for any possible decline in net profits by raising the gross profit rate and retail prices in Area Y, where it was in a competitive position to do so." 173 F.2d at 87. This makes no sense: A&P presumably strove to maximize long-term profits when setting its prices everywhere, and it would have been irrational to deviate from a profit-maximizing strategy in Area Y simply because the company decided to lower prices to meet competition in Area X.

[51] ADELMAN, *supra* note 17, at 16.

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that one A&P affiliate—the Atlantic Commission Company ("Acco")—operated as A&P's purchasing agent for fresh produce and sold to third-party grocery stores whatever A&P's retail stores did not need, typically at higher (*i.e.*, market) prices. The court condemned this practice because "Acco's policy of charging A&P one price and its other customers another, all worked to create restrictions upon competition and to handicap the competitors of A&P in view of the fact that competitors paid Acco earnings which went to A&P who did the competitive retailing."[52] It characterized as "unearned tribute" the payments that third-party retailers made to Acco for its leftover produce; noted that such payments found their way into "the treasury of A&P" and "could be used as defendants wished in competing with others"; and concluded that these "odorous unjustified transactions" and "[t]he multiple roles of Acco taint[ed] the whole fabric of defendants' operations."[53]

The court repeated variations on this rhetorical theme for several pages, but at no point did it explain why Acco's "multiple roles" posed any genuine problem. No one forced third-party grocery stores to pay "unearned tribute" to Acco. Instead, they presumably bought from Acco because its prices were competitive with those of other suppliers, and there were in fact many supplier alternatives. Indeed, Levinson observes, Acco's "sales to buyers other than A&P came to a mere 3 percent of U.S. grower's total produce sales."[54] In other words, these third-party grocery stores would have been no better off, and perhaps worse off, had Acco thrown out the produce that A&P did not need rather than offering it to them. At bottom, the complaint here was not that Acco charged third-party grocers too much, but that vertical integration with Acco

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[52] 67 F. Supp. at 657.

[53] *Id.* at 658.

[54] LEVINSON, *supra* note 15, at 230-31.

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enabled A&P to obtain produce too cheaply (including through the elimination of double-marginalization) and pass the savings to consumers.

Ultimately, the government's case had nothing to do with any genuine theory of *consumer* harm and everything to do with protecting companies at all levels of the grocery business from A&P's disruptive efficiency, no matter what the ensuing cost to consumers.[55] One prosecutor claimed that "A&P sells food cheaply [to consumers] in its own stores because it is a gigantic blood sucker, taking its toll from all levels of the food industry."[56] That logic bears a striking resemblance to a wholesaler association's argument in favor of the Robinson-Patman Act the previous decade: that rapid expansion of efficient chain stores was taking money "right out of [the] pocket" of "the producer and shipper[]" and "giving it to the consumer," who presumably had no right to it.[57] The similarity between these arguments was no coincidence. Adelman explains:

> the A & P case is best understood as an attempt … to infuse the Robinson-Patman Act into the Sherman Act.… The hostility to price competition, the yearning for secure entrepreneurial status, the envy and hate of the small businessman for big business were long ago embodied in a set of standard myths. Great gobs of misunderstood evidence were forced into these molds to produce the case for the prosecution.[58]

This said, the district court carefully recited that neither bigness nor vertical integration was per se unlawful[59] and that businesses "have the right to set prices at such figures as to meet

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[55] *See*, *e.g.*, 67 F. Supp. at 636 (conduct "that leads directly to lower prices to the consumer may … be restraint of trade" because the Sherman Act "has no concern with prices, but looks solely to competition").

[56] LEVINSON, *supra* note 15, at 229.

[57] *Id.* at 161-62.

[58] ADELMAN, *supra* note 17, at 17. The district court lent its own support to this view, expressing "doubt whether we ever needed the Robinson-Patman law," given that "the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured." 67 F. Supp. at 676.

[59] *See id.* ("[i]ntegration … is not, of itself, a violation of the law"; "the chain store system … is not in issue in this case"; "nor is A&P's size, alone, of importance").

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competition."[60] How, then, are executives at large companies to know when they have crossed the line? What limiting principle keeps the Sherman Act from condemning any aggressive, price-lowering competition? Instead of analysis, the court offered standardless rhetoric. Vertical integration, it held, is permissible—unless it confers "*unreasonable* advantages over competitors not similarly integrated."[61] Retail price cutting is permissible—unless it amounts to an "*unreasonable* restraint of competition."[62] A large buyer, the court continued, may drive a hard bargain with suppliers—unless it "*manipulate[s]* its power in order to realize an *unwarranted* discrimination or preference."[63] In each of these contexts, the court identified no criteria that would distinguish "reasonable" (or "warranted") from "unreasonable" (or "unwarranted") conduct. The court's opinion was shot through with such "I know it when I see it" value judgments, often expressed with some type of olfactory or visual metaphor. For example, the court found that various A&P "practices over the years leave a bad odor"[64] and that Acco's sales to unaffiliated grocers at market rates were not only "unjustified," but "odorous."[65] And various actions may, "standing alone, [have been] devoid of wrongful character, but when the fabric woven from them is considered as a whole," it "t[ook] on a polluted colored light."[66]

These and similar passages revealed only that the prosecution moved the district court to a visceral dislike of these defendants. They identified no coherent rule of decision for future cases, let alone one that served the intended beneficiaries of the Sherman Act: consumers.

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[60] *Id.* at 642.
[61] *Id.* (emphasis added).
[62] *Id.* (emphasis added).
[63] *Id.* at 639 (emphases added).
[64] *Id.* at 655.
[65] *Id.* at 658.
[66] *Id.* at 678.

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In 1949, the Seventh Circuit upheld the A&P convictions in a shorter opinion that contained just as little analysis.[67] The government promptly returned to court, this time seeking the economic death penalty: the breakup of A&P. The company responded with an aggressive legal and public relations defense. It ran one advertisement with a photograph of the Empire State Building and the caption: "It's Far Too Big. It Ought to be Seven Buildings."[68] A&P also orchestrated a write-in campaign from ordinary consumers, the beneficiaries of A&P's supposed multi-decade predation. One representative letter to the Attorney General read: "I am dropping you a line to see if you will try and help us housewives save our A.&P. stores. We surely could not make our money go so far in small stores."[69] The government's civil case stalled amid personnel changes in DOJ's leadership at the end of the Truman administration. It then settled soon after President Eisenhower took office: in exchange for the government's agreement to drop the suit, A&P agreed to close Acco.[70]

A&P began its long decline almost immediately thereafter. The decline began with the sudden death of chief executive John Hartford in 1951, accelerated with a series of managerial missteps over the ensuing decades, and finally culminated in 2016 with the closure of the company's few remaining stores. There are usually multiple reasons for a great company's demise, and A&P was no exception. The Hartford brothers' plans for a new generation of management proved faulty, and the company was less nimble than its rivals in adjusting to America's post-war economy. But A&P faced an enormous distraction that its rivals did not: a long struggle with the federal government, including criminal cases against senior executives and

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[67] 173 F.2d 79.

