ICLE International Center for Law & Economics

## FTC Hearings on Competition & Consumer Protection in the 21st Century

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# Comments of International Center for Law & Economics:

## *The Continued Viability and Flexibility of the Consumer Welfare Standard, and the Weakness of Its Alternatives*

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## I. Introduction

We thank the Commission for this opportunity to comment on the November 1, 2018 hearing on "The Consumer Welfare Standard in Antitrust Law," FTC-2018-0091.

The International Center for Law and Economics (ICLE) is a nonprofit, nonpartisan research center whose work promotes the use of law & economics methodologies to inform public policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth.

ICLE's scholars have written extensively on competition and consumer protection policy. Some of our writings are included as references in the comment below. Additional materials may be found at our website: www.laweconcenter.org.

In this comment we address the continued viability of the consumer welfare standard ("CWS"), its flexibility to include presumptions, as well as the relative weakness of proffered alternatives to the CWS.

The CWS has been the subject of much discussion lately, largely driven by a seeming uptick in criticism of the standard. This criticism falls generally into two camps. On the one hand, the CWS is understood to be the broadly correct, if imperfect, touchstone for antitrust enforcement. Proponents of this view support the consumer-focused approach to antitrust but nevertheless often recognize the inherent shortcomings of the CWS (endemic to any general legal principle applied in complex and evolving economic circumstances), and particular areas where its operationalization can and should be improved (e.g. accounting for innovation harms or properly defining who counts as a "consumer").[1]

On the other hand, the CWS is objected to per se as an improper or incurably deficient guiding principle for antitrust enforcement. Proponents of this view see the CWS as inconsistent with the proper goals of antitrust, which should, they contend, focus on control of threats to the "process of competition" (as opposed to the welfare of consumers). Many of the adherents to this perspective also contend that antitrust should address private-sector economic threats to the democratic process more broadly. In both cases a key component of the antipathy to the CWS is that it has allowed for the sustained presence of large corporations in the polity — a presence that is alleged to threaten, simply by its existence, both competitive and democratic welfare.[2]

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[1] *See, e.g.*, Kevin W. Caves & Hal J. Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, GEORGE MASON LAW REVIEW 2 (forthcoming, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205518.

[2] *See, e.g.*, Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, COMPETITION POLICY INTERNATIONAL, 3-4 (Oct. 7, 2018), https://www.competitionpolicyinternational.com/after-consumer-welfare-now-what-the-protection-of-competition-standard-in-practice-2/.

The first set of criticisms is part of a healthy dialog that seeks to continually update and improve the antitrust enforcement process. The second set of criticisms is less salutary, however (except perhaps to the extent that it has impelled the more constructive debate). The fundamental defect of the view that would undermine the CWS as the foundational principle of modern antitrust is its effort to shift antitrust enforcement away from a common-law-driven and economically grounded legal process toward a largely discretionary and expansive regulatory regime.

While the former is a constrained process for discovering and promoting the welfare of consumers, the latter is a process for allowing regulators to impose on consumers their predetermined (and often varying) notions of what is best for them — in other words: antitrust as a tool for the promotion of consumer welfare versus antitrust as a tool for the "protection" of consumers:

> Ultimately, from Louis Brandeis to Elizabeth Warren, those who cloak their approach to market regulation in the cloth of "consumer protection" instead of "consumer welfare" start from the premise that consumers need protection—from both the market and from themselves—and that learned regulators are best situated to offer this protection. A consumer protection standard is inherently ambiguous, affording regulators the power to structure markets in whatever manner they deem best for consumers. The consumer welfare standard, on the other hand, restricts the conduct of firms and regulators alike, ensuring that both operate in the objective best interest of consumers.[3]

There is an ironic elitism in the self-avowedly populist efforts to impose particular "ideal" market structures on the economy. Those who espouse this position implicitly or otherwise profess to know the ideal patterns into which markets should fall and what consumer preferences should be, and call for intervention to upset the actual patterns that emerge from the free association of individuals and firms in the economy and substitute their own preferences instead.

Regulation designed in accord with this vision of society is disconnected from the preferences of the millions of individuals and firms freely interacting in the economy. The CWS, for all its flaws, largely evades this critical problem with the structuralist view of antitrust by seeking out appropriate proxies for discovering the preferences of consumers. This is to say that allowing the competitive process to operate relatively freely will tend to surface the features of the market that are most salient and beneficial to consumers and firms. Under this goal, the task of enforcers is to ensure that mutually advantageous transactions in line with consumer preferences can take place without undue hindrance.

Contrary to the assertions of the modern populist critics of the CWS, this is not a revolutionary new paradigm foisted upon an unsuspecting public four decades or so ago. Instead, the experience of lawyers, economists, and government officials over the course of more than a century have

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[3] Geoffrey A. Manne and Justin (Gus) Hurwitz, *Big Tech's Big-Time, Big-Scale Problem*, CATO POL'Y REPORT (May/Jun 2018) at 12, *available at* https://object.cato.org/sites/cato.org/files/serials/files/policy-report/2018/6/cpr-v40n3-updated.pdf.

progressively built up (and continue to build) an understanding of more and less efficient ways to intervene in a large, dynamic economy. Most importantly — and in contrast to the static, top-down vision of the anti-CWS approach — antitrust law under the CWS has substantially developed an inherent restraint that tends to permit new and untested economic interactions and business models to develop and evolve. As Harold Demsetz eloquently put it:

> I have stated elsewhere what I believe to be the basic problem facing public and private policy: the design of institutional arrangements that provide incentives to encourage experimentation (including the development of new products, new knowledge, new reputations, and new ways of organizing activities) without overly insulating these experiments from the ultimate test of survival.[4]

The work of economists such as Demsetz and Friedrich Hayek — whose crucial work developed the understanding of competition as a discovery process[5] — teaches that policymakers should tend to operate under the assumptions that (i) a market outcome should only be acted upon if intervention improves upon the current state of affairs (and not if the market merely departs from some idealized state), and (ii) even when this is the case, intervention in complex systems should always be accompanied by an appropriate measure of restraint because it entails numerous unforeseeable effects; there is no guarantee that regulators will obtain what they set out to achieve.

