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CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR[1]

Dear Readers,

I was pleased to be asked to guest edit the April 2018 Antitrust Chronicle on Hipster Antitrust. The consumer welfare standard in antitrust is an important part of antitrust law and practice in the United States, but an increasing number of policy thinkers are starting to question whether it should maintain its primacy. Should courts and antitrust enforcers balance factors such as employment, wages, small businesses against consumer welfare effects in evaluating mergers and conduct? Do we need special rules for technology platforms in particular? Should we just bar large firms from making any further acquisitions or even consider just breaking them up? And if we should reconsider the consumer welfare paradigm, what would an alternate regime actually look like?

My own connection to the debate is coining the term Hipster Antitrust, but the issues under discussion in this issue predate the term itself. They have been building for some time, and represent the latest of a series of challenges to the consumer welfare standard. The April CPI Antitrust Chronicle presents views on both sides of the debate. Some authors argue the singular focus on consumer welfare is long overdue for a rethink, or should never have been so rigidly adopted. Others believe that the consumer welfare standard is flexible enough to deal with the challenges presented, and worry that the alternatives invite a host complications which have yet to be adequately addressed. I hope you enjoy this issue of the CPI Antitrust Chronicle. Thank you to CPI and to the other distinguished authors for their contributions.

Konstantin Medvedovsky
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1 CPI thanks Facebook for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

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Given a country founded on principles of anti-monopoly and the decentralization of power, an antitrust revival in the United States may have been inevitable. Some in the current revival have targeted the "consumer welfare" standard, but would that make the antitrust law too indeterminate? I argue that the leading alternative, "protection of competition" is actually no more uncertain, and arguably more predictable than the highly abstract goal of protecting consumer welfare and truer to the enacted goals of antitrust. The question should be: is the complained-of conduct (or merger) merely part of the competitive process, or is it meant to "suppress or even destroy competition?"

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Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule Of Law, And Rent-Seeking

By Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright

Hipster Antitrust calls for the rejection of the consumer welfare standard as the lodestar of antitrust law in favor of a vague "public interest" test that requires courts and agencies to consider a variety of social and political goals. In short, Hipster Antitrust seeks to dismantle the well-defined, economics-based approach to antitrust. It does so while attacking corporate America generally and with rhetorical flourish that nostalgically yearns for a return to the trustbusting days of antitrust's infancy. A primary theme of Hipster Antitrust is concern with regulatory capture and oversized corporate influence on market outcomes. We share those concerns. Yet, ironically, by expanding enforcers' discretion and removing institutional safeguards ensuring accountability, Hipster Antitrust would usher in a new era of rent-seeking by corporations hoping to misuse antitrust to gain advantages over competitors. In doing so, Hipster Antitrust ignores the lessons of public choice theory and trades the current antitrust regime, which promotes consumer welfare, for one that benefits businesses and maximizes corporate welfare.

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By Philip Marsden

The Hipster Antitrust movement asks competition authorities to "Move Fast and Break Things." Hipsters want direct intervention – breaking up bigness, diluting concentration and capping prices – to aid small business, consumer choice and fairness. These interventions would condemn the innocent, distort dynamic markets and reduce consumer incentives to engage actively. To ensure hipsters do no harm, authorities should engage by increasing their evidence base regarding, for example, trust in online markets and consumer vulnerability. Authorities should hold the line however and never let non-evidenced claims influence antitrust law enforcement itself. Shooting from the hip rarely results in a well-targeted remedy.

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Hipster Antitrust – A Brief Fling Or Something More?

By Konstantin Medvedovsky

Hipster Antitrust is the latest of the challenges to the consumer welfare standard that has been dominant in the United States since the late 1970s and early 1980s. However, unlike prior attacks on the consumer welfare standard, it comes at a time when concerns about economic concentration and income equality are paramount. As result, the Hipster movement appears to have more staying power, and more backing than prior, largely academic questions raised about the consumer welfare standard. This piece examines the rise of the Hipster Antitrust movement, discusses what the concerns of its proponents are, and discusses the legislative debate around the issues. The piece closes with some brief thoughts about the issues that the Hipster movement is trying to solve, and whether the consumer welfare standard is the proper target of those concerns.

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By David S. Evans & Richard Schmalensee

Platform businesses enable distinct types of customers to interact more readily and realize gains from interacting. The basic economics of such businesses is now well-established, and U.S. courts have long sought to anchor antitrust decisions in business realities and to employ sound economics. Nonetheless, some observers have argued that taking the business realities of platform businesses fully into account in antitrust decision-making would bias decisions in favor of platform businesses with market power. This essay rebuts that argument and shows that accounting for two-sided business reality in antitrust reduces both false negatives and false positives.

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Hipster Antitrust: New Bottles, Same Old W(h)ine?

By Christopher S. Yoo

Although the debate over hipster antitrust is often portrayed as something new, experienced observers recognize it as a replay of an old argument that was resolved by the global consensus that antitrust should focus on consumer welfare rather than on the size of firms, the levels of industry concentration, and other considerations. Moreover, the history of the Federal Trade Commission's Section 5 authority to prevent unfair methods of competition stands as a reminder of the dangers of allowing enforcement policy to be guided by vague and uncertain standards.

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Woodstock Antitrust

By Harry First

Before there was Hipster antitrust there was Woodstock antitrust. Flourishing in the decade from 1969 to 1979, Woodstock antitrust sought to take on the central issues in antitrust. Looking back we can see a program of enforcement and proposed legislation that constituted a radical effort to fix antitrust's shortcomings — the inability to stop the increase in concentration in the economy, or deal with durable monopolies, or cut through doctrine to reach tight oligopolies. This essay reviews some of the efforts of Woodstock antitrust and suggests how Woodstock still echoes in today's antitrust reform efforts.

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Four Questions For The Neo-Brandeisians

By Daniel A. Crane

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WHAT'S NEXT?

Our May 2018 Antitrust Chronicle will focus on the recent debates on the issue of **Online Platforms**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In the coming months of 2018, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE JUNE 2018 & JULY 2018

The June 2018 Antitrust Chronicle will feature articles from speakers at the LeadershIP Conference: "**IP, Antitrust, and Innovation Policy – Enabling the Fourth Industrial Revolution**" recently held in Washington D.C.

Our topic for July 2018 will focus on recent developments related to **Vertical Mergers**.

Contributions to the Antirust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topic. Co-authors are always welcome.

CPI TALKS…

With Andreas Mundt, President of the German Bundeskartellamt (Federal Cartel Office).

Thank you, President Mundt, for granting this interview to CPI.

1. There has been a lot of conversation about "Hipster Antitrust" (or "Big is Bad" antitrust) in the United States lately, from commentators, competition enforcers, and lawmakers. You even used the term at the Fordham International Antitrust Law and Policy Conference last September. How has the "Hipster Antitrust" conversation progressed in Europe? Has it had much of an impact in Europe?

There was indeed a lively debate in recent months in which a number of fundamental issues were raised: Are the established principles of competition law the right answer to today's challenges; are they the right principles for the globalized and digitalized economy? These are the questions we have to answer and I am not sure if it is helpful to call those rightly asking them "hipsters."

There are different approaches to these issues in the U.S. and Europe, but also inside Europe. One example are vertical restraints in the digital economy. Vertical restraints are seen as a huge problem in many Member States in Europe because they have seen a renaissance in online markets. There are a couple of reasons for this. Firstly competition has dramatically increased and there is a tendency towards lower prices. With the Internet and the emergence of e-commerce, the number of retailers the individual consumer can choose from has risen dramatically. Secondly, the Internet gives manufacturers a better overview of the prices at which retailers offer their products. Monitoring is easy. In the beginning of the internet age, increased competition and prices that are easy to monitor led to an increase of Retail Price Maintenance ("RPMs") and to a wave of RPM cases. However, we sent clear signals by imposing high fines and after a couple of cases manufacturers understood that mere and pure RPM were under a heavy threat of fines. Thus, they began looking for other options to control online distribution. Recent examples of our case work show the growing importance of more sophisticated strategies of vertical restraints in online markets. A good example is the *ASICS* case where we saw a combination of strategies like the prohibition of third-party platform sales, prohibition of price comparison websites, etc.

It is not surprising that these kind of cases are more likely to be taken up in Europe than in the U.S. This has something to do with different approaches in the EU and in the U.S. In Europe, RPM in the sense of fixing retail prices or setting minimum prices is considered a hardcore restriction under the applicable Block Exemption Regulation. It can be justified under the general rules, but only under narrow conditions, i.e. in a rather limited number of cases. We also have a critical view on some other, non-price vertical restraints. However, in the U.S. we see some more flexibility. This has also something to do with a different burden of proof.

More differences of this kind show up when we broaden our perspective. In the U.S., there is generally more reliance on the dynamics of markets, which results in less need seen for intervention. Against this background it is not so surprising that in the last few years many important cases in the digital economy were initiated in Europe. The former OFT in the UK and the Bundeskartellamt started early on to tackle the best price clauses of hotel booking platforms. In its *ASICS* decision the Bundeskartellamt took a closer look at the prohibition of price comparison engines, sales via third party platforms and use of brand names.

Moreover, it could well be that in Europe there is a greater awareness of the market power of large internet platforms. There is the case against Google by the EU Commission, the British OFT and ourselves have looked at Amazon Market Place, and the Bundeskartellamt has an ongoing proceeding against Facebook.

We must further develop the established principles of competition law with regard to the digital economy. And we must develop and apply new parameters like network effects and access to data with regard to these huge platforms. In my opinion this is not "hipster" but simply a question of applying established and internet-specific parameters of competition to new situations and cases in a stringent manner. There is nothing experimental about this but, of course to some extent, we are doing pioneering work. Still, at the end of the day, it is simply a question of further developing existing approaches.

2. However, competition authorities can also harm incentives to innovate through over enforcement. The Bundeskartellamt, which is currently conducting a number of cases in the digital economy, is also accused of this. What is wrong with relying on the built-in adjustment mechanisms of the markets?

Of course unnecessary intervention has the capability to destroy incentives to innovate and economies of scale. This is why it is so difficult in the digital economy to determine when an agency should intervene. Dynamic markets must remain dynamic. And obviously we always have this in mind. On the other hand, the economic and social costs of under-enforcement can also be very high. We see companies with years of stable market shares of over 90 percent, global business models, network effects, lock-in effects and competitive advantages due to privileged access to data. Therefore the question whether there is too little rather than too much enforcement in the digital world is a legitimate one. Many consumers are shocked to see the extent to which data is collected by dominant companies and how their data is subsequently used.

The aim of the Bundeskartellamt's Facebook proceeding is to tackle precisely these issues. We need to look at the collection, processing and relevance of data and to provide answers. This isn't hipster either but an attempt to establish a correlation between access to data and the competitiveness of companies.

3. Is "Hipster Antitrust" already just mainstream European competition law?

In my view the European approach to digital competition issues of the early 21st century is extremely positive. What we do is a consistent application of competition law, in particular stringent merger control and abuse control, in Germany and Europe to prevent the concentration of markets, the abuse of market power and to protect consumers from harm. In view of that I would not call our enforcement practice "hipster" only because we apply the rules in the special environment of the digital economy.

In the summer of 2017 the former FTC Commissioner and Professor Joshua Wright used the hashtag #hipsterantitrust, in debates on Twitter, in order, in his own words, "to capture a worldview of antitrust regulation expansive enough to solve societal woes ranging from economic inequality to climate change, mixed with the kind of vintage 1960s style 'big is bad' thinking." The issues which Wright raises are obviously important. But we don't claim to be able to solve all these problems with competition law. We are operating on one of many regulatory levels and our aim is to solve problems that are essentially competition problems with competition law. This is also our approach in our proceeding against Facebook. The statement mentioned above is rather hyperbolic in order to attract attention but it is not reflective of our core work.

All the same: Protecting competition is not an end in itself. Competition creates better and cheaper products and leads to innovation. But it is also about ensuring choice and diversity and preventing the concentration of too much power in the hands of a few. So competition has many positive effects which extend beyond purely economic benefit.

4. Do you believe that technology firms need to have a different standard applied to them than other types of firms in evaluating the competitive impact of their acquisitions and other conduct?

I think that the German and European competition law which we apply at the Bundeskartellamt is flexible enough to also deal with new questions and new markets.

Nonetheless there is need for adjustment because the digital economy works on different principles than the traditional sectors. It operates differently. Network effects can lead to large companies becoming bigger and bigger. Access to data also plays a key role. The question of multi- and single-homing is an important one. All these parameters go far beyond former criteria developed for traditional off-line markets. These parameters are now incorporated into German law, this is a huge modernization. So what we are talking about is not really a different treatment but adjusted parameters.

Very early on we launched a "Think Tank" to create the necessary conceptual bases for applying competition law in the digital economy. We published a working paper on the "Market Power of Platforms and Networks" and, together with the French competition authority, a paper on "Big Data." The Think Tank's work results are always reflected in our case practice.

We also advocated that the lawmaker provide detailed clarifications on these issues in the latest amendment to the competition law. This was done in the 9th Amendment to the German Competition Act ("GWB") in the summer of 2017. Germany is therefore one of the first countries to have its own competition rules for the digital economy.

5. What new rules are there?

I already mentioned network effects, access to data, multi- and single-homing that are now explicitly mentioned in the German law as important factors in assessing market power.

The amendment also clarified that a market may also be assumed where no monetary payments occur. This conclusion – especially in two-sided markets – had already been adopted in the competition authority's practice but until now had not been explicitly provided for in the German competition law. This is a very important aspect because in the digital economy people often pay with their data instead of money.

We have also implemented a new additional threshold for merger filings. The existing turnover thresholds turned out to be insufficient to cover all relevant mergers and acquisitions in the digital economy and other innovative sectors. Therefore, a new transaction volume threshold amounting to 400 million Euros has been introduced. The Bundeskartellamt can now also examine acquisitions of companies which only achieve marginal turnover but for which a relatively high purchase price was paid. This is often the case with start-ups and other innovative assets. In such acquisitions, the high purchase price is often indicative of an innovative business idea with a high competitive potential.

6. Are further changes to the law planned to deal with digitalization?

We are of course always thinking about how we can better position ourselves as an authority and how the legal framework conditions can be improved. We are thinking about how to improve our technical understanding by hiring more technical staff to monitor overall digital development independently of specific cases. If you want to examine the pricing algorithms of companies, you need good digital competence.

And we have to ask ourselves how we can solve the conflict between fast-moving markets and the due process of law. We have to investigate all the facts in our cases very thoroughly which is time consuming and resource intensive. But this is absolutely essential because our decisions obviously have to stand up in court. However, if we conduct our proceedings too slowly, our decisions could be too late. In the meantime a dominant company could have already forced its competitors out of the market. So we have to find the right balance between procedural efficiency and thoroughness. One option could be preliminary injunctions. But even this is by no means a cure-all not least because it could involve huge liability risks. Another possibility would be easier proof that the conditions for intervention are met. It might also be appropriate and necessary to intervene and prohibit abusive practices before a dominant position of one or more companies is created. These are all aspects which we need to discuss.

7. What role, if any, do you think competition law should take on with respect to issues of income inequality, or unemployment (as opposed to focusing specifically on competition issues)?

In its work the Bundeskartellamt concentrates on protecting competition. That is our task; and competition has many positive effects. Consumers benefit from lower prices, more choice, better quality and innovations.

But, of course, competition is not everything. There are other legitimate aims in a society: social justice, environmental protection, good access to education and much more. Not all these issues can be solved by competition law. These are objectives which can be achieved by the state, for example, via taxes, legislation and other measures. Conversely, misguided regulatory intervention can reduce competition and the competitiveness of companies. Tax legislation is sometimes a good example of this.

In the *Bayer/Monsanto* merger case many citizens expressed their concerns to the EU Commission that the merger could have negative effects on environmental protection or food safety. The Commission made it very clear that it takes these concerns seriously but that they cannot be the basis for a merger control proceeding. The aim of the proceeding was to examine whether the merger can have negative effects on prices, quality, choice or innovations. The Commission stressed that other non-competition concerns expressed by interested third parties are protected by other European or national rules on human health, food safety or environmental protection. The merged entity will continue to be subject to these rules post-transaction. I couldn't have said it any better.

With regard to our merger control cases, there is a division of competences in this area in Germany. The Bundeskartellamt examines mergers for their effects on competition. In exceptional cases the Federal Ministry for Economic Affairs and Energy can still clear a merger which has been prohibited by the Bundeskartellamt if the restraint of competition is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest. In the past the reasons considered were for example jobs, health research or energy security. Many jurisdictions have this kind of political instrument as a safety valve. For example, in the UK the government may intervene when it comes to national security, media plurality or the stability of the UK financial system. So the question is not so much whether there should be a political safety valve but rather what form it should take and its possible scope. The important thing is not to overload competition authorities with political issues.

8. One of the reasons for the current debate is that several recent studies have concluded that market concentration is increasing in a variety of industries. Do you share this concern? Has the *status quo* of competition law failed to preserve the rise of dominant firms?

Yes, there were several studies which show that concentration and profit margins have increased significantly in many sectors in the U.S. This was accompanied by a fall in the wage ratio, i.e. a shift in favor of capital owners and to the detriment of earned income. However, interestingly enough, the wage ratio did not fall to the same extent at all the companies but most notably at companies where the wage ratio tended to be lower in any case, i.e. large companies. The fall in the wage ratio can therefore be attributed at least to some extent to the increase in size of the large companies. This effect is most noticeable in the economic sectors with the highest increase in concentration. However, these studies are only based on the situation in the U.S. In Europe, and in Germany especially, we have not observed any similar trends. At least there are no comparable studies which would indicate this.

However I would like to make one exception: the digital economy. Here we are currently witnessing a trend towards size everywhere in the world. This is closely connected with the specifics of the digital economy. Network effects result in the concentration of a large number of users on individual platforms. Access to data can also create significant competitive advantages for some companies. As competition authorities we have to ensure that markets are kept open and newcomers have a chance. For example, we took action against the best price clauses of hotel booking portals. The best price clauses are essentially minimum prices which the portals require the hotels to observe in order to prevent new innovative platforms from offering lower prices. That is the one issue: Keeping markets open. The other is: If we have more large companies to deal with in the digital economy, abuse control will become a more important tool than ever before. We can already see this in several proceedings like for example our *Facebook* case where we are examining Facebook's market power and whether it is acting abusively in the collection and use of its users' data.

AFTER CONSUMER WELFARE, NOW WHAT? THE "PROTECTION OF COMPETITION" STANDARD IN PRACTICE

YEAH, ITS A LITTLE WEIRD HAVING THEM BACK THERE, BUT WHAT'S THE HARM TO CONSUMER WELFARE?

BY TIM WU[1]

1 Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. My thanks to Harris Rothman.

I. INTRODUCTION

Given a country founded on principles of anti-monopoly and the decentralization of power, an antitrust revival in the United States may have been inevitable. Today's revival, which dates from the later parts of the Obama Administration, shows signs of being broader than that of the 1990s. It is marked so far by broad shifts in academic and congressional discourse and even an apparent hunger by parts of industry for change. The larger question is whether change reaches the enforcement agencies in lasting form, the judiciary and ultimately, the law.

Among the forerunners of the current movement is the famed Robert Pitofsky, who warned in the late 1970s that "it is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[2] In 2008 he argued that "[b]ecause extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of facts) have come to dominate antitrust, there is reason to believe that the United States is headed in a profoundly wrong direction."[3] More and more have come to agree with that assessment.

Among those who generally agree with Pitofsky's statement, however, there are really two schools. Both are committed to antitrust revival, generally speaking. Both are also broadly opposed to what can be described as the extremes of the Chicago school, as represented by the work and influence of Aaron Director and Robert Bork. The difference between the groups can be discerned their reactions to the so-called "consumer welfare" standard, which since the 1980s has been widely described as setting the goal for antitrust law. The first group believes that the standard has been abused and misused, but nonetheless retains its utility as the anchor of antitrust law and policy. The second group believes that antitrust cannot be fully recovered without first jettisoning the premise that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[4]

The goal of this short piece is to answer the question: would, in fact, abandoning the "consumer welfare" standard make the antitrust law too unworkable and indeterminate? This concern is well captured by Judge Doug Ginsburg, who is willing to admit doubt that Congress really intended maximization of "consumer welfare" to be the Sherman Act's goal, but who argues that the alternatives used for most of the 20th century created too much leeway and unpredictability. As he complains, "[c]ourts were freely choosing among multiple, incommensurable, and often conflicting values."[5]

I argue that there is such a thing as a post-consumer welfare antitrust that is practicable and arguably as predictable as the consumer welfare standard. I say that in part because, in practice, the consumer welfare standard has not set a high bar. Decades of practice have shown that the promised scientific certainty of the Chicago method has not materialized, for economics does not yield answers, but arguments.

I argue that the leading alternative standard, the "protection of competition" is at least as predictable, and arguably more determinate than the exceeding abstract consumer welfare test, while being much truer to the legislative intent underlying the antitrust laws. More concretely, we should return to asking, in most antitrust cases, the following question: Given a suspect conduct (or merger): Is this merely part of the competitive process, or is it meant to "suppress or even destroy competition?"[6] This standard actually already forms a part of antitrust doctrine. What changes is eliminating "consumer welfare" as a final or necessary consideration in every case.

Here is why the protection standard might be more practical than consumer welfare was. There is a fundamental and important difference between a law that seeks to maximize some *value*, and one that is designed to protect a *process.* The maximization of a value, particularly one as abstract as "welfare," necessarily puts enforcers and the judiciary in a challenging position, given that welfare is abstract and ultimately unmeasurable. In contrast, the protection of competition standard puts the antitrust law in the position of protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure. In that sense, it makes the antitrust law akin to the "rules of the game," and make enforcers and judges referees, calling out fouls and penalties, with the goal of ultimately improving the state of play, by protecting a competitive process that actually rewards firms with better products. Beside this practical benefit, as a policy matter, this relatively small change would do much to give antitrust room to achieve its historic goals, and generally make antitrust far more attentive to dynamic harms.

2 Pitofsky, *The Political Content of Antitrust,* 127 U. Pa. L.R. 1051, 1051 (1979).

3 Pitofsky, *Introduction: Setting the Stage,* in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 1, 6 (Pitofsky ed., 2008) [hereinafter Pitofsky, How the Chicago School Overshot].

4 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

5 Ginsburg, *Bork's "Legislative Intent" and the Courts,* 79 Antitrust L.J. 941, 950 (2014).

6 *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

II. TWO REVIVALIST SCHOOLS

As I have suggested, there are really two revivalist schools active in the United States right now. Here we can take a closer look at each.

The first group presents a critique that is primarily though not exclusively economic. Its members are more likely to be economists or lawyers with significant experience with contemporary antitrust practice (many of the members of this group would previously be described as members of the "post-Chicago" school of antitrust.[7]) This group tends to take as a principal problem with current antitrust law the misuse and oversimplification of economics. Christopher Leslie (who is not exclusively of this school) writes that "Bork's legacy is an oversimplified economics that often rests on unfounded or disproven assumptions. Yet the very simplicity that renders Bork's descriptions and prescriptions hollow is what makes them so dangerously attractive."[8] As Jonathan Baker and Carl Shapiro write with respect to merger enforcement: "some courts and enforcers have taken flexibility too far, allowing mergers to proceed based upon dubious economic arguments about concentration, entry, expansion, and efficiencies."[9] Daniel Rubinfeld, while crediting the Chicago school for improvements in our understanding of the economics of antitrust, makes the following critique:

> [C]onservative economics has overshot the mark in a number of ways. It has worried more about false positives (bringing the wrong case) than false negatives (failing to bring the right case). It has been too quick to dispense with troubling vertical issues (both price and non-price restraints). And, it has fostered a tendency to downplay enforcement in dynamic technological industries in which innovation issues play a significant role.[10]

This school believes that newer economic tools, used more carefully, can yield a body of law that gains from the sophistication and rigor of economics, but escapes the many errors of omission that are the Chicago school's legacy.

The second antitrust revival group — the school of progressive, or Neo-Brandeisian antitrust — makes a more foundational critique. The second school seeks a return to antitrust's original goals, particularly as enumerated during the Progressive era and the midcentury. The school believes that the correct ends of antitrust have been lost or deliberately discarded — in the words of Barak Orbach, that antitrust has "lost its goal."[11] Less likely to be economists, and more likely to be historians, legal academics, or policy advocates, this group is particularly critical of Robert Bork's premise that the maximization of consumer welfare is the "exclusive" goal of antitrust.

As antitrust scholars know, Bork famously discovered in 1966 that the 1890 Congress had intended the Sherman Act to be what he later termed a "consumer welfare prescription."[12] As Bork put it, courts must be "guided exclusively by consumer welfare and the economic criteria which that value premise implies."[13] In later years, the weight of scholarship regards this discovery as both an implausible reading of the legislative history, and a suspicious echo of Bork's own theories.[14] As Herbert Hovenkamp later concluded, "Bork's analysis of the legislative history

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7 A representative series of essays is Pitofsky, How the Chicago School Overshot, supra note 3.

