

# The New Populist Movement in Antitrust: Could it Change the Status Quo and Does it Threaten American Businesses?

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**In recent years, a new populist school of antitrust thinking has emerged, known as “Neo-Brandeisian” to its proponents and “hipster” to its detractors. There are varying formulations of this movement, but proponents generally point to the purported increase in economic concentration and corporate profits in the U.S. economy to advocate for more aggressive antitrust enforcement, with respect to both mergers and other conduct. One notable element of this movement is a push to expand or even replace the established “consumer welfare” standard—which focuses on prices and outputs in balancing potential competitive harms against procompetitive efficiencies—by adopting a more rigid presumption that corporate “bigness” and large market share in themselves harm consumers. Some proponents, moreover, advocate for consideration of nontraditional factors in antitrust analysis, such as wages, employment levels, or growing inequality.**

Such approaches, which could significantly increase the burden on merging parties and allegedly dominant firms, have gained support from prominent figures on both the left and the right. Nevertheless, thus far, the new populism has not made notable inroads with antitrust practitioners, antitrust enforcement agencies, or the courts. The differences between long-standing practice and the new progressive antitrust proposals have come into sharp focus in recent weeks, taking center stage at the FTC’s ongoing “Hearings on Competition and Consumer Protection in the 21st Century.”

Could populist antitrust proposals replace the established consumer welfare framework for antitrust analysis in the United States? Whether the new populist antitrust agenda will take hold depends on the extent to which it can persuade the antitrust enforcement agencies, Congress, and the courts—all of which are interrelated and influence one another—of its underlying evidence and policy prescriptions. Indeed, the willingness of one of these government institutions to advance or reject populist perspectives could affect how open the others will be to revising antitrust thinking.

It is too early to tell whether any significant change will occur, or whether that change will reflect a fundamental departure from or just more aggressive enforcement within the existing framework. It is clear, however, that antitrust policy is in the midst of an important debate that could affect how antitrust agencies evaluate business conduct, potentially increasing burdens on merging parties, raising the likelihood of significant divestiture requirements, and limiting the business activities in which firms with large market share can engage. This client memorandum examines the core elements and growing influence of the progressive antitrust movement, reviews its possible acceptance by government institutions, and considers whether it could modify the consumer welfare standard as the framework for antitrust analysis in the U.S.

## Introduction

Debate over the appropriate standard for evaluating the competitive effects of business transactions and business conduct has long existed in the United States, with the dominant ideology shifting over time. Antitrust sentiment emerged during the Gilded Age of the 1880s in the midst of populist concern over growing corporate concentration and power, with both Democrats and Republicans rallying against the “trusts” that had come to dominate commerce. During the Progressive Era that followed, Congress

enacted the Sherman and Clayton Acts, and antitrust suits led to the breakup of corporate entities that restrained trade and manipulated markets. Following the First World War, however, American hostility to big business began to fade and antitrust enforcement ebbed.

By the 1960s, however, the pendulum had swung back to aggressive antitrust enforcement, especially against mergers. The leading perspective at the time was that consolidation was inherently bad and that efficiency provided scant justification in competition reviews. This thinking allowed the antitrust agencies to block mergers without putting forward much evidence that the mergers were likely to harm competition. For example, during this era the Supreme Court held that the merger of the 10th and 18th largest beer brewers in the U.S. (resulting in a combined national share of 4.49% and no higher than 24% in any state) was a violation of the merger laws in light of “a history of concentration in the beer industry.”<sup>1</sup>

In response to numerous enforcement actions that blocked business activities that would likely have benefited consumers, a new approach to antitrust thinking rose to prominence in the 1970s and 1980s. Known as the “Chicago School” because of its origin among economists and lawyers at the University of Chicago, this school of thought called for a greater emphasis on benefits to consumers and more rigorous economic analysis. It endorsed a “consumer welfare” standard for antitrust reviews, which balances an activity’s potential harm to consumers—generally experienced through higher prices, lower output, decreased quality, less choice, or reduced innovation—against procompetitive benefits such as lower prices, greater choice, or increased innovation.<sup>2</sup> Over time the consumer welfare standard, with its emphasis on economic benefits over structural presumptions, ultimately became the dominant approach, and it continues as the prevailing standard today, even as other elements of the Chicago School’s economic approach have been challenged from time to time.