Antitrust intervention entails more harm than good when enforcement moves away from the promotion of economic efficiency (through the proxy of consumer welfare).[6] While the CWS is not perfect, of course, a standard aimed at political or social objectives inherently increases the politicization of the process and provides opportunity and incentive for firms to engage in conduct that reduces competition, such as colluding with competitors (in the name of social betterment, of course) and lobbying for regulations that limit entry (rent-seeking).[7] Antitrust law unmoored from a consumer welfare goal may also be used to prop up failing firms in less obvious ways. Using the proxy of market structure to determine the "right" number of firms to achieve the welfare of some (favored) producers, democratic "health," or some other non-CWS metric is, at best, a messy inquiry and will likely lead authorities to protect economically inefficient conduct.

Bork's work and that of his intellectual forebears represented a movement toward more accurately assessing the welfare effects of various approaches to antitrust enforcement.[8] The virtue of the CWS,

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[4] *See, e.g.*, Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 20 (1969).

[5] *See* F.A. Hayek, *Competition as a Discovery Procedure*, 5 Q. J. AUSTRIAN ECON. 9-23 (2002) (translation by Marcellus Snow).

[6] *See generally* R.H. BORK, ANTITRUST PARADOX 422 (Simon & Schuster, 1993).

[7] *See* Gordon Tullock, *Efficient Rent-Seeking Revisited*, in THE POLITICAL ECONOMY OF RENT-SEEKING 91-94 (1988).

[8] *See* Geoffrey A. Manne, *Why US Antitrust Law Should Not Emulate European Competition Policy*, Statement to the United States Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 40-43 (Dec. 19, 2018) *available at* https://laweconcenter.org/resource/senate-testimony-on-why-us-antitrust-law-should-not-emulate-the-eu/.

as we have previously noted to the Commission,[9] is that it provides a relatively clear set of metrics for assessing the conduct of firms without needing to evaluate the motivation of firms: are consumers better off or worse off as a result of a certain set of observable behaviors?

Here it is crucial to also note what the CWS *is* and what it *is not*. The CWS is *not* a single tool; it is not even, in itself, a *tool* at all. Rather, it is a methodology by which to arrange the legal and economic tools that guide antitrust enforcement and adjudication and to evaluate their efficacy. This inquiry's focus on the role of presumptions provides an excellent lens through which to view the CWS in this regard.

As we detail below, presumptions are neither good nor bad *per se*, but are merely a tool, the utility of which depends upon the method of use. When applied within the CWS framework, presumptions can serve procompetitive ends. By contrast, when employed to satisfy the ends of advocates who wish to impose hypothetical "ideal" structures on the economy, presumptions can be — and often are — destructive.

## II. The flexibility of the CWS to incorporate presumptions

There is nothing wrong, per se, with using presumptions in antitrust if they are empirically and theoretically defensible and, ultimately, produce a result that, to some substantial degree, improves outcomes for consumers.

But, by the same token, it makes little sense to abandon presumptions that happen to result in relatively less enforcement simply in response to demands for "more" enforcement, however defined. To dismiss well developed doctrine in this way amounts to reverse engineering from a preferred result: it is an inherently political activity and not a legally, economically, or empirically grounded exercise.

Moreover, there is confusion about what the CWS *is* and what it *is not*. It is *not* a particular legal doctrine that is to be applied strictly in every situation and which, in itself, leads to particular results. It *is* a bundle of analytical tools and doctrines — subject to revision as new circumstances develop — that all point toward a common goal: increasing the welfare of consumers. These tools include

[9] See, International Center for Law & Economics, *Comments on The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, Since the Pitofsky Hearings*, FTC-2018-0048-D-0128 available at https://www.ftc.gov/policy/public-comments/2018/08/21/comment-ftc-2018-0048-d-0128

standing/injury requirements,[10] conduct requirements,[11] effects analysis,[12] burdens of proof,[13] market definition requirements,[14] and, relevant here, presumptions.

Judge Easterbrook, a strong proponent of the CWS, argued in 1984 for *more* presumptions in antitrust, to take one prominent example.[15] But, as Easterbrook makes clear, a presumption need not be a presumption that conduct is *harmful*; it may be the opposite, in fact. "In which direction should these rules err? For a number of reasons, errors on the side of excusing questionable practices are preferable."[16]

The relevant question when considering the appropriateness of presumptions is whether, in the overwhelming majority of cases, the presumed harmful or beneficial practice actually leads to the predicted results. Of course, not *every* challenged or approved practice that fits a presumption will lead to the expected outcome. *Per se* rules, for example, prohibit all price fixing conspiracies, but it is entirely possible that *some* forms of price fixing may benefit more consumers than they harm. Yet

> [w]e accept these mistakes because almost all of the practices covered by per se rules are anticompetitive, and an approach favoring case-by-case adjudication (to prevent condemnation of beneficial practices subsumed by the categories) would permit too many deleterious practices to escape condemnation.[17]

As noted, presumptions do not work in only one direction. Presumptions function as a way to apply, in Easterbrook's terminology, "filters" to cases in order to efficiently reduce what would otherwise be unmanageably large caseloads. That is, the role of presumptions is *not* to encourage maximal

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[10] *See, e.g.,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 488 (1977).

[11] *See, e.g.,* Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 488 (1992).

[12] *See, e.g.,* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 894 (2007).

[13] *See, e.g.,* Ohio v. Am. Express Co., 138 S. Ct. 2274, 228 (2018) ("To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market… If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint… If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.").

[14] *See, e.g.,* Ohio v. Am. Express Co., 138 S. Ct. at 2280 (considering the question of how to properly conduct a market definition analysis for two-sided markets); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482 (1992) (Noting that a market definition analysis can be either broad or narrow, depending on the unique character of the goods in question).

[15] Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 14-15 (1984) ("Courts should use the economists' way out. They should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution.").

[16] *Id.* at 15.

[17] *Id.* at 15.

enforcement, but instead to encourage *optimal* enforcement. "Market power," Easterbrook's first recommended presumption is instructive in this respect.

A per se prohibition on collusive activity that only raises prices or rivals' costs makes sense, but only insofar as a firm has the ability to *actually* harm its rivals or consumers. Thus, a presumption that no anticompetitive harm can occur where a firm lacks market power eminently makes sense because, again, smaller firms with insignificant market power can cooperate in ways that may actually allow them to realize efficiencies and pass them on to their own consumers.

Applying behavioral presumptions without a market power filter can lead to one of two bad results. Either enforcers waste scarce resources on enforcement that is not beneficial to society, or else firms without market power avoid conduct that may raise enforcement concerns, even if that conduct would otherwise benefit society. In both cases, there is a deadweight loss associated with an incorrectly drawn policy.