8 Leslie, *Antitrust Made (Too) Simple,* 79 Antitrust L.J. 917, 939 (2014).

9 Baker & Shapiro, *Reinvigorating Horizontal Merger Enforcement,* in Pitofsky, How the Chicago School Overshot, supra note 3.

10 Rubinfeld, *Conservative Economic Analysis and Its Effects,* in Pitofsky, How the Chicago School Overshot, supra note 3.

11 Orbach, *How Antitrust Lost Its Goal,* 81 Fordham L. Rev. 2253 (2013).

12 Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J.L. & Econ. 7 (1966); see also Bork, The Antitrust Paradox: A Policy at War with Itself 66 (1978) [hereinafter Bork, The Antitrust Paradox] (describing Congress' vision for the Sherman Act as a "consumer welfare prescription.").

13 Bork, *Legislative Intent and the Policy of the Sherman Act,* supra note 12.

14 See, e.g. Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 Cornell L. Rev. 1140, 1182 (1981) (rejecting the single-purpose consumer welfare position as ahistorical, and arguing that the major historical purposes of the antitrust laws are "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor."); Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer- Welfare Hypothesis*, 53 J. Econ. Hist. 359, 373 (1993); Hovenkamp, *Antitrust's Protected Classes,* 88 Mich. L. Rev. 1, 22 (1989); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65, 91 (1982) [hereinafter Lande, *Wealth Transfers*] ("Congress enacted the Sherman Act largely to prohibit and condemn them. Clearly, the chief economic concern was not productive efficiency; if Congress' main goal was to encourage that form of industrial organization that was, in 1890, most efficient, it would have praised the trusts, not condemned them. Rather, the Sherman Act was intended to insure that consumers obtained their 'fair share' of the benefits of free competition."); Pitofsky, *The Political Content of Antitrust,* supra note 2, at 1060-65 (arguing that legislative history, particularly that of the Clayton Act, undermines arguments that Congress viewed antitrust as a purely economic or efficiency-maximizing enterprise during the Progressive Era).

was strained, heavily governed by his own ideological agenda. . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."[15] Nonetheless, over the 1980s through 00s, the argument found a receptive audience in a federal judiciary eager for more clarity and a simpler tool useful for deciding difficult antitrust cases.[16]

The progressive school, in contrast to the first group, begins by demanding the rejection of Bork's oversimplification based on its raw incompatibility with Congressional intent as expressed in 1890 (the Sherman Act), 1914 (the Clayton and FTC Acts) and 1950 (the Anti-Merger Act). Rhetorically, this school takes as more faithful to the original intent of the antitrust laws other statements of antitrust's goals, such as the Supreme Court's statement, in 1904, not long after the law's passage, that the law "has prescribed the rule of free competition among those engaged in . . . commerce." Or the statement by Justice Douglas that the "the philosophy and the command of the Sherman Act" is that "[i]ndustrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self- appointed men...." As far as an accurate statement of legislative intent, the second school is more like to credit the famous summary of the law's goals by Judge Learned Hand, then writing for the Supreme Court in the *Alcoa* decision:

> "[Beyond the problem of monopoly pricing, the Sherman Act was enacted based on a belief that] possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.... We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results…. [A]mong 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....Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[17]

At some level the two schools are talking past each other, or fixated on different problems. The first is suggesting that the consumer welfare standard and associated economic tools are useful, as a means, for detecting truly anticompetitive behavior, but that their usage must be improved. The second school suggests that the problem is not economic but legal – that is, is a failure to defer to the actual intent of Congress, and that it is necessary to recover the original purposes of the laws.

III. HARD QUESTIONS FOR EACH SCHOOL

The hardest question for the first school is this. Can antitrust do everything it was intended to under a consumer welfare standard, or is that standard, as its critics charge, inherently too restrictive and static to faithfully execute the law's intent? The hardest question for the second school is this: what, in practice, would it really mean to move beyond a consumer welfare standard?

The first question is not trivial. It one assumes that the law did and does have broad goals, the consumer welfare standard, in practice, has proven a narrow lens that suffers from many well-documented infirmities.[18] Despite the often brilliant ability of economists to make consumer welfare arguments, the emphasis on measurable harms to consumers still tends to bias the law toward a focus on static harms and, especially, on prices. Such "price fixation" inevitably tends to marginalize parts of the antitrust law concerned with dynamic harms – harms like the blocking of potential competition, slowing of innovation, loss of quality competition, and overall industry stagnation. Stated differently, price fixation

15 Hovenkamp, *Antitrust's Protected Classes,* 88 Mich. L. Rev. 1, 22 (1989).

16 See, e.g. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

17 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) [hereinafter *Alcoa*].

18 Hovenkamp, The Antitrust Enterprise 35-36 (2005) (noting that the Chicago School's conceptions of efficiency, which underlie the consumer welfare paradigm, stand on oversimplified understandings of market dynamics and individual economic behavior); Fox, *The Modernization of Antitrust: A New Equilibrium*, supra note 14, at 1173-174 (the pure consumer welfare approach "fails to reflect producers' potential to achieve lower costs or to deliver the new, the imaginative, and the yet unconceived. It fails to consider opportunities for reversing an anticompetitive trend or for inviting untested competition at the margins. It fails to capture individuality of producers and consumers or to grasp the dynamic qualities of an open enterprise system."); Lemley, *Industry-Specific Antitrust Policy for Innovation,* 2011 Colum. Bus. L. Rev. 637, 637-38 (2011 Milton Handler Lecture) ("We benefit from market competition in existing products, but we benefit far more from the development of new products. . . . IP is more important [than the current static efficiency-maximization function of antitrust] because it stands for dynamic efficiency, which is simply more important to our society than static efficiency.").

makes it harder to fight exclusionary practices, both unilateral and collusive, even though, as Jonathan Baker argues, exclusion should be the "core competition concern,"[19] and as Wu and Hemphill argue, parallel exclusion may last longer than parallel pricing.[20] In theory, such effects are measurable under a consumer welfare standard, but in practice, and particularly before the judiciary, the importance of demonstrated price effects has weakened the law's ability to deal with some of the most serious anticompetitive harms.

Another critique of the consumer welfare driven antitrust is its indeterminacy. Originally sold as providing greater certainty, the highly abstract nature of "welfare" or "efficiency" means it has not delivered the scientific certitude promised. Moreover, as an economic abstraction, it means that only experts (economists, and the occasional lawyer pretending to be one) can make credible consumer welfare arguments in all but the simplest of cases. That leads to what Spencer Weber Waller and Henry First call "antitrust's democratic deficit."[21] As they charge, it yields "an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability."[22] It is hard to deny that, as a general matter, the dominance of the consumer welfare standard has led enforcers to place an emphasis on price-fixing cases or horizontal mergers that can be shown to have clear price effects over more complex, but potentially much more important cases.[23]

Meanwhile, perhaps the greatest challenge facing the the progressive revival of antitrust, is the question indeterminacy. Bork, especially in *The Antitrust Paradox*, described antitrust as incoherent, and offered to eradicate messiness and complex balancing of multiple factors in exchange for a simpler, disciplined and single-pointed theory that promised straightforward answers. Bork, a brilliant litigator, well appreciated the judicial appetite for practicality and administrability. The simple question that Bork posed for every doctrine was this: does it clearly prevent harm to consumers? Have you proven it? Or might there, plausibly, be an economic explanation that doesn't imply harm, and if so, what is it?[24] The challenge for the second school is coming up with some standard of at least roughly similar clarity.

A. After Consumer Welfare

In the progressive revivalist school, there are a few reactions to this critique. Some believe an antitrust with multiple objectives – as described by Learned Hand – is worthy and appropriate, and that the judiciary's very role is the balancing of multiple competing values, otherwise known as exercising judgment. By this view, Chicago School antitrust has simply given the judiciary an excuse not to do their jobs. In the 1960s, in direct response to Bork's 1966 proposal for an exclusive object for antitrust ("consumer welfare") Columbia professors Harlan M. Blake and William K. Jones commented that "Trying to measure a three-dimensional world with a one-dimensional yardstick must be terribly frustrating."[25] Others have seen embracing multiple goals as faithful to what Congress asked the courts and executive branch to do.[26] Even a brief look at the Congressional record surrounding the Sherman or Clayton Acts reveals a variety of intentions, not all of which are necessarily consistent. As antitrust has spread overseas, other nations have tended to also highlight a multiplicity of goals. For example, when the International Competition Network first surveyed its members to identify what they viewed as the goals of antitrust, some of the answers included "Ensuring an effective competitive process;" "Promoting consumer welfare;" "Enhancing efficiency;" "Ensuring economic freedom;" "Ensuring a level playing field for small and mid-sized enterprises;" "Promoting fairness and equality" and others.[27]

It is true that the original arguments against antitrust's multiple goals have not aged well. Robert Bork charged that judges like Learned Hand had assigned an illegitimate "value-choosing role to the federal judiciary."[28] Yet choosing one value to maximize (a narrow conception of

19 Baker, *Exclusion as a Core Competition Concern,* 78 Antitrust L.J. 527 (2013).

20 Hemphill & Wu, *Parallel Exclusion,* 122 Yale L.J. 1182, 1222 (2013).

21 First & Weber Waller, Antitrust's Democracy Deficit, 81 Fordham L. Rev. 2543 (2013). Available at: http://ir.lawnet.fordham.edu/flr/vol81/iss5/13.

22 Id. at 2544; see also K. Sabeel Rahman, *Democracy Against Domination,* (2016).

23 *Alcoa,* 148 F.2d at 429.

24 See generally Bork, The Antitrust Paradox, supra note 12.

25 Blake & Jones, *Toward a Three-Dimensional Antitrust Policy,* 65 Colum. L. Rev. 422, 422 (1965).

26 See, e.g. Pitofsky, *The Political Content of Antitrust,* supra note 2; Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979).

27 Int'l Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 90 (2007).

28 Bork, *Legislative Intent and the Policy of the Sherman Act,* supra note 12, at 10.

consumer welfare) is an even more extreme version of "value-choosing," and one that, moreover, elevates the judiciary over Congress. A fair reading of Congressional intent, it all of its contradictions, makes it hard to dispute that judges like Learned Hand were more faithful to the Sherman Act's mixture of goals.

Nonetheless, we live in an age where we seem to need the goal of any statute, or seemingly of any human endeavor, to be single-pointed.[29] If an antitrust with multiple goals might be more historically accurate and more faithful to congressional intent, the courts and the institutions of antitrust have clearly developed an appetite — even a need — for there to be a unifying purpose for the antitrust law.[30] As such the strongest argument in favor of single or simple standards is administrative and even managerial. The combined bar and judiciary is large; law is practical, and various standards can be hard for litigants and some courts to manage.

A single-pointed goal also does have value for enforcers. Antitrust investigations are challenging and intense, and it is important to have a sense of priorities or goals to guide the mission. But as stated previously consumer welfare, while a single goal, is not an ideal guide for enforcers, given that it is so abstract and unmeasurable in practice. The standard does have an appeal to economists, but that does not seem a good enough reason to support its continued usage; and in any event, the skills of the economist will be needed under any chosen standard.

B. Preservation of Competition

Some have begun to argue that the "preservation of competition" should be re-recognized as the "end" of antitrust. Even some members of the judiciary have so stated. Without much fanfare, Justice Stephen Breyer, in condemning so-called "pay for delay" settlements in the pharmaceutical industry, did so based on the "potential for genuine adverse effects on competition."[31] Richard Posner writes that "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency."[32]

As a legal matter, the "protection of competition" standard has the advantage of much greater support from congressional intent and earlier precedent. It is a challenging, even absurd exercise, to pick a modern economic standard out of the language of the Sherman, Clayton, or Anti-Merger Acts or their legislative histories. The idea that Congress was concerned with "allocative efficiency" in 1890 or even 1914 or 1950 is an economic version of anthropomorphism.[33] In contrast, it is no great stretch to say that Congress was interested in the preservation of competition. The Congressional Record does not contain the words "allocative efficiency," "consumer welfare" or "wealth transfer" but it does repeatedly discuss the choice between competition and monopoly. Here, as just one typical example, is Representative Dick Thompson in 1914: "the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition."[34]

These considerations suggest a return to the "protection of competition" as the recognized goal of American antitrust law. It is a return, for, as Barak Orbach makes clear, protection of competition was, from the 1890s through 1970s, the accepted and restated goal of the antitrust laws.[35] The point was repeated over the decades: In 1904 the Supreme Court said in *N. Sec. Co. v. United States* that the Sherman Act "has prescribed the rule of free competition among those engaged in . . . commerce."[36] In the 50s, it stated in *Standard Oil Co. v. FTC*, "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'"[37] And in 1978, the Court

29 This is a feature of our times that later historians may understand better than we do.

30 In another oddity, it is also sometimes assumed that the various statutes need share a similar goal, when Congress could easily have intended one set of goals for the Sherman Act, another the Clayton Act, and so on.

31 *FTC v. Actavis, Inc.*, 570 U.S. 136, 153 (2013) (*citing FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 460 (1986)).

32 *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986).

33 Lande, *Wealth Transfers,* supra note 14, at 109 (stating that the argument that consumer welfare maximization was the purpose of the Sherman Act "is not supported by the record. Familiarity with allocative efficiency did not increase substantially from 1890 to 1914, even among economists, who had little influence on the passage of the Act, much less among legislators. No mention of any concept resembling allocative efficiency appears in the legislative history of the FTC Act.").

34 Rep. Dick Thompson Morgan, 51 Cong. Rec. 9265 (1914).

35 Orbach, *How Antitrust Lost Its Goal,* supra note 11.

36 *N. Sec. Co. v. United States,* 193 U.S. 197, 331 (1904).

37 *Standard Oil Co. v. FTC,* 340 U.S. 231, 248 (1951).

observed that “Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country.”[38] In short, to use the “protection of competition” standard is not to break new ground but to return to previous practice.

C. Protection of the Competition in Practice

This leads us, finally, to our question: is “protection of competition” or “protection of the competitive process” too indeterminate a standard? I think the answer is “no,” because it draws on tests already in use in antitrust law and practice. Nonetheless, I think that its development will require much further work and practice to arrive at practicable standards. Indeed, this short writing surely does not represent the author’s final thoughts on the matter. What I describe here is a beginning of what I think is an important and indeed essential project for the future of the law.

In nearly any antitrust case, I suggest the law should focus on one question: is the complained-of conduct (or merger) merely part of the competitive process, or is it meant to “suppress or even destroy competition?”[39]

This is a test primarily focused on protection of a *process*, more specifically, which is different than the maximization of a *value.* It is based on the premise that the legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth. The former asks the legal system to eliminate subversions and abuses; the latter, in contrast inevitably demands some exercise in social planning, and ascertaining values that can be exceeding difficult, if not impossible, to measure.

We might analogize the economy to a complex competitive sport, like American football, with rules set by custom and the legal system. It would be very different to ask the referees to enforce the rules in an effort to maximize “fan welfare,” as opposed to telling them to protect the process of competitive from any gross distortions or subversions. The former creates a near-impossible undertaking – who can measure fan welfare? – in which a failing to calls fouls (false negative) would seem inevitable. The latter objective puts the referees in the more realistic position of penalizing what seem like deviations and abuses that threaten to ruin the game, by providing an end-run around competition on the merits. I think its more realistic to ask enforcers and judges to act like referees, calling out fouls and penalties, with the goal of ultimately protecting the quality of play, which in this case means an economy that does not allow size, market power, or anticompetitive agreements to be used as weapons, and instead seeks to reward the firms with better products.

At its best, protection of competition can and should draw on more than a century of economics that have sought to better understand how markets actually work in practice, as opposed to in theory. That means understanding that the competitive process includes both competition on quality and price, that it can be disrupted by market entry and the development of new technologies (yielding firms that may compete for instead of in the market), and that competition can be suppressed or impaired by collusion, by barriers to competition or entry, by the raising of rivals costs, and myriad other means. To repeat the point, what the law need do is separate fair and foul – allow competitive but deter and penalize undue suppression, distortion or subversion of that process. That includes suppression by very familiar means: conduct designed to negate price or quality competition, or designed to block or exclude challengers, which can be collusive or unilateral, and exclusionary or related to price or quality.

The protection of competition also calls for a more realistic assessment of firms at different stages of their life cycle. The Sherman Act did not take all firms as equal, but was premised on the concern that that monopolies and mergers to monopoly tended to suppress the competitive process. The law should also recognize that there are such things as long-standing incumbents, that is, firms that have held considerable market share for some time, as well as entrants, challengers and mavericks, firms that are either new to the market, or in some way attempting to gain market share. There are long-standing oligopolies who may want to exclude outsider. Firms can be in ascendance or on the decline and that this may influence their incentives and the goals of their mergers. To be sure, identity isn’t destiny, and not all new firms are innovative, nor are all monopolists or incumbents committed to the protection of their empires. However, we have more than a century of observed tendencies, and it is not unreasonable to suspect that a long-standing monopolist with outdated technology facing a challenge from an innovative competitor may, in fact, have the incentive to try and exclude the challenger. Hence the particular scrutiny of monopolies and those with market power.

The main advantage of a “protection of competition” standard is that, unlike threats to “consumer welfare,” potential threats to the competitive process are far more obvious: it is the allegation that a powerful or unethical firm is seeking to disable the process of competition on the merits. Such episodes do not go unnoticed, and indeed are already what spark the interest of enforcers when such conduct is complained of.

38 *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398-399 (1978).

39 *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

There is classic complaint about the protection of competition goal: that it can become protectionism, protecting the inefficient against the efficient. This is captured in often misused slogan that "antitrust is meant to protection competition, not competitors." Before going further, it should first be admitted that Congress is actually free to protect any class of firms if it wants to – for slogans, even if popular among antitrust lawyers, do not actually have the status of Constitutional law. But I want to face the argument on its merits. I think the charge of protectionism actually displays a lack of faith in the competitive process. If the antitrust law serves to eliminate distortions in competition, then, in theory, the firms with better quality goods and cheaper prices will win out. But that must be distinguished from the Chicago school's bad habit of finding any conceivable efficiency in an anti-competitive practice and pronouncing it part of the competitive process. The problem with the protectionism argument is that it can be wrongly used to describe situations where lack of antitrust enforcement is what is actually protecting the competitor – namely, the incumbent, who is actually weak, but is able to keep competitors at bay using means that should, in fact, be condemned. For at bottom, removing bottlenecks and subversions of competition does not afford protection for the weak, but exposing those whose weakness is disguised by the building of barriers to disguise that fact.

IV. FRAMEWORK OF ANALYSIS

Here is an example of the considerations that ought to be used by an enforcer whose aim is the protection of the competitive process. Leaving aside price-fixing cases (where consumers truly are the victims), antitrust complaints usually involve one party (the aggressor) seeking to inflict some economic damage to another party, or set of parties. That, of course, can be a legitimate part of market competition, much as inflicting blows is part of boxing. Yet it nonetheless remains the enforcers' task to distinguish between strategies and attacks that represent the competitive process (actual blows), as opposed to its subversion (low blows). Hence the basic question is whether the complained-of conduct is competition on the merits, or, rather, an effort to disable or subvert the competitive process? That is, I think, the question that should be front of mind for law enforcement, and ultimately, over time, begin to inform the substantive judicial tests, including the rule of reason, the tests surrounding Section 2 of the Sherman Act, and even, to some degree, merger review.

Given some complained-of conduct, the enforcer should ask the following questions:

1. Who is the complainant? An incumbent or a challenger? An entrant with at least a putatively better product, a price-cutting maverick, or an incumbent facing decline and possible displacement?

2. Who is the alleged lawbreaker? An entrant, or a long-standing monopolist, an incumbent who has been losing market share? Does the firm appear to have sufficient market power to actually affect the process of competition?

3. What is the complained-of conduct? It is competition on the merits (i.e. a better or cheaper product) or a potentially illegitimate methods (sabotage, exclusionary deals, tying, predation, manipulation of a standards process, and so on). It is here that any procompetitive justification for the conduct is considered.

4. Is there some evidence of distortion or suppression of the competitive process — anticompetitive effects, exclusion, or the raising of rivals' costs — as defined by competition on the basis of price and quality? It is here that potential harm to consumer welfare might be considered, but it is ultimately suppression of competition that is the concern.

5. Does the complained-of conduct or merger tend to implicate important non-economic values, particularly political values? Might it tend to preserve a long-standing, politically influential oligopoly, or preserve the position of a longstanding monopolist insulated from competition by the power of the state?

This kind of analysis attempts to capture far more of the dynamics of the competitive process then does existing analyses, and also implicate political considerations as well. And as I've suggested, this manner of thinking is not actually really new to contemporary antitrust analysis. It is reflected, for example, in Section 2's jurisprudence of exclusionary conduct versus "procompetitive justifications" in opinions like *Microsoft*.[40] Echoes of a similar concern with the competitive process can also be found in the concern with the elimination of "mavericks" that is a feature of merger analysis.[41]

40 *U.S. v. Microsoft,* 253 F.3d 34 (D.C. Cir. 2001).

41 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.1.5 (2010).

This manner of thinking also reverts to the original versions of the rule of reason which were more clearly concerned with the competitive process. In *Chicago Board of Trade*, Justice Brandeis' primary concern was whether the restraint in question was something designed to promote the process of competition, or whether it was meant to suppress or even destroy competition.[42] As he wrote, "[t]he true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition… The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."[43] Only in later years did the test morph into a supposed balancing test of harms and benefits, a balancing which, in practice, is almost never performed anyhow,[44] given the difficulty of actually measuring matters like market power and market harms.

Here is where the process-driven approach is really different from a consumer welfare standard. The former differs in the sense that it is not ultimately tied to arguments about whether, in the final analysis, consumer welfare has been served or not.

42 *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

43 Id.

44 See Baye & Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & Econ. 1 (2011) (presenting an empirical analysis of the effect of antitrust cases' complexity on appeal rate, and concluding that district judges lack the economic understanding necessary to evaluate evidence bearing on the consumer welfare effects of a practice or merger). See also Stucke, *Reconsidering Antitrust's Goals;* 53 B.C. L. Rev. 551 (2012) ("There is no empirical evidence that courts and antitrust enforcers systematically optimize efficiency across industries through the vague rule-of-reason standard.").

HIPSTER ANTITRUST MEETS PUBLIC CHOICE ECONOMICS: THE CONSUMER WELFARE STANDARD, RULE OF LAW, AND RENT SEEKING

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I. INTRODUCTION

Hipster Antitrust, or the "New Brandeis Movement," (hereinafter "Hipster Antitrust") proposes to divorce antitrust law from economic analysis, to abandon the well-established consumer welfare framework that introduced the rule of law to antitrust, and to replace that standard with a vague and pliable socio-political approach. Hipster Antitrust claims the consumer welfare standard invites excessive corporate control over antitrust agencies and outcomes. Hipster Antitrust claims it would reduce corporate control over antitrust institutions and their decision-making by relaxing the constraints imposed upon them by the consumer welfare standard and simultaneously granting them greater discretion under a broader, multi-factored public interest test. The purpose of our paper is to explain why this claim fails as a matter of both history and economics. In doing so, we hope to more fully illuminate the benefits of the consumer welfare standard in bringing the rule of law to antitrust.

It is difficult to overstate the positive influence upon antitrust jurisprudence and enforcement caused by the introduction of the consumer welfare standard and rejection of the previous incoherent hodgepodge of socio-political goals governing antitrust. But in this paper we focus not upon the more general benefits of the consumer welfare standard — for example, substantive improvements that more precisely tailored the antitrust laws to condemn anticompetitive behavior and allow procompetitive behavior — but instead evaluate the narrower question of the relationship between the choice of antitrust standard and incentives to engage in rent-seeking behavior or to subvert the antitrust laws for special interests. Hipster Antitrust claims a vaguer standard would reduce those incentives and produce superior outcomes. We rely upon public choice economics, empirical evidence, and the history of antitrust under precisely such a standard to demonstrate this claim is false. Indeed, we claim that an increase in the vagueness of the standard increases incentives for rent-seeking activity.

A core insight of public choice economics is that individuals within government institutions, like all individuals, respond to incentives. The operation of those institutions during the era in which the Hipster Antitrust's preferred vague antitrust standards were in place provides a window to evaluate the claim that greater discretion leads to less risk of regulatory capture, subversion of the antitrust laws, and crony capitalism. Not surprisingly, an evaluation of the historical record and evidence shows that the introduction of the consumer welfare standard reduced incentives for rent seeking and brought the rule of law to antitrust.

The rule of law is essential to our legal system. It is a foundational principle. And one with myriad economic benefits arising both from the predictability of outcomes, as well as holding government agencies and actors accountable for their decisions. The benefits arising from the increase in predictability of antitrust outcomes has been explored at great length by antitrust scholars and practitioners and we do not repeat those arguments here.[2] We focus primarily upon the second point — the constraints that a meaningful and objective standard imposes upon agency behavior and upon incentives to subvert the antitrust laws for private gain.