Today’s emerging antitrust populism movement is a reaction to this post-Chicago status quo, which the movement criticizes as having resulted in under-enforcement, industry concentration, and greater wealth inequality. Accordingly, rather than emphasizing “consumer welfare,” measured by price and output levels, this loose-knit coalition promotes the incorporation of factors currently not included in antitrust analysis. These factors include loss of employment, increase in political influence, economic inequality, and impact on startup companies. Advocates point to the uneven recovery following the Great Recession as another catalyst for this new populist thinking—arguing that while stock markets and M&A activity have risen dramatically, ordinary Americans have been left behind. As in the 1880s, large corporations find themselves to be the populist antitrust movement’s primary target. This movement, limited until recently to a few academics and advocacy groups, has garnered more mainstream attention from practitioners and government actors, particularly members of Congress.

## The Antitrust Enforcement Agencies

The populist movement appears to have developed an audience, at least, with U.S. antitrust enforcement agencies, especially the Federal Trade Commission (“FTC”). Indeed, at the FTC’s hearings on antitrust and consumer protection issues (which will run through January 2019), populist arguments have taken

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<sup>1</sup> U.S. v. Pabst Brewing Co., 384 U.S. 546, 546 (1966); see also U.S. v. Vons Grocery Co., 384 U.S. 270 (1966) (blocking the merger of two grocery store chains in the Los Angeles area with a combined 7.5% of sales at the time of the merger in light of the stores’ growth in the preceding decade and perceived increasing concentration).

<sup>2</sup> There are still some antitrust matters that are per se illegal, without any balancing of potential harms and benefits once the conduct is proven, such as collusion between competitors (“price-fixing”) and members of the board of directors of one company sitting on the board of a competitor (“interlocking directorates”).

center stage during some sessions.<sup>3</sup> In his opening statement at the hearings, FTC Chairman Joseph Simons cited recent criticism of the consumer welfare standard as one of the primary challenges that the hearings were meant to address.<sup>4</sup> Thereafter, a variety of panelists cited corporate consolidation as a major driver of economic inequality and suggested that some proposals characterized as “populist” may not be all that unreasonable.<sup>5</sup> Even before the hearings began, FTC Commissioner Rohit Chopra (one of the Commission’s two Democratic members) published a comment letter proposing that the FTC use its rulemaking authority to “bolster antitrust enforcement.”<sup>6</sup>

In contrast, panelists at the second day of hearings generally leaned toward maintaining the status quo. While a few participants still made impassioned calls to scrutinize big companies more stringently (notably, Nobel-winning economist Joseph Stiglitz of Columbia University), panel discussions focused on practical steps for reform within the existing antitrust framework rather than adoption of new approaches. For instance, the panelists discussed more aggressive enforcement by agencies, the issuance of revised guidelines (e.g., vertical merger guidelines), the performance of industry-specific studies (e.g., on drug patents), and neglected facets of the consumer welfare standard (e.g., buy-side concentration, non-price effects, and encouraging innovative startups).<sup>7</sup> Panelists noted that the consumer welfare standard is flexible and can address an array of competitive harms, but that antitrust law is ill-suited to address broader policy concerns, such as inequality or unemployment. Such arguments regarding the appropriate criteria and presumptions for evaluating antitrust harm will likely resurface in future sessions—notably on panels that will discuss the competitive effects of mergers, measurement of market power and barriers to entry, and the interaction between large technology companies and antitrust.

Perhaps most importantly, though the FTC’s hearings entertained a diversity of viewpoints, President Trump’s appointees to the FTC and the Department of Justice’s Antitrust Division (“DOJ”) have expressed support for established norms. While Chairman Simons has acknowledged criticisms levied against the consumer welfare standard, as Director of the FTC’s Bureau of Competition (from 2001 to 2003), he took an economics-driven approach to enforcement and recognized the importance of procompetitive justifications.<sup>8</sup> Further, since he became chairman, Simons has made clear his view that “basing antitrust policy and enforcement decisions on an ideological viewpoint (from either the left or the right) is a mistake.”<sup>9</sup> Perhaps more strongly, the head of the Antitrust Division, Makan Delrahim, stated that “we don’t need to go beyond the consumer welfare standard, because it can get the job done on its own” and that “there are serious risks to democracy in abandoning the consumer welfare standard.”<sup>10</sup>

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<sup>3</sup> New York Times, [F.T.C. Hearings Add to Efforts That Threaten Tech Industry](#) (Sept. 13, 2018) (quoting FTC Chairman Joseph Simons in discussing concerns over large tech companies as stating “[t]hese concerns raise a challenge to antitrust agency leadership, the courts and legislature”).