A market power requirement would be entirely consistent with the CWS, as would many other presumptions if it were shown that, on net, they reduced inefficiency in enforcement. Which is to say, the CWS is simply a guiding methodology, neutral as to the particular doctrines that are incorporated into it, so long as those doctrines and their tools are employed by enforcers and judges to optimize enforcement such that consumers are, on net, better off than they would be otherwise.

## III. The refinement of presumptions in the CWS

As we note above, applying presumptions in order to reach a particular process outcome — "more enforcement" in the case of many critics — is nonsensical. Several commentators have called for presumptions against mergers[18] and/or presumptions against certain forms of unilateral conduct,[19] yet these recommendations have little or no basis in economics or in empirical observations. They are instead rooted in a desire to impose ex ante restraints on firm conduct for fear that harmful conduct *may* slip through the enforcement process.

And to the extent that these presumptions are not grounded in economically rigorous analysis aimed at ensuring that they serve the interests of consumers, there is no principled mechanism for altering them. As one of us noted at the hearing to which these comments respond:

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[18] *See, e.g.,* Sen. Amy Klobuchar, *Senators Introduce Legislation to Modernize Antitrust Enforcement*, (Sep. 14, 2017), *available at* https://www.klobuchar.senate.gov/public/index.cfm/2017/9/klobuchar-senators-introduce-legislation-to-modernize-antitrust-enforcement

[19] *See, e.g.,* Lina M Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 803 (2016). ("More specifically, restoring traditional antitrust principles to create a presumption of predation and to ban vertical integration by dominant platforms could help maintain competition in these markets.").

> [GEOFFREY] MANNE: [T]here's obviously administrative value to presumptions. It helps if they're actually grounded in… some sort of reason to think that they cut in one direction or the other, but even that's not required for *administrability* purposes.
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> But what's great about the system we have now is that if the economy changes or a particular market changes in such a way that the structural presumption doesn't really make much sense anymore, there is at least a process by which it can be adjudicated in court. And the courts, over time, will adjust the way they approach the structural presumption.
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> What would be the worst of all possible worlds is imposing [a relatively] inviolable structural presumption that isn't subject to any kind of amendment by the [courts].[20]

Under the CWS the Court has moved away from many harmful presumptions (and categories of conduct proscribed under *per se* rules) exactly because we have developed experience with the challenged conduct and have learned through both experience and economic literature how to detect and deter actually harmful conduct without deterring procompetitive conduct that benefits consumers. The progression from mid-Twentieth Century structural presumptions to contemporary doctrines regarding the merging of firms illustrates this point.

The most prominent early advance in antitrust economics was the development of the Structure-Conduct-Performance (SCP) paradigm, associated with Berkeley economist Joe Bain.[21] Under a SCP analysis, the conduct of firms in an industry, and ultimately their performance, is a function of the overall structure of the industry.[22] One of the predictions of the SCP model is that more-concentrated industries are inherently less competitive, allowing firms to employ anticompetitive conduct (like collusion) to raise prices.[23] Profitability and market performance, in this view, are a function of market structure, not the relative efficiency of competing firms. SCP therefore generally supported presumptions against concentration regardless of market power — for instance by breaking up firms or challenging mergers — as a way of making industries more competitive. Ultimately, the SCP model proved to be overly simplistic and fell out of favor not long after it was popularized.[24]

Both SCP and the recently popular Brandeisian view of antitrust espouse a preference for smaller firms and, consequently, a preference for presumptions against "bigness" (however defined).[25] Both

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[20] Hearing Transcript, Federal Trade Commission Competition and Consumer Protection in the 21st Century, Hearing 5 (Nov. 1, 2018) at 342, *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf.

[21] Leonard W. Weiss, *Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104 (1978).

[22] *Id.*

[23] Joe S. Bain, *Structure Versus Conduct as Indicators of Market Performance: The Chicago-school Attempts Revisited*, 18 ANTITRUST L. & ECON. REV. 293-324 (1986).

[24] *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICHIGAN L. R. 1698 (1986).

[25] *See, e.g.,* Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY. (Jan. 10, 1914).

schools broadly hold that a market comprised of multiple competing smaller firms is comparatively better than a highly concentrated one (which implies larger firms).[26] And neither approach readily admits the possibility that big could be better under appropriate conditions. In practice, this leads to presumptions against large firms because they often happen to imply more concentrated market structures.

Yet the weight of economic research undertaken since the popularization of SCP has found that large firms are frequently ideal economic actors for maximizing consumer welfare.[27] Since the Industrial Revolution, and especially in the Information Age, it's not unusual for efficient, competitive markets to comprise only a few big, innovative firms. Unlike the textbook models of monopoly markets, these markets tend to exhibit extremely high levels of R&D, continual product evolution, frequent entry, almost as frequent as exit — and economies of scope and scale (i.e., "bigness"). Size simply does not correlate with anything recognizable as "consumer harm."

While perhaps counterintuitive, this means that, in many cases, modern antitrust law has evolved to actually condone bigness — or, put differently, without more, antitrust law has grown to be fundamentally agnostic about the size of firms or the extent of market concentration.

The classic example of the problem with the Brandeisian and SCP approaches to antitrust analysis is the 1966 *Von's Grocery* case.[28] In *Von's Grocery*, the Supreme Court addressed the government's challenge of the 1960 merger of Von's Grocery and Shopping Bag Food Stores, two grocery chains in southern California that were succeeding in a rapidly changing and increasingly concentrated grocery market.[29] Together, these chains controlled less than 8% of a grocery market that was becoming dominated by a small number of "big box" supermarkets with innovative business models that took advantage of changing demographics, affordable automobiles, and economies of scale, enabled in part by new technology.[30]

The market share of the merged chains was insufficient to have any meaningful effect on prices, but it might have been sufficient to give the resulting retail chain the scale it needed to compete. Yet despite the lack of evidence of any anticompetitive effect from the merger, the Supreme Court affirmed the government's challenge, adopting the SCP presumption against increased concentration even where there was no anticompetitive harm.[31]

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[26] *See* Joe S. Bain, *supra*, note 23.

[27] *See* Robert E. Lucas Jr., *On the Size Distribution of Business Firms*, BELL J. OF ECON. 508-523 (1978).