Hipster Antitrust has raised several interesting and intellectually important challenges to the antitrust *status quo*. Each deserves to be taken seriously and evaluated on its merits. We share the concern that antitrust institutions might be used to promote corporate welfare instead of consumer welfare, and lead to subversion of the antitrust laws more generally. We explain here in economic, empirical, and historical terms why the Hipster Antitrust claim that rejecting the consumer welfare standard in favor of a broader and more pliable public interest standard would reduce that risk is incorrect.

II. PUBLIC CHOICE THEORY AND ANTITRUST

A. Fundamentals of Public Choice Theory, Rent Seeking, and Regulatory Capture

Public choice economics refers to economists' study of collective choice processes. At its core, public choice economics extends the traditional tools of microeconomic analysis — that is, the study of individual decision-making — to individuals operating government institutions, be they legislators, bureaucrats, or judges. The economic problem becomes how to "model the ways in which the diverse and often conflicting preferences of self-interested individuals get expressed and collated when decisions are made collectively."[3]

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2 Early antitrust decisions often articulated conflicting goals that made it difficult to predict whether, for instance, courts would apply the antitrust laws to protect competition or, instead, to protect competitors from competition. See, e.g. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699-700. (1967) ("[A] competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.").

3 Shughart II, *Public Choice,* Library of Economics and Liberty, http://www.econlib.org/library/Enc/PublicChoice.html.

Public choice economics may be applied to explain why some government actions benefit certain interest groups at the expense of others, with a particular focus upon the political process.[4] Public choice also may be contrasted with "public interest theory." The latter presumes that while individuals act according to their own self-interest while behaving in their personal capacities, those same individuals act against their own self-interest and in accordance with the public interest — benevolently correcting the failures of private markets — while behaving as government employees.[5] Public choice theory, in contrast, recognized the oddity of presuming such vastly disparate motivations for precisely the same set of individuals, and challenged economists to use their traditional toolkit, focused upon individual decision-making, to analyze decisions within government institutions. It theorized, quite simply, that people are people, and that there exists a distinct lack of support for the notion that self-interested actors transform into substantially different creatures upon transitioning to their governmental capacities.[6] Under public choice theory, then, the government's part in the economy is another outcome "to be explained, not assumed."[7] Thus, the rise of public choice theory coincided with the intellectual development of the theory of economic regulation.[8]

The public choice approach, supplemented by empirical studies that firmly rejected the public interest theory of bureaucracy, helped explain the behavior of voters, bureaucrats, politicians, interest groups, and other political actors across a variety of non-market settings.[9] A primary insight of public choice's analytical framework is its theory of special interests and the process of rent seeking. For our purposes, economic rents, or returns in excess of a firm's opportunity cost, refer to those rents artificially created and awarded through government action.[10] Despite that these rents arise artificially (i.e. they are not derivative of natural market conditions), they are nonetheless subject to their own version of competition.[11] The process of pursuing these artificially created rents is commonly labeled "rent seeking," and entails significant societal costs.[12]

A quintessential rent-seeking example involves a domestic industry attempting to establish legislative or regulatory protection from foreign competitors.[13] A domestic industry in this scenario might donate to a politician's campaign to influence the politician's behavior, hire lobbyists to push domestic legislative bodies to adopt protective laws or rules, or employ lawyers to litigate, or to complain to government agencies about, a rival's allegedly unlawful behavior.[14]

Public choice labels such rent-seeking schemes as strictly wasteful because the process imposes significant costs upon society, regardless of whether the scheme is successful. If a rent-seeking scheme succeeds in raising legislative or regulatory barriers to entry, consumers will likely bear social costs similar to those associated with cartelization or price fixing.[15] When a government awards artificial rents, the beneficiary

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4 Tollison, *Public Choice and Antitrust*, 4 Cato J. 905, 910 (1985). See also Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie,* 74 Va. L. Rev. 179, 180-81 (1988).

5 Tollison, supra note 4, at 905. See also Brennan & Buchanan, supra note 4.

6 Tollison, supra note 4, at 907. In short, public choice is "politics without romance." See Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in The Theory of Public Choice—II, 11 (Buchanan & Tollison eds. 1984).

7 Tollison, supra note 4, at 906.

8 See, e.g. Peltzman, *Toward a More General Theory of Economic Regulation,* 19 J.L. & Econ. 211, 212 (1976) ("[a] common, though not universal, conclusion has become that, as between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest."); Becker, *A Theory of Competition Among Pressure Groups*, 98 Q.J. Econ. 371 (1983); Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

9 See, e.g. Buchanan & Tullock, Calculus of Consent (1962); Niskanen, Jr., Bureaucracy and Representative Government (1971); Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291 (1974); Shughart & Tollison, *On the Growth of Government and the Political Economy of Legislation*, 9 L. & Econ. 111 (1986); Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. Econ. J. 224 (1967).

10 Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 575 (1982). Economic "rents" can also occur naturally in the price system due to events such as shifts in the demand or supply curves and, under these circumstances, pursuing rents is merely synonymous with profit seeking in the competitive process. Id.

11 Id.

12 Id. Tullock is largely credited with developing and popularizing the concept of rent seeking. See Tullock, supra note 9; Tullock, *Public Choice*, in 4 The New Palgrave: A Dictionary of Economics 147 (Eatwell, Milgate & Newman eds. 1987) [hereinafter Tullock, *Public Choice*]. However, Ann Krueger coined the term "rent seeking." See Krueger, supra note 9.

13 See Tullock, supra note 9.

14 Id. See also Tullock, *Future Directions for Rent-Seeking Research*, *in* The Political Economy of Rent Seeking 465, 466 (Rowley, Tollison & Tullock eds. 1988); DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 Harv. J. L. & Pub. Pol'y 205, 214-15 (1991).

15 See Debow, supra note 14, at 215; Tullock, supra note 9.

often gains the ability to price above competitive levels. Although such decisions result in net losses to society, private interests can successfully extract these rents because the benefits are concentrated among a small number of organized individuals while the costs are diffused across numerous consumers who individually lack the incentive to organize and protect themselves.[16]

But rent seeking is costly regardless of whether it succeeds because it always diverts resources that could be used in productive endeavors (and thereby increase welfare), toward efforts that merely capture a greater portion of existing welfare (i.e. simply transferring welfare).[17] For example, a firm facing a loss of sales to a rival could respond by taking a number of productive actions such as lowering prices, improving product quality, innovating, or increasing advertising.[18] However, the firm also could take non-productive actions like appealing to the government for protection via lobbying for legislation, influencing a regulatory ruling, initiating a lawsuit, or complaining to an agency.[19] Compounding these costs, many situations also encourage private parties to engage in defensive forms of rent seeking; for example, to prevent the government from stripping them of a privately-created rent or awarding an artificial rent to a rival.[20]

Ultimately, a firm's decision to engage in rent-seeking activity depends upon its expected return from such behavior. It is well understood that granting government institutions broader discretion over the creation and distribution of rents will increase the expected return to rent-seeking behavior.[21] The avenues through which a government institution — an antitrust agency, for example — might increase its discretion over the creation and distribution of such rents are many. An increase in the vagueness of a statutory mandate or rule simultaneously: (1) presents more avenues by which a firm can rent seek; and (2) diminishes the government agency's accountability to the public which might force the agency to internalize the costs of poor decision-making. Multi-factored, opaque rules provide greater discretion to government agencies and, accordingly, less certainty as to outcomes. This makes it easier for an agency to explain any given outcome and more difficult for a court or the public to hold that agency accountable for such decisions. Thus, vague rules will generally increase the overall level of rent seeking — along with its commensurate societal costs.[22] Increased rent seeking can, in turn, increase the likelihood of what has been deemed "regulatory capture," that is, the phenomenon wherein government agencies charged with acting in the public interest instead act in the interest of the most vocal special interests before them, typically at the expense of the public at large.[23]

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16 See generally Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups (1965); Mitchell, *Interest Groups: Economic Perspectives and Contributions*, 2 J. Theoretical Pol. 85 (1990); see also Debow, supra note 10, at 215-16.

17 See Debow, supra note 14, at 216; Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 Cato J. 431 (1987); Tollison, *Is the Theory of Rent-Seeking Here to Stay?*, in Democracy and Public Choice: Essays in Honor of Gordon Tullock 143, 145 (Rowley ed. 1987); Tullock, *Public Choice*, supra note 12. Some refer to these types of activities as "directly unproductive." See Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. Pol. Econ. 988 (1982).

18 Shughart & McChesney, *Public Choice Theory and Antitrust Policy*, 142 Public Choice 385, 398 (2010).

19 Id. at 399.

20 McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. Legal Stud. 101, 102-03 (1987).

21 The expansion of governmental power and discretion also introduces more uncertainty into the law, making estimations about the chances of winning or losing at trial more difficult. This would almost certainly increase the problem of "overinvestment" in non-productive rent seeking. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 Cal. L. Rev. 1, 4 (1980). For deeper discussions on examples of private abuse in the area of antitrust, see Greenhut & Benson, American Antitrust Laws in Theory and Practice 145-222 (1989); Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985); Hazlett, *Is Antitrust Anticompetitive?*, 9 Harv. J.L. & Pub. Pol'y 277, *319*-29 (1986); Miller III, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267 (1985).

22 See Debow, supra note 14, at 222; Wright & Ginsburg, *The Economic Analysis of Antitrust Consents*, Euro. J.L. & Econ. (forthcoming 2018) ("Greater agency discretion over liability also may shift resources from productive uses to rent-seeking activities."). See also Sullivan, supra note 21.

23 Stigler, supra note 8; see also Olson, supra note 16.

B. Public Choice Theory and Antitrust

While public choice theory's implications for antitrust are, at times, overlooked,[24] the ties between public choice theory and antitrust enforcement have been rigorously evaluated over the last more than 30 years.[25] The public choice literature relating to antitrust has focused upon a series of interrelated inquiries. *First*, which theory, public interest or public choice, better explains agency behavior? *Second*, and relatedly, what do specific studies tell us about actual antitrust agency behavior? *Third*, why might antitrust enforcement be particularly prone to rent-seeking behavior? And, *fourth*, if public choice theory is indeed the better fit, how can antitrust best achieve its objective of maximizing consumer welfare?

At the outset, it is important to note that before antitrust law fully embraced the consumer welfare standard, it sought to effectuate a number of vaguely articulated socio-political goals, such as preventing bigness and preserving "small dealers and worthy men."[26] As developed, public choice theory predicts such a regime, characterized by a vague mandate and boundless discretion by agencies, would be characterized by large amounts of rent seeking; whereas public interest theory predicts regulators would nonetheless act benevolently and in the public interest.

To the first insight — which theory better explains agency behavior — at least by 1985, prolific public choice economist Robert D. Tollison noted that "many critics have shown[] the historical record of antitrust decisions will not support the public interest theory."[27] Shughart and McChesney similarly explained that, around this time, "scholars who studied antitrust policymaking came away puzzled by evidence they uncovered pointing to a significant gap between the theory of antitrust — widely but not unanimously accepted as a policy tool meant to protect consumers against abuses of market power in the economy — and its application in actual law enforcement practice."[28] They elaborated that "outcomes of large numbers of antitrust cases brought by the U.S. Department of Justice's Antitrust Division [and] the Federal Trade Commission (FTC)" before about 1980 appeared "inconsistent with law-enforcement philosophy guided by a consumer-welfare standard."[29]

Second, during this time, the FTC was frequently and consistently condemned for ineffective enforcement efforts — which were typically at odds with consumer outcomes. For example, *The Nader Report on the Federal Trade Commission* highlighted the Commission's numerous failures, illuminating its inability to protect consumers and its particular tendency to respond to political pressures rather than consumer interests.[30] Antitrust luminary Judge Richard A. Posner likewise noted in 1969 that the FTC was "rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized;" "lack[ed] both the incentives and the pressures to be efficient;" and that was, "all in all, inefficient and incompetent."[31]

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24 See infra Part II; see also Shughart II & Tollison, *The Positive Economics of Antitrust Policy: A Survey Article*, 5 Int'l Rev. of Law & Econ. 39, 53 (1985) ("Antitrust is one of the few remaining areas in which it is commonly assumed that government operates in the public interest.").

25 Shughart & McChesney, supra note 18, at 388-91 (collecting literature and empirical studies testing the "consumer welfare" or public interest theory of antitrust and explaining the "puzzling inability of the consumer-welfare models to predict antitrust law enforcement activity"); Shughart, *Antitrust, Regulation and the Chicago School*, Oxford Business Law Blog (Feb 26, 2017) https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/antitrust-regulation-and-%E2%80%9C-chicago-school%E2%80%9D.

26 See, e.g. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699 (1967) (A "competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men"); *United States. v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945) (antitrust law exists to "put an end to great aggregations of capital because of the helplessness of the individual before them").

27 Tollison, supra note 4, at 905.

28 Shughart & McChesney, supra note 18, at 386.

29 Id.

30 Cox, Fellmeth & Schulz, The Nader Report on the Federal Trade Commission (1969).

31 Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 47, 87 (1969). Further, the Antitrust Section of the ABA likewise authored a critical report of the Commission around this same time. Report of the ABA Commission to Study the Federal Trade Commission (1969). As Judge Posner noted, these criticisms followed a long line of earlier criticisms of the Commission. Posner, supra, at 47 n.1.

Empirical studies of agency behavior and antitrust outcomes during antitrust's socio-political era reinforced that the antitrust agencies were not, in fact, seeking to maximize the public interest.[32] Long, Schramm, and Tollison, for instance, analyzed the role of economic criteria in antitrust enforcement, particularly, "to what extent industry welfare losses, and the components of welfare losses which measure the price of monopoly and the industry size, explain the historical distribution of antitrust cases [between 1945 and 1970] across different manufacturing industries."[33] Their study concluded that "economic variables may influence antitrust decisions," but that "all the models tested explain[ed] at best about 60 per cent of the variance in cases brought across industries."[34] In other words, measurable public interest factors failed to explain nearly half of DOJ antitrust decisions. Subsequently, Coate, Higgins, and McChesney specifically tested whether FTC decisions were influenced by pressure from Congress.[35] Their study found political pressure indeed led the Commission to challenge additional proposed mergers in 1982 and 1986.[36]

Again, such results were not only unsurprising, but largely predicted by public choice theory. As with other areas (potentially) impacted by government action, special interest groups have often used their powerful voices to affect antitrust enforcement.[37]

Third, public choice theory elucidates various factors that may contribute to rent seeking in the antitrust context. Some relate to traditional public choice insights regarding bureaucratic incentives. For instance, agency employees will generally seek to increase the importance of their agency and themselves — which often translates to more government activity intended to, among other things, justify higher budgets; carve out a larger jurisdictional territory; and, in many cases, maximize individual employees' exit options into the private sector.[38]

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.[39] Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys' fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant's ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival's resources for years — thereby crippling a rival and diminishing the amount

32 See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365 (1970); Yandle, *Antitrust Actions and the Budgeting Process*, 59 Pub. Choice 263 (1988) (finding the "public interest hypothesis has not been supported by empirical work").

33 Long, Schramm & Tollison, *The Economic Determinants of Antitrust Activity*, 16 J.L. & Econ. 351, 351, 365 (1973).

34 Id. at 362.

35 Coate, Higgins & McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & Econ. 463 (1990).

36 Id. at 465, 481-82. The authors further explained that their "political variables may understate the FTC's overall susceptibility to political considerations. The sample does not include attempts to merge that would have occurred but for parties' perception that merger would be unacceptable politically." Id. at 477-78. Notably, this study also found factors articulated in the 1982 Horizontal Merger Guidelines also impacted Commission decisions. Id. at 481. See also Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. Pol. Econ. 884 (1986); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking at the Federal Trade Commission*, 91 J. Pol. Econ. 765 (1983).

37 The Robinson-Patman Act prohibits price discrimination and was specifically designed to protect smaller retailers from the competitive pressures exerted by larger (often chain) stores that could otherwise obtain significant bulk discounts. See Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. & Econ. 243 (1984). While it is widely recognized today that the Robinson-Patman Act does more harm than good by preventing such healthy competition, Tollison has explained that Robinson-Patman "is not a mistake of antitrust policy but a rationally designed law to buffer certain firms against losses." Tollison, supra note 4, at 911; see also Armentano, Antitrust and Monopoly: Anatomy of a Policy Failure 167-92 (1982); Bork, The Antitrust Paradox: A Policy at War with Itself 382 (1978); Blair & DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J.L. & Econ. 201, 201-02 (2014).

38 See Posner, supra note 31, at 85-86 ("George J. Stigler proposes as a reasonable assumption that regulators act so as (to) retain their jobs and (b) to obtain greater appropriations for their agency as a way of increasing personal power (and frequently remuneration as well). This assumption seems reasonable in regard to commissioners who seek reappointment and those staff members who make a career of government service. The self-interest of such individuals would appear to dictate the avoidance of controversy and the conciliation of well organized economic interests and influential Congressmen. . . . A commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement. He will receive no bonus upon entry (or reentry) into private practice for the vigorous championing of the consumer interest. . . . On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests would engender may do him some later harm, while making his tenure with the Commission more tense and demanding than would otherwise be the case."); Shughart II, *Don't Revise the Clayton Act, Scrap It!*, 6 Cato J. 925, 928 (1987) ("Bureaucratic incentives run strongly in the direction of producing visible output . . . The more work there is for government, the more opportunities there are for the attorney staff to build the human capital that is rewarded when they subsequently take jobs in big antitrust law firms, and the larger and more secure are the antitrust bureaus.").

39 See Baumol & Ordover, supra note 21, at 252-56.

of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.[40]

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.[41] The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

This historical context of the performance of antitrust institutions during the era of vague and multi-factored antitrust standards is critical to understanding contemporary proposals to revolutionize antitrust law and enforcement. Those proposals have claimed, counter to economic logic and historical evidence, that a return to the socio-political era of antitrust would bring a decrease in rent seeking. Our goal here is to explain why those claims are false. The consumer welfare standard provided antitrust law a correction that reduced subversion of the antitrust laws to serve corporate interests rather than consumer welfare. Modern critics of the consumer welfare standard argue the opposite. But the history of the antitrust enterprise tells a different tale. Today, there is wide, bipartisan agreement that the consumer welfare standard transformed antitrust law for the better.[42] It offers an economically-grounded framework for analyzing enforcement actions, and clear criteria the agencies (and private plaintiffs) must demonstrate to prove an antitrust violation. The consumer welfare standard thus was key to bringing the rule of law to antitrust. In doing so, the consumer welfare standard hampers rent-seeking efforts — which, in turn, has brought more clarity and consistency to antitrust outcomes.

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40 See Baumol & Ordover, supra note 21, at 254-55 (explaining why "vagueness of antitrust criteria" contribute to rent seeking, and noting "obscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition"); Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 Harv. J.L. & Pub. Pol'y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases."); Shughart & McChesney, supra note 18, at 389 ("Coupled with the large number of scholarly journal articles and books conducting and reporting on postmortems of individual antitrust cases, the empirical literature pioneered by Long et al. (1973) made it obvious that, whatever good intentions Congress may have had in passing the Sherman, Clayton and FTC acts, the enforcers of those laws were motivated by something other than the welfare of consumers.").

41 See, e.g. Baumol & Ordover, supra note 21, at 254-55 ("[T]he Areeda-Turner test [for predatory pricing] . . . seems to us certainly to have made a critical and beneficial contribution simply by reducing vagueness in the criterion of predation in pricing. This makes protectionist misuse of the antitrust laws much less easy."); Coate, Higgins & McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & Econ. 463, 470, 481-82 & n.43 (1990) (explaining that the Horizontal Merger Guidelines help to constrain the influence of political considerations on antitrust outcomes).

42 See, e.g. Ginsburg, supra note 40, at 222 ("There is now broad and nonpartisan agreement in academia, the bar, and the courts regarding the importance of sound economic analysis in antitrust decision making."); Averitt & Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175, 177 (2007) (describing the antitrust paradigm of the 1960s and 1970s as "standardless and unduly hostile to business" and the consumer welfare standard as "an immense improvement" over the big is bad era); Deborah Garza, Deputy Asst. Att'y Gen., Antitrust Division, The Modernization of Antitrust Law – Private and Public Enforcement and Abuses – Europe and the U.S., Remarks Before The Stanford Institute of Economic Policy Research (May 29, 2008), https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and ("Even the most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning . . . . We won't return to what antitrust enforcement looked like 40 years ago.").

III. HIPSTER ANTITRUST AND RENT-SEEKING INCENTIVES

A. Key Tenets of Hipster Antitrust

Hipster Antitrust comes in a wide variety of shapes and flavors but ultimately can be summarized by one unifying theme: the rejection of the consumer welfare standard in favor of vague social and political goals that elevate normative views about market structure over modern economic theory and empirical evidence.[43] To accomplish this goal, Hipster Antitrust attempts to capitalize on current populist sentiments to lure supporters with rhetoric drawing parallels between the trusts of the late 19th and early 20th centuries and the modern U.S. economy. While laying a myriad of societal ills at the feet of modern antitrust jurisprudence, Hipster Antitrust seeks, through nostalgic reflex, for antitrust law to become a central tool for carrying out a new wave of government intervention not seen since the New Deal. In doing so, Hipster Antitrust purports to offer a progressive vision, but one that ironically completely ignores the significant progress made in industrial organization economics over the past century and threatens to send antitrust policy careening back to the field's equivalent of the Stone Age.[44] This untethering of antitrust from the consumer welfare standard and modern economics not only would significantly increase errors in antitrust outcomes, but maybe more significantly, also would weaponize antitrust as a political and regulatory tool that encourages rent seeking and ultimately corporate welfare.

While Hipster Antitrust undoubtedly starts from a place of noble intentions and an alluring desire to promote democratic goals central to our nation's founding, it ultimately falls wide of the mark — and regrettably actually threatens to harm our institutions — by ignoring the lessons of antitrust's past, advances in economic learning, and incentives inherent in democratic decision-making structures. To better understand the flaws inherent in Hipster Antitrust, it is useful first to examine in more detail its central tenets and key policy proposals.

Dismantling the Consumer Welfare Standard: It is easy to forget that antitrust once was regarded as an incoherent body of law that was internally inconsistent and unprincipled.[45] Antitrust struggled with seemingly basic concepts, such as whether it should protect competition or whether it should protect competitors *from* competition. The arbitrariness of antitrust enforcement decisions during this time was so significant that one Supreme Court justice remarked: "The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins."[46] It is the consumer welfare standard that offered a way out of the quagmire. Born out of considerable debate, the consumer welfare standard provided antitrust with a disciplined method of analyzing competition that starts and ends with the straightforward question: "Is the challenged conduct likely to make consumers better or worse off?" The consumer welfare model further called upon courts and enforcers to rely on an error-cost framework and the latest economic evidence in assessing whether the challenged conduct harms consumers.[47]

Hipster Antitrust rejects the consumer welfare standard.[48] This hostility stems from a belief that the consumer welfare standard focuses narrowly only on short-term price effects and thus has dramatically weakened antitrust enforcement below some perceived optimal level. Hipster Antitrust proponents argue that, but for the consumer welfare standard, antitrust could be unleashed to challenge the many monopolistic practices that have been allowed to run rampant in the U.S. economy.[49] Putting aside whether the underlying facts support the notion that there is a

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43 See, e.g. *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Sen. Jud. Comm.* (2017) [hereinafter *Consumer Welfare Hearing*] (statement of Barry Lynn), available at: https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf; Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 *J. Eur. Comp. L. & Practice* 131, 131-32 (2018) [hereinafter Khan, *The New Brandeis Movement*]; Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017); Khan & Vaheesan, *Market Power and Inequality, The Antitrust Counterrevolution and its Discontent*, 11 Harv. L. & Pol'y Rev. 234 (2017); Rahman & Khan, *Restoring Competition in the U.S. Economy,* in Untamed: How to Check Corporate Financial and Monopoly 18-25 (2016); Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016).

44 See Kovacic & Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (2000).

45 See Bork, supra note 37, at 7-8; Averitt & Lande, supra note 42, at 178; Ginsburg, supra note 40, at 217; Wright & Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 2013 Fordham L. Rev. 2405-06 (2013).

46 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

47 See generally Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 15–16 (1984); Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 Antitrust L.J. 301, 303-09 (2011).

48 See, e.g. *Consumer Welfare Hearing*, supra note 43 (statement of Barry Lynn) ("I believe we must formally abandon the 'Consumer Welfare' philosophy…"); Khan, *The New Brandeis Movement*, supra note 43 (arguing that the consumer welfare standard has "blinded enforcers to the many harms cause by market power").

49 See, e.g. Rahman & Khan, supra note 43 (arguing that the Consumer Welfare standard has "in practice worked to narrow and weaken antitrust enforcement").

broader competition problem in the U.S. today, in attacking the consumer welfare standard, Hipster Antitrust both fails to understand the robust economic analysis called on by the consumer welfare framework and, as is discussed below, neglects to offer an alternative standard that would keep antitrust from once again vacillating between conflicting goals.

