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ANTITRUST POPULISM

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*In antitrust literature, “populism” is associated with sympathy for small local businesses and fears of large firms. In other areas and everyday language, “populism” means a confrontational approach that is used to attack institutions and influential elites. With the rise of populism in the United States and around the world, this Article questions the antitrust tradition of equating populism with ideas that shaped antitrust law a century ago. The tradition shields contemporary antitrust populists from the criticism and stigma that they deserve and, thus, empowers populist ideas that courts and scholars frequently endorse.*

*The Article makes three contributions to antitrust literature and the understanding of antitrust law. First, the Article clarifies the general characteristics of populism, contrasting the alleged cause of serving “the people” with the phenomenon’s costly dogmatic, anti-intellectual, and destructive methods. It then defines “antitrust populism” as an expression of the populist style in antitrust law and literature—the use of thin ideas, exaggerations, and anxieties to advance antitrust theories. Properly understood, certain forms of antitrust populism rely on dogmatic beliefs that reject nuanced policies and the need for analysis. Second, the Article identifies anti-bigness and anti-enforcement sentiments as the two primary populist strains in antitrust law and literature. Each strain is related to a populist political movement, guided by distrust in institutions, decorated with various theories, and critical of the other strain. Third, the Article explores the relationship between technological progress and antitrust populism. It explains why rapid technological change tends to inspire antitrust populists. The Article argues that courts, the agencies, and scholars should make an effort to reject populist arguments for their anti-intellectual nature and other flaws.*

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### INTRODUCTION



In antitrust literature, “populism” is associated with “an old native Populist strain in American thought, which identifies virtue with the small local businessman and evil with the banks, the railroads, and big corporations.”<sup>1</sup> This strain is marginalized in modern antitrust

1. Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, *FORTUNE*, Dec. 1963, at 138, 201. For expressions of this interpretation in the literature, see, e.g., Oliver Grawe, *Populism, Economists, and the FTC*, *ANTITRUST SOURCE*, Apr. 2017, at 1 (“Populists appear to share a fear or concern about concentrations of power.”); Steven C. Salop & Carl Shapiro, *Whither Antitrust Enforcement in the Trump Administration*, *ANTITRUST SOURCE*, Feb. 2017, at 2 (arguing that the term “populism” has been used to describe an approach seeking to reduce “the power of large corporations in the American economy.”); James C. Cooper, *A Return to Antitrust Populism?*, *ANTITRUST SOURCE*, Feb. 2017, at 1 (arguing that antitrust populism refers to the approach that “big is bad”); *What Is Trump Antitrust?*, 4 *CONCURRENCES: COMPETITION L. REV.* (2016) (a collection of essays referring to populism as aggressive antitrust enforcement that targets concentrated markets and large corporations); Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 *NEB. L. REV.* 370, 373 (2014) (arguing that courts should “strengthen the historic commitment of antitrust law to consumer populism”); Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2553–58 (2013) (identifying populism with aggressive enforcement); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 *N.Y.U. L. REV.* 659, 668 (2010) (identifying a “populist school” that arguably claims that “the Sherman Act . . . bans any conduct that restrains the auton-

law.<sup>2</sup> Thus, some have argued that “antitrust populism is long dead.”<sup>3</sup> The tradition of equating populism with certain outdated ideas reflects neither the common meaning of populism nor the broad understanding of antitrust law. For more than fifty years, this tradition has been shielding contemporary antitrust populists from the criticism and stigma they deserve, by using the stigma of populism against past ideas and implying that other ideas are not populist. Stated differently, the common meaning of “populism” in antitrust literature reflects a successful demonization of certain ideas that overshadows

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omy of traders or results in a concentrated marketplace.”); Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008) (criticizing the populist approach to antitrust and arguing that it vanished with the adoption of economic standards); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 220 (1995) (arguing that the “Modern Populist School” included antitrust scholars who argued that antitrust analysis should not exclusively rely on economic principles); Michael E. DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 HARV. J. L. & PUB. POL’Y 205, 206 (1991) (describing antitrust populist goals as “fair distribution of business opportunities and income and the dispersal of political and economic power.”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 n. 23 (1984) (describing “antipathy to business” as “populist”); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981) (defending the need to limit the power of large corporations); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) (same); Louis B. Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244 (1978) (same); Thomas E. Kauper, *The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968) (studying the fear of concentration of the Warren Court); Harold Fleming, *The Supreme Court and Big Business*, HARPER’S MAG., June 1950, at 89 (equating populism with the fear of bigness).

2. See, e.g., *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (“[W]e would resist interpretation [of the antitrust laws] geared more to the protection of existing *competitors* than to the stimulation of *competition*.”). See generally Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. REV. 605 (2012).

3. DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 113 (2011). See also Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 522 (2006) (arguing that in the mid-twentieth century “consumers and producers reached a political bargain to adopt a regime that protects competition through antitrust enforcement,” ending a political debate over competition policy); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1705 (1986) (“Twenty years ago, . . . the antitrust decisions of the Supreme Court ran to populism . . . to protect ‘small dealers and worthy men’ in small markets.”).

other forms of populism that are pervasive in antitrust law and policy.

In every context but antitrust law, “populism” means a confrontational approach that is not defined by any coherent philosophy and may be expressed in many ways. Populism’s primary characteristic is the vilification of institutions—the “establishment” and the “elites”—to gain influence, not necessarily antipathy to large businesses.<sup>4</sup>

This Article questions the antitrust tradition of associating populism with sympathy for small businesses and fears of large businesses. It seeks to correct the misguided approach to populism in antitrust thinking that results in accommodation and even endorsement of populism. The Article makes three contributions to the literature. First, the Article summarizes the general characteristics of “populism” and the “populist style.” It defines “antitrust populism” as an expression of the populist style in antitrust law and literature. Second, the Article identifies and compares two primary populist strains in antitrust law and literature. One strain is the anti-bigness approach. Another strain is an anti-enforcement approach. Both strains rely on strong beliefs that rationalize their uncompromising positions. Since the late 1970s,<sup>5</sup> the anti-enforcement strain has been dominating the development of antitrust law.<sup>6</sup> It is the signature mark of the antitrust jurisprudence of the Roberts Court and certain antitrust commentators.<sup>7</sup> Third, the Article

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4. See *infra* Part I.A.

5. See *Cont’l T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) (holding that non-price vertical restraints should be reviewed under the rule of reason); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (creating the “antitrust injury” doctrine); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (creating the “direct purchaser” doctrine). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (reshaping the standards for motion to dismiss); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (reshaping the standards for motion for summary judgment). See also George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMP. L. & ECON. 1 (2010) (summarizing the spirit of the Chicago School antitrust tradition).”

6. See, e.g., U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008); Easterbrook, *supra* note 1.

7. For the Roberts Court see Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); Noam Scheiber, *As Americans Take Up Populism, the Supreme Court Embraces Business*, N.Y. TIMES (Mar. 11, 2016), at B1. For criticism of conservative antitrust commentators see

discusses the relationships between technological progress and antitrust populism.