[68] LEVINSON, *supra* note 15, at 244.

[69] *Id.* at 245.

[70] *Id.* at 249.

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an attempt to dismantle the company. Those constant legal threats occupied a considerable amount of one of the most precious resources any company has—the time and energy of its senior management.

D. Don Turner's Prescient Retrospective.

In 1949, the same year the Seventh Circuit upheld the A&P convictions, two seminal articles appeared from economists sharply critical of the government's case against A&P. The first was Morris Adelman's initial analysis of the case,[71] which he later expanded into a full-length book.[72] The second was a student note published in the Yale Law Journal. Although student notes then appeared without bylines, the author was Donald F. Turner, who had earned an economics doctorate from Harvard and was teaching economics at Yale while earning his law degree there.[73] In 1954, Turner joined the Harvard Law faculty, where he coauthored a definitive antitrust treatise with his colleague Phil Areeda after leading the Antitrust Division under President Johnson.

Turner's student note made short work of the government's case against A&P. He explained that neither the government nor the courts had made any serious effort to "draw the line between 'predatory' and 'competitive' price cutting," and thus their "general broadside against A&P's reduction of gross profit rates is a direct attack on the competitive process. … Does the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo."[74] Likewise,

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[71] Morris Adelman, *The A&P Case*, 63 Q.J. ECON. 283 (1949).

[72] ADELMAN, *supra* note 17.

[73] Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A&P Case*, 58 YALE L.J. 969 (1949) ("Turner"); *see also* ADELMAN, *supra* note 17, at 18 & n.9 (identifying Turner as author of Yale note).

[74] Turner, *supra* note 73, at 977.

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Turner explained, the court's attacks on Acco's role within the A&P corporate family "approach saying that vertical integration is illegal *per se*," even though the court professed to reject that position.[75]

More broadly, Turner took aim at a "serious contradiction" in what he called the "[n]ew" Sherman Act—a misguided effort towards applying the Act to attack the very competitive forces it was meant to promote.[76] For example, in the name of protecting "competition," the government prosecuted A&P for *competing too hard* with smaller and less efficient grocers. Yet "vigorous competition is not a friendly pastime. New methods of production and distribution not only disturb existing firms; they frequently demolish them. It then becomes much too easy to identify the demise of these beleaguered competitors with a decline in competition itself."[77] That conceptual error not only leads to unjust prosecutions, but subverts the very point of the antitrust laws:

> The lure of temporary monopoly profits is an important impetus to the introduction of new products and new techniques, which rudely upset the peaceful, profitable existence of long-entrenched business firms. This constant change to the new, the more efficient, is the very heart of the process of effective competition.… But in [the *A&P* case] the defendant corporation represented the forces of competition, efficiency and change. The potential contradiction in the New Sherman Act is sharply exposed.[78]

In short, Turner argued, the antitrust philosophy on display in the *A&P* case was a paradox—a policy at war with itself.

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[75] *Id.* at 978.

[76] *Id.* at 970.

[77] *Id*.

[78] *Id.* at 969-71 (footnotes omitted) (paragraph break omitted).

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If that thesis sounds familiar, it should: it is the title of Robert Bork's book-length critique of antitrust policy three decades later.[79] Although Bork's book is often cited as a foundational text of antitrust's "Chicago School," Turner was no Bork, nor would anyone call him an antecedent of the Chicago School. To the contrary, Turner helped found the "Harvard School," often cited as a counterweight to the Chicago School in American antitrust theory.[80] And Turner went on to lead antitrust enforcement in the Johnson Administration, not known for its conservatism on economic policy.

This illustrates an important point, to which we return below: one need not be a Chicago School adherent to reject the type of analytical sloppiness that motivated the prosecution of A&P. Nor need one be a Chicago School adherent to agree with Turner that courts and enforcement agencies can promote the competitive goals of the antitrust laws only if they allow disruptive companies to reach efficient scale, achieve the efficiencies of vertical integration, and undersell smaller and less efficient competitors through relentless price-cutting. To take those positions, one need only know some economics and view the welfare of consumers as the central objective of sound antitrust policy.

II. Forgetting the Lessons of Robinson-Patman and *United States v. A&P*.

If "[t]hose who cannot remember the past are condemned to repeat it,"[81] the story of A&P should be remembered, now more than ever, as a cautionary tale of what can happen when

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[79] BORK, *supra* note 28.

[80] *See, e.g.*, William Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 6-7 ("[T]wo Harvard School scholars, Phillip Areeda and Donald Turner, spurred the rethinking of modern predatory pricing doctrine with their proposal in 1975 that a dominant firm can ordinarily be presumed to be acting legally under the U.S. antitrust laws when it sets its prices at or above its average variable costs.… Areeda and Turner, more than any other commentators, catalyzed the retrenchment of liability standards and motivated a more general and fundamental reassessment of U.S. doctrine governing dominant firms.") (footnote omitted).

[81] 1 GEORGE SANTAYANA, THE LIFE OF REASON 284 (1905).

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antitrust is divorced from an economically rigorous focus on consumer welfare. The stakes are high; without that focus, antitrust can easily be misused to destroy the very competition it was meant to promote. As economists William Baumol and Alan Blinder explain:

> One problem that haunts most antitrust litigation … is that vigorous competition may look very similar to acts that *undermine* competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but that really are the opposite. The difficulty is that effective competition by a firm is always tough on its rivals.[82]

In the first half of the twentieth century, the federal government ignored that distinction and inflicted large, unnecessary costs on the national economy—first, by enacting the Robinson-Patman Act to elevate the interests of inefficient companies over those of consumers, and then by importing Robinson-Patman principles into the Sherman Act through the criminal prosecution of A&P. It took several decades of diligent analysis from academics, practitioners, antitrust authorities, and courts to draw the critical distinction between harm to *competitors* and harm to *competition*. It would be a doctrinal mistake of historic proportions to blur that line again.

But that is precisely what the new antitrust critics propose. Consider Lina Khan's widely cited Yale Law Journal note in 2017, which is virtually the negative image of Don Turner's note in the same publication 68 years earlier.[83] Turner's note exposed the conceptual void at the heart of the government's case against the most popular and innovative retailer of the mid-20th century and urged antitrust enforcers to use greater analytical rigor in distinguishing between consumer-oriented harm to *competition* and mere harm to *competitors*. Khan's note urges the government to crack down on the most popular and innovative online retailer of our day—

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[82] *WILLIAM BAUMOL & ALAN BLINDER, ECONOMICS: PRINCIPLES AND POLICY* 425-26 (8th ed. 2000) (paragraph break omitted); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993).