Adopting a Vague, Multi-Prong "Public Interest" Standard: The closest that Hipster Antitrust comes to offering a framework to replace the consumer welfare standard is its proposal to adopt a "public interest" standard.[50] Indeed, in contrast to the common law development of the consumer welfare standard, some have called for Congress to amend the antitrust laws to formally adopt the "public interest" standard. The public interest standard purports to employ a more comprehensive approach to antitrust analysis that would allow courts and enforcers to consider a broader range of non-price effects arising from challenged transactions and business practices. Although the precise contours of the public interest standard remain vague, among the expanded list of items that could be considered as part of antitrust in a public interest regime are at least the following factors: income inequality, unemployment, worker mobility, wage disparities, political influence, and small business formation and growth.[51] In promoting the public interest approach, Hipster Antitrust seeks to make antitrust a vague and malleable regulatory regime that can be used to implement a broad range of policy preferences with little, if any, limiting principles on those who happen to be charged with wielding the newfound power.

Focusing Antitrust on Attacking Market Structure: Hipster Antitrust claims as a key influence the thinking of former Supreme Court Justice Louis Brandeis, who famously described the U.S. economy of the early 19th century as being beset by the "Curse of Bigness."[52] It is therefore no surprise then that Hipster Antitrust seeks to return antitrust to a bygone era when courts and enforcers focused narrowly on market structure rather than on actual anticompetitive effects to determine whether a transaction or business practice should be challenged under the antitrust laws.[53] Although economic learning has moved antitrust well beyond the attractively simplistic method of counting the number of firms to assess the likelihood of competitive harm,[54] Hipster Antitrust seeks for courts and enforcers to do just that by using concentration (however defined) as a proxy for a significant reduction in competition that would result in the host of socio-political ills implicated by the public interest standard.[55]

This "big is bad" mentality reminiscent of antitrust policy prior to the economics revolution that began in the 1970s, has motivated a general hostility to mergers (as all horizontal mergers, regardless of share, will lead to some increase in concentration) that has been embodied in specific legislative proposals. As part of its new policy platform, the Democratic Party has proposed to revise the antitrust laws to target not

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50 See, e.g. id. at 23 (arguing that the antitrust laws should be amended to adopt a broader "public" or "citizen" interest standard); Warren, supra note 43 ("Proposals include adopting a public interest standard for enforcement actions, placing the burden on merging companies to prove mergers will not harm competition, and requiring agencies to release more information about their enforcement actions.").

51 See, e.g. *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, DemocraticLeader.gov: A Better Deal 1 (2017) [hereinafter *A Better Deal*], http://abetterdeal.democraticleader.gov/wp-content/uploads/2017/10/A-Better-Deal-on-Competition-and-Costs.pdf ("The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.").

52 Khan, *The New Brandeis Movement*, supra note 43; see also Brandeis, The Curse of Bigness (Fraenkel ed. 1934). Ironically, Hipster Antitrust also claims a lineage to James Madison, who famously recognized, even at the time of the founding, many of the public choice concerns that arise when institutions are weakened to allow interest group influence and rent seeking. See, e.g. The Federalist No. 51 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

53 Under this former approach, transactions creating a firm with a combined share as low as 8 percent were prohibited despite the lack of any market power, leaving no merger safe from challenge under the antitrust laws. See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

54 See Ginsburg & Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201, 201-02 (2015). Hipster Antitrust goes further than the structural presumption articulated in Supreme Court precedent in that it claims not only that structure is the starting point for assessing actual competitive effects (and tips the scales in favor of the government), but that identifying the "correct" market structure is itself the key purpose of antitrust, regardless of actual effects.

55 See Khan, *The New Brandeis Movement*, supra note 43 (arguing that antitrust "must focus on structures and process of competition, not outcomes"); *Consumer Welfare Hearing*, supra note 43, at 13 (statement of Barry Lynn) (advocating for returning to the "previous approach to antitrust" that focused "foremost on the making and maintenance of 'market structures' designed to prevent concentration of power and to keep markets open and competitive."). For a discussion of how antitrust analysis has moved from a simplistic focus on structure to a robust effects-based analysis, see Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 72 (2010).

merely concentration, but corporate growth regardless of the effects on competition.[56] Democrats also have introduced new legislation that proposes to make all mergers over a certain dollar value presumptively unlawful (regardless of whether the merging firms have any competing businesses) and to require merging firms to bear the burden of proving that the proposed transaction not only will not harm competition, but that it will affirmatively benefit consumers.[57] In doing so, the proposed legislation would provide antitrust authorities with significant leverage and, coupled with a new public interest standard, broad discretion to decide which business ventures the government should permit.

Hipster Antitrust seeks to fundamentally alter antitrust law by shifting it away from the consensus consumer welfare standard that has been carefully developed over the last 50 years to make antitrust a productive part of society. Hipster Antitrust seeks to replace the current model, which is tethered to the common language of modern economics, with vague socio-political goals and a "big is bad" opposition to corporate growth, regardless of competitive effects. This shift away from economics and an objective welfare standard, not only would lead to increased error in individual cases, but as is discussed in the next section, it also would weaken antitrust institutions and encourage rent seeking by blurring the contours of antitrust liability rules.

B. Hipster Antitrust Would Increase Rent Seeking and Corporate Welfare

1. Vague Standards and Broad Discretion Invite Rent Seeking

A key feature of modern antitrust jurisprudence is that the consumer welfare standard provides a disciplined and objective framework for courts and enforcers to assess whether a transaction or business practice is likely to harm competition and violate the antitrust laws. Although there inevitably will be debate and advocacy in cases that fall on or near the margins, the contours of the consumer welfare standard have been developed through decades of case law and today are well established.[58] It is well understood by courts, enforcers, businesses, and practitioners what types of harms fall inside or outside of the antitrust laws and the types of evidence that are useful for discerning whether a violation has occurred. Stated simply, conduct that results in anticompetitive effects, such as higher prices, lower output or quality, or decreased innovation, is unlawful. Conduct that results in procompetitive benefits, or that is competitively neutral, is not. The consumer welfare standard thus provides businesses with important guidance about the types of conduct that are lawful and unlawful. More critically, though, the consumer welfare standard promotes the rule of law and decreases opportunities for rent seeking by cabining the discretion of the courts and enforcers.[59]

The well-established contours of the consumer welfare standard prevent against the arbitrary exercise of legal power, and ultimately the misuse of the antitrust laws, by limiting the ability of politics and interest groups to meaningfully influence individual antitrust outcomes. Public choice theory teaches that implementing such institutional safeguards is critical to ensuring that law and regulation are more likely to promote the public good rather than the interests of individual actors. Calls to replace the consumer welfare standard with a new "public interest" test would undo this key institutional protection and open the door to rent seeking by interested parties and, ultimately, create an antitrust regime that focuses on corporate welfare rather than consumers. Because the public interest standard consists of a test with multiple vague and potentially conflicting factors, enforcers (and private plaintiffs) would have little difficulty justifying nearly any antitrust challenge, including those advocated by firms seeking to gain a regulatory advantage against a competitor. Even in cases where the challenged conduct implicates conflicting factors, such as reducing employment by preventing store expansions but thereby also promoting the growth of local and small businesses, the public interest standard allows enforcers (and private plaintiffs) to decide which factor they consider most important at that time to justify the challenge. The public interest standard thus would undermine the rule of law and grant new power to corporations seeking to sway enforcers in an effort to gain regulatory rents.

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56 *A Better Deal*, supra note 51; see also Crane & Schrepel, *The Democrats' "Better Deal" is Neither Better nor a Deal*, NYU J. L. & Bus. (forthcoming Nov. 2017).

57 See Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017).

58 For a discussion of the common law method to developing antitrust rules in the context of the Federal Trade Commission's authority under Section 5 of the FTC Act, see Rybnicek & Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo. Mason L. Rev 1287 (2014).

59 Some commentators believe that the DOJ's lawsuit seeking to block AT&T's acquisition of Time Warner is an unsavory example of politics (rather than substance) determining whether the government pursues an antitrust enforcement action. See, e.g. Kendall & FitzGerald, *Justice Department Files Lawsuit Challenging AT&T Time Warner Deal*, Wall St. J. (Nov. 20, 2017), https://www.wsj.com/articles/justice-department-expected-to-file-lawsuit-challenging-at-t-time-warner-deal-1511210955. We have no reason to believe that politics was involved in the DOJ's decision but, more importantly, conclude that the combination of an independent arbiter and the consumer welfare standard, properly applied, ensures that the case will succeed or fail on the merits, that is to say, whether there is evidence that consumers are likely to be harmed.

Calls to make large mergers presumptively unlawful and to focus antitrust analysis on market structure rather than actual anticompetitive effects similarly opens the door to rent seeking and, ultimately, corporate welfare. It is well known that proving procompetitive benefits in merger litigation is exceedingly difficult.[60] In fact, there exists no merger case in which a court has ultimately concluded that procompetitive benefits outweigh the anticompetitive harms alleged by the government. Should merging parties be required to prove procompetitive benefits in order to receive permission to complete their transaction, enforcers likely could prevent any merger they decide to oppose. As the case law shows, courts rarely would conclude that the merging parties have carried their burden of proving, with the required high degree of certainty, that a transaction generates procompetitive benefits. The result would be that enforcers would gain broad discretion to oppose nearly any transaction, which in turn would leave them susceptible to rent seeking by corporations hoping to impose new regulatory burdens on their competitors. Furthermore, as we have seen in antitrust's past, elevating a focus on market structure and deconcentration over actual anticompetitive effects would allow enforcers to successfully oppose even transactions resulting in a firm with a combined share in the single digitals.[61] As with putting the onus on merging parties to prove with certainty future procompetitive benefits, allowing enforcers to rely on market structure (which always will be more concentrated following a horizontal merger) would give enforcers broad discretion to decide which transactions should be permitted to close. Public choice theory teaches that such vague standards and broad discretion lead government agencies to stray from their public mission and to become susceptible to rent seeking.

Moreover, a new public interest test would take years to deploy and even longer before meaningful guidance could be issued similar to that which the consumer welfare standard offers today. In the meantime, firms could use the new standard as leverage over the antitrust agencies. Once allowed to influence agency enforcement practices during the initial period when no framework exists, it will be difficult to establish guidelines that do not leave room for such manipulation to continue. By calling to replace the consumer welfare standard with a vague multi-factored public interest test and elevating a focus on market structure over the application of economic theory and empirical evidence to determine actual anticompetitive effects, Hipster Antitrust ironically would grant large, powerful corporations the ability to exert undue influence over the decision-making process at the antitrust authorities, all to the detriment of consumers.

2. Hipster Antitrust Ignores Prior Experience with Vague Standards

The hazards inherent in vague liability standards are not merely theoretical and, regrettably, not unprecedented in the U.S. experience. Hipster Antitrust ignores the lessons gleaned from prior pursuits of lofty, but fantastical, standards that aim to put public servants, as dedicated as they may be, in the position of ignoring their own individual preferences and instead promoting some malleable notion of public interest. The Federal Communication Commission's ("FCC") bleak history of attempting to employ a public interest approach is particularly instructive and should cause policy makers to be skeptical that abandoning the consumer welfare approach to antitrust in favor of a vague new public interest test will do anything other than cause significant harm.[62]

The FCC's public interest standard has been aptly summarized by Ronald Coase, who observed nearly 60 years ago that "the phrase [public interest] . . . lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation."[63] In the absence of a clearly articulated framework demarcating the boundaries of the public interest standard, the FCC has been able to apply the public interest test broadly to evaluate a multidimensional set of factors and to reach almost any result desired in a particular case.[64] As Tom Hazlett has noted, "because a public interest explanation can easily

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60 See generally, Crane, *Rethinking Merger Efficiencies,*110 Mich L. Rev. 347 (2011) (discussing the greater proof required to substantiate efficiencies claims than to prove potential anticompetitive harms).

61 See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966).

62 Chairman Ajit Pai has taken important steps to attempt to tether the FCC's public interest standard to economics in an effort to align the agency's enforcement framework more towards an objective cost-benefit analysis resembling the approach used in antitrust. In particular, on January 30, 2018, the FCC created a new Office of Economics and Analysis to achieve a more systematic and regular vetting of proposed policies and rules, a role similarly carried out today by economists at the DOJ and FTC. Fed. Comm. Comm'n, FCC 18-7, Order for the Establishment of the Office of Economics and Analytics (2018).

63 Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1, 8-9 (1959).

64 See Thierer, Media Myths: Making Sense of the Debate Over Media Ownership, 97-100 (2005); Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose,* in A Legislative History of the Communications Act of 1934 3, 14 (Paglin ed., 1989) (describing the public interest standard as "vague to the point of vacuousness, providing neither guidance nor constraint on the agency's action"); Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, Brookings (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation; Sallet, *FCC Transactional Review: Competition and the Public Interest,* FCC Blog, (Aug. 12, 2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest (noting "the 'public interest' standard is not limited to purely economic outcomes").

be manufactured, regulators are free to promote economic transfers to members of a prevailing coalition."[65] Hazlett argues that the "pliability [of the public interest standard] yields political advantages to policy makers and influential interest groups," resulting in a scenario where "consumer interests are dependably eclipsed by special interests."[66] These observations are shared across the political spectrum.[67]

The history of the FCC is littered with examples of potential rent seeking and regulatory capture made possible by the indeterminate nature of the public interest standard. For instance, observers have noted that broadcasters long sought and obtained regulatory protection from the FCC, which "suppress[ed] the cable industry by preventing direct competition between cable, and over-the-air broadcasting" and likely also significantly stifled innovation.[68] More recently, the debate over whether the FCC should impose net neutrality regulations have generated significant interest from industry participants hoping to extract rents by burdening their competitors.[69] Such regulations would benefit corporations at the expense of consumers, by discouraging investment and reducing the type of innovation that has allowed the Internet to flourish.[70]

The pliable nature of the public interest standard can be examined in the application of the FCC's merger review authority. For instance, in the Sirius-XM transaction, the FCC allowed a merger between the only two satellite radio companies because the FCC determined that monopoly ownership of satellite radio would be in the public interest.[71] The FCC brokered an agreement that required Sirius-XM not to increase the price on the basic subscription package for three years.[72] Sirius-XM responded a year later by raising prices twenty-eight percent on customers with multiple accounts, and adding a new three dollar per month charge for the online version of satellite radio, which was formerly free.[73] It is unclear what, if any, level of effects analysis the FCC conducted to conclude that a monopoly satellite radio company would sufficiently compete with traditional radio such that consumers would not be harmed, but the absence of an objective economics-based framework allowed the FCC to forgo such a rigorous analysis.

Similarly, by giving the FCC unbound flexibility to identify potential problems with a transaction, the public interest standard allows the FCC to use its merger review power to impose "one-off company restrictions that the FCC could not impose through ordinary regulatory processes."[74] For example, when the FCC approved AT&T's acquisition of MediaOne in 2000, the agency declined to condition the merger on an agreement to provide access to proprietary content, instead claiming that an aggrieved party should seek relief "through the generally applicable program access rules."[75] But, four years later when reviewing NewsCorp's acquisition of DirecTV, the FCC required the merged firm to comply

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65 Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 Harv. J.L. & Tech. 335, 403 (2001). Hazlett also cites to the memoir of long-time FCC attorney William B. Ray, who recalls staff being asked to articulate public interest justifications for agency actions after the decision had been made to pursue the agency action. See Ray, FCC: The Ups and Downs of Radio-TV Regulation 44-45 (1990).

66 Id. at 402-03.

67 See, e.g. Wu, The Master Switch: The rise and Fall of Information Empires 308 (2010) ("Again and again in the histories I have recounted, the state has shown itself an inferior arbiter of what is good for the information industries. The federal government's role in radio and television from the 1920s through the 1960s, for instance, was nothing short of a disgrace . . . . Government's tendency to protect large market players amounts to an illegitimate complicity . . . [particularly its] sense of obligation to protect big industries irrespective of their having become uncompetitive.").

68 Kellogg, Thorne & Huber, *Federal Telecommunications Law 689* (Little Brown & Co. ed., 1992); see also Thierer, *Is the Public Served by the Public Interest Standard*?, Found. for Econ. Educ. (Sept. 1, 1996), https://fee.org/articles/is-the-public-served-by-the-public-interest-standard/.

69 See, e.g. Litan & Singer, *Why Business Should Oppose Net Neutrality*, Brookings (Aug. 10, 2010) https://www.brookings.edu/opinions/why-business-should-oppose-net-neutrality/ ("It would mean that no enhanced service offerings would be permitted unless an ISP could prove that it was not discriminating. Imagine the rent-seeking behavior that such a provision would encourage, as ISPs would be forced to go to the FCC on bended knee to seek an exemption from the general ban!").

70 See generally Hazlett & Wright, *The Law and Economics of Network Neutrality*, 45 Ind. L. Rev. 767 (2012).

71 Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, MB Docket 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12349 (2008).

72 Paul, *Sirius XM to Raise Some Prices as Debt Looms*, Reuters (Jan. 21, 2009), https://www.reuters.com/article/us-siriusxm/sirius-xm-to-raise-some-prices-as-debt-looms-idUSTRE50K63V20090121.

73 Id.

74 Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 Rev. Ind. Organ. 295, 312 (2014).

75 Id. See also Skorup & Koopman, *How FCC Transaction Reviews Threaten Rule of Law and the First Amendment* 15 (Mercatus Ctr. Working Paper, May 2016), https://www.mercatus.org/system/files/Skorup-FCC-Transaction-Reviews-v1.pdf. The FCC was also able to cap a cable company's market share at thirty percent by making that a condition of this merger. This regulation was later struck down. *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

with conditions that were more stringent than were required by the program access rules.[76] These restrictions had no apparent connection to the transaction or enhancing consumer welfare, and instead amounted to a cheap consent easily obtainable by the FCC as a result of the legitimate threat to block the transaction.[77]

Today the antitrust agencies are well-insulated from rent-seeking behavior and the influence of the corporations that fall within their jurisdiction because the agencies ultimately must apply a well-defined and objective economics-based framework to prove a violation of the antitrust laws. Dismantling the consumer welfare standard in favor of a vague new public interest test, and increased agency discretion in the form of placing the burden on merging parties to show that a transaction is procompetitive, would significantly increase the agencies' ability to justify nearly any enforcement decision. The absence of institutional safeguards that ensure meaningful accountability and cabin agency discretion inevitably would lead to increased opportunities for rent seeking and, ultimately, agency focus on corporate welfare rather than consumers.

IV. CONCLUSION

The risk of regulatory capture, rent seeking, and subversion of the antitrust laws to serve corporate welfare rather than consumer welfare are important concerns in the modern debate over the appropriate scope of the antitrust enterprise. Both Hipster Antitrust and its critics share these concerns and believe they lead to less desirable outcomes. In this paper, we explain how the consumer welfare standard introduced the rule of law to antitrust and its role in both reducing opportunism by antitrust institutions and weakening incentives for rent seeking. A lesson of the American antitrust experience with the sort of vague and unbounded standard desired by Hipster Antitrust is that it resulted in a dramatic increase in corporate and political influence over antitrust agencies. Public choice economics, empirical evidence, and history teach that an increase in regulatory discretion — such as the one that would follow from the rejection of the consumer welfare standard — would inevitably result in an antitrust regime that favors corporate welfare over consumer welfare, increases the risk of regulatory capture, and undermines the rule of law.

76 See Yoo, supra note 74, at 312.

77 Id.

WHO SHOULD TRUST-BUST? HIPPOCRATES, NOT HIPSTERS (FEAT. EVIDENCE-LED SUGGESTIONS FOR HOW AUTHORITIES COULD BE MORE "PROGRESSIVE")

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I. INTRODUCTION

The hipster antitrust movement is not new, but it is pressing and comes with powerful political allies. As such, competition authorities should engage with it to ensure, first, that it does no harm but also to see where it could do some good. Antitrust authorities could be more "progressive" but the way forward is not by making non-evidence based decisions condemning market structures. Progress could come through authorities better communicating the relevance of their existing theories of harm to assessing alleged problems of bigness, concentration or unfairness. If authorities want to better identify whether hipster complaints raise real problems that antitrust or other regulatory authorities could or should address, they could increase their evidence base starting with, for example, trust in online markets and consumer vulnerability. Authorities should hold the line however and never let non-evidenced claims influence antitrust law enforcement itself.

II. HIPSTERS AT THE GATE (AGAIN)

If the hipster antitrust debate concerns the relative role of efficiency and consumer welfare, vs. fairness and total societal welfare, then the debate isn't new. It surfaces every few years within the antitrust community, and is a worthy challenge and reminder of the populist roots of competition law.

The issues at the heart of hipster antitrust are made more pressing because they are spurred on by technological developments and accompanied by loud calls for static one-shot remedies. So, complaints about bigness, concentration, undue bargaining power, political influence, income inequality, and high profits – all come with obvious and self-referential solutions like ordering breakups and price caps. No one mentions increased economies of scale and scope, widespread innovation and lower prices – or even free services.

What seems to be new this time is the involvement of powerful forces outside the antitrust community, their vocal disappointment in competition policy, law and economics, and their call for faster – and ideally structural – intervention. Break up monopolies and oligopolies, block more mergers, get platforms to open, release more data or restrict its collection and do it now, before it is all too late. Hipsters want competition authorities to "move fast and break things."

Their disappointment in competition policy blends with traditional concerns about "trusts." Hipsters call for presumptions that "big is bad" and that concentration, cross-shareholdings and too much vertical integration are *a priori* a bad thing too. Added to this are similar-sounding concerns that in the online world, big data is bad, algorithms are too manipulative, and both are creating imbalances in power that competition law is powerless to address. A key target is antitrust's "consumer welfare" standard – which hipsters argue is too narrow to capture any of these problems, and is making authorities less and less credible with ministries, consumer groups and disruptive entrants.

As a result, there is less and less trust in markets and more and more dissatisfaction with the most economically-literate developments in competition policy. Competition authorities pour fuel on the hipster fire when they find – as the CMA has in most of its market investigations – that in many problem markets a contributing factor is a lack of consumer engagement. Hipsters want more paternalistic intervention to protect even disengaged and inert consumers, or to act even when no consumer harm is even likely. When authorities respond that the consumer welfare standard can evolve – and that they already assess non-price issues like quality (including privacy) and innovation, hipsters say that is not enough. They say a forced awakening is needed for competition policy to adapt to assess and address harms, old and new. Without it, antitrust is becoming politically irrelevant, and will be replaced with direct intervention, including sterner break up powers, price caps or more – to ensure markets are fair.

III. ANTITRUST RISING

The fact that there is a debate at all – including in this issue of the CPI Chronicle – shows that the competition community is listening and engaging. Just as hipsters are calling for change, competition authorities are doing more to communicate how their core mission actually achieves many of the same objectives. When competition works, a market treats everyone more fairly. When consumers exercise choice, suppliers have to offer better products. When consumers are deprived of choice – or have it skewed – offline or online, then the competitive dynamic is distorted or freezes. Competition or, if needed, competition law interventions can thus serve to address related societal needs. That said, "more antitrust" isn't always the answer. Sometimes the market provides the solution. Sometimes more direct regulatory mechanisms are required. Even then though, competition authorities can help advise ministries on how they may best tailor their interventions to achieve the desired result, but do so with the least harm to dynamic markets. Though not their primary mission, competition authorities are also addressing conduct that exploits regulatory failures, for example, through excessive pricing decisions.

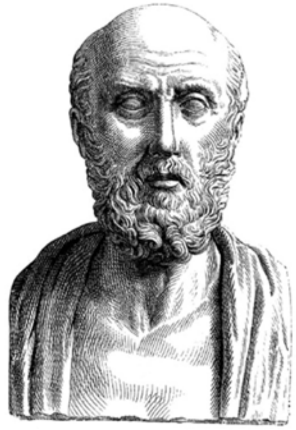
Nevertheless, the consumer welfare standard the hipsters are attacking as too narrow does seem to be a bit of a straw man. Competition law isn't just about price/cost tests and looking out for Homo Economicus – if it were, we'd just need competition law algorithms rather than teams of investigators, lawyers, economists and remedies experts. Of course, competition authorities are recognized experts on assessing static markets and price effects – perhaps because they are easier to measure. Nevertheless, as the nature of markets and business changes, competition authorities recognize that their approach must evolve. Officials are humble enough to admit that they need to be more open to dynamic non-price theories of harm, relating to quality (including privacy) and innovation, as well as ensuring that their work does not chill innovation incentives, essential to dynamic markets in the first place. They are alive to the need to place more emphasis on potential competition in merger review, and take greater account of the potential cost of entry and the ability of firms to expand. Authorities are increasingly ensuring that markets remain open to entrants, and that disruptive innovators in particular are not "embraced and extinguished." As one would expect in any healthy competition of competition policies, some authorities are more concerned than others about restraints in the online world and are intervening accordingly. This "natural enforcement experiment" will help us all better assess when intervention is required, for the good of the entire online and offline ecosystem. Behavioral insights are also helping authorities work out more comprehensive assessments of consumer harm – including consumer vulnerability – and thus design remedies that are more targeted and more effective.