<sup>4</sup> [Competition and Consumer Protection in the 21st Century: Welcome and Session 1](#) (Sept. 13, 2018).

<sup>5</sup> E.g., Jason Furman, Kennedy School, Harvard University, Panel Participant, [Transcript of FTC Hearing #1: Competition and Consumer Protection in the 21st Century, Segment 1](#) (Sept. 13, 2018) (asserting that re-examining certain facets of current antitrust analysis based on decades-old studies and thinking may be important in furthering appropriate antitrust enforcement, and disagreeing that it would be inherently “populist and barbarian”).

<sup>6</sup> See Rohit Chopra, Comm’r, Fed. Trade Comm’n, [Comment of Commissioner Rohit Chopra on Hearing #1 on Competition and Consumer Protection in the 21st Century](#) (Sept. 6, 2018).

<sup>7</sup> In furtherance of this view, at an antitrust conference on September 25, 2018, FTC Chairman Simons said that the FTC is thinking about how to bring cases within the existing antitrust framework against large technology companies buying startups. Bloomberg, [Big Tech’s Purchases of Startups Under Microscope, FTC Chief Says](#) (Sept. 26, 2018).

<sup>8</sup> For more detail, see Davis Polk’s Client Memorandum, [Trump’s Nominees for the FTC](#) (Oct. 19, 2017).

<sup>9</sup> [FTC Hearings, Opening Statement](#) (Sept. 13, 2018).

<sup>10</sup> Makan Delrahim, Ass’t Att’y Gen. Antitrust Div., [Public Remarks at an Open Market Institute Event](#) (June 12, 2018).

Accordingly, we view it as unlikely that the current slate of antitrust enforcement officials will depart much from the consumer welfare standard, certainly not dramatically or immediately.

## Congress

Legislation might present a more likely path for changing our current antitrust framework. Some Democrats have already outlined a plan to strengthen the antitrust laws in order to “address excessive concentration” and end corporate “abuse of economic power.”<sup>11</sup> A recent Democratic congressional platform, “A Better Deal,” includes proposals that would appear to depart from the consumer welfare approach as well as otherwise toughening the antitrust laws. These proposals include: (1) requiring the antitrust agencies to consider whether mergers eliminate jobs or hinder the ability of small businesses to compete; (2) requiring post-merger reviews of companies to ensure that they are not harming competition (which could allow the imposition of post-closing remedies); (3) creating a “consumer competition advocate”—independent of the antitrust enforcement agencies—that would recommend investigations; and (4) providing that “the largest mergers would be *presumed* to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal.”<sup>12</sup>

To this end, Senate Democrats have already introduced several bills.<sup>13</sup> Most notably, the Consolidation Prevention and Competition Promotion Act of 2017 (“CPCPA”) introduced by Amy Klobuchar (D-MN), the Ranking Democrat on the Antitrust Subcommittee, would amend Section 7 of the Clayton Act (the statute governing merger enforcement) to make it easier for the antitrust agencies to prohibit a transaction. The core of the proposal would lower the standard of proof for an agency to block a merger from a “substantial” to a “material” lessening of competition (although the practical difference is hard to pin down from the language itself). Another provision of the CPCPA, which would apply to targets worth more than \$5 billion when the acquiring company has a market capitalization of at least \$100 billion, would require the *merging parties* to prove that there is no “material” lessening of competition. (The long-standing current standard puts the burden of proof on the antitrust agency.)<sup>14</sup> Relatedly, Senator Elizabeth Warren (D-MA) suggested requiring Amazon to divest all of its assets other than its e-commerce platform, much as banks were once required to do under the Glass-Steagall Act.<sup>15</sup>

As a practical matter, if turned into law, these proposals would make it notably easier for the enforcement agencies to block transactions, particularly large ones—affecting many of the almost 2,000 transactions

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<sup>11</sup> Press Release, [Hillary Clinton’s Vision for An Economy Where Our Businesses, Our Workers, and Our Consumers Grow and Prosper Together](#) (Oct. 3, 2016).

<sup>12</sup> Senate Democrats, [A Better Deal: Cracking Down on Corporate Monopolies](#) (emphasis added).

<sup>13</sup> See, e.g., Eric Kroh, [Merger Bills Show Dems Embracing Antitrust Enforcement](#), Law360 (Sept. 18, 2017).