[83] Khan, *supra* note 2. Khan is now a visiting fellow at Yale and Director of Legal Policy at the Open Markets Institute.

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Amazon—and abandon the consumer-oriented focus that Turner helped introduce, which she misattributes to the "Chicago School" that arose only decades later.

The rhetoric favored by these critics of modern antitrust doctrine bear an uncanny similarity to the slogans that the government deployed with such disconcerting success in *United States v. A&P*. Like A&P's prosecutors, the critics would use the machinery of antitrust to deny consumers the benefits of low prices and efficient vertical integration.

A. Forgetting the Value of Low Prices.

Consider first the critics' complaint that Amazon has used its scale to obtain special discounts from book publishers and other manufacturers and thereby narrow their margins while lowering retail prices to consumers. They blame those discounts on contemporary antitrust doctrine, which, by "focusing on consumer welfare[,] disregards the host of other ways that excessive concentration can harm us—enabling firms to squeeze suppliers and producers."[84] In Franklin Foer's words, Amazon "must be stopped" because "[w]e've all been seduced by the deep discounts" and now the company is "cannibalizing the economy."[85] These critiques vividly recall the claim of A&P's prosecutors that the grocery chain improperly "s[old] food cheaply in its own stores because it [wa]s a gigantic blood sucker, taking its toll from all levels of the food industry."[86] They also echo the corporate interests that lobbied for the Robinson-Patman Act to

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[84] Khan, *supra* note 2, at 743.

[85] Foer, *supra* note 7; *see also* Khan, *supra* note 2, at 716 ("[T]he story of Amazon's sustained and growing dominance is also the story of changes in our antitrust laws.… It is as if [Amazon CEO Jeff] Bezos charted the company's growth by first drawing a map of antitrust laws, and then devising routes to smoothly bypass them."); Lina Khan, *Amazon Bites Off Even More Monopoly Power*, N.Y. TIMES, June 21, 2017 ("The company has established its level of dominance because of the failings of our current antitrust laws."); Pearlstein, *supra* note 7 ("Amazon.com … has made itself as essential to commerce in the 21st century as the railroads, telephone systems and computer hardware makers were in the 20th."). The authors have advised Amazon on a variety of antitrust issues.

[86] LEVINSON, *supra* note 15, at 229.

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keep efficient chain stores from taking money "right out of [the] pocket" of "the producer and shipper[]" and "giving it to the consumer."[87]

Like A&P's prosecutors, the new antitrust critics condemn Amazon and other online insurgents for "clock[ing] staggering growth" while "report[ing] meager profits"[88] and, in particular, for winning business at the expense of smaller companies by consistently underselling them. Under longstanding antitrust doctrine, anyone claiming "predatory pricing" today—as opposed to the 1940s, when A&P was prosecuted—would need to show that such pricing will harm consumers at some point even though it obviously benefits them now. Specifically, a plaintiff must show a "dangerous probability of recoupment"—*i.e.*, that a seller's low prices are part of a long-term strategy to drive competitors out of business, raise prices to monopoly levels, and keep them there for a sustained period.[89] That would be a tall order here because Amazon has been offering consumers low prices for more than two decades, with no end in sight, and no one reasonably expects that Amazon could or would raise prices for any product category to monopoly levels.[90] To paraphrase Professor Adelman's observation about A&P, "[n]o reasonable and prudent [Amazon] management would … incur[] losses to drive out competition because it would [be] impossible to claim the pay-off," given that "[e]ntry into [retailing is] so cheap and easy that any attempt to raise prices would immediately … resurrect[] competition."[91]

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[87] *Id.* at 161-62.

[88] Khan, *supra* note 2, at 713; *see also* Foer, *supra* note 7 ("Rather than pocketing the profits from this creation, Amazon has plowed revenue into bettering itself ….").

[89] *Brooke Grp.*, 509 U.S. at 222-23.

[90] *See, e.g.*, Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI ANTITRUST CHRON. 1, 6 (Oct. 2017) ("almost nothing about [Amazon's] market positions suggests that it would be able to sustain monopoly pricing without producing so much consumer defection or competitor entry that the price increase would be unprofitable"), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2771&context=faculty_scholarship ("Hovenkamp").

[91] ADELMAN, *supra* note 17, at 14; *cf. Brooke Grp.*, 509 U.S. at 222-23.

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Undeterred, the new antitrust critics argue for dispensing with any recoupment showing for "dominant platforms found to be pricing products below cost"[92] in order to reinstitute the "rich set of concerns that had animated earlier critics of predation, including an aversion to large firms that exploit their size."[93] Of course, one person's "rich set of concerns" is another's analytical incoherence. Turner could have been addressing today's proposals for jettisoning the recoupment requirement when he criticized the government's prosecution of A&P (another putatively "dominant platform") for failing to "draw the line between 'predatory' and 'competitive' price cutting" and for conflating "the demise of … beleaguered competitors with a decline in competition itself."[94]

To be sure, most antitrust scholars agree that predatory pricing that harms consumers, though rare, is not impossible. But existing antitrust doctrine already captures the circumstances in which liability for predatory pricing would make sense. Antitrust cannot be revised to prohibit low prices not already captured by that doctrine without harming consumers in both the short term (discounts are eliminated) and long term (large firms are necessarily reluctant to reduce prices). As explained by then-Judge (now-Justice) Stephen Breyer, "A price cut that ends up with a price exceeding total cost … is almost certainly moving price in the 'right' direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such beneficial 'birds in hand' for the sake of more speculative (future low-price) 'birds in the bush.'"[95]

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[92] Khan, *supra* note 2, at 791.

[93] *Id.* at 730.

[94] Turner, *supra* note 73, at 970, 977.

[95] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.).

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B. Forgetting the Value of Efficient Vertical Integration.

Critics of modern antitrust doctrine also read from the A&P prosecutors' playbook when they condemn leading tech companies for vertical integration and, in particular, for offering upstream inputs to downstream competitors. Much as A&P sold surplus produce to third-party grocers through its Acco purchasing agent, Amazon offers third-party retailers access to its store through Amazon Marketplace. For example, Amazon contracts with independent merchants to display their goods on Amazon's website, stock their goods in Amazon's extensive network of local fulfillment centers, and ship the goods on the merchants' behalf to individual consumers.[96] This arrangement is highly efficient: Amazon's scale allows for warehousing and shipping services at a lower per-unit price than many smaller merchants could obtain on their own. Such merchants can thus outsource those functions to Amazon to save costs, and they can then pass the savings to their customers through lower retail prices.