The balance between too much intervention and not enough is a fine one though. In the online world in particular, authorities have to be careful that their interventions are necessary, effective and do not chill dynamic markets. To consider the hipster rhetoric to move fast and break things, what authorities need most of all is evidence: evidence to back up the complaints that competition policy is never enough, and evidence that more intervention is needed and wouldn't lead to worse outcomes.

VI. THE BATTLE OF THE BEARDS

Some guiding principles might help in identifying what evidence and what approaches would be helpful. Obviously, if the base line is "evidence," then this calls for more than the self-referential and circular demands of the hipsters. Whether selfie-seeking millennials, or grey-haired progressives, the hipster antitrust movement cannot just assert that the problem defines the solution, not when the former hasn't been proven to exist nor the latter to be necessary. "Banning bigness because bigness is bad" is a mission, not a theory of harm, let alone a presumption. There are already controls – starting with merger control itself, and the "special responsibility" on dominant firms and monopolization provisions. Ordering breakups because "concentration is bad" is equally facile and not obviously an improvement. Similarly, linking concentration and profit margins and demanding price caps is a convenient flipbook of hipster snapshots … but isn't the whole picture, not if we care about accounting for efficiencies, not chilling pro-competitive conduct or structures, and ensuring dynamic markets. So, evidence of some likely harm is going to remain at the core of competition law, and if the definition of "harm" is to be expanded to include areas expressly and repeatedly excluded, then a cogent argument *with evidence* needs to be made for why it is necessary and would not be worse, let alone how it would even be administrable.

So, what principles might help us? Rather than blindly accept the hype of the hipsters or reject it without consideration, one famous first principle might serve as a guide. In their core role, competition authorities "do good" by "stopping or preventing bad" – whether conduct or transactions. However, before even intervening, the best follow a Precept laid down centuries ago by Hippocrates: first, do no harm.



As with medicine, it is important to keep in mind that the most important interventions often can't be undone. This is why evidence of all sides of an argument is so crucial. This is why procedural fairness guarantees that authorities assess all the relevant evidence. This is why authorities have remedies teams to design tailored interventions that will not distort market dynamics or innovation incentives. Sometimes mistakes will be made, and sometimes *ex-post* assessments may reveal that a remedy did not make a difference – perhaps it was ineffective, or more likely the market moved on around it. But at least we have some assurance that the authority didn't make things worse.

V. MAKING MARKETS WORK

Competition authorities also "do good," directly, not simply from prohibiting bad conduct. Some have market inquiry mechanisms that allow deeper and wider investigations unrelated even to whether competition law has been violated. Here the task at hand is to respond directly to complaints – often populist, political or even hipster – that a market is not functioning well. Many of these complaints won't be drafted in terms of a consumer welfare harm or price effect. The market may just be alleged to be acting not as well as it could – whether through concentration, lazy monopoly or cozy oligopoly, consumer inertia, regulatory incoherence, or all of the above.

VI. OPENING RATHER THAN BREAKING UP

In such inquiries, since there is no allegation of illegal conduct, competition authorities have to be particularly careful to "first, do no harm." Yet it is in these market references that self-referential hipster arguments are made most loudly. In the UK, this is also because structural remedy powers are available. As a result, companies are alleged to have too much power, and demands are made to break them up – and any eventual remedy other than breakup is loudly proclaimed "a damp squib." Break ups are rare though, and for very good evidence-based reasons. In the recent Retail Banking market investigation for example, we found that breaking up the big banks just to add one or more rivals would do nothing but exacerbate the real problems – of a lack of innovation and choice in the market. We chose to open up the banks instead. We found various reasons why they were sitting on customer data that could be usefully employed by them, by entrants and by financial intermediaries and then consumers. Releasing that data would result in more innovation, more engaged consumers and more responsive competition.

A paternalistic break up or price cap would have caused an immediate change, but with long term damage to what we wanted to be a much more dynamic responsive market. We were thus making it easier for consumers to access, assess and act on more information – but still depend on them engaging and exercising effective choice. Of course, much depends on what kinds of financial tools are developed and whether consumers use them, but at least both sides of the supply/demand dynamic are engaged and have a real chance to operate, rather than be superseded entirely by static and too blunt regulation.

There is often no silver bullet anyway, but in our banking investigation we tried to move the role of the competition authority on from designing the consumer interface (e.g. a price comparison tool) – which officials are admittedly not great at – to facilitating the development of a new, better market, one which still left room for and indeed depended on evolving technologies to ensure the system works and is safe to use, and maximizes the opportunities for consumers to engage actively. After all, consumers do have to take responsibility for their purchasing decisions, and exercise choice where they can. Demand side responses to the supply side is an important part of the competitive dynamic. The static short-term fixes of politicians and hipsters harm that dynamic competition.

So, in their own way, competition authorities are actually going a little bit "hipster" – but genuinely hipster (if that is not too painfully oxymoronic a term): authorities are riding new trends and they are experimenting. They are down with the kids on data, AI and APIs. They are designing novel remedies to address novel problems – but all on an evidence-based basis. Data release and data portability remedies; building "compliance by design" into algorithms and "disclosure by default" into data collection are all on the table. To me, going with the grain of technological developments and accelerating innovation – like we did in retail banking – is the most truly hipster thing to do in antitrust.

VII. JOINING UP

In many fast-moving and high tech markets, consumer engagement and data are key. It thus makes sense to divert loud but vague populist calls for action into joined-up assessments of how these markets work. Consumer law plays a crucial role here. So often we see consumer enforcement complementing competition enforcement, and vice versa. The complement is natural, since in both we are making sure that consumers can trust markets and helping them know that what they're seeing is what they're getting. Online reviews, for example, bolster competition as people can make more informed choices, but this only works if reviews are trustworthy. Making sure that businesses abide by consumer protection law, that they treat their customers fairly, and in ways that engender trust, helps to create a more competitive marketplace. Firms have to work harder to offer better products, across all the competitive variables.

VIII. OPENING UP THE DISCUSSION – A CALL FOR EVIDENCE

Competition authorities can adapt further too. Competition laws are designed to adapt – but this doesn't necessarily mean entirely new rules are required. The evolutionary process starts with deepening our understanding of how markets work.

Can authorities stimulate this understanding, rather than always being on the back foot, or being presumed to be defending our corner from hipster and political intrusion? As evidence-based authorities, is there not something blindingly obvious we could contribute to the calls for us to do more?

Two things come to mind: a call for evidence, and at the same time, an enhancement of the tools we have to analyze evidence. This year, at the CMA, we are encouraging more fundamental research into trust in markets. This would likely be highly interdisciplinary in nature and would seek to identify which market practices are most likely to be considered unfair and to undermine trust in markets. We could, for example, test perceptions of the fairness of a range of practices, including those that are not transparent or where the consumer does not feel in control; practices that require undue effort or transactions costs to secure a good deal or practices that involve extreme forms of price discrimination. We want to understand the drivers of trust and mistrust in markets and improve our understanding of the challenges facing vulnerable groups of customers who are at high risk of experiencing poor outcomes in markets. This could all be with a view to informing case selection, diagnosis of problems and the development of remedies.

At the same time, we need to improve our ability to assess the evidence we will receive. All competition authorities need highly skilled economics and remedies teams to understand and examine markets and business models. To address the knowledge gaps regarding the use of data, though the CMA is creating a Data and Digital Insights team to help us understand better how online markets work, the importance of data in these markets, what are the barriers to entry, what drives consumer behavior, and when the transparent nature of the Internet might increase the scope for dominance to become entrenched. This should enhance our understanding of the digital economy and make sure our interventions and capabilities keep pace with the evolution of business models and practices.

This welcoming of new evidence and the ability to assess it will of course influence a range of thinking within authorities, on markets, consumer work, mergers or even antitrust. Until then though, I will close with some arguments about why I feel it is incredibly important to *hold the line* and not let wooly, non-evidence based, populist influences affect *antitrust law enforcement* itself.

IX. ANTITRUST CASES: DON'T SHOOT FROM THE HIP – EVIDENCE MATTERS

The big is bad movement has no place in antitrust law enforcement. Nor do calls for removing economics (or wildly expanding its scope to include wider societal issues directly). Antitrust after all is law enforcement. It concerns conduct, not structure, and involves specific and serious allegations about likely or actual harm to competition. Alleging bigness doesn't cut it nor should it. What matters is deeds not size, let alone words.

To focus only on big companies would miss many harms. Taking on infringements in small markets matters in itself, and as a read-across and compliance and deterrence message more broadly. Removing economic evidence or diluting it significantly with non-consumer based concerns would undermine the theories of harm on which investigations are based. This applies also to object-based approaches by authorities, because in those cases the likely or inevitable economic harm is baked into the offence itself. Economic analysis is obviously crucial for effects cases, but even then does not result in reliance solely on price cost tests. Qualitative evidence matters too. Fairness itself is even a constituent element of some offences but it is not in itself a standalone theory of harm. The concept of fairness is too amorphous to be administrable, and risks skewing decision making and creating false positives or remedies that would distort market dynamics, and thus be unfair. Successful firms should not be attacked just because they have succeeded, even in obtaining a dominant or even monopoly position. What we try to do is investigate very specific conduct harming consumers or the competitive process. Presumptions operate in antitrust, but they are based on well-founded economic or legal experience. In all cases, though, what matters most is the evidence. Investigations and hearings depend more on facts than theories and this is why it is crucial to ensure due process, full consideration of the evidence and an appropriate balancing of the assessment of competitive harm and any pleaded efficiencies or other justifications.

X. IN CLOSING

Greater study of how markets work and how consumers engage with them – in our case, focusing on consumer vulnerability and trust in markets – could contribute to populist, progressive and political calls for change. So, hipsters can count on authorities' engagement – but they'd better be ready to come half way at least, with evidence, not rhetoric. When we get to law enforcement itself, it is the evidence that matters most, and legal presumptions should not be tweaked to accommodate hipster anecdotes and priors that are not well-founded on economics and experience. Otherwise we risk upending the rule of law, as well as competitive markets.

My final call is to make sure that antitrust hipsters know what they are talking about when they say our consumer welfare standard isn't fit for purpose. They need to think about the kind of consumer that needs protecting. We think it is consumers who are vulnerable or likely to be deprived of more advanced, cheaper, quality goods and services. That entails some engagement by consumers, to contribute to the competitive dynamic. So many of the hipster suggestions for break ups and price caps would sacrifice beneficial economies, harm dynamic competition, and be paternalistic rather than empowering. Isn't it dangerous to protect and thus foster inert, unengaged consumers? Isn't it preferable to find ways to motivate them to be more active and engaged, to lean in more, and contribute to the competitive dynamic? The market may not be everything, but it is a very large thing, and it seems better to me to have citizens involved and contributing what they can to the forces within it, rather than sitting back even more, staring glass-eyed and slack-jawed, swiping at their little hipster screens, and waiting for the next regulatory intervention.

HIPSTER ANTITRUST – A BRIEF FLING OR SOMETHING MORE?

BY KONSTANTIN MEDVEDOVSKY[1]

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I. INTRODUCTION

In a series of cases in the late 1970s and early 1980s,[2] the Supreme Court endorsed what is known today as the "consumer welfare standard" as the key concern of U.S. antitrust policy. While that history is by now well-trod ground,[3] the importance of this shift cannot be overstated. Previously, antitrust law in the United States consisted of a morass of contradictory Supreme Court decisions, with no clear line of prevailing reasoning prevailing beyond "Big is Bad," to the point that the government would at times intervene against conduct that created too much *downward* pricing pressure.[4] After the embrace of the consumer welfare standard, antitrust enforcers in the United States have analyzed mergers and other antitrust issues with the goal of answering a relatively narrow economic question: what will be the impact of a merger or conduct on product quality and price?

II. A CONTENTIOUS CONSENSUS

A. From Then…

"Hipster Antitrust" is a catchall term I coined to describe the recent spate of questions from commentators about whether the narrow focus on consumer welfare is either misplaced generally, or ill-equipped to cope with competitive concerns raised by large technology platforms in particular (namely Facebook, Apple, Amazon, Netflix, and Google). Criticisms of the consumer-welfare standard are not new. Critics have argued a diverse range of positions: that antitrust was designed to enforce economic fairness and to further distributive goals,[5] that antitrust should attempt to maximize material and non-material "well-being,"[6] that the *status quo* regime is insufficiently attentive to consumer choice,[7] or that antitrust should do more to address systematic economic risks posed by enterprises that are "too big to fail."[8] Even as the consumer welfare standard was taking hold, soon-to-be FTC commissioner Robert Pitofsky expressed concern that an exclusively economic approach to antitrust would not be politically sustainable, because it would result in an economy "dominated by a few [presumably low priced] corporate giants," which would both "breed antidemocratic political pressure" and make it "impossible for the state not to play a more intrusive role in economic affairs."[9] Pitofsky's words seem apt now.

B. …To Now

The Hipster Antitrust movement (sometimes called Neo-Brandeisian, after Justice Brandeis, who espoused the moral value of networks of small independent businesses) has been building for some time. However, it arguably reached maturity with the publication of Lina Khan's piece in the Yale Law Journal, *Amazon's Antitrust Paradox.*[10]

Khan argued that antitrust authorities' narrow focus on prices and output was misguided, and particularly prone to under-enforcement in the high-tech industry. Khan's focus on tech firms was due to the network and lock-in effects associated with broad technology platforms, which she argued increase the risks posed by predatory pricing. Using the *Amazon e-Books* case as an example, Khan argued that Amazon's practice of pricing best-sellers below cost was in fact predatory, despite the fact that Amazon's overall e-book distribution business was consistently

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2 *Contl. T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332 (1982); *Natl. Collegiate Athletic Ass'n v. Bd. of Regents of U. of Oklahoma,* 468 U.S. 85 (1984).

3 See, e.g. Wright & Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405 (2013); Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. Competition L. & Econ. 133 (2011).

4 *Utah Pie Co. v. Contl. Baking Co.*, 386 U.S. 685 (1967).

5 Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65 (1982).

6 Stucke, *Reconsidering Antitrust's Goals,* 53 B.C. L. Rev. 551 (2012).

7 Lande, *Consumer Choice As the Ultimate Goal of Antitrust,* 62 U. Pitt. L. Rev. 503 (2001).

8 See generally, Too Big to Fail: The Role of Antitrust Law in Government Funded Consolidation in the Banking Industry, Hearing before the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary, U.S. House of Representatives, March 17, 2009, available at: https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg48102/pdf/CHRG-111hhrg48102.pdf.

9 Pitofsky, *The Political Content of Antitrust,* 127 U. Pa. L. Rev. 1051, 1051 (1979).

10 Khan, *Amazon's Antitrust Paradox. Yale Law Journal,* Vol. 126 (2017).

profitable in the aggregate. Per Khan, the lock-in effects of platforms (such as the Kindle), made below-cost pricing by Amazon anticompetitive, because it "would tend to facilitate long-term dominance."

While Khan did not offer any evidence that Amazon actually recouped any of its losses, she attributed this to the fact that Amazon's prices are too difficult to track, and potentially too personalized to make a traditional predatory-pricing recoupment analysis possible. Khan also noted the possibility of Amazon (or other tech platforms) either recouping the losses from predatory pricing in a different, but adjacent product market, or by raising prices on publishers rather than on consumers.

Khan concludes that the failure of the DOJ to bring a case against Amazon is due in large part to the consumer welfare framework under which DOJ operates under. As a result, Khan argued "we should replace the consumer welfare framework with an approach oriented around preserving a competitive process and market structure," which in this case means "restoring traditional antitrust principles to create a presumption of predation and to ban vertical integration by dominant platforms." (emphasis added).

The term Hipster Antitrust itself (and associated #HipsterAntitrust hashtag) came about several months after the publication of Khan's piece, in the context of Amazon's acquisition of Whole Foods.[11] Several weeks later, the term hit the mainstream when Senator Orrin Hatch invoked it to draw a distinction between vigorous antitrust enforcement within the consumer welfare framework on the one hand, and "Hipster Antitrust" outside the consumer welfare framework on the other.[12]

C. A Movement with Legs

While previous critiques on the consumer welfare standard have come and gone, the current Hipster movement appears to have staying power. "Has Antitrust Failed?" asks Jason Furman (chairman of President Obama's Council of Economic Advisors).[13] "Antitrust is sexy again" writes Carl Shapiro.[14] The drumbeat can also be seen in the popular press, with the *Wall Street Journal*,[15] the *New York Times*,[16] and the *Economist*[17] all recently running pieces on the apparent decline of competition in the United States. Overall, the number of news stories discussing antitrust has skyrocketed since 2014:[18]

11 Medvedovsky, "Antitrust hipsterism. Everything old is cool again." @kmedved, June 19, 2017, available at: https://twitter.com/kmedved/status/876869328934711296.

12 Hatch Speaks on Growing Controversy Over Antitrust Law in the Tech Sector, Orrin Hatch Press Release, August 3, 2017, available at: https://www.hatch.senate.gov/public/index.cfm/2017/8/hatch-speaks-on-growing-controversy-over-antitrust-law-in-the-tech-sector; Hatch Speaks Again on 'Hipster Antitrust,' Delrahim Confirmation, Orrin Hatch Press Release, September 25, 2017, available at: https://www.hatch.senate.gov/public/index.cfm/2017/9/hatch-speaks-again-on-hipster-antitrust-delrahim-confirmation.

13 Furman, *Panel Discussion: "Has Antitrust Failed?,"* presented at NYSBA Antitrust Law Section Annual Meeting, January 26, 2017, available at: https://piie.com/system/files/documents/furman20170126.pdf.

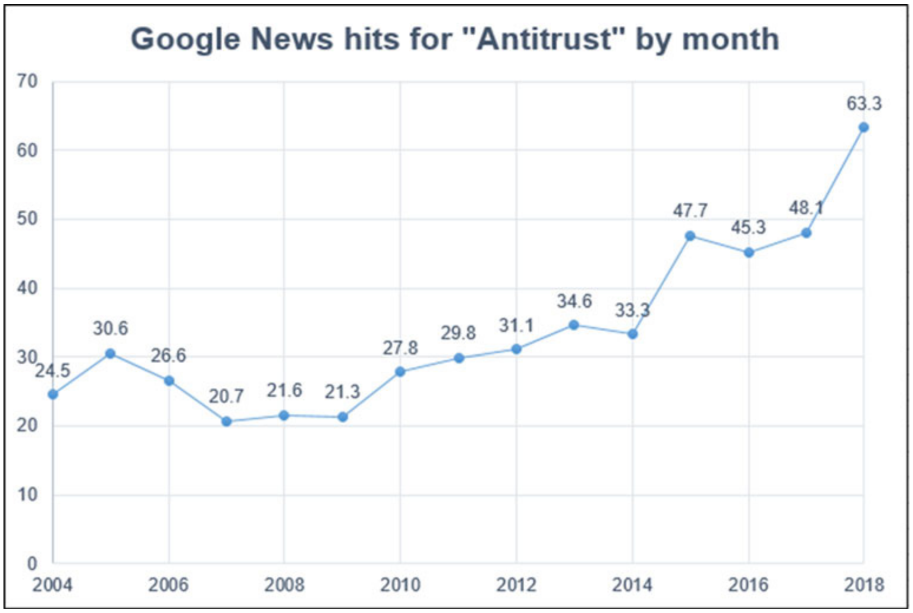
14 Shapiro, *Antitrust in a Time of Populism* (2017), available at: https://ssrn.com/abstract=3058345.

15 Francis & Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, Wall Street Journal, October 18, 2015, available at: https://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306.

16 Porter, *With Competition in Tatters, the Rip of Inequality Widens,* New York Times, July 12, 2016, available at: https://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html.

17 *Too Much of a Good Thing, Economist,* Mar 26, 2017, available at: https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing.

18 Google Trends hits for U.S. news pieces mentioning "Antitrust," available at: https://trends.google.com/trends/explore?cat=16&date=all&geo=US&q=antitrust.



III. HIPSTER ANTITRUST IN CONGRESS

Concerns over the consumer welfare standard have also reached Congress. For example, in the wake of Amazon's announced acquisition of Whole Foods, Congressman Ro Khanna gave an interview in which he expressed concern that "Robert Bork … made [antitrust] a litmus test just about consumer prices." Khanna cited *Von's Grocery*, where the Supreme Court blocked the merger of two Los Angeles area grocers that would have resulted in combined shares of 7.5 percent, as an example of "jurisprudence that should be amplified," and expressed an interest in "reorient[ing] antitrust policy" to consider "the loss of jobs, the impact on wages, the impact on local small businesses, and the impact on innovation within an industry."[19]

Khanna is not alone. Other members of Congress, both in the House and Senate, have taken an active interest in the consumer welfare standard, and ponder whether it is broad enough to deal with a variety of social and economic issues.

A. Democrats Antitrust Caucus

In late 2017, Khanna and several other congressional Democrats (Rick Nolan, Mark Pocan, David Cicilline, and Keith Ellison) formed the Congressional Antitrust Caucus.[20] The group has held briefings on the impact of "Concentrated Economic Power" on racial and gender inequality, as well as on "Democracy and Political Inequality." The Caucus has expressed concern about whether labor market concentration has led to lower wages.

B. Democrat's Better Deal Proposal

As part of their Better Deal program, congressional Democrats unveiled a set of accompanying antitrust proposals, titled "Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power."[21] The proposals call for "new merger standards that require a broader, longer-term view," including whether a merger will "reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete." The proposal also leans into the "Big is Bad" era of antitrust, by making "the largest mergers" presumptively anticompetitive, and requiring firms to prove the benefits of the deal to be allowed to merge.

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19 Madrigal, *A Silicon Valley Congressman Takes on Amazon,* The Atlantic, June 19, 2017, available at: https://www.theatlantic.com/technology/archive/2017/06/ro-khanna-amazon-whole-foods/530805/.

20 Tess Townsend, *Keith Ellison and the New 'Antitrust Caucus' Want to Know Exactly How Bad Mergers Have Been for the American Public*, select/all, December 4, 2017, available at: http://nymag.com/selectall/2017/12/antitrust-bill-from-keith-ellison-seek-info-on-mergers.html.

21 *Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power, Democratic Party*, available at: https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf.

The Better Deal proposal was accompanied by a proposed bill from Democratic senator Amy Klobuchar that attempts to codify the Better Deal concepts.[22] The bill makes transactions valued over $5 billion or those where *either* party had over $100 billion in assets presumptively anticompetitive, rebuttable only by an affirmative showing that the acquisition would not lessen competition by any amount.[23] This latter requirement would effectively prohibit dozens of companies from making any further acquisitions, no matter how small, without making such a showing. This standard would apply irrespective of whether the acquisition is in an entirely unrelated industry.

The Better Deal proposal also included two other concepts, which while not directly touching on the consumer welfare standard, further demonstrate the interest of congressional Democrats in strengthening antitrust enforcement. The first would require "frequent, independent [after-the-fact] reviews of mergers" and require regulators "to take corrective measures if they find abusive monopolistic conditions where previously approved measures fail to make good on their intended outcomes." The second would create a "consumer competition advocate" who would recommend investigations to the FTC and DOJ.

C. Before the Senate Judiciary

More recently, the Senate Judiciary Committee held a hearing entitled "The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt.[24]" During this hearing, members of the Senate Judiciary Committee heard prepared remarks from Tad Lipsky, Barry Lynn, Diana Moss, Carl Shapiro, and Josh Wright. Members of the Committee also questioned the panel about issues such as whether the consumer welfare standard is equipped to handle innovation competition, labor market monopsonization, and the difference between a consumer welfare and a total welfare standard. While no fireworks emerged, the simple existence of the hearing itself demonstrates that interest in reviewing the consumer welfare standard is perhaps at an all-time high.

D. Booker Questions to the DOJ and FTC

Possible 2020 presidential candidate Cory Booker has also expressed interest in the question of whether the consumer welfare standard is sufficiently broad. In a letter to the Assistant Attorney General Makan Delrahim and Acting Chairman of the FTC Maureen K. Ohlhausen, Booker asked Delrahim and Ohlhausen about tools available to the DOJ and FTC to protect labor markets.[25] The heavily footnoted letter cited to numerous studies concerning possible labor market monopsonization, and possible wage effects. Booker used these studies as a jumping off point to ask nearly two dozen questions regarding DOJ's and FTC's willingness and ability to bring labor market cases and challenge mergers due to labor issues under current law.

The current legislative interest in the consumer welfare standard sets Hipster Antitrust apart from previous challenges. Through Senate confirmations, Congressional hearings, and possible legislation, Congress has the ability to wield significant authority over the direction antitrust law should take.

IV. AN ANSWER IN SEARCH OF A PROBLEM

It is difficult to respond to all of the concerns of the Hipster/Neo-Brandeis movement, since its proponents are as varied a group as any other, and do not all agree on what changes they would like to see in antitrust policy. Some want a return to the structural analysis that ruled before the consumer welfare standard, and its associated economic tools took hold. Others believe that we need special rules for the technology sector in particular. Others (particularly in Congress), are concerned primarily with labor markets, or whether social and economic equity can be furthered through antitrust law. With that caveat, I will briefly comment on some of the proposals.

