

FOUR QUESTIONS FOR THE NEO-BRANDEISIANS



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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.

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.

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 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.

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 (Pitofsky, ed. 2008).

11 See, e.g., Bolton, Brodley & Riordan, *Predatory Pricing: Strategic 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.

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 unexercised 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 unexercised 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).

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 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).