[28] United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[29] *Id.* at 273.

[30] *Id.* at 281.

[31] *Id.* at 277.

In *Von's Grocery*, this meant breaking up a merger that did not harm consumers, on the one hand, while preventing firms from remaining competitive in an evolving market by achieving efficient scale, on the other. As Justice Stewart noted in dissent:

> In fashioning its per se rule, based on the net arithmetical decline in the number of single store operators, the Court completely disregards the obvious procreative vigour of competition in the market as reflected in the turbulent history of entry and exit of competing small chains.... The Clayton Act was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution.[32]

In other words, by adopting a formalistic rule against increased concentration, the analysis in *Von's Grocery* disregarded the more-nuanced market dynamics that justified the merger, thus harming consumers, competitors, and dynamic competition.

In the 1970s, antitrust economists increasingly questioned the sort of small-is-good bias promoted by neo-Brandeisian and SCP antitrust. Prompted by cases like *Von's Grocery*, antitrust economists realized that small-is-good as an antitrust ethos lacked empirical and intellectual justification. Moreover, preferring firm size as an analytical dimension for applying antitrust laws could often lead to perverse outcomes where consumers were harmed and smaller, less-efficient competitors were protected. Rather than focusing on naïve proxies for conduct and performance, more probing analysis was needed.

## IV. The CWS can be updated to examine new forms of conduct

Just as the CWS evolves to develop more nuanced analysis for conduct that was previously poorly understood and, therefore, subject to sub-optimal prohibitions or presumptions, the doctrine is also capable of growing in order to recognize more expanded claims, or to modify existing doctrine in light of new business practices. Under the CWS

> antitrust law can replace rules that require detailed factual assessment of individual cases with simpler, more categorical rules, such as the per se prohibition of price fixing; the modified per se rule applicable to most tying arrangements under *Jefferson Parish*; presumptions such as those used in horizontal merger analysis: and abbreviated rule of reason standards which do not require plaintiffs to prove harm to competition. While antitrust law moved away from such short-hands in recent years, there is nothing about the [consumer welfare] paradigm that would preclude a movement of the pendulum in

[32] *Id.* at 292.

> the other direction, as evidenced by past episodes of antitrust expansion in monopolization doctrine and enforcement policy.[33]

Recently, the Supreme Court took up just such a potential modification in *Apple v. Pepper*.[34] *Apple v. Pepper* emerged from a claim that Apple's pricing model for its App Store violates US antitrust laws. The central dispute of the case is whether the *Illinois Brick* indirect purchaser doctrine[35] — which limits standing in price fixing cases only to those parties directly injured, and prevents private actions by subsequent purchasers — can be used to prevent App Store users from suing Apple for its alleged anticompetitive pricing imposed on app developers.[36] Those in favor of applying *Illinois Brick* to prevent the standing of users assert that — following *Campos v. Ticketmaster* in the 8th Circuit[37] — it is the app developers themselves who are injured by the restrictive pricing (while users receive only a pass-through injury).[38] Therefore, so the argument goes, end users do not have standing under *Illinois Brick* to bring an antitrust suit.

The real opportunity presented to the Court in this case, however, is to consider how antitrust standing doctrine should apply to certain kinds of digital platforms. In truth, Apple's position at the center of the transaction between developers and end users is unique in the context of the indirect purchaser doctrine. The relationship is arguably better framed as a two-sided market, rather than a traditional vertical chain of purchases, and so it may be the case that end users should have standing to bring antitrust complaints against a platform operator — not because *Illinois Brick* was wrongly decided, but because *Illinois Brick* should be amended to reflect the particular circumstances of this and similar cases.

Importantly, this doctrinal evolution also occurs in a larger context in which courts are grappling with the law and economics of two-sided platforms more generally. The Court's recent *Ohio v. American Express* decision actually sets the stage for considering the standing doctrine in *Apple v. Pepper*, and for how antitrust law ought to develop to address two-sided platforms more generally. In *American Express* the Court held that plaintiffs must incorporate facts about both sides of a two-sided "transaction" platform when alleging anticompetitive harm.[39] The full ramifications of this decision are not yet known, but the general consensus is that this means that litigants must conduct a full

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[33] A. Douglas Melamed and Nicolas Petit, *Before "After Consumer Welfare" – A Response To Professor Wu*, COMPETITION POL'Y INT'L (July 2018), *available at* https://www.competitionpolicyinternational.com/before-after-consumer-welfare-a-response-to-professor-wu/.

[34] In Re Apple iPhone Antitrust Litigation, Apple Inc. v. Robert Pepper, et al., no. 17-204 (2018).

[35] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[36] In Re Apple iPhone Antitrust Litigation, 2017 WL 3393652 (U.S.).

[37] Campos v. Ticketmaster Corporation, 140 F.3d 1166 (8th Cir. 1998).

[38] *See* Brief of Petitioner Apple Inc., at 38, in Apple Inc. v. Robert Pepper, et al., no. 17-204 (2018).

[39] Ohio v. Am. Express Co., *supra*, note 13.

cost-benefit analysis that examines the net harms and benefits of the platform as a whole, and cannot satisfy the prima facie burden by demonstrating harm to only one side of a platform.[40]

If *Apple v. Pepper* is decided in favor of the plaintiff — which seems possible given the tenor of the oral arguments[41] — and does increase the number of potential litigants by relaxing the indirect purchaser doctrine for two-sided platforms like the App Store, it is likely that *American Express* will temper the feared excesses this could bring by imposing a higher burden on plaintiffs. The end result may be a system that is capable of addressing more claims, while also being calibrated to limit the risk of wrong-headed or abusive litigation and other administrative problems.

Thus, antitrust enforcement, guided by a focus on consumer welfare, can certainly be expanded to incorporate a variety of new approaches to remedying actual harms. The CWS is not, as some would have it, a rule against enforcement. But a consumer-focused approach to antitrust — especially in the face of novel theories of harm and novel economic conduct — does demand that new legal theories and the application of existing doctrine to new economic conduct are not undertaken blithely. The doctrinal demands of antitrust enforcement under the CWS *are* limiting — but not unreasonably or immutably so, and not only for antitrust *plaintiffs*. Rather, these doctrinal constraints generally serve to limit the risk and cost to consumers of both under- and over-enforcement.