## I.

### WHAT IS POPULISM?

#### A. *Common Characteristics*

During the past three decades, populism has been on the rise in the United States and around the world.<sup>8</sup> In 2016, the Republican Party, led by Donald Trump, seized control of the White House and the two houses of Congress.<sup>9</sup> Trump won the Presidency with radical populism and grandiose promises to serve all people,<sup>10</sup> empower the American worker,<sup>11</sup> act against large businesses,<sup>12</sup> appoint conservative judges,<sup>13</sup> and implement radical nationalism.<sup>14</sup> Trump's populism exhibited disregard of the rule of law, an open distaste for science and economics, as well as use of divisive rhetoric, hyperbolic

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Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

8. See, e.g., JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016).

9. See Janet Hook et al., *President Trump: Populist Surge Lifts Republican to Upset*, WALL ST. J., Nov. 9, 2016, at A1; Mark Landler, *A Broadside for Washington*, N.Y. TIMES, Jan. 21, 2017, at A1 (describing President Trump's Inaugural Address as "a scalding repudiation of the Washington establishment").

10. See, e.g., Julie Hirschfeld Davis & Michael M. Grynbaum, *Trump Intensifies His Attacks on Journalists and Condemns F.B.I. 'Leakers'*, N.Y. TIMES (Feb. 24, 2017), at A1; *This Moment Is Yours*, N.Y. TIMES, Jan. 21, 2017, at A16 (annotating President Trump's Inaugural Address); Jim Dwyer, *Drawing a Line From Theories to Untruths*, N.Y. TIMES, Feb. 8, 2017, at A21 (describing Donald Trump's use of conspiracy theories, false claims, and attacks on the press); Michael M. Grynbaum, *Trump Calls Media the 'Enemy of the American People'*, N.Y. TIMES, Feb. 18, 2017, at A15.

11. Michael Scherer, *The Person of the Year*, TIME, Dec. 19, 2016, at 46, 49, 58.

12. See, e.g., Bret Stephens, *The Plot Against America*, WALL ST. J., Oct. 18, 2016, at A9 (commenting on Donald Trump's campaign against the "global power structure"); Holman W. Jenkins, Jr., *Donald Trump's Amazon Adventure*, WALL ST. J., May 14, 2016, at A11 (describing Donald Trump's threats to act against Amazon on antitrust grounds).

13. See, e.g., Kyle Peterson, *Trump's Supreme Court Whisperer*, WALL ST. J., Feb. 4, 2017, at A11 (quoting President Trump proclaiming: "We're going to have great judges, conservative, all picked by the Federalist Society.").

14. See, e.g., *An Insurgent in the White House*, ECONOMIST, Feb. 4, 2017, at 7; *America First and Last*, ECONOMIST, Feb. 4, 2017, at 17.

claims, lies, conspiracy theories, and attacks on the press.<sup>15</sup> The contradictions and contrasts left antitrust experts uncertain about the direction of antitrust law,<sup>16</sup> yet many experts continued to warn that antitrust may return to populism, referring to voices hostile to large businesses.<sup>17</sup> The mismatch between the present tide of populism and experts' depictions of populism calls for clarification.

Studies of "populism" identify the phenomenon as a confrontational approach that may be expressed in many ways, ranging from a reasoning technique to a political strategy to a political movement. The essence of populism is an effort to disrupt the existing social order by solidifying and mobilizing the animosity of "the people" against the "corrupt elites" and the "establishment."<sup>18</sup> The approach is typically used by outsid-

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15. See, e.g., Matt Taibibi, *The Madness of Donald Trump*, ROLLING STONE, Oct. 5, 2017, at 32; Charles Sykes, *Insane Clown Posse*, NEWSWEEK, Sept. 29, 2017, at 17; David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES, June 25, 2017, at SR10; James Risen & Tom Risen, *Donald Trump Does His Best Joe McCarthy*, N.Y. TIMES, June 22, 2017, at SR2; *The War on Journalism*, L.A. TIMES, Apr. 5, 2017, at A12; *Why the President Lies*, L.A. TIMES, Apr. 4, 2017, at A10; *Conspiracy Theorist in Chief*, L.A. TIMES, Apr. 3, 2017, at A11; *Our Dishonest President*, L.A. TIMES, Apr. 2, 2017, at A17; Jim Dwyer, *Drawing a Line from Theories to Untruths*, N.Y. TIMES, Feb. 8, 2017, at A21; Sendhil Mullainathan, *The Disappearing Economist*, N.Y. TIMES, Feb. 26, 2017, at BU6; Michael M. Grynbaum, *Trump Calls Media the "Enemy of the American People"*, N.Y. TIMES, Feb. 18, 2017, at A15; Quinta Jurecic, *Trumpelstiltskin*, WASH. POST, Jan. 29, 2017, at B4; Nancy Gibbs, *The Choice*, TIME, Dec. 19, 2016, at 44; Michael Scherer, *The Person of the Year*, TIME, Dec. 19, 2016, at 46; *Art of the Lie*, ECONOMIST, Sept. 10, 2016, at 9; *Yes, I'd Lie to You*, ECONOMIST, Sept. 10, 2016, at 17; Dan P. McAdams, *The Mind of Donald Trump*, ATLANTIC, June 2016, at 76. See also David Von Drehle, *The Second Most Powerful Man in the World?*, TIME, Feb. 13, 2017, at 24 (profiling Steve Bannon, the White House's Chief Strategist in the Trump Administration).

16. See, e.g., *What Is Trump Antitrust?*, CONCURRENCES NO. 4-2016, Nov. 2016.

17. See, e.g., *id.* (a collection of essays); Grawe, *supra* note 1; Salop & Shapiro, *supra* note 1; A.B.A. SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT 2-3, 34-35 (2017).

18. See Bart Bonikowski & Noam Gidron, *The Populist Style in American Politics: Presidential Campaign Discourse, 1952-1996*, 94 SOC. FORCES 1593, 1593-94 (2016) (defining "populism" as "a form of politics predicated on a moral vilification of elites and a concomitant veneration of the common people" and finding that "populism is primarily a strategic tool of political challengers, and particularly those who have legitimate claims to outsider status"); Robert R. Barr, *Populists, Outsiders and Anti-Establishment Politics*, 15 PARTY POL. 29, 44 (2009) (defining populism as "a mass movement led by an

ers, mavericks, and ideologues when institutions appear to cause or neglect social and economic problems of “the people.”<sup>19</sup> Historically, rapid technological advancements, economic crises, and changes in the composition of the population were conducive to populism.<sup>20</sup> Otherwise, populism often serves as a persuasion technique and inspires ideological beliefs. Populism can be found throughout the political spectrum, but is concentrated at the poles.<sup>21</sup> It does not have contextual characteristics—the phenomenon defies political classifications and tends to include inconsistent and even contradicting elements.<sup>22</sup>