22 S.1812 - Consolidation Prevention and Competition Promotion Act of 2017, 115th Congress (2017).

23 Deals where the acquiring party would exceed a $50 billion valuation were also made presumptively illegal.

24 The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Subcommittee on Antitrust, Competition and Consumer Rights, December 13, 2017, available at: https://www.judiciary.senate.gov/meetings/the-consumer-welfare-standard-in-antitrust-outdated-or-a-harbor-in-a-sea-of-doubt.

25 Booker Presses DOJ, FTC on Corporate Concentration and its Impact on Competition in Labor Markets, Cory Booker Press Release, November 1, 2017, available at: https://www.booker.senate.gov/?id=692&p=press_release.

A. The Difficulty Balancing Multiple Mandates

The most immediate problem antitrust enforcers would face without the singular consumer welfare standard to guide them is what to do when considerations apart from consumer welfare come into conflict. While there are legitimate debates to be had about issues like GUPPI models, CR ratios, or the relative harm from over- or under-enforcement, these debates are occurring within the context of attempting to answer a question everyone understands. Without the "true north" of consumer welfare, enforcers would be left to balance multiple, often competing policy goals, as well as to weigh the evidence with respect to each one of those goals.

This would risk turning what is presently a data-driven, law enforcement exercise into something that is beholden to the political issues of the day. For instance, how is an agency supposed to evaluate a merger that can reasonably be expected to lower prices and improve product quality, but also to negatively impact local small businesses? The interests of consumers and small businesses would be conflict. Antitrust enforcers would need to effectively pick one side or another in such a case, raising concerns about favoritism, lobbying, and corruption. If the answer is to simply "balance all factors," then the weighting of each respective factor becomes paramount.

A system with multiple mandates is also less predictable. It will depend more on the views of the specific staffers and ultimately courts evaluating a merger, leading to the likelihood of different outcomes for similar fact patterns. Such unpredictability raises uncomfortable questions about the rule of law.

B. "Short-Term Price Effects"

A frequent element of Hipster critiques of the consumer welfare standard is the claim that the consumer welfare standard is about "short-term price effects." For instance, Lina Khan is explicit in *Amazon's Antitrust Paradox*:

> This Note argues that the current framework in antitrust—specifically its pegging competition to "consumer welfare," defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy. (emphasis added).

Similar comments about the antitrust agencies' alleged short-term focus are common in many other Hipster commentaries.

However, this short-termism cannot be found anywhere in the Horizontal Merger Guidelines.[26] As almost any antitrust practitioner can tell you, it is also missing from the real-life practice of law before the FTC and DOJ. To the contrary, much to the consternation of clients, agencies will frequently ask for more documents, data and longer-term projections than one would need to evaluate a short-term impact. This emphasis on evaluating every possible aspect of a merger is likely a major reason for why U.S. merger investigations take so long: over ten months on average for "significant" merger investigations, as calculated by the Dechert Antitrust Merger Investigation Timing Tracker ("DAMITT").[27]

Tad Lipsky, former Deputy Assistant Attorney General and acting FTC Bureau of Competition director, spoke to this point at the Senate Judiciary Committee hearing on the Consumer Welfare standard referenced above. He explained that rather than the consumer welfare standard being "centrally or even uniquely focused on short-term effects on consumer prices," the agencies considered both "long-run" impacts, and "dynamic effects."[28]

It is likewise difficult to square a view that the consumer welfare standard is exclusively short-term price focused with the recent emphasis by the antitrust agencies on innovation markets,[29] which are inherently long-term in nature. 'Innovation and Product Variety" likewise get an entire section devoted to them in the Horizontal Merger Guidelines. This emphasis on innovation also challenges the notion that the consumer welfare standard is solely price focused at all, let alone only concerned with short-term prices.

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26 Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, available at: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

27 DAMITT: How Long Does it Take to Conduct Significant U.S. Antitrust Merger Investigations?, January 18, 2018, available at: https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html.

28 Lipsky, Prepared Statement at Hearing on The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, December 13, 2017, available at: https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lipsky%20Testimony.pdf.

29 Rosch, Antitrust Regulation of Innovation Markets, Federal Trade Commission, February 5, 2009, available at: https://www.ftc.gov/public-statements/2009/02/antitrust-regulation-innovation-markets.

C. Technology Platforms

The concern over technology platforms is perhaps the single unifying thread between all Hipster Antitrust proposals and commentary, distinguishing them from previous critics of the consumer welfare standard. In particular, there is a view among many of these critics that special rules may be needed for technology platforms. As laid out by Khan, the reasons for the focus on technology platforms is relatively simple: technology platforms are "winner-take-all" due to network effects and the importance of data, so predatory pricing is an especially advantageous strategy.

Khan may well be correct that the economics of technology platforms make them more likely to result in a small number of large firms (although even this remains to be seen in the long-run). However, essentially none of the concerns raised with respect to these platforms are outside the scope of what the consumer welfare standard can address. While a technology platform may have a greater incentive to engage in predatory pricing, it remains illegal for them to do so, even within the existing consumer welfare framework. Nor does anything prevent antitrust enforcers from considering recoupment in adjacent product markets. The difficulty of proving recoupment meanwhile is not unique to technology platforms. Eliminating, or carving out the consumer welfare standard for one particular (rapidly changing) business sector, in response to an evidentiary concern seems like an overreaction at this stage.

V. CONCLUSION

At the present time, the Hipster Antitrust movement seems likely to have more policy influence than previous attacks on the consumer welfare standard due to the interest in the subject from prominent members of Congress. However, the calls for rapid and radical changes to antitrust law in response to what appear to be largely speculative harms are premature. More evidence is likely needed with respect to the economics and durability of technology platforms in particular. In the meantime, the debate is healthy, and has helped heighten interest both in the history and the future of antitrust law.

IGNORING TWO-SIDED BUSINESS REALITY CAN ALSO HURT PLAINTIFFS

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I. INTRODUCTION

The two-sided analysis of platform businesses isn't pro-defendant or pro-plaintiff. By accounting for business reality and modern economics, it helps courts and enforcement agencies reach the right decision and thereby reduces the likelihood of false negatives as well as false positives. Sometimes two-sided analysis is essential for uncovering how conduct harms competition and consumers. Other times it helps establish that conduct is innocuous or beneficial. Fears, and hopes, that two-sided analysis will discourage enforcement efforts are misplaced.

II. BUSINESS REALITY REQUIRES ACCOUNTING FOR INTERDEPENDENT CUSTOMERS

Stripped to the essence, platforms enable two distinct types of participants to interact more readily and realize gains from trade or other interaction.[2] The participants on one side generate externalities for the participants on the other. Customers on each side benefit when they can interact with the customers on the other side, so there is a value to having a joint standard for interacting, and customers on each side benefit when they can interact with more customers on the other side, so there are positive indirect network effects.[3] As a result the demand for joining and using the platform by one group of participants depends on the demand for joining and using the platform by the other group of participants. In the case of ride-sharing apps, for example, drivers value a platform that has more riders in their area who have the app and use it, and passengers value a platform that has more drivers who are on the platform and available to pick them up.

The interdependent demands between the two groups that result from these externalities infuse many aspects of the business reality of platforms and determine their economics. Managing one of these businesses requires getting these participants on board, in the right proportions, getting them to interact with each other, and helping them secure gains from trade. This is seen from considering one key business strategy, setting prices, but it extends to many other aspects of running these firms.

The economic theory of two-sided platforms shows it can pay to subsidize one group of participants to join and use the platform and make up the losses from the other group of participants.[4] The profit-maximizing access and transaction prices can be less than the marginal cost of provision, and can even be zero or negative, subject to at least some of these prices being sufficiently above marginal cost so that the platform earns a profit. These sorts of pricing structures are common in practice. OpenTable, for example, doesn't charge diners for making reservations and instead gives them reward points for using its service, resulting in discounts at participating restaurants. It makes money by charging restaurants for each diner who makes a reservation through OpenTable and for software services.

There is no material controversy over the basic economics of two-sided platforms in the industrial organization literature, which now consists of hundreds of papers, many published in top journals, and several books.[5] A few economists have nonetheless argued for marginalizing the role of this new field in antitrust matters. One line of attack is that the two sides of the platform are just complements, like tennis balls and tennis racquets, and don't raise new issues that haven't been dealt with before, such as in after-market cases.[6] This argument ignores the fact that a platform business *must* serve both its sides, because it is in the business of connecting them. Many businesses sell one complement but not the other, and sometimes when they sell both they sell them to the same customer. It would surprise many platform managers that they could learn much about strategies for their businesses from the basic theory of complements.

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2 For a nontechnical overview of the economics of platforms, see Evans & Schmalensee, Matchmakers: The New Economics of Multisided Platforms (Harv. Bus. Rev. Press 2016). Some platforms have more than two sides but we focus on two-sided ones here to simplify the discussion. Participants are distinct for the purposes of the interaction but they don't have to be different entities. For marketplaces for second-hand furniture, for example, sometimes people are buyers, and other times they are sellers.

3 It is sufficient to have just one side that benefits from access to the other side. For ad-supported media, for example, advertisers want access to consumers but consumers may not care about ads or may even dislike ads.

4 See, e.g., Rochet & Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. Econ. 645 (2006).

5 For an overview, see Evans & Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 Oxford Handbook Int'l Antitrust Econ. 404 (Blair & Sokol eds., 2014). The online appendix to our Oxford Handbook paper lists over 350 significant economic articles published through December 2012; see: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373.

6 *Amici Curiae* Connor, Gaynor, McFadden, Noll, Perloff, Stiglitz, White & Winter in Support of Petitioners (Dec. 14, 2017), *State of Ohio et al. v. American Express,* S.Ct. No. 16-1454.

Another critical argument is that two-sided analysis doesn't apply when markets are mature.[7] The basic idea is that indirect network effects aren't important once all relevant participants have joined. Neither the theoretical literature nor empirical studies provide any basis for believing that indirect network effects are exhausted commonly in mature markets. But even if all potential participants had joined one or more platforms at the overall market level, individual two-sided platforms would still generally compete, on both sides, for participants to join and use their platforms. The pricing and other business strategies that are common to two-sided platforms occur in theory and in practice regardless of market maturity. Platform managers in mature industries would also be surprised to learn that they could ignore interdependent demand and all its ramifications for running their businesses.

III. ACCOUNTING FOR BUSINESS REALITY REDUCES BOTH FALSE NEGATIVES & FALSE POSITIVES

Just as both sides matter to platform executives, both sides matter to antitrust analysts. Any practice that affects the demand by one set of customers has an impact on the demand by the other set of customers. Positive feedback effects between the two sides tend to magnify these impacts. A shopping mall that imposes an exclusivity requirement on an anchor store will tend to get greater foot traffic from shoppers who have to come to patronize that store. That might inconvenience those shoppers but might enable the mall operator to attract smaller stores, which benefits those shoppers.

These two-sided effects are also important for practices that affect competitors. A practice by a rival that affects one side, such as by reducing demand, has an impact on the other side, and feedbacks between the two sides magnify these effects. A shopping mall that imposes an exclusivity requirement on an anchor store could make it more difficult for a competing mall to get traffic and recruit other stores.

Whether these cross-side impacts are material is an empirical question, but one could not know the answer without considering both sides. When they are important, antitrust analysis, like economic analysis more generally, needs to account for the implications of interdependent demand.

Accounting for business reality, and using the appropriate economic models, should tend to minimize errors. Consider conduct that directly affects customers on one side of a platform. Analyzing conduct on just that side could reach a false negative by ignoring harms on the other side and a false positive by ignoring benefits on the other side. There doesn't appear to be any *a prior* reason to believe that doing the correct two-sided analysis should increase errors in making decisions concerning antitrust matters or that it should disproportionately reduce false positives relative to false negatives.

Comcast's proposed acquisition of Time Warner Cable illustrates the potential for false negatives. These companies operated local cable systems but never in the same zip code. Given this lack of overlap the parties, as well as many analysts and commentators, argued that there was no possible anticompetitive harm. Viewed from a single-sided perspective that position is obviously correct since the merger wouldn't change the choices available to consumers.

These cable systems, however, operated two-sided platforms. As Internet Service Providers ("ISPs") they connected households and Internet content providers and as Multichannel Video Distribution Providers ("MVPDs") they connected households and video programming providers. Focusing just on the households that participated on one side ignored the possible impact of the merger on the Internet content providers and video programmers as well as the possible feedbacks between those participants and households.

The U.S. Department of Justice found that the merger would increase bargaining leverage over Internet content providers and video programmers and thereby impose harm on those customers.[8] Moreover, the merger would increase the risk that the parties would use their control over broadband access to soften competition between the MVPD businesses and the emerging streaming video business, thereby harm-

7 Shy, *A Short Survey of Network Economics,* 38 Review of Indus. Org. 119, 136 (2011), ("The example of payment cards highlights the limitation of the two-sided market theory, because under full capacity no new spillovers between buyers and merchants can be created. More precisely, no additional network effects can be generated once most buyers already use payment cards and most merchants accept merchant cards. Therefore, *policy conclusions of two-sided market models should be confined to immature markets.*"). Also see *Amici Curiae*, id.

8 Hill, Rose & Winston (2015), "Economics at the Antitrust Division 2014-2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron," Review of Industrial Organization, 47:425-435. Also see Baer, "Video Competition: Opportunities and Challenges," Remarks as Prepared for the Duke Law Center for Innovation Policy, Fall Conference on the Future of Video Competition and Regulation, Washington DC, October 9, 2015, https://www.justice.gov/opa/file/782401/download.

ing consumers. These conclusions are predicated on the lack of competition on the household side. Consumers have few good alternatives for broadband service, and the costs of switching are high. The merger wouldn't change this competitive situation on the household side but it would on the other Internet content and video programming sides through the agglomeration of these households into larger bottlenecks.[9]

Predatory pricing clearly illustrates the possibility of both false positives and false negatives.

Profit-maximizing platforms often set prices above marginal cost on one side and below marginal cost on the other side. These skewed pricing structures persist in the face of competition. There is therefore no basis for inferring that a firm is engaging in price predation from the fact that price is below cost on one side. The traditional price-cost test applied to one side leads to a false positive decision.

A French predatory pricing case against Google Maps shows this danger. Bottin Cartographe sold mapping software that buyers could embed in their websites for the purpose of showing people directions. Google provided mapping software to websites for free but in return secured the right to deliver ads when people clicked on the directions shown; it also had a paid premium service. Bottin Cartographe sued Google for predatory pricing in the French commercial court.

The lower court agreed, on the grounds that Google charged websites nothing for a service that had positive marginal cost.[10] The Paris Appeals Court reversed that false positive finding.[11] It relied on an analysis by the French competition authority, which showed that Google Maps' revenue exceeded its costs after accounting for the advertising revenue that resulted from people viewing the free ad-supported maps.[12]

Of course, two-sided platforms can engage in price predation by lowering their overall prices below the profit-maximizing levels to drive out rivals and then recouping profits after they have secured monopoly power. A single-sided analysis, however, wouldn't necessarily detect this behavior and could reach a false negative finding.

Consider a city with two daily newspapers and suppose, as is usually the case, that the profit-maximization results in a pricing structure in which readers pay less than marginal cost and advertisers pay more than marginal cost. The dominant newspaper reduces advertising prices so that they are below the profit-maximizing level but above marginal cost and leaves reader prices unchanged. As a result it loses money overall since the profits on the advertiser side do not cover the losses on the reader side. The smaller newspaper can't survive at the lower advertising prices and exits.

A single-sided analysis would focus on the conduct on the advertiser side since that is where prices are being lowered. It would find that prices are greater than marginal cost and therefore conclude that there was no basis for a price predation claim. That is a false negative. A two-sided analysis accounting for prices and costs on both sides would prevent this error.

Single-sided analyses can reach false negatives or false positives for any conduct involving two-sided platforms for the same reasons they can arise in predatory pricing. Examining one side provides an incomplete picture of the benefits and costs of the conduct to customers as well as to the platform and a distorted view of what's happening to competition among platforms. Filling in the picture by considering both sides and accounting for the linkages between them provides a complete view. That could expose anticompetitive behavior, or reveal the procompetitive reasons for conduct that looks dubious viewed from one side.

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9 Evans presented economic studies to the FCC and Justice Department, on behalf of Netflix, concerning the competitive effects of the transaction, and Schmalensee also did to the FCC, on behalf of a trade association. See Evans, Economic Analysis of the Impact of the Comcast/Time Warner Cable Transaction on Internet Access to Online Video Distributors (December 23, 2014). Available at: https://ssrn.com/abstract=2600715 or http://dx.doi.org/10.2139/ssrn.2600715.

10 Tribunal De Commerce [ordinary court of original jurisdiction] Paris, Jan. 31, 2012, Case No. 2009061231.

11 Cour d'appel [regional court of appeal] Paris, civ., Nov. 25, 2015, Case No. 12/02931.

12 Autorité de la Concurrence, *Rendu à la Cour D'appel de Paris Concernant un Litige Opposant la société Bottin Cartographes SAS aux sociétés Google Inc. et Google France* [Report to the Paris Court of Appeals Concerning the Litigation between Bottin Cartographes SAS and Google Inc. and Google France] ¶ 50 (Dec. 16, 2014).

IV. TECH GIANTS, AND ALL PLATFORMS, HAVE AS MUCH TO FEAR AS TO GAIN FROM ACCOUNTING FOR TWO-SIDED BUSINESS REALITY

Some of the advocacy presented to the Supreme Court in *State of Ohio v. American Express* fails to appreciate that single-sided analysis of two-sided platforms can result in false negatives as well as false positives. The U.S. Department of Justice and several of the *Amici* in support of the state plaintiffs have essentially argued that the courts should confine rule of reason analyses to the side of the platform on which the conduct has taken place for the first stage of the rule of reason analysis.[13] That approach would help secure a verdict against American Express and could help plaintiffs in other similar cases. But it would also make it more difficult to secure verdicts against platforms in which conduct on one side inflicts harm through its impact on the other side.

More generally, applied across all platform enterprises, there is no apparent reason to expect that the single-sided approach would tend to reduce false negatives more than false positives. From the standpoint of antitrust enforcement, the Justice Department has therefore taken a shortsighted approach towards analyzing conduct by platform businesses.

Some commentators seem to think that two-sided analysis will give tech companies a free pass to engage in anticompetitive conduct.[14] To begin with, two-sided analysis accounts for business reality and gets the economics right. If that analysis doesn't find that conduct harmed competition and consumers, then chances are that the conduct isn't anticompetitive. More importantly, however, imposing single-sided analysis on two sided platforms would likely have two related adverse effects.

The first is that it would lead to false negatives. Consider a platform that provides an enormous amount of free content for users and earns profit from advertising. The single-sided approach advocated by the Justice Department would enable the platform to engage in conduct on the advertising side that harmed users (but not advertisers) and conduct on the user side that harmed advertisers (but not users) through its effect on competition.

The second is that it would shift anticompetitive behavior to conduct that evades detection. To do that the platform just needs to come up with conduct on one side that inflicts harm on competitors on the other side. Two-sided predation discussed above is a good example. If a platform lowered the price on the advertiser side, but kept the price above marginal cost, it could drive competing ad-supported platforms out of business by drying up their profitable advertising revenue.

It is hard to predict the net effect of single-sided analysis versus two-sided analysis on tech companies, but there's no apparent reason why tech foes should be rooting for single-sided analysis and tech friends should be cheering for two-sided analysis. A good default position would be to advocate two-sided analysis when there is significant interdependent demand on the theory that getting the right answer is probably best, on average, for everyone — at least for consumers.

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13 The Justice Department argues that benefits to the other side could be considered in the second stage of the rule of reason analysis. U.S. Br. 43-47, 52. Remarkably, the *Amici* Law Professors and *Amici* Economists for the Petitioners argue that the courts should not consider pro-competitive justifications involving the second side even in the second stage of the rule of reason analysis. See Petitioner *Amici* Law Professors' Br. 32-34; Petitioner *Amici* Economists' Br. 23.

14 Bernstein, "A Lawsuit Over Credit Card Feeds Could Further Empower Big Tech," *Bloomberg,* January 24, 2018. https://www.bloomberg.com/news/articles/2018-01-24/a-lawsuit-over-credit-card-fees-could-further-empower-big-tech. ("Even the most extreme scenarios could be immune to antitrust complaints if the tech platforms could argue that benefits accrue to someone else, said Tim Wu, a professor at Columbia Law School. 'Don't you realize you're insulating a whole class of business from the reach of the law?'") See also *Amici* Brief of Open Markets Institute, *State of Ohio et al. v. American Express*, S.Ct. No. 16-1454.

HIPSTER ANTITRUST: NEW BOTTLES, SAME OLD W(H)INE?

BY CHRISTOPHER S. YOO[1]

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Antitrust appears to be in the midst of a transition into a new era. The number of jurisdictions with active enforcement programs has risen dramatically in recent years, and competition law authorities around the world are ramping up their efforts. The advent of the digital economy has supported the rise of large high-tech enterprises that now dominate lists of the ten largest companies in the world. At the same time, the populist wave that is transforming politics in countries all over the globe has provided a platform for advocates on both the left and the right who have long been skeptical about big business and large institutions to argue for more vigorous enforcement.

In the midst of these developments, a recent outcry over what is sometimes called "Neo-Brandeis" or, more often and more colorfully, "Hipster Antitrust" has come to the forefront. In short, proponents of this new movement advocate abandoning the consumer welfare standard that jurisdictions around the world have embraced as the definitive benchmark. They would abandon the efficiency-based approach that focuses on low prices, high quantities, and high quality in favor of one that focuses on the absolute size of firms, the level of industry concentration, injuries to small business, and other more amorphous goals, such as wealth redistribution, political power, and employment. The commotion has prompted Senate hearings and statements by members of Congress, extensive commentary from leading antitrust practitioners, and academic conferences devoted to the topic.

Much as every generation thinks it has invented sex, the Hipster Antitrust movement is sometimes discussed as if it represents something brand new. A brief look back at the intellectual history of antitrust reveals that the current controversy is more properly regarded as another iteration of what has become an old debate. The bottles may be new, but the wine still tastes the same.

The contours of this debate are well documented in the antitrust literature, outlined quite nicely in Michael Jacobs's 1995 historical survey. During the 1970s and 1980s, antitrust populists waged an unsuccessful war against the growing dominance of the economic approach to antitrust and attempted to preserve the Warren Court jurisprudence that regarded large firm size and industry concentration as inherently problematic without any need to analyze the impact of particular business practices on consumers. They faced a vigorous academic critique showing that large size may well be the product of economies of scale inherent in a particular industry or from being a more efficient competitor. As the consumer welfare standard became entrenched in judicial decisions, the academic literature, and agency practice and guidance documents, populist criticism "took on a frantic tone" and eventually "grudgingly acknowledged the success" of the consumer welfare approach. By the end of the 1980s, the debate between the populist and the economic approaches "ha[d] lost its drama," and "[t]he victory of a purely economic analysis . . . could hardly seem more complete."[2]

Gone were the days when big was regarded as inherently bad and when small firms were protected for their own sake. Instead, firm size was relevant only to the extent that it benefitted or harmed consumers. Herbert Hovenkamp has noted that the problem with applying standards other than consumer welfare is that the goals:

> are unmeasurable and fundamentally inconsistent, although. . .their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.[3]

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2 Jacobs, *An Essay on the Normative Foundations of Antitrust Economics,* 74 N.C. L. Rev. 219, 221, 228, 236–37, 239–40 (1995). For acknowledgements by prominent populists of the dominance of the economic approach, see, e.g. Lande, *Implications of Professor Scherer's Research for the Future of Antitrust,* 29 Washburn L.J. 256, 258 (1990) (recognizing that "the dominant paradigm today is that the only goal of the existing antitrust laws is to increase economic efficiency"); Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 Cornell L. Rev. 1140, 1140 (1981) (conceding that "[r]egard for efficiency is in the ascendancy").

3 Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?,* 94 Notre Dame L. Rev. (forthcoming 2018), *draft* available at: http://dx.doi.org/10.2139/ssrn.3097452.

It thus comes as no surprise that during this period, the Supreme Court embraced consumer welfare as the appropriate standard under the Sherman Act.[4] The emergence of a consensus that economic analysis should dictate the contours of antitrust did not, of course, mean the end of all controversy. As anyone who has worked with economists knows, agreement that consumer welfare is the goal of antitrust still leaves a great deal of room for differences of opinion. During the 1990s and 2000s, these disputes took place between the largely price-theoretic approach of the Chicago School and the more game-theoretic approach of the post-Chicago School. More recently, antitrust has taken a more empirical turn. It would be a mistake, however, to regard these disputes as a rehash of the old fight between the economic and populist approaches. Instead, these arguments took place within a shared commitment to consumer welfare as the proper antitrust standard. In the words of Carl Shapiro, Berkeley business professor and former Deputy Assistant Attorney General for Economics of the U.S. Department of Justice's Antitrust Division, "If 'Post-Chicago Economics' stands for the notion that . . . antitrust should move away from promoting efficiency and consumer welfare, count me out."[5]

The continuing support for the consumer welfare standard was evident at the December 13, 2017, hearings held by the Antitrust Subcommittee of the Senate Judiciary Committee on "The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?" While one of the speakers advocated abandoning the consumer welfare standard, the other three disagreed, including those who generally favor more vigorous enforcement of the antitrust laws.