## V. The CWS is the best method yet devised for directing the enforcement of antitrust

We are asked to comment on what alternatives to the CWS exist, and their relative strengths and weaknesses. In examining this question it is important to first understand that the alternative to the CWS is not merely a different set of legal and economic tools; it is a different *objective* that ostensibly necessitates the use of different tools. Criticisms of the particular tools of the CWS, as well as the particular way they are employed, cannot, in and of themselves, justify the adoption of an entirely different objective. To be sure, the doctrinal tools that have evolved under the CWS may be imperfect, but that fact alone is not a sufficient basis for jettisoning the CWS.

Under the CWS, antitrust often (though surely not always[42]) looks to price and output to identify and measure the consumer welfare effects of complained-of conduct. But it is important to

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[40] *See* Tad Lipsky, Joshua D Wright, Douglas H. Ginsburg & John M. Yun, *The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Platforms, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University*, GEORGE MASON LAW & ECONOMICS RESEARCH PAPER 2 (2018).

[41] Cory L. Andrews, *Reading The Tea Leaves Of Apple v. Pepper Supreme Court Oral Argument*, FORBES (Nov. 28, 2018), *available at* https://www.forbes.com/sites/wlf/2018/11/28/reading-the-tea-leaves-of-apple-v-pepper-supreme-court-oral-argument/#6a4432d2664c.

[42] *See, e.g.*, *infra*, notes **Error! Bookmark not defined.-Error! Bookmark not defined.** accompanying text.

remember that price and output are merely proxies for the ultimate investigation: what do consumers actually value, and are they being served well according to those preferences?

Price and output are metrics (and relatively easily identifiable ones, at that) that aggregate the decisions of countless individuals who are performing their own hedonic calculations, using all of their own subjective values, with respect to the conduct of firms in the economy. The price and level of output that arise from those individual calculations necessarily take account of the various preferences, albeit relatively imprecisely, of all those subjective calculations. In other words, although imperfect, measurements of market price and market output are (generally) reliably informative, at the very least of the direction of likely changes in consumer welfare in response to changes in firm conduct.

Nor are measurements of price and output as constraining as is often argued. As Melamed and Petit have recently observed:

> [W]hen economists draw demand (and supply) curves, they are often not literally talking about prices. Instead, they are depicting a metaphor that represents marginal benefit (and costs) from which one can infer a rich set of individual preferences not confined to a dollar valuation. A consumer's price point on the demand curve denotes, for example, a quality-adjusted marginal benefit. The slope of the demand curve reflects consumers' actual and potential alternatives in and out of the market. Upwards and downwards shifts of the demand curve reflect dynamic competition and innovation, or lack thereof. Downward shifts of the supply curve reflect innovation and increased efficiency. There is nothing about antitrust nomenclature or metaphors that restricts the focus to static price analysis.[43]

Of course this is an imperfect process. A particular price analysis, for instance, might fail to capture adequately how much innovation a particular group of consumers actually prefers as against the next best (or the ideal) option. Yet price *does* take into account innovation, relatively when users defect between manufacturers or among different models from a particular manufacturer. This is generally referred to as Hedonic Demand Theory, and is notably used to compute economic indicators such as the Consumer Price Index.[44] Discrete choice models can also be used for similar ends.[45] Alternatively, economists have also used regression discontinuity analysis to measure how much consumer surplus innovative new products can generate.[46] It is thus wrong to claim that innovation is not

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[43] A. Douglas Melamed and Nicolas Petit, *supra*, note 33.

[44] Jerry Hausman, *Sources of Bias and Solutions to Bias in the Consumer Price Index*, 17 J. ECON. PERSPECTIVES 35 (2003). *See also*, Sherwin Rosen, H*edonic Prices and Implicit Markets: Product Differentiation in Pure Competition*, 82 J. POL. ECON. 34-55 (1974).

[45] Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan*, 110 J. POL. ECON. 706 (2002).

[46] Peter Cohen, Robert Hahn, Jonathan Hall, Steven Levitt & Robert Metcalfe, *Using Big Data to Estimate Consumer Surplus: The Case of Uber*, NBER WORKING PAPER NO. W22627 (2016).

cognizable under price-centric analyses (even if this type of analysis only imperfectly factors-in innovation-related benefits).

And this is the point: price and other metrics that CWS-oriented antitrust analysis employs are not perfect, but the question is not one of perfection, but of "good enough" in a world of second-bests. Antitrust enforcers and judges work hard to find ways to read the subjective preferences of consumers within a wide variety of cases under the CWS — including ones implicating consumer preferences for innovation. Innovation matters to consumers, so it matters to the CWS. Whether the tools employed to measure and incorporate consumer preferences for innovation are the most effective is an important question, and one that should be (and is) continually addressed by economists, enforcers, and courts. But that is quite a different matter than the question whether the CWS is the proper standard at all.

Contrary to what is sometimes claimed,[47] the CWS has generally proven itself up to the task of dealing with non-price parameters of competition. *Alcoa* was an attempt by the Court to address entry and the risk of bad long-term incentives from a protected monopoly.[48] *Jefferson Parish* tried to parse the preferences of consumers in contexts where the goods were tied.[49] *Microsoft* was entirely focused on threats to innovation from conduct that might create barriers to entry.[50] *Intel* was about innovation, as were the issues involved in the *AT&T/Time Warner*,[51] *Dow-DuPont*,[52] and *Bayer-Monsanto* mergers.[53] While the analyses in these cases may not be perfect, they do seek to determine the effect of non-price factors on consumer welfare and, in so doing, demonstrate that it is possible to wrestle with non-price effects under the CWS.[54]

Any purported standard that would replace the CWS — for example, one that simply prioritizes an industry structure in which innovation by new entrants is preferred to innovation by incumbents — is not simply a substitution of "better" analytical tools for the existing ones. Either such a standard is a rejection of the primacy of consumers and an embrace of a different maximand, or else it is a not a new standard at all, but a claim that certain tools can better capture consumer preferences in

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[47] *See, e.g.,* Caves & Singer, *supra* note 1.

[48] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[49] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 (1984).

[50] United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001)

[51] United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018).

[52] Proposed Final Judgement, U.S. Department of Justice v. Dow & DuPont, *available at* https://www.justice.gov/opa/press-release/file/973941/download.

[53] Proposed Final Judgement, United States v. Bayer AG and Monsanto Company, *available at* https://www.justice.gov/atr/case-document/file/1066676/download.