<sup>14</sup> The CPCPA would also establish an Office of Competition Advocate, an independent office that would recommend antitrust investigations to the FTC and DOJ, and require companies to provide certain post-merger settlement data to the agencies, for the purpose of allowing the agencies to monitor consent decree effectiveness.

Multiple other bills have also recently been introduced that would impact antitrust, particularly merger, enforcement. In May 2018, the House passed the SMARTER Act (which lowers the FTC’s burden to block a transaction in order to match the DOJ standard); the SMARTER Act is still pending in the Senate. The Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2018 would impose a moratorium on large agribusiness, food and beverage manufacturing, and grocery retail mergers and would establish a commission to review competition issues in those industries. The Journalism Competition and Preservation Act of 2018 would temporarily exempt small news publications from the antitrust laws in order to give them negotiating leverage against the “duopoly” of Google and Facebook in online advertising.

<sup>15</sup> [Andrew Ross Sorkin Interview with Senator Elizabeth Warren](#), at 26:45 (Sept. 13, 2018).

each year that parties report to the FTC and DOJ.<sup>16</sup> Transaction data suggest that in the first half of 2018 almost 20% of transactions were valued at over \$5 billion,<sup>17</sup> while another source notes that there have been 243 announced transactions valued at over \$5 billion in the past five years.<sup>18</sup> Just listing a few recent mergers with buyer market capitalization over \$100 billion and targets valued at over \$5 billion provides a glimpse of the potential impact the “large merger” provision could have: Disney/21st Century Fox; UTC/Rockwell Collins; Amazon/Whole Foods; Dow/DuPont; and AT&T/Time Warner. In addition to these merger-related impacts, under the various proposed measures, companies run the risk of triggering heightened antitrust consequences as they cross certain size thresholds, even if purely through successful competition on the merits of their products and services.

Some Republicans, most notably Senator Ted Cruz (R-TX) and President Trump, have also adopted populist antitrust rhetoric. A former Director of the FTC’s Office of Policy Planning, Senator Cruz has suggested using the antitrust laws to curtail the position of large technology platforms.<sup>19</sup> President Trump has often made public statements that echo populist antitrust rhetoric. While on the campaign trail, he pledged to block the AT&T/Time Warner transaction, stating that it would concentrate too much “power in the hands of too few.”<sup>20</sup> He also promised to break up companies that he considered to be too large and to have too much political influence. More recently, the White House has reportedly drafted an Executive Order that calls for the antitrust agencies to probe leading tech companies for alleged “antitrust” violations relating to a perceived bias against conservatives on online platforms.<sup>21</sup> As of the date of this Client Memorandum, the Executive Order has not been publicly released.

While these legislative proposals and supportive rhetoric should give companies pause, there has so far been nothing close to a clarion call or imminent consensus for competition law reform in Congress. Though statements like those from Senator Cruz might suggest bipartisan interest in antitrust reform, a notably different take comes from Senator Orrin Hatch (R-UT): commenting on the Democrats’ “A Better Deal” platform, Hatch, stated that this “peculiar set of proposals” leaves him “deeply unimpressed.”<sup>22</sup> The silence on the issue from most legislators on both sides of the aisle does not suggest antitrust reform at this time has much momentum. But the Congress next year may have a different calculation.

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<sup>16</sup> FTC and DOJ, [Hart-Scott-Rodino Annual Report \(FY2017\)](#), at Exhibit A. This figure does not take into account transactions that are not required to be reported to the FTC and DOJ.

<sup>17</sup> Pitchbook, [10 charts illustrating M&A activity in 2Q 2018](#) (Aug. 28, 2018).

<sup>18</sup> Intelligize, Mergers & Acquisitions Database.

<sup>19</sup> Daily Caller, [“Profoundly Dangerous” – Ted Cruz Just Put Mark Zuckerberg On Notice](#) (Apr. 25, 2018); see also Multichannel News, [Sen. Warren Signals Amazon Needs Shaking Up](#) (Sept. 14, 2018); footnote 15, *supra*.

<sup>20</sup> [Campaign Speech in Gettysburg, PA](#) (Oct. 22, 2016).