Two common characteristics of populism are nationalism and anti-intellectualism. Populist nationalism is a product of commitments to “the people,” as opposed to “others.” Like populism itself, populist nationalism is an evasive concept that may mean anything from national pride and efforts to main-

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outsider or maverick seeking to gain or maintain power by using anti-establishment appeals and plebiscitarian linkages”); Cas Mudde, *The Populist Zeitgeist*, 39 *GOV'T & OPPOSITION* 541, 543 (2004) (defining populism as “an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the . . . general will of the people”); Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 *POL. STUD.* 2, 3 (1999) (defining populism as “an appeal to ‘the people’ against both the established structure of power and the dominant ideas and values of the society”); MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 1 (rev. ed. 1998) (defining populism as “a language whose speakers conceive of ordinary people as a noble assemblage not bounded narrowly by class, view their elite opponents as self-serving and undemocratic, and seek to mobilize the former against the latter”). See also *Playing With Fear*, *ECONOMIST*, Dec. 12, 2015, at 15 (“Populists differ, but the bedrock for them all is economic and cultural insecurity.”); George Packer, *The Populists*, *NEW YORKER*, Sept. 7, 2015, at 23 (“That’s the volatile nature of populism: it can ignite reform or reaction, idealism or scapegoating. It flourishes in periods . . . when large numbers of citizens who see themselves as the backbone of America . . . feel that the game is rigged against them.”).

19. See, e.g., Bonikowski & Gidron, *supra* note 18, at 1594; Barr, *supra* note 18, at 44.

20. See KAZIN, *supra* note 18; ERNESTO LACLAU, *ON POPULIST REASON* (2005).

21. See Mudde, *supra* note 18 at 542.

22. LACLAU, *supra* note 20.

tain national identity to isolationism and anti-globalism.<sup>23</sup> Populist anti-intellectualism refers to the willingness of populists to seek endorsement of low-information audiences, rejection of facts and criticism, common use of conspiracy theories, and targeting of intellectuals as “corrupt elites.”<sup>24</sup> Populist thinkers sometimes include intellectuals, such as those of the Progressive movement in the early 20th century and the conservative movement in the late 20th century.<sup>25</sup> But the participation of intellectual thinkers in populist movements does not cure their anti-intellectual nature. Historian Richard Hofstadter famously identified in populism a “paranoid style,” which he described as a crusading mentality of “angry minds” that use thin ideas with “heated exaggeration, suspiciousness, and conspiratorial fantasy.”<sup>26</sup> Hofstadter’s characterization captures the spirit of the populist style: a persuasion technique that utilizes exaggerations and anxieties to promote certain ideas supposedly to serve the public.<sup>27</sup> Political populism periodically gains power, but the populist style has always been common and is here to stay.<sup>28</sup> It is this style that defines populists, not their commitments to particular ideas.

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23. Barr, *supra* note 18; Canovan, *supra* note 18; Mudde, *supra* note 18; KAZIN, *supra* note 18. See generally *Why They’re Wrong*, ECONOMIST, Oct. 1, 2016, at 11; John O’Sullivan, *Special Report: The World Economy*, ECONOMIST, Oct. 1, 2016; *The New Nationalism*, ECONOMIST, Nov. 19, 2016, at 11; *League of Nationalists*, ECONOMIST, Nov. 19, 2016, at 63; *Drawbridges Up*, ECONOMIST, July 30, 2016, at 16 (explaining that “[t]he divide in rich countries is not between left and right but between open and closed”).

24. See, e.g., RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1962); Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER’S, Nov. 1964, at 77; MATT K. LEWIS, *TOO DUMB TO FAIL* xxx (2016) (“The word [intellectuals] has a negative connotation on the Right.”); James Surowiecki, *The Populism Problem*, NEW YORKER, Feb. 15, 2010, at 50 (“[The] new populism has stitched together incompatible concerns and goals into one ‘I’m mad as hell’ quilt.”).

25. See KAZIN, *supra* note 18.

26. Hofstadter, *The Paranoid Style in American Politics*, *supra* note 24.

27. For the use of reasoning to advance arguments see Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57 (2011) (discussing empirical literature showing that people tend to use reasoning to persuade others, not to evaluate their own ideas, and often fail to recognize that they do so).

28. See KAZIN, *supra* note 18.

### B. *Defining Antitrust Populism*

The populist style—used as a reasoning instrument—often appears in antitrust law and policy, as well as in antitrust literature. “Antitrust populism,” thus, may be defined as an expression of the populist style in antitrust law and literature—the use of thin ideas, exaggerations, and anxieties to advance antitrust theories. Two vocal strains in antitrust law have these characteristics and are closely related to populist political movements. For their affiliations to political movements, these strains are casually known as “liberal” and “conservative,” but may be better described as “anti-bigness” and “anti-enforcement” populist strains. Anti-bigness populism is the old strain that has been traditionally known in antitrust literature as “populism.” This strain seeks to protect the local control of industries by small businesses and identifies business size as evil.<sup>29</sup> Justices Brandeis and Douglas greatly contributed to this line of antitrust populism. Brandeis was often described with titles that bespeak the aura of populism: “the people’s lawyer”<sup>30</sup> and the “principal champion of small business.”<sup>31</sup> Before his appointment to the Supreme Court, Brandeis wrote a highly influential series of articles for *Harper’s Weekly*, which discussed the “Money Trust” problem and advocated for using the antitrust laws against large industrial companies and the financial industry.<sup>32</sup> The most famous article in this series was

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29. See, e.g., *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962) (relying on anti-bigness sentiments to block a merger).

30. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 227 (2009); John Braeman, “*The People’s Lawyer*” Revisited: *Louis D. Brandeis versus the United Shoe Machinery Company*, 50 *AM. J. L. HIST.* 284 (2010). See also LOUIS D. BRANDEIS, *BUSINESS – A PROFESSION* 321 (1914) (“We hear much of the ‘corporation lawyer,’ and far too little of the ‘people’s lawyer.’ The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.”).

31. Milton Handler, *Introductory – The Brandeis Conception of the Relationship of Small Business to Antitrust*, 16 *A.B.A. SEC. ANTITRUST L.* 13, 14 (1960). See also Richard P. Adelstein, “*Islands of Conscious Power*”: *Louis D. Brandeis and the Modern Corporation*, 63 *BUS. HIST. REV.* 614, 615 (1989) (describing Justice Brandeis as the “indefatigable champion of small enterprise”); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 41 (1978) (“It is well known that a strong underlying policy orientation of Brandeis’ approach was sympathy for small, perhaps inefficient traders who might go under in fully competitive markets.”).