[54] There are stumbles, of course. The FTC's *Nielsen-Arbitron* decision, for example, grappled with innovation, but in a ham-fisted way that eschewed, rather than embraced, the available tools for predicting consumer welfare effects. *See* Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, FTC File No. 131-0058 (Sep. 20, 2013).

the context of innovation (e.g., by adopting a presumption in favor of new entry). The latter is, as we have noted, a welcome offering — although it is one that must defend its claims by demonstrating its greater efficacy. The former, by contrast, is an essentially aesthetic or idiosyncratic preference for a vision of society that the status quo does not appear to impart.

To be sure, it is possible that proxies other than price and output may better assess and evaluate the consumer welfare effects arising from non-price factors, including innovation. But if there are, we have not yet discovered them. And this is not for lack of trying. As we discuss below, tying antitrust principles arbitrarily to the structure of industry and the size of firms — the alternative most commonly offered today — has been shown repeatedly to be a poor method of understanding the competitive dynamics that contribute to the welfare of consumers.

### A. The "protection of competition" standard

Professor Tim Wu has offered what he believes to be a more administrable standard for antitrust, the "protection of competition" standard.[55] In his view, focusing on protecting the process of competition, as opposed to focusing on the end of consumers' welfare, would allow judges to more fully function as neutral arbiters of antitrust law.[56] He analogizes the proper role of antitrust enforcers to that of referees in a sporting contest:

> 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 [sic] from any gross distortions or subversions. The former creates a near-impossible undertaking – who can measure fan welfare? – in which a failing to calls [sic] 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 [sic] 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 anti-competitive agreements to be used as weapons, and instead seeks to reward the firms with better products.[57]

This is a tempting analogy, but ultimately a useless and misguided one. The economy is nothing like a football game, or any other simplistic competition at all. Football exists only by virtue of a certain set of well-defined, top-down rules to which players must adhere in order for the game even to be recognizable as football. By contrast, any economic system is far more diverse; there is no single

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[55] Tim Wu, *supra*, note 2.

[56] *Id.* at 2. We dispute that the CWS is not about protection of the competitive process. But for the purposes of this comment, we engage with his proposal on its own terms.

[57] *Id.* at 9.

"game." Moreover, the "players" in the economy engage in far more complicated interactions that very rarely admit of the easy application of simplistic rules to say whether conduct was obviously good or bad.

Professor Wu would have antitrust "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?'"[58] But, in some sense, the goal of every firm is to drive competitors from the market. Attempts to base antitrust on the "intent" of firms would find all firms in violation, with the result that all actions by all firms would be illegal except those explicitly permitted by antitrust authorities.[59] An economy governed by such rules would be extremely authoritarian, in direct contrast to the claims made by neo-Brandeisians.

Continuing to draw on Professor Wu's analogy, the frailty of proposing a simplistic set of rules to determine "fouls" becomes clearer. In a football game there are obvious and well-known restraints that are definitionally important: only a certain number of players can be allowed on a field at a given time; only certain players are permitted to occupy certain positions on the field; movement is permitted only within a well-defined and narrow set of spatial-temporal parameters. Similarly, players are expected to be kept within a "natural" size, as judged by whether they ingested chemicals in order to augment their size.

There is emphatically nothing similar about competition among firms in the economy. Not only is every firm explicitly trying to make it so that no one else can play the same game at all (obviously not the point of spectator sports), it is not readily apparent what is the "right" structure of firms in an industry. Some markets operate best with few firms that vertically integrate, with competition being *for* the market itself.[60] Other markets operate well with a large number of competitors vying directly *in* the market. The choice of whether to vertically integrate (and thus potentially grow into a very large firm), or else to contract with other firms for similar services is critically made by different firms in different ways, and with differing degrees of success.

Moreover, simple games with well-known rules also have simple objectives: scoring points by reaching an end-zone or sinking a ball in a basket. Cutting through the technical law and economics of antitrust, the end goal can be stated as optimizing the creation of value in society by firms. Unfortunately (for regulators), value is inherently subjective, which means that the determination of whether

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[58] *Id.*

[59] *See generally* Geoffrey A. Manne & Marc Williamson, *Hot Docs vs. Cold Economics*, 47 ARIZ. L. REV. 609 (2005).

[60] *See* Harold Demsetz, *Why Regulate Utilities?*, 11 J. L. & ECON., 1 (1968); *See also*, Neil Quigley, *Dynamic Competition in Telecommunications: Implications for Regulatory Policy* 17, C.D. HOWE INSTITUTE COMMENTATY, no. 194 (Feb. 2004), available at https://www.cdhowe.org/pdf/commentary_194.pdf; Sami Hyrynsalmi, Arho Suominen & Matti Mäntymäki, *The Influence of Developer Multi-homing on Competition Between Software Ecosystems*, 111 J. SYS. & SOFTWARE 119, 119-27 (2016).

firms are serving the goal of optimally providing value to society must ultimately be judged by the consumers of the goods and services themselves.

Professor Wu is correct that one benefit of a "process-based" approach as compared to a "value-based" approach is that violations of the former are easier to identify: If clear rules are prescribed in advance (irrespective of their effect on consumers) it is relatively easy to tell when they have been violated. But Professor Wu does not recognize that this is also the source of the greatest *defect* of his approach: While it purports to elevate the *process* of competition, it does not identify *why* that process should be elevated.[61] In the absence of a "value" to which competition points, there is no basis for judging indeterminate conduct — and given the variety of circumstances in which economic conduct occurs, its effect is virtually *always* at least somewhat indeterminate. In football, the objective is given by the rules of the game; in the market, this is simply not the case. And any system of economic regulation that effectively *provides* the objective by rule is not "protecting" the process of competition in the market; it is simply imposing one from above.

To take one example, Netflix hosts much of its operations on AWS, yet Amazon also competes directly with Netflix through its Prime Video service. Even if Amazon does not observe granular viewing data about individual Netflix consumers, the clever engineers who work for Amazon surely could acquire competitively useful information merely from managing the infrastructure on which Netflix relies. Professor Wu might call this a "foul," but it is also possible that this sort of data observation leads to optimizations that not only make individual video consumers better off but also lead to refinement of the overall AWS system that improves *Netflix's* services alongside other AWS-enabled firms. In short, the effects of this kind of arrangement are far from obvious, and are emphatically not subject to an easy evaluation of whether there was a "competitive foul" or not. And absent a principle to guide the antitrust assessment of such conduct there is no basis for choosing between condemnation or approval: such decisions become instead simply a matter of prosecutorial (or judicial) discretion.