Although these arrangements make all parties better off, the new antitrust populists consider it problematic that Amazon (1) has "creat[ed] a logistics empire" to "reduce its delivery times, raising the bar for entry yet higher"[97] and (2) "enjoys receiving [fulfillment] business from its rivals, even as it competes with them."[98] The first concern—that Amazon has "raised the bar" for competitors by building costly fulfillment centers to serve consumers better—quarrels with the fundamental premise of a free-market system, that consumers are best served if the lure of winning more business gives companies incentives to invest in ways to enhance consumer value.

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[96] The arrangement described here is known as "Fulfillment by Amazon" ("FBA"). Merchants can also obtain, at a lower fee, a "Fulfillment by Merchant" ("FBM") arrangement, in which they handle warehousing and shipping but still appear on Amazon's website.

[97] Khan, *supra* note 2, at 777.

[98] *Id.* at 755; *see also* Foer, *supra* note 7.

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A&P, too, was condemned for harming rivals by making its retail and distribution "empire" work so well for grocery shoppers. Turner's 1949 critique of that position applies equally here: disruptive shifts to "more efficient" modes of operation are "the very heart of the process of effective competition" even though—indeed, precisely because—they "rudely upset the peaceful, profitable existence of long-entrenched business firms.[99]

The second cited concern, about Amazon "inserting itself into the business of its competitors,"[100] also makes no sense. No one forces any merchant to buy fulfillment services from Amazon, just as no one forced independent grocers to buy surplus produce from Acco. Indeed, Khan concedes that Amazon "offer[s] independent sellers the ability to ship goods *more cheaply and quickly* than they could by using UPS and FedEx directly."[101] She nonetheless worries that "Amazon is … positioned to use its logistics infrastructure to deliver its own retail goods faster than those of independent sellers that use its platform and fulfillment service—a form of discrimination that exemplifies traditional concerns about vertical integration."[102] By "*traditional* concerns," she apparently means concerns untethered to consumer welfare. Again, consumers can only be better off if Amazon has appropriate incentives to share its scale economies with third parties and if those third parties are free to accept or reject Amazon's offers in the competitive markets for warehousing, shipping, and other fulfillment services.

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[99] Turner, *supra* note 73, at 970.

[100] Khan, *supra* note 2, at 776-77.

[101] *Id.* at 779 (emphasis added).

[102] *Id.* Khan claims that the discounts Amazon obtained from delivery companies have harmed third-party merchants because the "[d]elivery companies sought to make up for the discounts … by raising the prices they charged to independent sellers." *Id.* at 775. This claim parallels the A&P prosecution's charge that "[t]he consumers who [bought] food in stores competing with A&P pa[id] part of the low cost of A&P's operation" on the theory that the food suppliers who gave A&P discounts made up for them by raising prices to other grocery stores. LEVINSON, *supra* note 15, at 231. In both cases, the claims contradict the basic economics of individualized bargaining: suppliers can normally be expected to charge each buyer the highest price it can negotiate from that buyer, irrespective of whatever concessions they make to other buyers. *See id.*

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The critics ultimately fall back on the claim that, economics aside, any large vertically integrated company's "conflicts of interest *tarnish the neutrality* of the competitive process."[103] To paraphrase Phil Areeda, this is an epithet in search of analytical content.[104] What is this "neutrality" ideal, and how does it serve consumers? What does it mean to accuse a vertically integrated firm of "conflicts of interest" when the firm sells inputs to sophisticated downstream competitors at arm's length, free of any fiduciary obligations, and in transparent and competitive markets? This recourse to morally freighted rhetoric recalls the A&P court's analogous finding that "[t]he multiple roles of Acco" were "odorous" and "taint[ed] the whole fabric of [A&P's] operations."[105] As Turner noted, such rhetoric is no substitute for analysis and steers very close to the implausible position that "vertical integration is illegal *per se*."[106]

Indeed, the critics sometimes appear unaware that vertical integration is ubiquitous and that retailers routinely sell their own products alongside those of third parties. Just as A&P stocked its own leading coffee brand (Eight O'Clock) alongside Maxwell House and Folgers,[107] Walmart offers "Sam's Choice" and other house brands alongside third-party products, Macy's offers Alfani and other private brands alongside third-party apparel, and Apple offers its own apps alongside competing third-party apps in the App Store—iBooks as well as the Kindle, Apple Maps as well as Google Maps, and Safari as well as Chrome and Firefox.[108] The new

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[103] Khan, *supra* note 2, at 780 (emphasis added).

[104] *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990).

[105] 67 F. Supp. at 658.

[106] Turner, *supra* note 73, at 978.

[107] A&P sold Eight O'Clock Coffee from the company's earliest days to its ultimate demise. LEVINSON, *supra* note 15, at 55-56. That brand, now owned by international conglomerate Tata, is one of A&P's last remaining vestiges.

[108] *See generally* Sarah Halzack, *Retail's Secret Weapon Is the Private Label*, BLOOMBERG (Oct. 24, 2017), https://www.bloomberg.com/gadfly/articles/2017-10-24/private-label-brands-retail-s-new-secret-weapon.

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antitrust critics offer no coherent basis for uprooting such arrangements throughout the economy or for identifying when they "tarnish the neutrality of the competitive process,"[109] whatever that might mean. As next discussed, rhetoric about "discrimination" and "conflicts of interest" are no substitute for what modern antitrust provides: empirical analysis of how vertical relationships and other business practices actually affect consumers.

III. Unpacking the New Antitrust Criticism.

The new antitrust critics claim that "[i]t's time for a radical plan" to revamp antitrust doctrine because, "[i]n effect, we've been thrust back 100 years to a time when the law was not up to the task of protecting the threats to democracy posed by monopoly."[110] Such claims tend to conflate two different issues: (1) whether contemporary antitrust doctrine is suited to protecting *consumers* in today's economy and (2) whether antitrust should serve objectives *independent of* consumer welfare. Untangling those two questions is critical to understanding the emptiness of this new movement.

A. Antitrust's Success in Promoting Consumer Welfare.

1. *Antitrust's Big Tent.*

Those who claim that antitrust is "not up to the task" of protecting *consumer welfare* in the digital age misunderstand and indeed caricature modern antitrust doctrine. Antitrust is a big tent. It encompasses economists, legal scholars, jurists, and practitioners who sometimes disagree on the details of antitrust enforcement but agree on one big issue: the value of applying rigorous economic analysis to advance the interests of consumers across the range of highly dynamic markets that make up today's economy.

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[109] Khan, *supra* note 2, at 780.

[110] Foer, *supra* note 7; *see also* Khan, *supra* note 2, at 716.