Diana Moss of the American Antitrust Institute, one of the leading organizations arguing in favor of ramping up antitrust enforcement, stated that her organization "has always held the view that the antitrust laws are fundamentally durable and the consumer welfare standard is fully capable of meeting the challenges of the modern economy." She cautioned that "remaking the antitrust laws or replacing the existing consumer welfare standard would throw the enforcement agencies, private plaintiffs, and the courts into disarray." She then traced enforcement actions taken under the consumer welfare standard, concluding that "[t]hey support the notion that the standard capable of taking on the challenges we face moving forward" and that "[t]he consumer welfare standard is able to tackle the manifestation and exercise of market power in these settings." In short, any problems with antitrust lay in the vigor with which it has been enforced, not in the consumer welfare standard itself.[6]

Shapiro similarly endorsed the consumer welfare standard and rejected concluding that a firm harms consumers simply because it has obtained a dominant position. He further stated:

> During the 40 years that I have been studying and practicing antitrust, there has been a broad consensus among antitrust scholars and practitioners in favor of the "consumer welfare" standard. No evidence whatsoever has been put forward calling this consensus into question. Indeed, I know of no serious antitrust experts who favor abandoning the "consumer welfare" standard, and no workable alternative has been proposed.[7]

If one moves beyond the academy to examine actual enforcement practices, the debate has followed a very similar trajectory with respect to the Federal Trade Commission's ("FTC's") Section 5 authority to prevent actors from engaging in "unfair methods of competition."[8] From time to time, FTC Commissioners and staff have debated whether to wield this power as a standalone authority to redress conduct that does not represent a violation of the antitrust laws, even conducting hearings on the issue in 2008. Indeed, such a position draws support from a line of old U.S. Supreme Court cases, some of which are acknowledged to be wrongly decided even by advocates of more expansive Section 5 authority,[9]

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4 *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription." (internal quotation marks omitted)). For the Court's most recent pronouncement, see *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013) ("The point of antitrust law is to encourage competitive markets to promote consumer welfare.").

5 Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak, 63 Antitrust L.J. 483, 484 (1995).

6 *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the S. Comm. on Antitrust of the S. Comm. on the Judiciary,* 115th Cong. 5–6, 8, 9 (2017) (statement of Diana Moss, President, American Antitrust Institute), available at: https://www.judiciary.senate.gov/download/12-13-17-moss-testimony.

7 Id. at 3–4 (statement of Carl Shapiro, Transamerica Professor of Business Strategy, Walter A. Haas School of Business, University of California at Berkeley), available at: https://www.judiciary.senate.gov/download/12-13-17-shapiro-testimony.

8 15 U.S.C. § 45(a)(1).

9 See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Atl. Ref. Co. v. FTC,* 381 U.S. 357, 367 (1965); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948); *Fashion Originators' Guild of Am. v. FTC,* 312 U.S. 457, 463, 466 (1941). For the concession that certain cases were wrongly decided, see Dahdouh, *Section 5, the FTC and Its Critics: Just Who Are the Radicals Here,* Competition: J. Antitrust & Unfair Competition L. Sec. St. Bar Cal., Fall 2011, at 1, 15–16 & n.85.

as well as passing mentions in more recent decisions as well.[10]

To say that the FTC's Section 5 authority is not confined to the strict contours of antitrust law as laid out in the Sherman Act is not to say it is unbounded. A trilogy of cases from the 1980s and a 1994 case in which the courts rejected the FTC's efforts to exercise its standalone Section 5 power stand as a cautionary note.[11] The court's discussion in the *Ethyl* case, in which the FTC attempted to reach consciously parallel pricing that in the absence of an agreement, is instructive. Given that "the term, 'unfair' is an elusive concept, often dependent upon the eye of the beholder," the court noted the Supreme Court's warning in that "appropriate standards must be adopted and applied to protect a respondent against abuse of power." Without such standards, "the door would be open to arbitrary or capricious administration of § 5." Consequently, "the Commission owes a duty to define the conditions under which conduct" constitutes unfair competition under Section 5 "so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of compete unpredictability." Thus, even though Section 5 authority is not limited to the metes and bounds of the Sherman Act, courts have not authorized treating it as a roving authority in the hands of the FTC. Instead, it is limited to "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit."[12]

The admonitions of the *Ethyl* court resonate to this day. The need for limiting principles has led those who support expanding Section 5 authority beyond the strict letter of the antitrust law to insist that it be applied in a manner consistent with the economic approach. A classic example is Robert Lande's statement at the FTC's 2008 workshop on Section 5 that "if the Commission tried to have an expansive reading of Section 5. . ., but did not do so in a way that was clear and was bounded, then the Supreme Court would today restrict Section 5. . .to the other antitrust laws. And this would especially happen if the Commission interpreted Section 5 in a way that was non-economic."[13]

Herbert Hovenkamp's article on *The Federal Trade Commission and the Sherman Act* provides another apt illustration of this point. While he supports the limited use of Section 5 to reach practices that fall outside of traditional antitrust, he insists that the condemned practice "really be 'anticompetitive' in a meaningful sense. That is, there must be a basis for thinking that the practice either does or will lead to reduced output and higher consumer prices or lower quality in the affected market." Thus, he supports the use of Section 5 to reach cartel-like behavior, such as conscious parallelism, that has clear negative implications for consumer welfare despite the fact that it lacks the agreement necessary to violate Section 1 of the Sherman Act and the market power needed to violate Section 2 of the Sherman Act. He cautions, however, against using Section 5 to attack monopoly in its incipiency in the absence of a dangerous probability of economic harm, penalizing companies simply because they are large will likely benefit "small independent retailers, . . . not consumers." He also raises concerns about using the Section 5 power to mimic the European doctrine of abuse of a dominance, arguing that such cases should be limited to situations in which "the harm to completion [is] apparent." He closes by reminding us that Section 5 "must not be interpreted to undermine competition goals, which are high output of high quality products and low prices."[14] His support for applying the Section 5 power thus clearly falls within the consumer welfare paradigm and should not be regarded as an endorsement of a return to the approach that penalized firms simply for being large.

The *Ethyl* court's admonitions about the importance of clearer guidance to giving companies that are potentially subject to Section 5 are reflected in a recent speech and law review article published by then Commissioner and now Acting Chairman Maureen Ohlhausen. She reviews uncertainty surrounding the FTC's past efforts to implement Section 5's mandate against unfair trade practices and proposes a framework for providing public guidance regarding the agency's enforcement policy with respect to standalone Section 5 cases.[15]

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10 See *Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 762 n.3 (1999); *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986).

11 *E.I. du Pont de Nemours & Co. v. FTC,* 729 F.2d 128, 139 (2d Cir. 1984) (*Ethyl*); *Boise Cascade Corp. v. FTC,* 637 F.2d 573, 582 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC,* 630 F.2d 920, 927 (2d Cir. 1980); *FTC v. Abbott Laboratories,* 853 F. Supp. 526, 535-36 (D.D.C. 1994).

12 *Ethyl,* 729 F.2d at 136–37, 138, 139; accord *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (noting that the FTC's Section 5 authority "is particular well established with regard to *trade practices which conflict with the basic policies* of the Sherman and Clayton Acts even though such practices may not actually violate these laws" (emphasis added)).

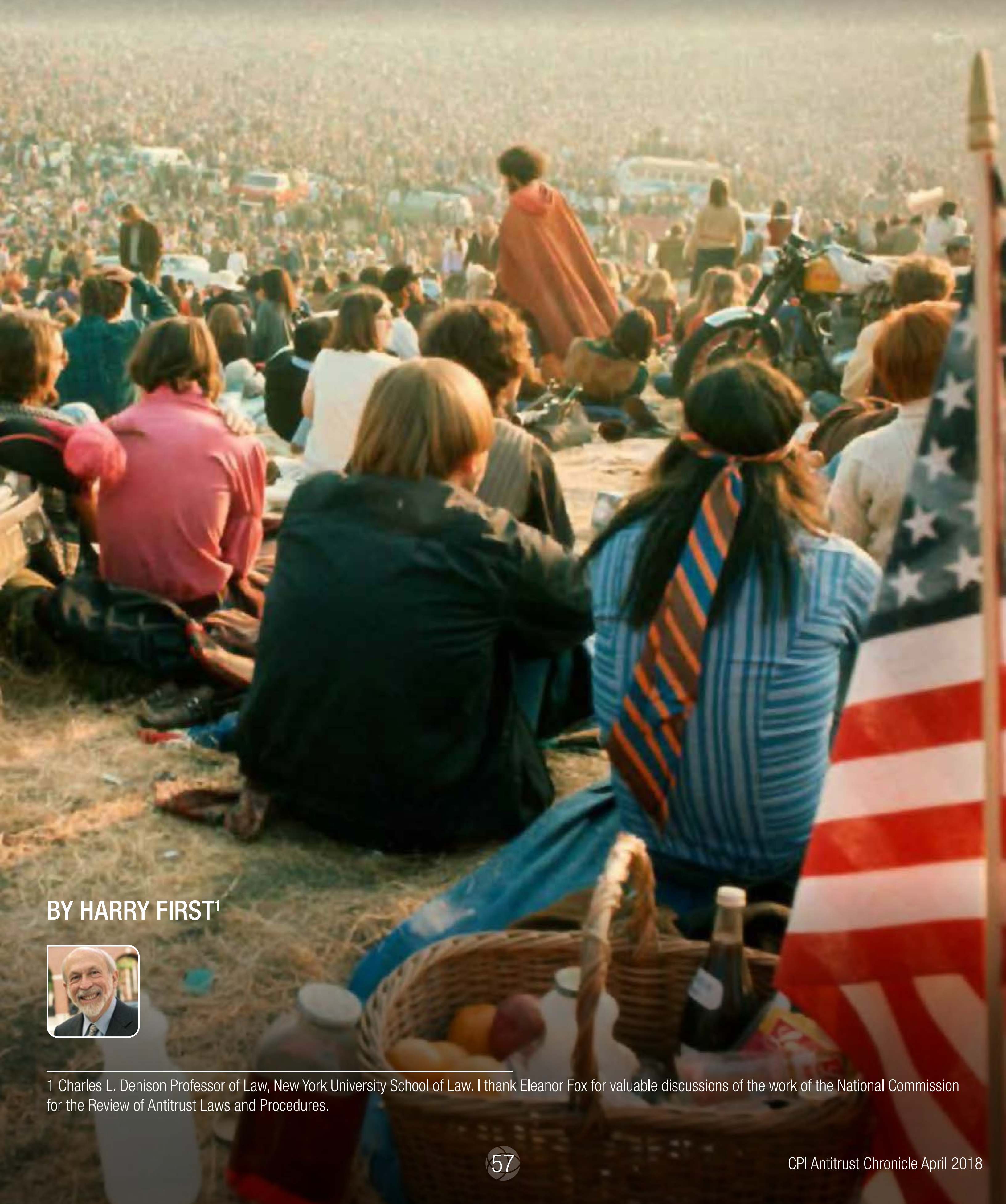
13 Transcript, Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute 87 (Oct. 17, 2008), http://www.ftc.gov/bc/workshops/section5/transcript.pdf.

14 Hovenkamp, *The Federal Trade Commission and the Sherman Act,* 62 Fla. L. Rev. 871, 878, 879–82, 884, 893 (2010).

15 Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation,* 2 J. Antitrust Enforcement 1 (2014); Ohlhausen, Commissioner, Fed. Trade Comm'n, Remarks at the U.S. Chamber of Commerce: Section 5: Principles of Navigation (July 25, 2013), available at: https://www.ftc.gov/public-statements/2013/07/section-5-principles-navigation.

In short, to experienced observers of antitrust, the current uproar about hipster antitrust has the familiar ring of a debate that both sides thought had been long settled. The new bottles do not hide the fact that the wine is the same, and the same vinegary flavor that led to its rejection a generation ago remains. Although complaining about large companies has always had a certain appeal in some quarters and may have new appeal in others, mere slogans and epithets do not represent an adequate substitute for reasoned analysis. This is particularly true in the digital economy, which has yielded specular economic growth and value and in which the need for large investments in R&D and other features of the market may necessitate the existence of large firms if consumers are to enjoy these benefits. Moreover, the classic nirvana fallacy reminds us how easy it is to point out the flaws of one approach while foregoing any close examination of the proffered alternative, which no doubt suffers from flaws of its own that may be even greater. The absence of a coherent alternative to the consumer welfare standard thus limits the seriousness with which complaints about it are taken. All of these considerations are framed by the backdrop that vague standards open the door to political manipulation and abuse and that enforcement authorities around the world typically watch U.S. antitrust law closely and often take cues from how it develops. They underscore the importance of avoiding the seduction of basing legal changes on mere demagoguery and insisting that any reforms be based on a solid analytical foundation.

WOODSTOCK ANTITRUST



BY HARRY FIRST[1]

1 Charles L. Denison Professor of Law, New York University School of Law. I thank Eleanor Fox for valuable discussions of the work of the National Commission for the Review of Antitrust Laws and Procedures.

I. INTRODUCTION

Some years ago I was at a conference giving a paper that I co-wrote with Peter Carstensen. The topic of the paper was *Topco*. In the paper we argued that the Supreme Court in fact decided the case correctly, even if the opinion was written in broader strokes than we might have liked. The Court got it right because it saw that Topco was a cartel of retail grocery chains trying to use its private label to keep each member out of the other's backyard. The exclusive territorial scheme Topco embraced was not necessary to produce a private label, as Topco tried to argue, but it did act as a mechanism to allocate territories among potentially competing grocery chains.[2]

Topco, of course, is one of the Chicago School's "noiriest" *bête noires*, topped only by *Von's*, and our paper drew some criticism from conference participants. The criticism I remember most, however, was a statement by one of the participants that the paper reflected "Woodstock antitrust." I responded that I took this as a compliment, not a criticism, and that I embraced the label. Of course, the comment was not made as a compliment, but as an epithet to brand the paper as extreme.

So, too, with "hipster antitrust," an epithet now being used to brand some of the recent critiques of current antitrust as extreme, unmoored from correct antitrust doctrine and approaches. Perhaps not coincidentally, both labels connect antitrust to a broader social moment, each of its time. In this sense, both labels are indicative of those unusual times when antitrust comes out of the legal and technical shadows to have broader political and social salience. Most times antitrust stays quietly in the shadows.

I leave to others the task of defining hipster antitrust, let alone defending or criticizing it. What I would like to do is to describe Woodstock antitrust. I offer this vision not only to evoke that particular time, and remind us what was on the table then in terms of antitrust, but, dare I say, to suggest that we take a new look at some of those proposals. Hipster antitrust may turn out to be tamer by comparison.

II. SMALL IS BEAUTIFUL

When did Woodstock antitrust flourish? I would date it from 1969 to 1979, 1969 for the date of Woodstock itself, but also for the filing of five cases by the Justice Department challenging conglomerate mergers. I give Woodstock antitrust a decade's run, ending when the National Commission for the Review of Antitrust Laws and Procedures ("NCRALP") submitted its Report. The Report recommended that Congress "undertake an inquiry" into strengthening the Sherman Act to deal with "persistent monopoly power" by adopting a "no fault" approach to Section 2 liability, but it did not fully endorse the proposal and nothing ever came of the recommendation.[3] Ronald Reagan was elected in 1980, and antitrust went in a different direction.

Much of what went on in antitrust during the Woodstock decade was aimed at corporate size. And, in defiance of today's view of political leanings, much of it was done in Republican administrations (six of the ten years). Imagine a Republican Attorney General today saying what John Mitchell said in 1969: "I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers. . . . The danger that this super-concentration poses to our economic, political and social structure cannot be overestimated."[4]

What united the frolickers at Woodstock and the bond lawyer turned Attorney General? If there were anything that could link the two it would be a fear that powerful institutions — government and business — had grown too large and threatened personal freedom. This wasn't necessarily the freedom to get a better deal as a consumer, but the freedom to make personal choices not controlled by big institutions. Paraphrasing the words of a popular book of the time, small was beautiful.[5]

2 Carstensen & First, *Rambling Through Economic Theory: Topco's Closer Look,* in Antitrust Stories 171-203 (Fox & Crane, eds., 2007).

3 Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures viii-ix (1979).

4 See Speech to Georgia Bar Ass'n, ATRR No. 413, pp A-2, X-9 June 10, 1969.

5 See Schumacher, *Small Is Beautiful: A Study of Economics As If People Mattered* (1973).

III. NO-FAULT MONOPOLIZATION

High on the list of Woodstock antitrust's effort to deal with corporate size and power was an attempt to use Section 2 to reach durable monopoly power, not just bits and pieces of conduct that might contribute to the maintenance of a monopolist's position. There was a frustration with targeting particular acts, which led to endless trials and would most likely end only with stopping those acts themselves. If monopoly in itself was bad, why not deal with that more directly?

The idea of no-fault (or no-conduct) monopolization began to gather steam in 1969 with its endorsement from Donald Turner, who argued that a firm should be held to have unlawfully monopolized a market "simply by obtaining and retaining monopoly power over a substantial enough period of time to indicate that its power is relatively impervious to competitive erosion."[6] Oliver Williamson in 1972 began a Harvard Law Review article by stating that "[a]ntitrust policy has long been plagued by the problem of continued dominance of an industry by a single firm which has obtained its position by lawful means."[7] He saw this as a form of market failure, leading not only to resource misallocation and output reduction, but also to providing "an excuse for bigness in other spheres of economic and political activity–to the possible detriment of the public." He argued for "government intervention to upset this condition."[8]

In 1976 Senator Philip Hart introduced a no-fault bill embodying Turner's approach. Titled the "Monopolization Reform Act of 1976," Hart's bill would have removed the defense of "superior product, business acumen, or historic accident" in government monopolization cases but would have allowed a defense to divestiture where divestiture would result in the "loss of substantial economies of scale."[9] Hart introduced the bill with this: "I think it can be said that we must soon decide if we are going to continue the slide toward bigger and bigger firms and more Government control or give competition one more try."

The Areeda-Turner treatise in 1978 continued to press the argument for dealing with "monopoly status" rather than expending effort in examining the business history of persistent monopolies to look for examples of exclusionary behavior: "The evils of monopoly are largely independent of the manner in which it is achieved or maintained. Even innocently obtained monopoly can and likely will produce monopoly pricing."[10] John Flynn subsequently pressed NCRALP to consider a no-conduct proposal as part of its review of the antitrust law and procedure. Flynn argued the need for efficient government structural monopolization litigation that could focus on the heart of the matter – the existence of monopoly power – and not get bogged down in a lengthy trial of every aspect of the history of the defendant's industry and all of the defendant's actions. "The central issue in such cases," Flynn argued, "should be that posed by Senator Hart: 'Does the defendant have a degree of economic power which should no longer be accepted in a competitive economy?'"[11]

Flynn gave a number of examples of government monopolization cases that were "plagued" by massive litigation, but the one that was front and center at the time was the *IBM* litigation, a case that spanned the Woodstock era. Brought in 1969 and eventually settled in 1982, Robert Bork polemically dubbed it "the Antitrust Division's Vietnam," the perfect way to tar what Bork saw as a misguided government effort.

But Flynn's argument was not that such cases were wrongly brought. It was that monopoly power should be all that the government need prove where monopoly was persistent. In fact, the litigation effort masked the more difficult problem in such cases — remedy. Pointing out that "inadequate attention" had been paid to remedy, Flynn argued that the result was "frequent failures to achieve structural remedies for a structural violation, occasional reliance upon complex behavioral decrees requiring ongoing judicial and enforcement agency supervision, and the outbreak of renewed litigation seeking further relief."[12] No, Flynn was not talking about the yet-to-come *Microsoft* litigation, but he did put his finger on a Woodstockian problem that resonates in today's efforts against dominant firms: How do you repair things and make changes that will really matter?

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6 Turner, *The Scope of Antitrust and other Economic Regulatory Policies,* 82 Harv. L. Rev. 1207, 1217 (1969). He would have excepted a firm whose size was attributable to scale economies or whose power was attributable to unexpired patents, id.

7 Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations,* 85 Harv. L. Rev. 1512 (1972).

8 Id. 1514-15.

9 S. 3429, 94th Cong., 2d Sess. (1976), reprinted [§4; remove the *prima facie* effect under CL5].

10 3 Areeda & Turner, Antitrust Law ¶ 614 at 35 (1978).

11 Statement of John J. Flynn, 48 Antitrust L.J. 845, 853 1979.

12 Id.

Flynn's arguments to the Commission did get no-conduct monopolization on its agenda. There was a series of relatively restrained recommendations relating to "improvements" in structural relief, as well as a recommendation that "appropriate Congressional committees" should examine how to strengthen the Sherman Act to deal with "persistent monopoly power."[13] The text of the Report rehearsed the arguments over no-conduct monopolization at some length, but the Report was clearer with regard to structural relief in general: "[T]he Commission concludes that structural relief should be the preferred remedy whenever a violation of Sherman Act Section 2 or Clayton Act Section 7 has been found."[14]

IV. CONCENTRATION AND THE OLIGOPOLY PROBLEM

Concern for concentrated economic power extended beyond durable monopolies. The even more intractable problem for antitrust was oligopoly, particularly tight oligopoly that achieved monopoly-like results without overt collusion. Turner in 1962 had tried to thread the needle between "pure oligopoly" pricing, which he felt Section 1 couldn't reach, and other settings for oligopoly pricing that he thought Section 1 could reach (such as the industry-wide use of a particular pricing system).[15] However useful this effort could be for individual cases, it could not really tackle oligopoly as a structural matter. These efforts were left to Woodstock antitrust.

One legislative approach was the Industrial Reorganization Act that Senator Hart introduced in successive Congresses between 1972 and 1975.[16] This proposal would have made it unlawful for any corporation "or two or more corporations" to possess monopoly power "in any line of commerce in any section of the country." How would monopoly power be proved? The bill provided for a "rebuttable presumption" of monopoly power in three circumstances: 1) for a single firm, if the average rate of return on net worth after taxes exceeded 15 percent over 5 of the 7 years preceding the filing of suit (take that Apple!); 2) if there had been no substantial price competition among two or more corporations "in any line of commerce in any section of the country" for 3 of the 5 years preceding the filing of suit (take that airlines!); or 3) if four or fewer companies have at least 50 percent of sales "in any line of commerce in any section of the country" in 3 of the 5 years preceding filing of suit (take that Facebook and Google for online advertising!).

The proposed Act was brief when it came to the substantive standards for liability — it did not explain how a defendant could rebut the presumption of monopoly power, for example — but it was fulsome in its enforcement provisions. Fulsome and ambitious. Prosecutions for violations of the Act, and orders for reorganizing companies found to be in violation, would be adjudicated before a new "Industrial Reorganization Court" composed of 15 Article III judges appointed by the President with Senate confirmation.[17] Prosecutions would be brought by a new "Industrial Reorganization Commission," to last 15 years, after which its duties would transfer to the FTC. This Commission would not only have the power to enforce the Act but also a mandate to study a group of eight industries (including, for example, "electronic computing and communication equipment" and "chemicals and drugs") and develop a plan of reorganization for each without regard to whether any of the corporations in those industries were violating the Act. The Commission was to report the status of each study and plan to Congress every other year, with appropriate legislative recommendations.[18]

A deconcentration effort of the type proposed in the Industrial Reorganization Act was always going to be a heavy lift, of course. Perhaps litigation under current law would be more tractable? The FTC gave it a go in two shared monopoly cases brought during this period, one in 1972 against the six leading ready-to-eat cereal manufacturers, the other in 1973 against the eight major gasoline refiners in the United States. Both cases sought to attack the two industries in structural terms. The cereal makers, the Commission alleged, "have maintained, and now maintain a highly concentrated, noncompetitive market structure" resulting in a $100 million "monopoly overcharge" in 1970 on sales of $740 million.[19] The oil companies, the Commission alleged, had "maintained and reinforced a noncompetitive market structure," pursuing a "common course of action" to "abuse and exploit" their ownership and control of crude oil, thereby forcing "American consumers" to pay "substantially higher prices" for gasoline than they would have in a competitively structured market.[20] Neither case proved particularly tractable, though, and both ended up being dismissed once the Reagan administration came to power.

13 NCRALP Report at vi-viii.

14 Id. at 119. For a vigorous defense of a no-conduct approach in appropriate cases, see Separate Views of Commissioner Fox, id. at 339-47.

15 Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 673 (1962).

16 See S. 1167, 93d Cong., 1st Sess. (1973).

17 Id. § 271.

18 See id. § 203 (a) (4).

19 *In the Matter of Kellogg Co.*, 99 FTC 8 (1982).

20 *In the Matter of Exxon Corp.*, 98 FTC 453 (1981).