Ultimately, Professor Wu positions his proposal in terms that, interestingly, are not at all dissimilar to the ends that are sought by those who promote the CWS. He criticizes the CWS as trying to "maximize some value" (consumer welfare) when

> what the law need do is separate fair and foul – allow competitive [sic] 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.[62]

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[61] Other than that it is more-easily administered and that, according to Professor Wu, it is more consistent with Congressional preference. While we disagree with the latter, it is irrelevant to a discussion of which policy best serves society.

[62] Tim Wu, *supra*, note 2 at 10.

But Professor Wu misunderstands the nature of the CWS. It is not designed to "maximize some value," but is instead designed to act as an organizing principle when examining suspicious conduct. As Douglas Melamed and Nicolas Petit observe in their response to Wu's proposal, antitrust law as guided by the CWS is already designed to ensure a competitive process:

> Antitrust law prohibits the creation or increase of market power by conduct that is not competition on the merits. Period. There are two elements to an antitrust violation: bad conduct and more market power than there would be absent that conduct. Bad conduct is, to oversimplify, conduct that does not reduce costs or price or increase output or product quality (including innovation).
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> Instead, the [consumer welfare] paradigm serves two very different but nonetheless important functions. Requiring judges and enforcers "to maximize some value" is not one of them. First, the [consumer welfare] paradigm cabins antitrust enforcement to economic matters rather than a hodgepodge of political and social objectives. Second, it provides a criterion to guide the formulation and case-by-case application of the specific rules – the "fouls," to use Wu's term – of antitrust law…[B]oth elements of the antitrust offense in the CW paradigm are about "protect[ing] a process."[63]

At root Professor's Wu's proposal is the worst of both worlds: It is neither a proposed set of better tools with which to promote consumer welfare, nor is it an alternative standard to guide the enforcement and adjudication of antitrust law. Instead, Professor Wu offers a set of tools unmoored from any standard. While some of his proposed tools are not bad (but, in those cases, neither are they any different than would occur under the CWS),[64] some are simply invitations for competitors, advocates, enforcers, and courts to impose their idiosyncratic preferences on the economy. Whatever the defects of the CWS, this cannot be a preferable approach.[65]

## B. The paradox of the populist project

Indeed, the broader project of the neo-Brandeisian antitrust movement offers what can only be characterized as a regressive set of policy prescriptions. Cloaking discussion of antitrust in terms of its function in promoting "democracy" (whatever that means) is unintelligible by comparison to the

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[63] A. Douglas Melamed and Nicolas Petit, *supra*, note 33.

[64] For example, Professor Wu proposes that enforcers should ask "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?" Tim Wu, *supra*, note 2 at 11. These are sensible questions to ask when assessing the nature of the alleged anticompetitive conduct and the evidence offered to support it. Of course, enforcers today ask these questions.

[65] *See, e.g.,* Manne, *supra* note 8 at 21-24 ("All of which of course highlights the fundamental, underlying problem: *If antitrust becomes more political, the outcome will be less democratic, more politically determined results*—precisely the opposite of what proponents claim to want.").

CWS benchmark. Moreover, any attempt to administer antitrust in a way that does not try to reliably gauge actual consumer welfare will necessarily be more politicized.

Thus, proposed "standards" that purport to satisfy a spectrum of goals — democratic "health," labor policy as such, the support of local commerce, as well as the encouragement of firm efficiency — try to build a house on sand. Inevitably, cases that try to satisfy multiple ends either fail at achieving those ends, or, more likely, are resolved arbitrarily according to the mercurial preferences of enforcement officials.

Consider the demand that antitrust more explicitly contemplate labor policy in its administration.[66] The logic of the Brandeisian antitrust movement should, theoretically, make it friendly to cartels, insofar as cartels are certainly tools that can reverse wage depression. Although counterintuitive, employees have long supported and benefited from cartels, because cartels generally afford both job security and higher wages than competitive firms. And, of course, labor itself has long sought the protection of cartels – in the form of unions – to secure the same benefits.

For instance, in the days before widespread foreign competition in domestic auto markets, native unionized workers of the big three producers enjoyed a relatively higher wage for relatively less output. Competition from abroad changed the economic landscape for both producers and workers with the end result being a reduction in union power and relatively lower overall wages for workers.[67]

The same story can be seen in other industries, as well, from telecommunications to service workers to public sector employees. Generally, market power on the labor-demand side (employers) tends to facilitate market power on the labor-supply side: firms with market power — with supracompetitive profits — can afford to pay more for labor and are often willing to do so in order to secure political support (and also to make it more expensive for potential competitors to hire skilled employees). The union model — a labor cartel — can guarantee higher wages to unionized workers. But it does so at the expense of innovation and results in lower quality, higher-priced products. Long-term, it undermines the competitiveness of the cartelized domestic industry, harming those workers who have relied on the protection of the cartel.[68]

If narrow labor effects (i.e. the effects on workers at particular firms) were deemed to be a prime concern of antitrust, enforcers might use antitrust laws to encourage cartel formation on the basis

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[66] *See*, e.g., Marina Lao, *Workers in the Gig Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2017). *See also*, Suresh Naidu, Eric A. Posner, and E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, HARV. L. REV. (forthcoming, 2019), *available at* https://ssrn.com/abstract=3129221.

[67] Matt Patterson and Julia Tavlas, *Detroit: Empire of Rust*, NATIONAL REVIEW ONLINE (July 25, 2013), https://www.nationalreview.com/2013/07/detroit-empire-rust-matt-patterson-julia-tavlas/.

[68] *See* John T. Addison and Barry T. Hirsch, *Union Effects on* Productivity, *Profits, and Growth: Has the Long Run Arrived?* 7 J. LABOR ECON. 72 (1989).

that wages at cartelized firms would likely be higher. If there were a presumption in favor of cartels (on the basis that such cartels generate benefits for workers at cartelized firms), cartels would be encouraged. Yet such a presumption would adversely affect productivity, lead to higher prices, and harm not just non-unionized workers but even, ultimately, unionized workers, and the economy as a whole.