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Consider the modern consensus on vertical integration. Empirical research has come a long way since the "bad odor" impressionism of the A&P decision; we now know that vertical agreements and integration are not only commonplace, but usually pro-consumer. One need not rely on the "Chicago School" for that conclusion because it follows from several decades of dispassionate analysis from economists not associated with that movement. For example, in the words of one landmark survey coauthored by Francine LaFontaine, a Michigan economist who was later appointed to a top antitrust position in the Obama Administration:

> [W]e did not have a particular conclusion in mind when we began to collect the evidence, and we have tried to be fair in presenting the empirical regularities. We are therefore somewhat surprised at what the weight of the evidence is telling us. It says that, under most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view. Although there are isolated studies that contradict this claim, the vast majority support it.[111]

That said, "raising rivals' costs" analysis—foreshadowed by University of Chicago economists in the 1950s and later developed by post-Chicago scholars—does shed valuable light on the circumstances in which vertical integration can at least theoretically diminish consumer welfare.[112] Antitrust practitioners and scholars may disagree on how commonly those circumstances arise but agree that they are the exception, not the rule. Even Steven Salop, credited as a developer of the "raising rivals' costs" paradigm in the late twentieth century,

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[111] Francine LaFontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007). Professor LaFontaine served as Director of the FTC's Bureau of Economics from 2014-15. Similarly, Oliver Williamson, no Chicago economist, won a Nobel Prize in significant part for his work on the role of efficient vertical integration within the modern firm. *See*, *e.g.*, Oliver Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548 (1981).

[112] *See, e.g.*, Aaron Director & Edward Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281, 293 (1956) (noting raising-rivals'-costs considerations); Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (developing analysis).

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agrees that "[m]ost vertical mergers do not raise competitive concerns and likely are procompetitive."[113]

The incorporation of raising-rivals'-costs scholarship into modern antitrust analysis provides a valuable object lesson in the field's commitment to incremental improvement based on advances in economic research, irrespective of the researchers' affiliation with any particular "School." University of Chicago scholars did play a key role, mainly before 1980, in reorienting antitrust towards an empirical analysis of consumer welfare and thus in rescuing antitrust from its mid-century conceptual morass. But the chief legacy of the Chicago School today is empirical and methodological, not ideological. As one of us has written, the term "Chicago School" should be retired for most purposes because "[i]nvoking Chicago, either pro or con, in most arguments about antitrust policy today is frequently meaningless or, worse, a wasteful distraction."[114]

The new antitrust critics also claim that contemporary doctrine ignores "the underlying structure and dynamics of markets" and conclude that only a doctrinal sea change would permit antitrust enforcers to "look[] to the structure of a business and the structural role it plays in markets" when deciding whether to file suit.[115] In fact, no sea change is needed because this is exactly the analysis that the antitrust agencies routinely use today in deciding whether to block a merger or prosecute anticompetitive conduct. For example, the Justice Department's antitrust case against Microsoft at the turn of the millennium rested on a sophisticated analysis of

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[113] STEVEN SALOP & DANIEL CULLY, POTENTIAL COMPETITIVE EFFECTS OF VERTICAL MERGERS: A HOW-TO GUIDE FOR PRACTITIONERS 5 (Georgetown U. Law Ctr. Dec. 8, 2014), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub.

[114] Bruce Kobayashi & Timothy Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 172 (2012) (noting that the Chicago School's shared purpose was criticism of 1960s and 1970s antitrust policy and that the School had no shared positive antitrust agenda).

[115] Khan, *supra* note 2, at 717.

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Microsoft's then-central role in the Internet ecosystem, reinforced by the "applications barrier to entry."[116] DoJ antitrust chief William Baxter—a member in good standing of the Chicago School even though he taught at Stanford—led a team that broke up the Bell System in the 1980s based on an extensive analysis of AT&T's then-central role in the emerging information economy.[117] More recent examples include the FTC's ongoing case against Qualcomm, its cases against Intel in the first decade of the 21st century, its past and present cases against "pay for delay" settlements in the pharmaceutical industry, and the Justice Department's crackdown on collective hiring restrictions in Silicon Valley.[118] As Richard Posner has observed, "antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy."[119]

Another canard of the new populist movement is that antitrust focuses myopically on "short-term effects on price and output" and ignores other dimensions of consumer welfare—"product quality, variety, and innovation."[120] No one familiar with the actual operation of antitrust could make such a claim. Antitrust authorities and courts not only examine both short-term and long-term price effects, but also recognize that "price" and "quality" are two sides of

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[116] *See Microsoft Corp.*, 253 F.3d at 55 ("That barrier … stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This 'chicken-and-egg' situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems." (citation omitted)).

[117] *See* United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom* Maryland v. United States, 460 U.S. 1001 (1983).

[118] *See*, *e.g.*, Complaint, FTC v. Qualcomm Inc., No. 5:17-cv-00220 (N.D. Cal. filed Jan. 17, 2017); Press Release, FTC, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010); FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013); Press Release, Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010). The authors have played roles in some of these matters while in the government or private sector.

[119] Richard Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001) ("Posner"); *see also* Jonathan Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, ANTITRUST 89 (Fall 2001).

[120] Kahn, *supra* note 2, at 716, 737.

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the same coin; thus, "quality-adjusted prices are frequently used in industrial organization economics and in antitrust analysis."[121] Likewise, the federal antitrust agencies fully account for effects on "variety" and "innovation." Indeed, the Obama Administration's revision of the *Horizontal Merger Guidelines* includes an entire subsection entitled "Innovation and Product Variety."[122]

Where the critics and modern antitrust do diverge is in how they analyze these dimensions of consumer welfare. For example, while the critics rigidly assume that innovation always increases with the number of competitors, the antitrust literature offers much more nuanced perspectives on the complex interplay between innovation and market concentration.[123] Antitrust likewise recognizes that placing a value on innovation can cut either for or against aggressive antitrust enforcement, depending on the context. For example, competition *for* a market, rather than traditional competition *in* a market, has produced some of the greatest innovations of the digital age. Antitrust would have prevented many of them had it focused singlemindedly on the risk that the innovators would obtain market power after launching their breakthrough products.[124]

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[121] Joshua Wright & Douglas Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2410 (2013) ("Wright & Ginsburg") (footnote omitted).

[122] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (Aug. 19, 2010) ("2010 HORIZONTAL MERGER GUIDELINES").

[123] *See*, *e.g.*, Jonathan Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007); Michael Katz & Howard Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1 (2007); Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, *in* 6 INNOVATION POL'Y & THE ECON. 159 (Adam Jaffe et al. eds., 2006). One of us discussed these issues as FTC Chairman in analyzing the proposed Genzyme-Novazyme merger in 2004. *See* Statement of Chairman Timothy Muris in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc. 3 (Jan. 13, 2004) (citing "lack of any clear theoretical or empirical link between increased concentration and reduced innovation"), https://www.ftc.gov/news-events/press-releases/2004/01/ftc-closes-its-investigation-genzyme-corporations-2001.