32. *Banker-Management*, *HARPER’S WKLY.*, Aug. 16, 1913, at 14; *The Solution of the Trust Problem*, *HARPER’S WKLY.*, Nov. 8, 1913, at 18; *Cutthroat Prices*,

*A Curse of Bigness*, which iconized the condemnation of business size. Brandeis's writing has inspired many anti-bigness advocates. Justice William Douglas, who succeeded Justice Brandeis on the Court, pressed the pro-enforcement line far further than Brandeis.<sup>33</sup>

By contrast, the anti-enforcement strain emphasizes criticism of enforcement institutions and identities reasons to avoid antitrust enforcement. It builds on exaggerated beliefs that markets are competitive and tend to correct themselves relatively quickly, whereas erroneous antitrust enforcement is common and impairs market functioning. Robert Bork is the most influential thinker behind this strain of populism. Bork's famous antitrust paradox is largely a critique of Brandeis's anti-bigness populism and the Supreme Court that supposedly endorsed Brandeis's ideas.<sup>34</sup> Bork believed that antitrust law had "so decayed" that it was "no longer intellectually respecta-

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HARPER'S WKLY., Nov. 15, 1913, at 10; *Breaking the Money Trust*, HARPER'S WKLY., Nov. 22, 1913, at 10; *How the Combiners Combine*, HARPER'S WKLY., Nov. 29, 1913, at 9; *The Endless Chain*, HARPER'S WKLY., Dec. 6, 1913, at 13; *Serve One Master Only!*, HARPER'S WKLY., Dec. 13, 1913, at 10; *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10; *Where the Banker Is Superfluous*, HARPER'S WKLY., Dec. 27, 1913, at 18; *Big Men and Little Business*, HARPER'S WKLY., Jan. 3, 1914, at 11; *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18; *The Inefficiency of the Oligarchs*, HARPER'S WKLY., Jan. 17, 1914, at 18. Brandeis later published some of the articles in a book that focused on the financial sector. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1914).

33. C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895 (2008). See also *United States v. Columbia Steel Co.*, 334 U.S. 495, 535–36 (1948) (Douglas, J., dissent):

We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. The Curse of Bigness shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices . . . [S]ize . . . the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist.

34. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 408 (1978) ("The paths [of] . . . antitrust law . . . [exhibit] the paradox of great popularity and vigorous enforcement coupled with internal contradiction and intellectual decadence."); Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, *FORTUNE*, Dec. 1963, at 138 (warning about a crisis caused by "'protectionist' trends in antitrust").

ble.”<sup>35</sup> Yet, in his pursuit of a more logical version of antitrust law, Bork went as far as offering and promoting a study of the legislative intent of the Sherman Act that is completely divorced from the record.<sup>36</sup> Bork’s attack on institutions, chiefly the Supreme Court, and aversion of liberal elites epitomize populism.

As populist voices, the anti-bigness and anti-enforcement strains have a few common characteristics. Both are expressions of political populism and are guided by criticism of institutions—big corporations and their enablers, antitrust enforcement, politicians, and weak courts. The antitrust philosophy of each strain builds on relentless critique of the other strain and intellectuals associated with that strain. Of course, proponents of each strain take pride in its intellect, while emphasizing the incoherency of the other strain. Explicitly or implicitly, proponents of each strain see populism only in the other strain.

The contrast between the Warren and Roberts Courts illustrates the point. The Warren Court’s pro-small business approach is often used to exemplify anti-bigness populism.<sup>37</sup> The Roberts Court’s antitrust jurisprudence approach is, in many ways, a mirror image of the Warren Court. It reflects chronic skepticism of the efficacy of antitrust enforcement and hostility toward antitrust plaintiffs.<sup>38</sup> Thus, when the Warren and Roberts Courts are compared in their antitrust jurisprudence, it is difficult to argue that one is populist and the other is not.

## II.

### TECHNOLOGICAL PROGRESS AND ANTITRUST POPULISM

The relationship between antitrust and technological change provides some context for the sources of antitrust populism. The term “technological change” refers to improved ef-

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35. BORK, *supra* note 34, at 418.

36. Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 ANTITRUST L.J. 881, 891 (2014).

37. See, e.g., Kauper, *supra* note 1. The Chicago School developed literature ridiculing the antitrust jurisprudence of the Warren Court. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 218 (1985) (“The Chicago School has been particularly relentless in its criticism of the antitrust policy of the Warren Era, which has been presented as the antithesis of sound economic thinking in antitrust policy.”).

38. See Epstein et al., *supra* note 7; Scheiber, *supra* note 7.

iciencies gained through innovation. The process disrupts markets and may be unfavorable to older technologies and small economic units. A market disruption, especially one with negative effects on small firms, is a prescription for antitrust populism.

#### A. *Guiding Principles for National Policies*

Modern national economic policies are guided by the premise that productivity growth, which is an increased efficiency measured by gross domestic product (GDP) per capita per hour, defines a country's ability to improve the standard of living over time.<sup>39</sup> The primary source of productivity growth, in turn, is the "total factor productivity" (TFP), which is the portion of national output not explained by the amount of inputs used; namely, the gap between input and output of resources in production. TFP is generally attributed to innovation and efficiencies.<sup>40</sup> Accordingly, national economic policies, including antitrust law, seek to promote efficiency and innovation. These widely accepted economic principles, which emphasize the virtues of technological progress, were developed during the twentieth century. In the context of antitrust policies, competition is one of the factors that may affect innovation intensity, but the relationship between competition and innovation is complex.<sup>41</sup> Market competition may influence the degree of

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39. See, e.g., COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 207 (2016) ("Productivity growth is critical to the well-being of the American economy, its workers, and its households. Growth in labor productivity means American workers generate more output for a given amount of work, which can lead to higher living standards via higher wages, lower prices, and a greater variety of products."); PAUL KRUGMAN, THE AGE OF DIMINISHED EXPECTATIONS 11 (3d ed. 1997) ("Productivity isn't everything, but in the long run it is almost everything. A country's ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker."). The reliance on GDP to measure prosperity has been under criticism. See *How to Measure Prosperity*, ECONOMIST, Apr. 30, 2016, at 7; *The Trouble with GDP*, ECONOMIST, Apr. 30, 2016, at 23.

40. See Jason Furman, Chairman, Council of Economic Advisors, Productivity Growth in the Advanced Economies: The Past, the Present, and Lessons for the Future, Remarks at the Peterson Institute for International Economics (July 9, 2015).

41. See, e.g., Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, in THE RATE AND DIRECTION OF ECONOMIC ACTIVITY REVISITED 361 (Josh Lerner & Scott Stern eds., 2012); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 577 (2007);

inventive activities, but not always in the same direction and it is not entirely clear how.<sup>42</sup> There is, however, a broad consensus that antitrust law should facilitate and promote innovation.<sup>43</sup>

### B. *The Social Costs of Progress*

One of the assumptions underlying economic policies that seek to enhance productivity growth is that negative welfare effects, associated with increased efficiencies and innovation, dissipate effectively in the economy. When this condition does not hold, efficiencies and innovation may not produce the expected productivity growth and improvements in the standard of living. This phenomenon is known as the “productivity paradox.”<sup>44</sup>

To illustrate the productivity paradox, consider the present time. The transition from the “old economy” to the “new economy” produced considerable efficiencies, but is unfavorable to large segments of society.<sup>45</sup> Big data, artificial intelligence, and robotics permit greater automation and improved optimization, leading to dramatic changes in the demand for skills, the elimination of many jobs, and the retirement of

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Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTI-TRUST L.J. 1, 2 (2007).