In fact, at the hearing to which these comments respond, Barry Lynn made exactly this claim. In criticizing the FTC's actions against the Professional Skaters Association[69] and the American Guild of Organists,[70] Mr. Lynn asserted that the actions were misguided because they would undermine the ability of such workers to cartelize:

> [BARRY] LYNN: [We recently looked at] the FTC's enforcement actions against… individuals trying to form labor unions, individuals trying to form trade associations, you know… [starting with] the move against church organists. They've also, in recent years, targeted ice-skating instructors, animal breeders, music teachers, public defenders, doctors and dentists in private practice, home health aides, truck and Uber drivers.
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> [CARL] SHAPIRO: You're saying that… those sort of collective actions by certain classes of workers or professionals you think should be given more running room under the antitrust law, even if, let's say, it looked like a cartel type of arrangement like a union? Is that… the direction you're going in?
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> MR. LYNN: Yeah, I would say — I mean, that's exactly what we were saying —
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> MR. SHAPIRO: It seems to me you're saying… you welcome their not competing against each other in order to get a presumably higher rate and have a better life, right, because of a higher income, and that… you welcome that. That's what we're talking about, right?
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> Congress has various statutory provisions, such as particularly in the agricultural area, where farmers are allowed to form cooperatives. So Congress has made a decision that that's allowed. Okay… you would go for the same type of approach for the skating coaches[?]
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> MR. LYNN: Of course. Whatever… rules govern the ability of farmers to come together, whatever rules govern the ability of workers to come together, any small enterprise that wants —[71]

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[69] FTC, *In the Matter of the Professional Skaters Association, Inc.*, File No. 131-0168 (2015).

[70] FTC, *In the Matter of the American Guild of Organists*, File No. 151- 0159 (2017).

[71] Hearing Transcript, *supra* note 20, at 321-28.

This undergirds the existence of a deeper concern regarding ongoing efforts to undermine the CWS. Fundamental contradictions exist in Brandeisian antitrust rhetoric that is unmoored from economic analysis. Professor Hovenkamp highlights this in a recent paper:

> As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with 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.[72]

To be fair, even with careful economic analysis, it is not always perfectly clear how to resolve the tensions between antitrust and other policy preferences. For instance, Jonathan Adler has described the collision between antitrust and environmental protection in cases where collusion might lead to better environmental outcomes (for example, in the context of fisheries management, where a collusively managed commons would be superior to the dominant "competitive" open access regime, under which fish stocks have been decimated).[73] But even in cases like that, he notes that the collusion is essentially a means to address free-rider problems and, as with intra-brand price agreements where consumer goodwill is a "commons" that can benefit from protection against free-riding retailers, what might be an antitrust violation in one context is not necessarily a violation in a second context.

But, at root, deviation from the CWS, at least by any of the means currently proposed by its critics, means an antitrust that is inevitably more political:

> [S]uch a standard-less antitrust law could be used to impose arbitrary market controls subject only to political whim. The earliest, worst impulses of American antitrust law catered to the would-be industrial planners of the early 20th century. Contemporary calls to weaken the consumer welfare standard are motivated by the demands of similar

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[72] *See* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. R. 585-586 (2018).

[73] *See* Jonathan H Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3 (2004). *See also*, Jonathan H. Adler, *Conservation Cartels*, 27 REGULATION 38 (2004).

> would-be planners to reshape American industry in their own idiosyncratic image. Regardless of whether that image for the American economy is good (it is not), such designs should be made through the legislative process, not by hollowing out the core of antitrust law and parasitically repurposing it for political purposes.[74]

## VI. Conclusion

Ideally, antitrust enforcement would operate with perfect information. This is, of course, impossible, and, in our world of "second bests" we are relegated to using the tools that we have, not the ones we wish we had.[75] By all means, we should encourage the development of analytical tools that more perfectly gauge the subjective preferences of individuals. But in our quest to do that, we should not throw up our hands and resort to a loose set of necessarily inferior guesses that reflect the political preferences of a small group of individuals.

Thus, perhaps the greatest virtue of the consumer welfare standard is not that it is the best antitrust standard (which, so far, it is) — it's simply that it *is* a standard. The story of antitrust law for most of the 20th century was one of standard-less enforcement for political ends. It was a tool by which any entrenched industry could harness the force of the state to maintain power or stifle competition.

This is because competition, on its face, is virtually indistinguishable from anti-competitive behavior. Every firm strives to undercut its rivals, to put its rivals out of business, to increase its rivals' costs, or to steal is rivals' customers. The consumer welfare standard provides courts with a relatively concrete mechanism for distinguishing between good and bad conduct, based not on the effect on rival firms, but on the effect on consumers. Absent such a standard, any firm could potentially be deemed to violate the antitrust laws for any act it undertakes that could impede its competitors.

Compounding the problem, the operative text of the Sherman Act comprises about 170 frustratingly ambiguous words. It is difficult to escape the sense that advocates of the elimination or dilution of the CWS seek to coopt the Act's terse ambiguity to invent a sort of "meta-legislation" in order effectively to enact social preferences that they couldn't convince Congress to adopt outright.

Before contorting antitrust into a policy cure-all, it is important to remember that the consumer welfare standard evolved out of sometimes good (price fixing bans) and sometimes questionable (prohibitions on output contracts) doctrines that were subject to legal trial and error. This was an

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[74] Manne & Hurwitz, *supra* note 3, at 8 & 12.

[75] *See* Friedrich A, Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519-530 (1945); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189 (1998).

evolution that was triggered by "increasing economic sophistication"[76] and as "the enforcement agencies and courts [began] reaching for new ways in which to weigh competing and conflicting claims."[77]

The vector of that evolution was toward the use of antitrust as a reliable, testable, and clear set of legal principles that are ultimately subject to economic analysis. When the Brandeisians suggest, for instance, a return to a time when judges could "prevent the conversion of concentrated economic power into concentrated political power"[78] via antitrust law, they are proposing much more than just adding a new hammer to the toolkit of existing doctrine; they are proposing that we unlearn all of the lessons of the twentieth century that ultimately led toward the maturation of antitrust law through well-considered economic and legal constraints. We should not take them up on their offer.

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[76] *See* Ernest Gellhorn, The New Gibberish at the FTC, THE AMERICAN ( MAY 1, 1978), *available at* http://www.aei.org/publication/the-new-gibberish-at-the-ftc/.

[77] *Id.*

[78] William A. Galston and Clara Hendrickson, *A Policy at Peace With Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS (Jan. 5, 2018), *available at* https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/.