[124] *See*, *e.g.*, Posner, *supra* note 119, at 930 ("The gale of creative destruction that [Joseph] Schumpeter described, in which a sequence of temporary monopolies operates to maximize innovation that confers social benefits far in excess of the social costs of the short-lived monopoly prices that the process also gives rise to, may be the reality of the new economy.").

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Similarly, the critics assume that consumer welfare always improves with increases in product diversity, whereas the economic literature recognizes that "[r]eductions in variety … may or may not be anticompetitive," depending again on the context.[125] For example, a merger between two companies with similar but non-identical products may advance consumer welfare if product consolidation is efficient and the preexisting variety "offers little in value to customers."[126] And "both economic theory and empirical evidence are replete with examples of business conduct that simultaneously reduces choice and increases welfare in the form of lower prices, increased innovation, or higher quality products and services."[127]

2. *The Market Concentration Fallacy.*

Prominent critics across the political spectrum nonetheless argue that modern approaches to antitrust must harm consumer welfare because, they say, various metrics show a worrisome increase in market concentration throughout the economy. Senator Elizabeth Warren contends: "[T]oday in America competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy."[128] The President's Council of Economic Advisers ("CEA") issued a widely cited report in 2016 concluding that "competition may be decreasing in many economic sectors, including … increases in industry-specific measures of concentration."[129] And the traditionally free-market-oriented *Economist* issued a concentration analysis of its own, concluding that

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[125] 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 122, § 6.4.

[126] *Id.*

[127] Wright & Ginsburg, *supra* note 121, at 2411.

[128] Senator Elizabeth Warren, Keynote Remarks at the New America's Open Markets Program: Reigniting Competition in the American Economy (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf ("Warren").

[129] COUNCIL OF ECON. ADVISORS ISSUE BRIEF, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 1 (Apr. 2016) ("CEA REPORT").

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supposedly high profits and "creeping consolidation" show that "America needs a giant dose of competition."[130]

There are two basic problems with this "market concentration" critique. *First*, because economy-wide statistics inevitably aggregate economic phenomena across product and geographic lines, they grossly overstate concentration in well-defined antitrust markets. Consider the CEA's claim that "the majority of industries have seen increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012."[131] In the words of former Obama and Clinton Administration antitrust official Carl Shapiro, any purported "industry" in this study encompasses many different product and geographic markets, and the industry groupings are thus "far too broad to assess market power" in any actual market.[132] Instead, "the trends observed may well reflect nothing more than the expansion of successful, efficient firms into related lines of business" and "new geographic regions, to the benefit of consumers":

> [C]onsider what happens to concentration measured at the national level if we begin with a situation in which each of many local markets has five stores, all locally owned with no cross-ownership across geographies. Then suppose that four national chains arise, and each local market shifts to having a store from each of these four national chains plus one locally-owned store. This shift causes no change at all in concentration at the local level, i.e., in the properly defined relevant markets.… Nationally, however, the HHI starts near zero and grows to

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[130] *Too Much of a Good Thing*, THE ECONOMIST, Mar. 26, 2016 ("*Too Much of a Good Thing*") (emphasis omitted).

[131] CEA REPORT, *supra* note 129, at 4.

[132] CARL SHAPIRO, ANTITRUST IN A TIME OF POPULISM 8 (Oct. 24, 2017), https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf (emphasis omitted). Professor Shapiro was Deputy Assistant Attorney General for Economics in the Antitrust Division from 1995 to 1996 and again from 2009 to 2011 and served on the President's Council of Economic Advisers in 2011-12. For another, equally incisive critique of the CEA analysis, see Gregory Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST MAG. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912##.

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> 1600 (four chains each with 20% nationally). This shift could well go along with lower prices and better service for customers.[133]

The authors of the CEA report duly acknowledged these limitations, noting that their numbers were "national statistics across broad aggregates of industries, and an increase in revenue concentration at the national level is neither a necessary nor sufficient condition to indicate an increase in market power. Instead, antitrust authorities direct their attention to concentration at *the relevant market level for each product or service*."[134] Alas, Shapiro notes, "many of those citing the CEA Report [were] not nearly so careful."[135]

That observation underscores a broader problem with populist antitrust critiques today. For example, Barry Lynn's contention that "Amazon is monopolizing commerce in the United States"[136] is empty because it does not analyze Amazon's position in *actual markets*. There is no antitrust market for "commerce" or even "e-commerce." There are instead numerous separate markets for particular goods and services, and Amazon participates in many of them. Amazon is thus a large, diversified, and successful company, but that does not mean that Amazon has market power in those markets, let alone monopoly power.

Second, quite apart from this inattention to well-defined markets, the concentration levels described in the CEA report and similar studies are generally far too low to warrant concern about consumer welfare. As noted, the CEA report identified "concentration level increases in the revenue share enjoyed by the 50 largest firms" in the industries it studied. As Shapiro points

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[133] SHAPIRO, *supra* note 132, at 11. "HHI" refers to the Herfindahl-Hirschman Index, a widely used approach to measuring market concentration.

[134] CEA Report at 4 (emphasis added).

[135] SHAPIRO, *supra* note 132, at 9. Shapiro observes that the same shortcomings undermine the conclusions the *Economist* purported to draw from its own concentration analysis of "900-odd sectors," *Too Much of a Good Thing*, *supra* note 130, within the national economy. SHAPIRO, *supra* note 132, at 9-12.

[136] Alex Shepard, *How Amazon Is Changing the Whole Concept of Monopoly*, THE NEW REPUBLIC (June 19, 2017), https://newrepublic.com/article/143376/amazon-changing-whole-concept-monopoly.

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out, this "fifty-firm concentration ratio … is not informative regarding the state of competition" because "[i]ndustrial organization economists generally believe that markets are normally quite competitive with far fewer than fifty firms."[137] Indeed, the statistics would not be much more meaningful even if they addressed the revenue shares of the top *four* firms. For example, the *Economist* recently expressed concern that "[t]he weighted average share of the top four firms" in each of "900-odd sectors" "has risen from 26% to 32%."[138] But there would be nothing especially worrisome about that 32% figure even if it described actual markets rather than loosely defined industrial "sectors." As Shapiro explains, "think about a market … in which the top four firms have shares of 10%, 8%, 8%, and 6%. There must be at least 11 more firms, since the largest any of these other firms can be is 6%, and they comprise 68% of the market.… Industrial organization economists would generally describe this market as being unconcentrated."[139]

Those who are nonetheless alarmed by such concentration numbers are repeating a basic conceptual error that led to the worst excesses of 1960s-era antitrust enforcement. Until the mid-to-late 1970s, most economists believed that any degree of concentration—any deviation from perfect competition among many "atomistic" rivals—was inherently harmful, even in seemingly well-functioning markets.[140] This view reached its infamous apogee in 1966. In *United States v. Von's Grocery Co*,[141] the Supreme Court condemned, as part of a "threatening trend toward

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[137] SHAPIRO, *supra* note 132, at 8 (emphasis omitted).