<sup>21</sup> Ben Brody, [White House Considers Draft Order to Look Into Google, Facebook, Bloomberg](#) (Sept. 22, 2018). Other conservative leaders can be seen as expressing a somewhat similar view. For example, the Department of Justice and several state attorneys general have recently begun to focus on technology companies, in part out of concern that these companies are using their market positions to bury conservative views. John D. McKinnon, [More States to Join Justice Department’s Discussion of Social Media Companies](#), Wall Street Journal (Sept. 14, 2018); Mark Ballard, [Louisiana AG Jeff Landry wants to break up social media giants](#), Advocate (Sept. 18, 2018); see also Steve Hilton, *Positive Populism* (2018) (proposing that conservatives should embrace the legacy of Republican trust-busters like President Teddy Roosevelt and Senator John Sherman (R-OH) and confront the market power of big tech by imposing regulation, and proposing that companies with higher market shares pay higher taxes).

<sup>22</sup> Floor Remarks, Aug. 3, 2017 (as reported by Wired, [Do Not Mistake Orrin Hatch for #HipsterAntitrust](#) (Aug. 3, 2017)).

## The Judiciary

The judiciary has historically played arguably the most critical role in antitrust enforcement, interpreting the vast delegations of authority given to it under the antitrust laws as well as reviewing cases brought by the agencies and private parties. Indeed, the Supreme Court has noted that antitrust is, perhaps uniquely, a form of federal common law because of its largely court-driven evolution. Notably, in recent years the Supreme Court has repeatedly taken positions making antitrust enforcement more difficult, holding that antitrust laws do not limit certain types of conduct and rejecting efforts to minimize plaintiffs' burdens of proof. For example, in 2004 the Supreme Court in *Trinko* (and again in 2009, in *Credit Suisse*) placed important limits on antitrust intervention in regulated sectors of the economy. The *Trinko* Court also warned about the overextension of antitrust intervention, noting that "The Sherman Act...does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach may yield greater competition."<sup>23</sup> Moreover, just last term the Supreme Court ruled in *Ohio v. American Express* that plaintiffs bear a particularly high burden when proving anticompetitive effects in two-sided markets when there are "pronounced indirect network effects and interconnected pricing and demand."<sup>24</sup> Courts must balance the benefits that the platform's actions bring to one side of the platform against any potential harm to the other side. The practical effect of this decision is that it becomes more difficult for a plaintiff to establish an antitrust violation, which could have a notable impact in the growing technology sector of the economy.<sup>25</sup> The Supreme Court's conservative/centrist bent in antitrust cases is likely to strengthen with the addition of Justice Kavanaugh, and even sitting "liberal" Justices Breyer and Kagan have expressed support for the existing "consumer welfare" standard.<sup>26</sup>

Lower courts have also resisted changes to the consumer welfare approach and to the economic methods used to assess conduct under that standard, as exemplified this summer when the D.C. District Court rejected the DOJ's effort to block the AT&T/Time Warner transaction. AT&T/Time Warner involved a rare agency challenge to a vertical merger, and in his opinion, Judge Leon emphasized that the vertical merger would result in savings and no elimination of competition.<sup>27</sup> The case is on appeal to the D.C. Circuit, with a decision likely in early 2019. Should the case end up before the Supreme Court, it would be the first merger case before the Court in several decades. Accordingly, it seems unlikely that populist antitrust proposals will take hold through judicial intervention in the foreseeable future.<sup>28</sup>

## Conclusion

The conflict between emerging populist antitrust ideas and the established consumer welfare standard has become a central topic in the press, among lawmakers, and at the ongoing FTC Hearings on Competition and Consumer Protection in the 21st Century. Whether the outcome of these hearings leads to a new consensus in antitrust thinking or leaves the current standard intact is unclear, although, as we have stated, we do not think significant change is imminent through the agencies, Congress, or the courts. Nonetheless, this unfolding debate and the responses of government institutions warrant continuing attention, given the potential stakes for enterprises doing business in the United States.

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<sup>23</sup> *Verizon Comm'n's Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 416 (2004).

<sup>24</sup> See *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2286-87 (2018).

<sup>25</sup> See *id.* As described in this memorandum, two-sided platforms (like Amazon and Facebook) are increasingly the subject of political backlash.

<sup>26</sup> In *FTC v. Actavis* (2013), the Court rejected the FTC's attempt to make reverse payment settlement agreements presumptively unlawful, forcing the FTC to "prove its case" under a more difficult "rule of reason" standard.

<sup>27</sup> *U.S. v. AT&T Inc.*, 310 F. Supp. 3d 161, 164 (D.D.C. 2018).

<sup>28</sup> But, of course, the same was initially believed about the Chicago School's replacement of the previous structural approach.

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