Another way to deal with oligopoly and increasing concentration was to use merger law to stop such growth before it occurred, the avowed goal of the 1950 Amendments to Section 7 of the Clayton Act. This approach bracketed the Woodstock decade.

As mentioned above, the Woodstock decade began with the Justice Department's attack on the major conglomerate firms of the time. Five Section 7 suits were filed, three against ITT, one against LTV, and one against Northwest Industries.[21] These cases tried to push beyond conventional theories focused on same-market effects to theories examining strategic behavior across markets (for example, reciprocity); but they also advanced the view the mergers violated Section 7 because of a resulting increase in "aggregate concentration" (the concentration of productive assets generally in the hands of fewer firms), which, the Justice Department urged, would lead to a "lessening of competition" in numerous (but undesignated) lines of commerce in the economy. The cases met an untimely death, though, killed by Richard Nixon on the eve of Supreme Court review when he ordered the Justice Department to withdraw a pending appeal and settle the cases.

The decade ended with one last effort to stop merger growth, Senator Edward Kennedy's "Small and Independent Business Protection Act."[22] This proposal would have banned large-firm mergers where each firm had sales or assets exceeding $2 billion (roughly $7 billion in 2018 dollars) and would have made presumptively illegal any merger where both firms had sales or assets exceeding $350 million (roughly $1.3 billion in 2018 dollars) or where one firm had sales or assets exceeding $350 million and the other firm had 20 percent of sales "in any significant market" in the year preceding the acquisition. Unlike Hart's Industrial Reorganization Act, Kennedy's bill provided that the presumption might be rebutted on a showing that the transaction would have the "preponderant effect" of "substantially enhancing competition" or would result "in substantial efficiencies."[23] But there was no rebuttal for mergers where both parties had assets or sales exceeding $2 billion, a figure that would have covered approximately 300 U.S. corporations.

V. FAIRNESS

One target of Woodstock antitrust was the Sperry & Hutchinson Company, seller of S&H green stamps. Trading stamps were a big deal in the 1960s — 400 billion stamps issued in 1964 on $40 billion in retail sales — and S&H was the largest of the trading stamp companies, with annual gross receipts of over $300 million and 40 percent of the market. The essence of the Commission's case against S&H was that S&H had unfairly placed restrictions on stamp redemption and had suppressed the efforts of independent stamp exchanges that had grown up to allow stamp holders greater freedom to get value from their stamps.

The FTC's prosecution resulted in a 1972 Supreme Court decision giving the Commission broad power to proceed against practices it judged unfair: "[T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[24]

The Commission's opinion, however, hadn't asserted the sweeping power to advance "public values" that the Supreme Court said it could. Rather, the Commission had focused on freedom of choice — the freedom of consumers to dispose of stamps as they wanted and the freedom of merchants to offer to redeem stamps for goods. The Commission had lots of specific examples of S&H's efforts to suppress freedom of choice. Military personnel left the United States and wanted to sell their stamps, but couldn't. Some consumers didn't have cars and couldn't easily get to a redemption center, but S&H allowed mail redemption only if you lived more than twenty-five miles from a center. Some consumers preferred using their stamps at stores that would accept them instead of cash so that they could get goods they preferred. But S&H wouldn't allow it, even when food stores wanted to provide food for the needy who lacked cash but had stamps.

Unfairness it was, but unfairness that could be cured by competition, specifically, the competition that independent stamp exchanges provided to S&H's closed system of redemption centers. As to these small companies, the Commission wrote that S&H had "monopoly power" over them in the sense that they couldn't stay in business if they couldn't deal in S&H stamps. S&H's actions "tended to eliminate the operations of a whole class of businessmen" who had been providing a "useful and valuable function." Who says antitrust doesn't protect small business?

21 See *United States v. International Telephone & Telegraph Corp. (Grinnell)*, 324 F.Supp. 19 (D.Conn. 1970), appeal dismissed 404 U.S. 801 (1971); *United States v. International Telephone and Telegraph Corp. (Canteen)*, 1971 Trade Cas. ¶ 73,619 (N.D. Il1.1971); *United States v. International Telephone & Telegraph Corp. (Hartford),* 1971 Trade Cas. ¶ 73,666 (D.Conn.1971); *United States v. Ling–Temco–Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970) (consent judgment entered); *United States v. Northwest Industries, Inc.*, 301 F.Supp. 1066 (N.D.Ill.1969) (denying preliminary injunction).

22 S. 600, 96th Cong., 1st Sess. (March 8, 1979).

23 Id. § 3 (a).

24 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

VI. ECHOES OF WOODSTOCK

Today's efforts to expand antitrust's reach in some ways seem pale in comparison to Woodstock antitrust. The proposed "Merger Enforcement Improvement Act of 2017" would have provided more post-merger information to the federal agencies regarding the effects of merger remedies and would have studied the possible impact of institutional investor cross-ownership of competing companies in concentrated industries, worthy goals but hardly revolutionary. The "Consolidation Prevention and Competition Promotion Act of 2017" would have gone substantially further than current law in prohibiting large mergers and mergers that increase competition, taking an approach similar to Kennedy's 1979 proposal, although fewer companies would have been covered. Apart from those two proposals, though, and unlike Woodstock antitrust, the effort to expand antitrust has taken place almost exclusively as an opposition movement, not one embraced by enforcement agencies or legislators.

But my goal in describing Woodstock antitrust is not to draw invidious comparisons to current efforts, or even to argue that Woodstock antitrust was a great success. Indeed, the concrete efforts described above did not change antitrust law and ended up falling of their own weight. No statutory changes and no deconcentration measures were enacted, shared monopoly prosecutions and attacks on conglomerate mergers were abandoned, no-conduct monopolization was forgotten.[25]

And yet, Woodstock antitrust echoes today. Freedom is still a North-star for antitrust policy, and the Supreme Court still quotes *Topco*'s parallel between the Bill of Rights' protection of personal freedoms and antitrust law's preservation of economic freedom.[26] The findings of the proposed Industrial Reorganization Act that competition "preserves a democratic society" and an "opportunity for a more equitable distribution of wealth" are echoed in the findings of 2017's proposed Consolidation Prevention and Competition Promotion Act that competition "reduces economic inequality" and that undue concentration undermines "the health of democracy in the United States."

In addition to Woodstock's emphasis on freedom, I take three other messages from the echoes of Woodstock. First is the importance of remedy to any plan for improving antitrust. No-fault reminds us of this issue. Second is the importance of distributional goals. Monopolies and tight oligopolies were condemned for overcharges, and overcharges can have distributional consequences, harming those marginalized by price increases.[27] Even if a deconcentration program is no more likely today than it was in the Woodstock decade, antitrust can still make a difference if we pay more attention to exploitation and excessive pricing. Third is the importance of politics to antitrust. Changing political winds wrecked many of the efforts of the Woodstock decade, from the ITT prosecutions to the FTC's shared monopoly cases. Efforts to redirect antitrust today won't succeed without political connection. Say what you will about Hipster antitrust, it has connected to broader political concerns, and that is for the good.

A slogan of the Woodstock decade was "Power to the People." It still works for antitrust, "Right On."

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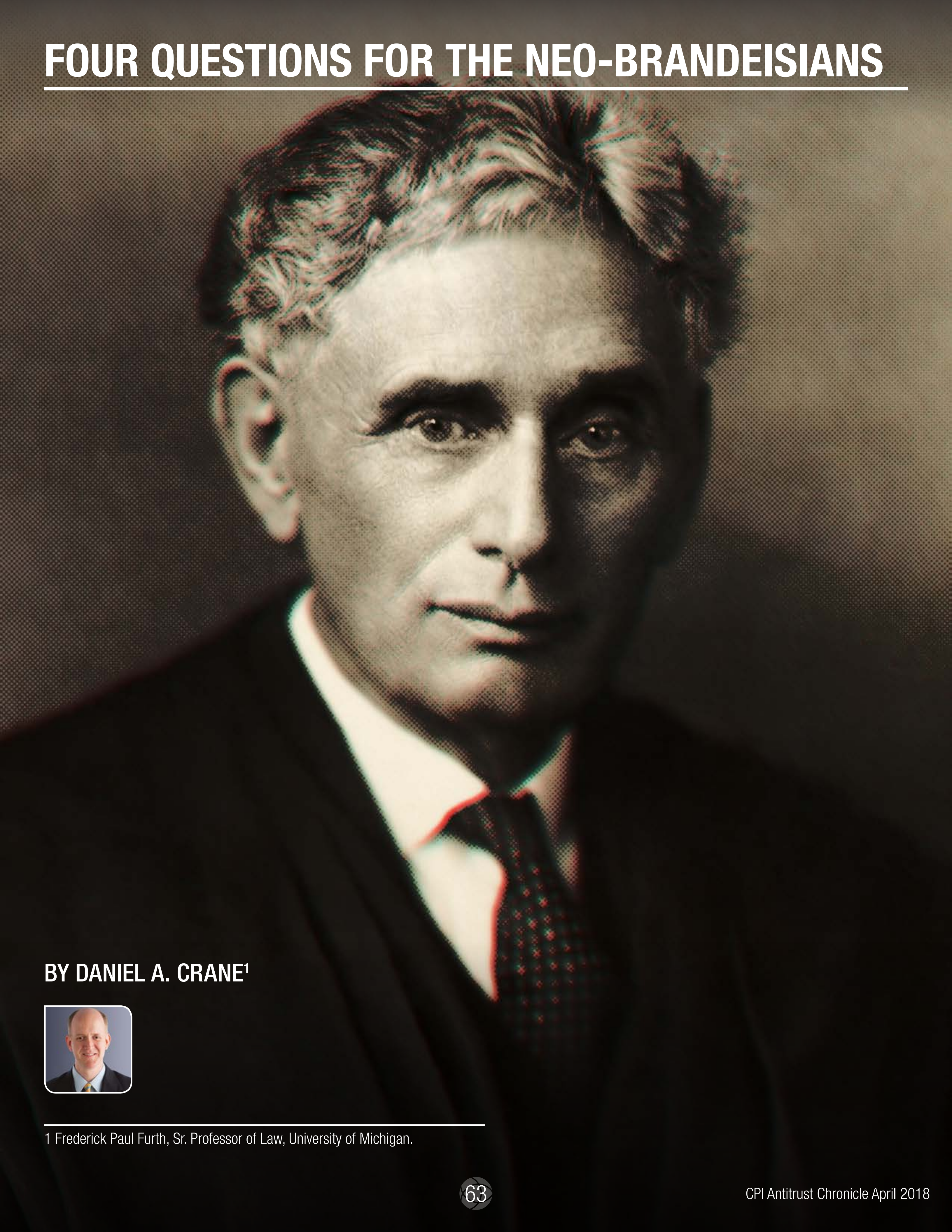
25 For a thorough discussion and critique of many of the efforts of this period, see Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration,* 74 Iowa L. Rev. 1105 (1989).

26 See *N.C. State Bd. of Dental Exam'rs v. FTC,* 135 S. Ct. 1101, 1109 (2015).

27 See Van Loo, *Consumer Law as Tax Alternative,* __ N.C.L. Rev. __ (2018), https://ssrn.com/abstract=3090800, at 6 (estimating that "removing overcharge [throughout the economy] would reduce the top households' share of income from 20% closer to 15%").

FOUR QUESTIONS FOR THE NEO-BRANDEISIANS



BY DANIEL A. CRANE[1]

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I. INTRODUCTION

I have been asked to contribute some thoughts on "hipster antitrust," but since I have foresworn that label as a matter of professional courtesy, I will instead use the label preferred by those mounting the current challenge to the consumer welfare standard: Neo-Brandeisian.[2] Throughout its history, antitrust has been characterized by chronic, cyclical, and often abrupt ideological shifts, so it would be naïve to believe that the consumer welfare consensus that has reigned for the last thirty or forty years represents the end of history. The Neo-Brandeisians have every right to throw down the gauntlet and propose a new (or old really, since there's nothing new under the sun in antitrust) vision. In this brief essay, I will first offer a few thoughts on the consumer welfare consensus currently under attack, and then pose four questions to the Neo-Brandeisians.

II. WHY THE CONSUMER WELFARE CONSENSUS DIDN'T FEEL CONSENSUAL

In the last year or so, we've heard a lot about the bi-partisan consumer welfare consensus that has held sway for the past generation and that is now under attack from the Neo-Brandeisians. Given the amount of vigorous contestation that has taken place within the antitrust community over the direction of antitrust law during that period, it may seem odd to talk about a prevailing "consensus." To set the stage for understanding the current Neo-Brandeisian challenge, a brief recap on what the consumer welfare standard settled and didn't settle.

The consumer welfare standard became the "official sponsor" of U.S. antitrust law in 1979, when citing Robert Bork, the Supreme Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[3] The courts, antitrust agencies, and antitrust community at large fell into step and consumer welfare became antitrust's byword. But the consumer welfare settlement of the late 1970s did not end the contestation about the direction of antitrust law nor establish the Chicago School as the unchallenged paradigm on the particulars of antitrust law. Rather, it shifted the locus of controversy to two questions internal to the consumer welfare model: (1) what counts as consumer welfare; and (2) what sorts of antitrust interventions are necessary to advance consumer welfare?

The first question—what counts as consumer welfare or economic efficiency — is subject to a broad array of answers. Robert Bork famously defined consumer welfare narrowly — as simply the avoidance of output reductions leading to deadweight losses.[4] He explicitly excluded consideration of wealth transfers from consumers to producers, which he considered neutral from an efficiency perspective.[5] Critics charged that Bork had misread (or deliberately distorted) the Sherman Act's legislative history and deleted a critical aspect of consumer welfare — the avoidance of wealth transfers from consumers to producers.[6] Additionally, Chicago School critics argued that consumer welfare had to be understood more broadly than just price effects, including such additional components as choice, variety, and innovation.[7] On the other side of the spectrum, some economists (and others) argued that total welfare, including efficiency gains captured by producers but not necessarily passed on to consumers, should be the standard.[8] Thus, within the past generation's broadly conceived consumer welfare/economic efficiency standard, there has been a wide and consequential band of disagreement over the meaning and scope of the standard.

There has also been a wide scope for disagreement over what sorts of antitrust interventions are necessary to promote consumer welfare, however it is defined. A conventional caricature imagines the Chicago School as almost completely non-interventionist, but that "school" in fact

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2 Dayen, *This Budding Movement Wants to Smash Monopolies,* The Nation April 4, 2017; Vinik, *Inside the New Battle Against Google,* Politico, September 17, 2017 https://www.politico.com/agenda/story/2017/09/17/open-markets-google-antitrust-barry-lynn-000523.

3 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Bork, The Antitrust Paradox, at 66).

4 Bork, The Antitrust Paradox: A Policy at War with Itself 110–12 (1978).

5 Id.

6 See, e.g., Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice,* 81 Fordham L. Rev. 2349, 2354 (2013; Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65, 69–70 (1982).

7 Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice,* 81 Fordham L. Rev. 2349 (2013); Stucke, *Reconsidering Antitrust's* Goals, 53 B.C. L. Rev. 551 (2012); Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis,* 8-FEB Antitrust Source 1 (2009); Leary, *The Significance of Variety in Antitrust Law*, 68 Antitrust L. J. 1007 (2001).

8 Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs,* 58 Am. Econ. Rev. 18 (1968). Strictly speaking, the total welfare standard is not "internal" to the consumer welfare standard, since it includes consideration of welfare obtained by producers but not by consumers. However, to the extent that consumer welfare has become conflated with economic efficiency, debates between the pure consumer welfare and total welfare standards occur within the same economically oriented paradigm — at least as distinguished from the Brandeisian perspectives back on the table today.

reflected a wide range of views on the degree of necessary intervention, with considerable daylight, for example, between Bork and Posner.[9] Chicago School critics charged that Chicago had "overshot the mark," leading to a near-complete abdication of antitrust enforcement due to "extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of the facts)" that has caused antitrust in the United States to "head[] in a profoundly wrong direction."[10] Drawing on advances in economic modeling, game theory, and behavioralism, Post-Chicago scholars argued for considerably more interventionist stances across a broad array of antitrust topics, such as predatory pricing,[11] tying,[12] and vertical mergers.[13] The skirmishing over the degree of necessary intervention took place not only within academic circles, but also on the political front — particularly in transitions between administrations, as when the Obama Justice Department loudly withdrew a Bush Administration report on monopolization offenses complaining that it would lead to excessive laxity.[14]

Given the sometimes fierce scholarly and political skirmishing over both the scope of the consumer welfare standard and its implementation, one may be surprised to hear today about the "consensus" in antitrust law reigning for the past generation.[15] To those working within the consumer welfare paradigm, the breadth of contestable space and the vigor of its contestation made dissension rather than consensus appear the dominant reality.[16] It took (or perhaps is taking — the challenge is nascent) a radical external challenge for the laborers in the consumer welfare vineyards to begin to think of themselves as aligned in a common consensus enterprise.

III. THE FOUR QUESTIONS

The Neo-Brandeisians have explicitly targeted the consumer welfare standard as leading to overly lax enforcement and have proposed to replace it with a considerably more aggressive antitrust paradigm. Fair enough. But as opposition parties quickly learn, it's one thing to oppose the *status quo*, and quite another thing to govern. In that spirit, let me pose four critical questions to the Neo-Brandeisians.

A. Is the Problem the Consumer Welfare Standard or its Implementation?

The first question is the obvious one, and it has already been posed by many voices across the political spectrum, including some that think antitrust law has been dramatically overly lenient in recent years: If the concern is that antitrust enforcement has been too lax, why throw out the consumer welfare standard instead of working within it to increase the level of antitrust enforcement? As the skirmishing within the antitrust community over the last several decades has shown, the consumer welfare standard is broad, flexible, and capable of accommodating a wide variety of enforcement perspectives.

Some Neo-Brandeisians seem to think that the consumer welfare standard is narrowly focused on price effects and hence fails to take into account other important values such as quality, variety, and innovation. That is a misunderstanding. As the 2010 Horizontal Merger Guidelines make clear, generic principles of antitrust analysis are often expressed in price terms "[f]or simplicity of exposition," but all other factors affecting consumer welfare including "product quality, reduced product variety, reduced service, or diminished innovation" should also be taken into effect.[17] If current antitrust analysis is too focused on static efficiency, there is nothing within the frame of the consumer welfare standard that prevents pushing it in the direction of dynamic efficiency or some other aspect of consumer value.

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9 Crane, *Chicago, Post-Chicago, and Neo-Chicago,* 76 U. Chi. L. Rev. 1911 (2009).

10 Pitofsky, Introduction, in How Chicago Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 6 (Pitosfky, ed. 2008).

11 See, e.g., Bolton, Brodley & Riordan, *Predatory Pricing: Stategic Theory and Legal Policy,* 88 Geo. L. J. 2239 (2000).

12 Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory,* 123 Harv. L. Rev. 397 (2009).

13 Riordan & Salop, *Evaluating Vertical Mergers; A Post-Chicago Approach,* 63 Antitrust L. J. 513 (1995).

14 See Press Release, Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), http://www.justice.gov/atr/public/press_releases/2009/245710.htm.

15 See Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust,* 79 Antitrust L. J. 601 (2014) (arguing that despite the appearance of a broad consensus regarding antitrust law, politics and ideology continue to matter).

16 Id.

17 Dep't of Justice & FTC 2010 Horizontal Merger Guidelines, Part 1, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

I suspect that an unstated aspect of the Neo-Brandeisian objection to the consumer welfare standard is that articulating the goal of antitrust in technical economic terms empowers economists as key policy decision makers — within the agencies and as expert witnesses. There is some truth to that suspicion, although the balance of influence over the antitrust field has not tipped entirely to the economists. The alternative is to define the legal norms in a way that empowers lawyers to the exclusion of economists, as arguably occurred under the "form-based" legal regime in the EU until the recent trend towards "effects-based" analysis. Perhaps the Neo-Brandeisians prefer the form-based approach, the rule of lawyers, and the economically arbitrary distinctions that tends to create, for that is what they are likely to get if they jettison the consumer welfare standard.

B. Is Bigness or Market Power the Curse?

The Brandeisian slogan — that "bigness" is "a curse" — raises a fundamental question: Is the concern with bigness in size, or bigness in market power? The two are distinct phenomena. When Berle & Means warned in 1933 that "[t]he rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state,"[18] their supporting data tables largely demonstrated corporate size as represented by such factors as gross assets, cash positions, and proportions of securities issued. Corporate size is distinct from market power in the sense in which economists and antitrust lawyers use that term — as the power to raise price above a competitive level and exclude competitors.[19] A firm of tremendous size may have little market power. General Motors ("GM"), with $145 billion in annual revenues, sales over 10 million units, and 200,000 employees,[20] is clearly a very big company. Indeed, it may be "too big to fail." Yet GM faces aggressive domestic and foreign competition in nearly every market segment, has a market share far less than conventionally thought necessary to achieve market power, and is on the run from new competitors with new technologies like Tesla, whose market capitalization has surpassed GM's.[21] Conversely, relatively small firms can possess market power by occupying a market segment free from competitive threats.

The distinction between market power and corporate bigness has long been understood, and it has been consequential to antitrust law. In 1952, future Nobel Laureate George Stigler drew a distinction between two meanings of "bigness" in business: "First, bigness may be defined in terms of the company's share of the industry in which it operates . . . . Second, bigness may mean absolute size—the measure of size being assets, sales, or employments as a rule."[22] He added that antitrust law deals adequately with the first phenomenon but "cannot cope effectively with the problem posed by big business."[23] Even during the era in which Brandeisian views largely prevailed in the Supreme Court, mere corporate bigness was not sufficient to constitute an antitrust offense.[24]

So what's the concern: market power or bigness? If it's market power, the consumer welfare standard is already on the case. If it's sheer bigness, a dramatic shift in antitrust law — including major legislative reworkings of the key statutes — would be needed to address the ostensible problem.

C. How Do You Choose Between Beneficiaries When Conflicts Arise?

For all the ambiguity surrounding the reach of "consumer welfare," that standard gave courts, litigants, and agencies a focal point for analysis. Adversaries might disagree about whether or not a particular behavior harmed consumer welfare, but they knew the concept to conjure. But what would happen in a system that was nominally designed to protect consumers, workers, labor unions, small business, new entrants, and existing competitors all at once? Since the interests of those groups are often in conflict, courts and agencies would have to pick their favorites

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18 Berle & Means, The Modern Corporation & Private Property 313 (1933).

19 *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1954) ("[M]onopoly power [[is] 'the power to control prices or exclude competition.'").

20 https://www.statista.com/topics/2480/general-motors/.

21 https://www.statista.com/statistics/239607/vehicle-sales-market-share-of-general-motors-in-the-united-states/; Ferris, *Tesla passes General Motors to become the most valuable US Automaker,* CNBC April 10, 2017, https://www.cnbc.com/2017/04/10/tesla-passes-general-motors-to-become-the-most-valuable-us-automaker.html.

22 Stigler, *The Case Against Big Business*, Fortune, May 1952.

23 Id.

24 *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offence or the existence of unexerted power an offence."); *United States v. Int'l Harvester Co.*, 274 U.S. 693, 708-09 (1927) ("The law...does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power…"); *U.S. v. Columbia Steel Co.*, 334 U.S. 495 (1948) (rejecting government challenge to large corporate acquisition on grounds that it did not diminish competition).

on the fly, without any objective principle to decide among them. This would be a recipe for subjective and favoritistic decision-making, and it would raise serious rule of law problems.

Opponents of the consumer welfare standard seem to dismiss this concern by assuming away the conflict, as if the "right" set of antitrust rules would simultaneously protect a broad set of deserving beneficiaries, goring only the ox of "big business" and monopolists. That belief is naïve. History has shown that competition rules invariably involve trade-offs. Protecting small business from larger firms comes at the cost of increasing consumer prices, as the unfortunate experience with the Robinson-Patman Act has shown.[25] Although small business may be incidentally benefitted by consumer welfare oriented antitrust, placing small business (or other interests) in the catalogue of intended beneficiaries invites an antitrust regime that harms consumer welfare and/or involves arbitrary trade-offs between interest groups.

D. Is Big Government Also a Curse?

Brandeis' preoccupation with "bigness" was not limited to large corporate scale — he was also deeply concerned with large *governmental* scale. As Jeffrey Rosen has observed, "[d]enouncing big banks as well as big government as symptoms of what he called a 'curse of bigness,' Brandeis was determined to diminish concentrated financial and federal power, which he viewed as a menace to liberty and democracy."[26]

Do the Neo-Brandeisians share Brandeis' concern over excessively large government as well as excessively large business? Are they Jeffersonian in preferring small-scale organization in both government and business, or will they follow the Elizabeth Warren/Bernie Sanders wing of Progressivism in embracing Hamilton on governmental scale and Jefferson on business scale? The Neo-Brandeisians are certainly within their rights to choose the latter course, but perhaps in that case they should choose a different patron.

25 Antitrust Modernization Commission, Report and Recommendations, Part IVA (2008), https://govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf.

26 Rosen & Brandeis: American Prophet 1 (Yale Univ. Press 2016).

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