42. See, e.g., Shapiro, *supra* note 41, at 362; Ilya Segal & Michael D. Whinston, *Antitrust in Innovative Industries*, 97 AM. ECON. REV. 1703, 1703 (2007) (“[T]he effects of antitrust policy on innovation are poorly understood.”); Katz & Shelanski, *supra* note 41, at 2 (analyzing challenges for merger policy when sometimes concentration is conducive to innovation); Baker, *supra* note 41, at 577.

43. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 1 (2005) (“Few people dispute that antitrust’s core mission is protecting consumers’ right to the low prices, innovation, and diverse production that competition promises.”); U.S. DEP’T OF JUSTICE, *COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT* vii (2008) (“The U.S. antitrust laws reflect a national commitment to the use of free markets to allocate resources efficiently and to spur the innovation that is the principal source of economic growth.”).

44. Nobel laureate Robert Solow is credited for identifying the phenomenon, when in the late 1980s he observed that “[y]ou can see the computer age everywhere but in the productivity statistics.” Robert M. Solow, *We’d Better Watch Out*, N.Y. TIMES BOOK REV., July 12, 1987, at 36.

45. For early discussions of the transition to the new economy see *The New Economy: Work in Progress*, ECONOMIST, July 24, 1999, at 21; *The New Economy*, TIME, May 30, 1983, at 62.

many technologies.<sup>46</sup> In numerous industries, the demand for labor has already dramatically declined or changed, and in others the decline and transformation of the demand is imminent. Technology and innovation change labor markets in other ways as well. Over 20% of the workforce is already employed in the “gig economy” and this sector is expected to grow.<sup>47</sup> In these markets, gig workers enter into formal agreements with on-demand companies (*e.g.*, Uber, Airbnb) to provide services to the company’s customers. The contractual arrangements of gig workers are flexible, giving workers fewer benefits than those provided to traditional employees and less control over their tasks than a typical independent contractor would have.<sup>48</sup> These contractual arrangements produce considerable efficiencies, leading to the decline of traditional business models in various industries.<sup>49</sup> The productivity gains tend to be unfavorable to the workforce and small companies.<sup>50</sup> The productivity paradox, thus, is created because of the negative welfare effects on large segments in the economy.

Long term-trends underscore negative welfare effects experienced during the transition to the new economy. Since the mid-1970s, income inequality has been on the rise, business dynamism (the rate of entry of entrepreneurial firms) has been declining, mobility between jobs and across occupations

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46. *See, e.g.*, ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE* (2014); Tom Standage, *Special Report: Artificial Intelligence*, *ECONOMIST*, June 25, 2016; *The Onrushing Wave*, *ECONOMIST*, Jan. 18, 2014, at 24; Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?* (Sept. 17, 2013) (working paper) (on file with the Oxford Martin Programme on Technology and Employment); *Special Report: Data, Data Everywhere*, *ECONOMIST*, Feb. 27, 2010.

47. *See* Cynthia A. Montgomery et al., *The On-Demand Economy*, Harvard Business School Technical Note 716-405, Sept. 2015; SARAH A. DONOVAN ET AL., CONG. RESEARCH SERV., *WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS?* (2016); *There’s an App for That*, *ECONOMIST*, Jan. 3, 2015, at 17.

48. Mark J. Loewenstein, *Agency and the New Economy*, 72 *BUS. LAWYER* 1 (2017).

49. Anna Louie Sussman & Josh Zumbrun, *‘Gig’ Economy Spreads Broadly*, *WORLD STOCK MARKET NEWS* (Mar. 25, 2016), <http://stockmarketnewsworld.com/gig-economy-spreads-broadly/>; DONOVAN ET AL., *supra* note 47. *See also* *There’s an App for That*, *ECONOMIST*, Jan. 3, 2015, at 17.

50. *See, e.g.*, Eric Morath, *Top Earners Gain in Gig Economy*, *WALL ST. J.*, May 4, 2016, at A2; *Part-time Palaver*, *ECONOMIST*, Sept 19, 2015, at 74; Lauren Weber, *Some Bosses Reclassify Employees to Cut Costs*, *WALL ST. J.*, July 1, 2015, at B1.

has diminished, market concentration in many key industries has increased, and national productivity growth has been relatively disappointing.<sup>51</sup> The trends are not fully understood. There is, however, a consensus that social discontent caused by the transition to the new economy is among the primary causes of the present rise of populism in the United States.<sup>52</sup> Stated simply, during the past decades, dramatic changes in markets produced significant efficiencies, yet various trends related to these changes also generated negative welfare effects and social discontent.

Thus, although technological progress is celebrated as the principal engine of prosperity, theory and history show that rapid technological change may result in significant negative welfare effects that could give rise to populism. Such populism, in turn, tends to result in policy distortions that have additional and even greater negative effects.

### C. *Industrial Revolutions and Their Significance*

The United States produced two industrial revolutions that generated prolonged periods of social discontent. The Second Industrial Revolution led to the emergence of the first large businesses and prompted Congress and the states to begin developing modern business laws. The present industrial revolution is still ongoing and is often described as the transition from the “old economy” to the “new economy.”<sup>53</sup> Both industrial revolutions generated massive waves of populism.

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51. See Jason Furman, *Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth*, Remarks delivered at Searle Center Conference on Antitrust Economics and Competition Policy (Sept. 16, 2016); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q. J. Econ. 1 (2003); Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCIENCE 838 (2014); *Forgotten Men*, ECONOMIST, Feb. 18, 2017, at 22 (describing the growing gap between white working-class men and other men in the United States); Adrian Wooldridge, *Special Report: The Rise of the Superstars*, ECONOMIST, Sept. 17, 2016 (describing the rise of companies with market power); *Too Much of a Good Thing*, ECONOMIST, March 26, 2016, at 23 (describing the increase in concentration in the US economy); *Jobs Are Not Enough*, ECONOMIST, July 19, 2014, at 23 (describing the decline in productivity growth).

52. See Barack Obama, *The Way Ahead*, ECONOMIST, Oct. 8, 2016, at 22.

53. The “First Industrial Revolution,” mostly known as the “Industrial Revolution,” took place in Great Britain between 1760 and 1830. It gave birth to factories in Great Britain and later in other countries. See THE BRIT-

An “industrial revolution” is a rapid transformation of the economy through significant technological advancements, bringing about automation and enhanced efficiencies. The concept intends to convey the idea of a radical change in the set of technological possibilities.<sup>54</sup> At least in the short run, industrial revolutions have considerable negative welfare effects, such as elimination of jobs, and losses to businesses that are invested in older technologies.<sup>55</sup> These negative welfare effects are conducive to populism.