[138] *Too Much of a Good Thing*, *supra* note 130.

[139] SHAPIRO, *supra* note 132, at 14.

[140] These studies and the concentration debate are summarized in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey Goldschmid et al. eds., 1974); *see also* Wesley Liebeler, *Bureau of Competition: Antitrust Enforcement Activities*, *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 65 (Kenneth Clarkson & Timothy Muris eds. 1981).

[141] 384 U.S. 270 (1966). Just as the unlikely advocate for the government in *A&P v. FTC* (the 1979 Robinson-Patman case) was Frank Easterbrook, *see* note 42, *supra*, the unlikely advocate for the government in

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concentration," a cost-reducing merger between the number three and number six grocery chains in Los Angeles even though the two companies together accounted for only 7.5% of the relevant market.[142]

This reflexive antipathy towards even moderate concentration levels foundered in the 1970s on the empirical evidence and, in particular, on the highly influential research of Harold Demsetz.[143] For the sake of argument, Demsetz accepted as true the widely held belief that large firms in concentrated industries earned higher rates of return than most other firms. He hypothesized that if the reason was that those firms had *market power* and exercised it through higher prices, then smaller firms in those same concentrated industries, which would benefit from the relative lack of competition, should earn higher rates of return than smaller firms in unconcentrated industries. If, however, the larger firms in concentrated industries were more profitable mainly because they were *more efficient*, then smaller firms in those concentrated industries would not have higher profits than smaller firms in unconcentrated industries. As Demsetz found, the evidence supported the efficiency hypothesis.[144] That and similar empirical

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Von's Grocery was Richard Posner. In a 1992 interview, Posner remarked that he was "perfectly convinced of the soundness of the government's position" when he argued the case in 1966 but subsequently concluded that the merger "was completely harmless." *Interview with Judge Richard Posner, Seven Circuit Court of Appeal*, 6 ANTITRUST 4, 5 (Spring 1992).

[142] 384 U.S. at 272, 277. As Justice Stewart remarked in dissent, this outcome was perplexing because "[t]here is simply no evidence in the record … that the increment in market *share* obtained by the combined stores can be equated with an increase in the market *power* of the combined firm." *Id.* at 297.

[143] Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION, *supra* note 140, at 164.

[144] *See id.*; *see also* JEFFREY PERLOFF ET AL., ESTIMATING MARKET POWER AND STRATEGIES 33 (2007) ("Many researchers, after finding a link between high profits (or excessive rates of return, or large price-cost margins …) and high concentration ratios, infer improperly that high concentration rates are bad because they 'cause' high profits. However, profit and concentration influence each other. An alternative interpretation of a link between profits and concentration is that the largest firms are the most efficient and innovative. Only when a firm is efficient or innovative is it profitable to expand in a market and make the market concentrated. In this interpretation, a successful firm attracts consumers, either through lower prices or better products. A firm's success, as measured by both its profits and its market share, is an indicator of consumer satisfaction, not of poor industry performance.") (citation omitted).

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studies led scholars and policymakers to recognize that some degree of consolidation in competitive markets can be pro-consumer by creating economies of scale and scope and other forms of efficiency. A concise summary of the changing views on concentration can be seen in successive editions of the *Horizontal Merger Guidelines* published by U.S. antitrust agencies in 1968, 1982, and 2010. In those three editions, the marginal case has effectively moved from "8-to-7" mergers to 6-to-5 to 4-to-3.[145]

Of course, market concentration and consumer welfare can be related, and antitrust authorities rightly scrutinize mergers that would make an already highly concentrated market substantially more concentrated, particularly if the merging parties produce very close substitutes and entry and repositioning by other firms is unlikely. And reasonable people within the modern antitrust consensus can and do disagree about whether, at the margin, merger standards should be recalibrated.[146] But no one benefits from a renewed emphasis on market concentration for its own sake, divorced from consideration of how mergers can create efficiencies and improve consumer welfare. Insisting on unconcentrated markets as an end in itself would cost consumers billions by undermining those efficiencies. *Von's Grocery* made no sense when it was decided in 1966 and makes no more sense today.

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[145] *See generally* TRANSCRIPT OF FTC WORKSHOP, HORIZONTAL MERGER GUIDELINES REVIEW PROJECT, No. P092900 (Jan. 26, 2010), https://www.ftc.gov/sites/default/files/documents/public_events/horizontal-merger-guidelines-review-project/100126transcript.pdf. A "4-to-3" merger is one that combines two firms in a market occupied by four major participants, leaving three post-merger firms. Unlike the guidelines that followed, the 1968 version lacked uniform benchmarks. In some cases, the 1968 guidelines condemned mergers in markets with more than eight equal-sized competitors.

[146] *Compare, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2014) *with* MICHAEL VITA & F. DAVID OSINSKI, JOHN KWOKA'S MERGERS, MERGER CONTROL, AND REMEDIES: A CRITICAL REVIEW (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888485.

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B. The Vacuity of Proposals to Refocus Antitrust Away from Consumer Welfare.

The critics of modern antitrust doctrine would win no headlines if they simply argued that contemporary antitrust doctrine inadequately analyzes the multiple dimensions of consumer welfare. On that issue, they are plainly out of their depth. Most have no formal economic training and appear only passingly familiar—if that—with the rich diversity of economic tools that inform modern antitrust theory. Instead, their tack is more radical. They suggest that antitrust should jettison its singular focus on consumer interests and pursue independent goals such as "our interests as workers" and the proliferation of small "producers" as valuable in themselves, rather than as a means to pro-consumer ends.[147] Barry Lynn, for example, suggests that antitrust law should be reformulated radically to promote "liberty" rather than "more stuff" and to "protect the 'opportunity' of the citizen producer" rather than "promote the 'welfare' of the 'consumer.'"[148]

One problem with this approach is that these additional goals are not only independent of consumer-welfare goals, but often openly at war with them—and the critics proposing this "big is bad" jurisprudence offer no coherent means of balancing the incommensurable values they want antitrust to promote. Take low prices. When do the interests of consumers in paying less outweigh the interests of small businesses in charging consumers more? Or suppose that a merger between two companies in a market with several competitors would eliminate labor force inefficiencies and thus lower consumer prices. When do we decide that low consumer prices are too much of a good thing and must be kept high to protect redundant jobs and avoid the

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[147] *E.g.*, Khan, *supra* note 2, at 737.