The “Second Industrial Revolution” was a spike of innovation in the United States between 1870 and 1914, which contributed to productivity growth in the US economy that lasted into the 1970s.<sup>56</sup> The technological advancements of the era contributed to the development of mass production and mass distribution and, thus, to a transformation of the economy. New forms of businesses emerged—multiunit companies. These business enterprises utilized economies of scale and scope, integrated several lines of operations, and relied on professional managements.<sup>57</sup> The rise of multiunit firms marked the decline of traditional businesses that were owned by “an individual or a small number of owners,” who operated “a shop, factory, bank, or transportation line, out of a single office.”<sup>58</sup> The Second Industrial Revolution formed what was known during much of the twentieth century as the “modern

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ISH INDUSTRIAL REVOLUTION: AN ECONOMIC PERSPECTIVE (Joel Mokyr ed., 2d ed. 1999).

54. See DAVID S. LANDES, *THE UNBOUND PROMETHEUS* (2d ed. 2003).

55. David H. Autor, *Why Are There Still So Many Jobs? The History and Future of Workplace Automation*, 29 J. ECON. PERSP. 3 (2015); Joel Mokyr et al., *The History of Technological Anxiety and the Future of Economic Growth: Is This Time Different?*, 29 J. ECON. PERSP. 31 (2015). See also Thurman Arnold, *Depression—Not in Your Lifetime*, COLLIER'S, Apr. 25, 1953, at 24, 26 (noting that “[s]udden industrial advances always shake existing economic institutions to their foundations.”).

56. See Andrew Atkeson & Patrick J. Kehoe, *Modeling the Transition to a New Economy: Lessons from Two Technological Revolutions*, 97 AM. ECON. REV. 64 (2007); Alfred D. Chandler, Jr., *Industrial Revolutions and Institutional Arrangements*, 33 BULL. AM. ACAD. ARTS & SCI. 33 (1980); Robert J. Gordon, *U.S. Economic Growth since 1870: One Big Wave?*, 89 AM. ECON. REV. 123 (1999).

57. ALFRED D. CHANDLER JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 1–5 (1977).

58. *Id.* at 3. Alfred Chandler observed that the “modern business enterprise” of the twentieth century was “the organizational response to fundamental changes in processes of production and distribution made possible

economy,” which relied on relatively local manufacturing with vertical distribution chains and depended on fossil fuels. Today, the twentieth century economy is known as the “old economy.”

The present industrial revolution began in the 1970s.<sup>59</sup> Developments in information and communications technologies (ICT) have been radically transforming the organization of production and distribution. Big data, artificial intelligence, and robotics considerably enhance automation and optimization of resources.<sup>60</sup> Additionally, we are witnessing a transition to efficient energy sources and advanced materials, while reducing reliance on fossil fuels and organic materials. This industrial revolution has been expanding globalization, enhancing efficiencies, and reshaping the demand for skills and capital in markets. The new economy is global and builds on technologies that permit automation of a wide range of complex routine and non-routine cognitive tasks (mostly known as “high-tech”). There are also dramatic developments in the structure of business organizations. The new business enterprise that emerges in this industrial revolution is often described as “platform.” It utilizes network externalities to connect suppliers and consumers through an online platform. Amazon, Apple, Google, and Facebook, the titans of the era, illustrate the model.<sup>61</sup>

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by the availability of new sources of energy and by the increasing application of scientific knowledge to industrial technology.” *Id.* at 376.

59. See Ryan Avent, *The Third Great Wave; To Come*, *ECONOMIST*, Oct. 4, 2014, at 3; *The New Economy: Work in Progress*, *ECONOMIST*, July 24, 1999, at 21. See also Chandler, *Industrial Revolutions and Institutional Arrangements*, *supra* note 56 (describing the First and Second Industrial Revolution and depicting the likely characteristics of the Third Industrial Revolution).

60. See, e.g., ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* (2014); Tom Standage, *The Return of the Machinery Question*, *ECONOMIST*, June 25, 2016, at 4; Oliver Morton, *Immigrants from the Future*, *ECONOMIST*, March, 29, 2014, at 3; *The Onrushing Wave; The Future of Jobs*, *ECONOMIST*, Jan. 18, 2014, at 26; Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?*, Oxford Martin Programme on the Impacts of Future Technology (Sept. 2013); Kenneth Cukier, *Data, Data Everywhere*, *ECONOMIST*, Feb. 27, 2010, at 3.

61. See generally *Robber Barons and Silicon Sultans; Self-Made Wealth in America*, *ECONOMIST*, Jan. 3, 2015, at 54; *Everybody Wants to Rule the World; Internet Monopolies*, *ECONOMIST*, Nov. 29, 2014, at 19; *Another Game of Thrones; Technology Giants at War*, *ECONOMIST*, Dec. 1, 2012, at 24.

#### D. *Antitrust Reflections*

Antitrust law was born in a populist reaction to the developments during the Second Industrial Revolution. Congress enacted the Sherman Act in response to a populist agrarian movement whose leaders proudly identified themselves as populists.<sup>62</sup> This movement resented intellectualism and perceived technology as a threat.<sup>63</sup> The so-called “antitrust movement,” which led to the early development of antitrust laws related to “trustbusting,” emerged after the enactment of the Sherman Act as a thread of the Progressive movement.<sup>64</sup> The four-way presidential race among Woodrow Wilson, William Howard Taft, Theodore Roosevelt, and Eugene Debs in 1912 is often used to illustrate this form of populism.<sup>65</sup> Until 2016, the 1912 presidential race was the last election in which anti-trust featured in major presidential campaigns.

Old antitrust cases sometimes refer to the need to respond to public anxieties in the era of the Second Industrial Revolution. For example, *Trans-Missouri* speaks of “small dealers and worthy men. . .who might be unable to readjust themselves to their altered surroundings.”<sup>66</sup> In *Alcoa*, Judge Learned Hand observed that “among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.”<sup>67</sup> *Brown Shoe* talks about the “desirability of retaining

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62. See Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQ. 263 (1992) ; Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT’L. REV. L. & ECON. 73, 74 (1985); George J. Stigler, *The Origin of the Sherman Act*, 14 J. L. STUD. 1 (1985). See also JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMERS’ ALLIANCE AND THE PEOPLE’S PARTY* (Minn. Arch. ed., 1931).

63. HICKS, *supra* note 62.

64. See Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE BUSINESS ESTABLISHMENT* 113 (Earl. F. Cheit ed., 1964); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

65. See JAMES CHACE, *1912: WILSON, ROOSEVELT, TAFT & DEBS* (2005); Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025 (2015); William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History*, 3 ANTITRUST 25 (2011).

66. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

67. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

local control over industry and the protection of small businesses.”<sup>68</sup> The adoption of the “rule of reason” standard in the 1911 *Standard Oil* case was perceived as an interpretation empowering large businesses.<sup>69</sup> Criticism of the interpretation and concerns regarding the rise of large business entities contributed to the enactment of the Clayton and Federal Trade Commission Acts of 1914.<sup>70</sup>

By the 1960s, memories of the anxieties and displacement caused by the Second Industrial Revolution had faded. Confidence in government regulation began to erode.<sup>71</sup> Courts became influenced by a new “populist mood” expressing doubts of agency expertise and concerns that agencies were “captured” by the industries that they regulated.<sup>72</sup> Conservative populism emerged as a movement that criticized the perceived ineffectiveness of the establishment (the government and the Supreme Court), ridiculed liberal intellectuals, and made exaggerated claims about market efficiency and economic logic.<sup>73</sup>

In economics and antitrust, conservative populism is associated with the Chicago School.<sup>74</sup> Four emblematic examples of this populism in antitrust law are (1) the argument that in antitrust consumer welfare means allocative efficiency; (2) the “false positive” (or “error costs”) framework; (3) skepticism of

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68. *Brown Shoe*, 370 U.S. at 315–316.

69. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See *Views of Financial Leaders on the Standard Oil Decision*, WALL ST. J., May 17, 1911, at 1. See also *Business Likes Oil Decision*, N.Y. TIMES, May 17, 1911, at 1; *An Improvement Looked for By Leading Industrial Interests*, WALL ST. J., May 20, 1911, at 1; Edward G. Lowry, *The Supreme Court Speaks*, HARPER'S WKLY., June 3, 1911, at 8.

70. See *May Amend Sherman Law*, N.Y. TIMES, May 16, 1911, at 4; *Business Likes Oil Decision*, *supra* note 69, at 1; *Amended Trust Law to Be Issue*, WASH. POST, May 17, 1911, at 4; *Senators in Haste to Amend Trust Act*, N.Y. TIMES, May 18, 1911, at 3; *To Tighten Trust Law*, WASH. POST, May 18, 1911, at 1. See generally Winerman, *supra* note 64.

71. See, e.g., MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

72. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHL-KENT L. REV. 1039 (1997).

73. For populism in the conservative movement, see KAZIN, *supra* note 18, at 165–94; 245–66.

74. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

the profitability of exclusionary conduct; and (4) the belief that vertical restraints are unlikely to harm competition. The proposition that the phrase “consumer welfare” means “allocative efficiency” comes from Robert Bork’s interpretation of the legislative intent of the Sherman Act, which is understood today as academic deceit or gross exaggeration.<sup>75</sup> Bork’s interpretation implies that distributive concerns should not factor into antitrust policies. Its literal meaning (consumer welfare = efficiency) is confusing and there is no good explanation for its broad endorsement.<sup>76</sup> The “false positives” framework was derived from Aaron Director’s formulation of laissez faire economics by commentators associated with the Chicago School and was adopted by the Supreme Court as a guiding doctrine for antitrust analysis.<sup>77</sup> The framework states that anticompetitive conduct is largely self-correcting, whereas antitrust enforcement deters beneficial business activities.<sup>78</sup> Stated simply, the false positives framework is a broad statement that anti-

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75. Orbach, *supra* note 36.

76. See Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

77. See Aaron Director, *The Parity of the Economic Market Place*, 7 J. L. & ECON. 1, 2 (1964) (“Laissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error.”). For criticism of the framework, see Baker, *Taking the Error Out of “Error Cost” Analysis*, *supra* note 7. For the adoption of the framework by the Supreme Court, see for example, *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007) (“[A]ntitrust courts are likely to make unusually serious mistakes.”); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[M]istaken inferences in [antitrust] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”).

78. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 329 (1984):

[J]udicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not. . . . The costs of the judicial process—including the costs of errors, which deter beneficial practices—suggest the wisdom of letting the competitive process rather than the courts deal with conduct that does not create profits by reducing competition. If the practice really is anticompetitive and privately unprofitable, it will go away in time. If it persists, the appropriate inference is that it has competitive benefits.

trust enforcement tends to be cost-ineffective.<sup>79</sup> For example, the skepticism of the potential profitability of exclusionary conduct is often articulated with economic lingo, but generally reflects a hostility toward antitrust enforcement that is not supported by economics.<sup>80</sup> Finally, the belief that vertical restraints are unlikely to harm competition emerged when antitrust law condemned many procompetitive vertical restraints. Rather than stating that vertical restraints tend to be procompetitive but may also serve anticompetitive purposes, Chicago School scholars argued that vertical restraints should be legal per se under antitrust law.<sup>81</sup> Today, the rule of reason standard applies to vertical restraints and the application of the rule is very unfavorable for plaintiffs.<sup>82</sup> As noted, this approach may be better described as anti-enforcement populism.

The transition to the new economy prompted two populist reactions to antitrust law: some have fiercely argued that antitrust laws are ill-equipped to regulate innovative firms, while others have strongly argued that antitrust laws ought to address the size of the technological giants and their financiers. For example, in the late 1990s, the *Microsoft* trial sparked the first significant debate about the role of antitrust law in the new economy.<sup>83</sup> In 1998, when the Justice Department and 20 states filed the complaint, Microsoft was the world's largest software maker.<sup>84</sup> The debate over the effectiveness of anti-

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79. See, e.g., Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. J. L. & PUB. POL'Y 1, 6 (2011) (“[T]he error cost framework . . . presumes that errors are an inevitable and core feature of the antitrust enterprise.”).

80. See Baker, *Exclusion as a Core Competition Concern*, *supra* note 7.

81. See, e.g., Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

82. See Barak Orbach, *Antitrust Stare Decisis*, 15 ANTITRUST SOURCE 1 (2015).

83. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). See also Robert J. Barro, *Why the Antitrust Cops Should Lay Off High Tech*, BUS. WEEK, Aug. 20, 1998, at 20; Robert H. Bork, *The Most Misunderstood Antitrust Case*, WALL ST. J., May 22, 1998, at A16; Robert H. Bork, *What Antitrust Is About*, N.Y. TIMES, May 4, 1998, at A19.

84. *At War With Microsoft*, ECONOMIST, May 23, 1998, at 15.

trust enforcement roughly followed the trial.<sup>85</sup> The *Microsoft* court wrote that it decided the case “against a backdrop of significant debate amongst academics and practitioners over the extent to which ‘old economy’ . . . doctrines should apply to firms competing in dynamic technological markets.”<sup>86</sup> The Antitrust Modernization Commission examined the concerns and concluded that there was “no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features” and that antitrust enforcers should “carefully consider market dynamics” in all industries.<sup>87</sup> More recently, in the *eBook* case, Apple orchestrated a hub-and-spoke conspiracy and warned the court that “a ruling against Apple would set a dangerous precedent” as it would “punish innovation.”<sup>88</sup>

From the opposite direction, fears of size escalated quickly after the Great Recession. Journalists, commentators, and politicians returned to populist ideas from the early days of antitrust law, such as “trust-busting,” the protection of small businesses, “fair competition,” fears of bigness, concerns that “everything is rigged,” and hostility to “robber barons.”<sup>89</sup> In

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85. See, e.g., George L. Priest, *Flawed Efforts to Apply Modern Antitrust Law to Network Industries*, in HIGH-STAKES ANTITRUST 118 (Robert W. Hahn ed., 2003); David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, in 2 INNOVATION POLICY AND THE ECONOMY 1 (Adam B. Jaffe et al. eds., 2002); Jonathan M. Jacobson, *Do We Need a “New Economy” Exception for Antitrust*, 2001 ANTITRUST 89 (Fall 2001); Robert Pitofsky, *Challenges of the New Economy: Challenges at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913 (2001); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001).