[148] Lynn, *supra* note 6; *see also* Warren, *supra* note 128 (favorably citing proposals for "adopting a public interest standard for enforcement actions").

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challenge of retraining workers for more productive roles in the modern economy? The critics have no answer to such questions, let alone a formula that generalist courts could apply. Instead, the critics appear content to replace the consumer orientation of contemporary antitrust with a battery of conceptually empty epithets, which courts and juries could apply on an ad hoc basis to condemn anything that "distort[s] fair competition."[149] This standardless approach would benefit class action lawyers bringing strike suits. And it would give cover to government officials who, like Presidents Nixon and Kennedy, decide to use antitrust to reward political friends and crush political foes.[150] But it would disserve virtually everyone else, including ordinary consumers.

Although one would not know it from reading much of the popular press, antitrust's singular focus on consumer welfare enjoys remarkably broad support from economists and legal scholars across the political spectrum. For example, Carl Shapiro—a leading antitrust economist in the Obama and Clinton Administrations—warns:

> [L]et us avoid a "big is bad" mentality and let us truly have the interests of consumers in mind. We learned long ago that proper antitrust enforcement is about protecting consumers, and protecting the competitive process, not about protecting competitors. We must not forget that guiding principle. Indeed, that principle is especially important in markets subject to large economies of scale, whether those scale economies are based on traditional production economies or based on network effects, which are often important in the tech sector.[151]

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[149] Khan, *supra* note 2, at 795; *see also id.* at 780 (discussing "discrimination" and "conflicts of interest").

[150] *See* George Lardner Jr., *On Tape, Nixon Outlines 1971 "Deal" To Settle Antitrust Case Against ITT*, WASH. POST, Jan. 4, 1997 (describing White House intervention in antitrust proceedings involving political benefactor); Ed Kilgore, *Is Trump's War with Amazon Like Kennedy's War with U.S. Steel?*, NEW YORK MAG., Apr. 4, 2018 (noting that Attorney General Robert Kennedy "launched an antitrust investigation, summoned a federal grand jury, and sent FBI agents to the homes and offices of steel executives" after President Kennedy announced a political vendetta against steel companies); *see also* Callum Borchers, *Two Reasons Trump Loves One Media Merger But Hates Another: Fox News and CNN*, WASH. POST, Dec. 15, 2017 (speculating about White House influence in merger clearance decisions). These past episodes of abuse are answer enough to Tim Wu's curious proposal for injecting "non-economic … political values" into antitrust analysis. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI ANTITRUST CHRON., Apr. 2018, at 9. (The authors have advised AT&T in connection with the AT&T-Time Warner merger.)

[151] SHAPIRO, *supra* note 132, at 26.

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Herbert Hovenkamp, coauthor of the leading antitrust treatise for several decades, agrees, and sums up the academic consensus as follows:

> Should antitrust condemn every practice that reduces the defendant's prices or costs, or improves the quality of its product when rivals are injured or suppliers are worse off? That policy would rather quickly drive the economy back into the Stone Age, imposing hysterical costs on everyone. To be sure, there might be ways of limiting the rule. For example, we might say that lower prices or higher quality ought to be condemned only when it creates or threatens to create a monopoly. That approach might not be quite as bad, but it would be a strong barrier to innovation, and particularly to market shifting innovations that result in dominant firms. There would go Ford, Bell, IBM, Kodak, Polaroid, Xerox, Microsoft, Google, Apple and numerous others.[152]

As Hovenkamp suggests, companies like Amazon, Apple, Facebook, and Google have been built from the ground up in the United States rather than in Europe or China largely because the U.S. legal environment is stable, predictable, and uniquely hospitable to vigorous, paradigm-shattering competition by all economic actors, large and small. In Shapiro's words,

> [t]he fundamental danger that 21st century populism poses to antitrust in that populism will cause us to abandon [antitrust's consumer-welfare orientation] and thereby undermine economic growth and deprive consumers of many of the benefits of vigorous but fair competition. Economic growth will be undermined if firms are discouraged from competing vigorously for fear that they will be found to have violated the antitrust laws, or for fear they will be broken up if they are too successful.[153]

Consider Amazon—the focus of so much populist criticism. Amazon has added hundreds of billions of dollars of value to the U.S. economy. It employs more Americans than FedEx, Target, or General Electric. It enables tens of millions of Americans in less populous areas to shop easily for a vast array of goods and services that they would otherwise find difficult to obtain, and at exceedingly reasonable prices. It provides tools and services to help small

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[152] Hovenkamp, *supra* note 90, at 5.

[153] SHAPIRO, *supra* note 132, at 28.

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entrepreneurs increase their sales and expand their businesses. It is a brilliant innovator: just as Apple's iPod revolutionized how we listen to music, Amazon's website revolutionized how we shop for personal goods, Amazon's Kindle revolutionized how we read books, and Amazon's Echo is spurring innovation among many voice-enabled services and revolutionizing how we interact with connected devices in our homes and offices. And these breakthroughs have in turn helped launch new waves of innovation across retail and technology sectors, to the great benefit of consumers. For example, online retailing is now commonplace among traditional retailers, who often incorporate online marketplaces into their distribution strategies[154] and offer "omnichannel" experiences such as "click-and-collect" or "buy online and return in-store."[155]

Now imagine how Amazon would—or would not—have developed in a legal environment favored by the movement to "reform" antitrust. Once it grew beyond a certain size, perhaps by the late 1990s, its lawyers would have counseled it to go easy on expansion and price-cutting, lest it face treble-damage liability for the competitive disadvantages faced by less efficient rivals. The lawyers would have counseled Amazon to increase prices across the board, charge customers full freight for shipping rather than launch Amazon Prime, and not develop the Kindle or, at a minimum, hike Kindle book prices to keep e-books from becoming too attractive a substitute for physical books. Luckily, Amazon's lawyers did not give this advice because it would have badly misstated American antitrust law. We hope that such advice will never become sound.

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[154] *See*, *e.g.*, Daphne Howland, *Why The Marketplace Revolution Keeps Gaining Momentum*, RETAILDIVE, Jan. 31, 2017; Phil Wahba, *Here's the Latest Way Walmart Is Taking on Amazon and eBay*, FORTUNE, July 5, 2016; Fareeha Ali, *Crate and Barrel Launches an Online Marketplace*, INTERNET RETAILER, Nov. 18, 2016.

[155] *See generally* Raffaella Bianchi et al., *More Than Digital Plus Traditional: A Truly Omnichannel Customer Experience*, MCKINSEY&COMPANY (July 2016), https://www.mckinsey.com/business-functions/operations/our-insights/more-than-digital-plus-traditional-a-truly-omnichannel-customer.

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