86. *Microsoft*, 253 F.3d at 49.

87. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 32 (2007).

88. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 707 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

89. See, e.g., Luther Lowe, *It’s Time to Bust the Online Trusts*, WALL ST. J., Nov. 1, 2017, at A15; Rana Foroohar, *Tech ‘Superstars’ Risk a Populist Backlash*, FIN. TIMES, Apr. 24, 2017, at 9; Derek Thompson, *America’s Monopoly Problem: How Big Business Jammed the Wheels of Innovation*, ATLANTIC, Oct. 2016, at 26; Adrian Wooldridge, *The Rise of the Superstars*, ECONOMIST, Sept. 17, 2016, at 1; Steven Davidoff Solomon, *Tech Giants Gobble Start-Ups in a Regulatory Blind Spot*, N.Y. TIMES, Aug. 17, 2016, at B3; Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES, Apr. 18, 2016, at A21; *The Problem With Profits*, ECONOMIST, March 26, 2016, at 11; *Too Much of a Good Thing*, ECONOMIST, March 26, 2016, at 23; Theo Francis & Ryan Knuston, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL ST. J., Oct. 19, 2015, at A1; Greg Ip, *Why Corporate America Needs Some*

April 2016, President Obama issued Executive Order (EO) 13725 declaring that an efficient and competitive marketplace is also fair and emphasizing the positive effects of competition in labor markets.<sup>90</sup> Simultaneously with the issuance of the EO 13725, the Council of Economic Advisors released a short report stating that “decades-long decline in new business formation and increases in industry-specific measures of concentration” are at least partially related to permissive competition policies.<sup>91</sup> In October 2016, the Justice Department and the FTC issued *Antitrust Guidance for Human Resource for Professionals*.<sup>92</sup> The policy responds to developments in the economy, reflecting concerns about reduced competition and collusive practices in labor markets.

Microsoft’s experiences with populism are somewhat symbolic. In December 2016, shortly after the victory of populism in the US elections, the European Commission approved

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*More Competition*, WALL ST. J., July 9, 2015, at A2; *Should Digital Monopolies Be Broken Up?*, ECONOMIST, Nov. 29, 2014, at 11; *Everybody Wants to Rule the World*, ECONOMIST, Nov. 29, 2014, at 19; Rana Foroohar, *Call in the Trustbusters*, TIME, Aug. 18, 2014, at 16; Steven Davidoff Solomon, *Changing Old Antitrust Thinking for a New Gilded Age*, N.Y. TIMES, July 23, 2014, at B5; *Robber Barons and Silicon Sultans*, *supra* note 61; Matt Taibbi, *Everything Is Rigged: The Biggest Price-Fixing Scandal Ever*, ROLLING STONE, May 9, 2013, at 32; *Survival of the Biggest*, ECONOMIST, Dec. 1, 2012, at 11; Barry C. Lynn, *Killing the Competition*, HARPER’S, Feb. 2012, at 27; Thomas Catan, *Trustbusters Try to Reclaim Decades of Lost Ground*, WALL ST. J., Feb. 1, 2010, at A2; *US Returns to Its Trust-busting Roots*, FIN. TIMES, May 13, 2009, at 10. See also Senator Elizabeth Warren, *Reigniting Competition in the American Economy*, Keynote Remarks at New America’s Open Markets Program Event (June 29, 2016) (calling for “a revival of the movement that created the antitrust laws” to protect small businesses and fight large ones).

90. Exec. Order No. 13725 § 1, 81 Fed. Reg. 23417 (Apr. 20, 2016) (“Maintaining, encouraging, and supporting a fair, efficient, and competitive marketplace is a cornerstone of the American economy. Consumers and workers need both competitive markets and information to make informed choices.”); Exec. Order No. 13725 § 2, 81 Fed. Reg. 23417 (Apr. 20, 2016) (“Agencies shall identify specific actions that they can take in their areas of responsibility to build upon efforts to detect abuses such as price fixing, anticompetitive behavior in labor and other input markets, exclusionary conduct, and blocking access to critical resources that are needed for competitive entry.”)

91. COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (Apr. 2016).

92. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE FOR PROFESSIONALS (Oct. 2016).

Microsoft's acquisition of LinkedIn.<sup>93</sup> Brad Smith, Microsoft's President and Chief Legal Officer, released a statement recognizing that new technologies have broad negative welfare effects and alluding to the impact of populism:

On both sides of the Atlantic, it has become increasingly apparent that many people feel left out and unable to participate in the economic growth and opportunities created by the rising digital economy.

While technology tools are not a panacea for current economic challenges, we believe they can make an important contribution. Microsoft and LinkedIn together have a bigger opportunity to help people online to develop and earn credentials for new skills, identify and pursue new jobs, and become more creative and productive as they work with their colleagues. . . . Our ambition is to do our part to create more opportunity for people who haven't shared in recent economic growth.

We readily recognize that no single company can come close to solving the many economic challenges that confront the world today. . . . [A]cross the private and public sectors, we all will need to come together and act with a sense of shared responsibility.<sup>94</sup>

Populism and the populist style, therefore, have always existed in antitrust law and are likely to continue to influence antitrust theories. Contrary to the common depiction in the literature, antitrust populism has several varieties. Although liberal varieties were particularly influential in the past, in recent decades, conservative varieties came to dominate antitrust law. With technological innovation and changes in the economy, especially since the Great Recession, the liberal varieties have become vocal again and possibly started regaining power.

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93. Press Release, European Comm'n, European Commission Approves Microsoft's Acquisition of LinkedIn, Subject to Conditions (Dec. 6, 2016).

94. Brad Smith, *Microsoft-LinkedIn Deal Cleared By Regulators, Opening New Doors for People Around the World*, MICROSOFT CORPORATE BLOGS (Dec. 23, 2016), <https://blogs.microsoft.com/blog/2016/12/06/microsoft-linkedin-deal-cleared-regulators-opening-doors-people-around-world/>.

## CONCLUSION

The purpose of this Article is to correct the misguided antitrust tradition of associating “populism” with fears of bigness and sympathy for small businesses. The tradition refers to an old populist strain and fails to recognize that other populist strains may influence antitrust law and policy. It, thus, accommodates certain forms of populism in antitrust law, chiefly those related to anti-enforcement sentiments. For this tradition, courts, the agencies, and commentators escape the stigma of populism when they promote populist ideas, such as chronic skepticism of anticompetitive effects and hostility toward antitrust enforcement. Antitrust populists should be recognized for their approach. They have many varieties and represent diverse views, but they all rely on exaggerations, selective facts, and uncompromising beliefs.