



Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy

BY JOE KENNEDY | OCTOBER 2018

There is no legitimate case for abandoning the consumer welfare standard in favor of a vague and hard-to-enforce alternative that represents an amalgam of often conflicting goals, some of which would work against progress and the national interest.

The application of antitrust policy, through which the government seeks to shape the general rules of competition, has always been contentious. But for roughly 40 years there has been a consensus that its ultimate goal should be the welfare of consumers, broadly defined to usually mean maximizing overall economic growth. A small but growing group of activists and scholars is now arguing that we should abandon the consumer welfare standard, adding in a host of new factors for antitrust policy to address, while also attacking “bigness” per se. They believe focusing on consumers overlooks other values, including vibrant small businesses, innovation, privacy, worker interests, and healthy democratic processes. For them, large companies by their very nature pose a unique danger to the economy and help form a kind of society they reject. The consumer welfare standard stands in the way of using antitrust policy to limit the size of large firms. A careful review, however, shows the consumer welfare standard is able to handle some of their legitimate concerns. In the areas where it cannot, other policy tools (e.g., privacy policy, campaign finance reform, etc.) are more appropriate means of addressing their concerns. But in other areas, pursuing their goals—including protecting businesses, especially small firms, against legitimate competition, and avoiding layoffs—would reduce consumer welfare and economic growth. In short, there is no legitimate case for abandoning the consumer welfare standard in favor of a vague and hard-to-enforce alternative that represents an amalgam of conflicting goals, some of which would work against progress and the national interest.

INTRODUCTION

Antitrust policy has undergone many changes since its basic statutes were first passed around the turn of the 19th century. Enacted in response to a growing number of large trusts that were attempting to consolidate national markets, half a century later it morphed into an attack on bigness per se with the government seeking to prevent mergers that would give companies any sort of market power, breaking up large companies into smaller units, and forcing firms to share intellectual property with competitors. The attack on bigness often resulted in great uncertainty as companies wondered how big was too big and the potential consequences of gaining too much market share—even if it was the result of offering consumers better products at lower prices.

For the last 40 years, however, antitrust policy has enjoyed a broad consensus that regulators and courts should pursue consumer welfare as the ultimate goal when implementing antitrust law. This turning point was the result of several factors. Perhaps the most important was the recognition in the 1970s—with the slowdown of the U.S. economy and the growth of global competition—that past regulatory structures, including antitrust, needed to be rethought. Under the guidance of economist Alfred Kahn, the Carter administration launched a major regulatory reform initiative designed to spur consumer welfare, bringing competition to industries such as railroads, airlines, and trucking.¹ Another factor was Robert Bork's 1978 book *The Antitrust Paradox: A Policy at War with Itself*, which laid out a clear critique of antitrust policy and provided a consistent alternative.² The election of Ronald Reagan as president in 1980 resulted in the appointment of administration officials and judges who were sympathetic to Bork's arguments. But the turn toward consumer welfare was also motivated by the belief across the ideological spectrum that antitrust policy had become too subjective and aggressive. By attacking large companies regardless of any effect on consumer welfare, it had produced too much uncertainty, deterred firms from innovating and boosting productivity, and harmed the ability of American companies to compete in global markets.

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The consumer welfare standard generally states that overall consumer welfare and economic efficiency should be the main criterion regulators look to when evaluating a merger or alleged anticompetitive behavior. The widespread use of this standard did not quell debate about the specific response to all cases. But it did impose a rough agreement about the general purpose of the laws and the need to examine the specific economic impacts of any decision.

Over the past decade, a small but slowly growing group has begun to challenge this consensus. Proponents of this view make two basic arguments. The first is that a predominant focus on consumers—and specifically prices—blinds antitrust regulators to other market impacts that can come about through mergers or other behavior. These effects include harm to competitors, reduced innovation, fewer jobs as a result of industry consolidation, reduced market entry, decreases in product quality, and having to hand over large amounts of personal data. Second, they argue that the existence of large companies by itself imposes social ills beyond any potential positive effects on specific markets. Large

firms, they claim, harm local economies by reducing local producers' market share, increase income inequality, reduce media diversity, become "too big to fail," and concentrate political power into the hands of a fortunate few, thereby undermining democracy. These arguments resurrect those made by Supreme Court Justice Louis Brandeis in the early part of the 20th century.³ For today's neo-Brandeisians, bigness has become a unifying theory of all that is wrong with the U.S. economy and society—fight bigness, and we will achieve long-held progressive goals, including the very goal of reducing the number of big firms.

In fact, a principal reason neo-Brandeisians have turned to antitrust as a social policy tool is their lack of faith in the Democrats controlling both chambers of Congress, including at least 60 seats in the Senate, anytime soon. Without that control, they believe there is little chance of enacting policies to address what they see as pressing social challenges, including workers' rights, income inequality, better jobs, privacy, more economic localism, and restraints on corporate political power. However, they have much more faith a Democrat can win the presidency and that such a Democratic administration could and should try to enact these and other social and economic policy reforms through antitrust enforcement. This has led neo-Brandeisians to not only attribute a large array of societal challenges to bigness—wrongly as it were—but to see tougher antitrust enforcement as an all-purpose tool to help them attain their version of the good society. Unfortunately for their cause, the consumer welfare standard, which holds that antitrust policy should be guided by economic impacts on consumers, stands in their way.⁴

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These arguments have been opposed by the vast majority of antitrust experts, including many who believe markets are becoming more concentrated and favor greater use of the antitrust laws to prevent mergers. These experts argue that the consumer welfare standard, properly defined, protects all counterparties from an excess of market power. It incorporates nonprice harms to consumers, such as lower quality, reduced variety, or slower innovation. It gives regulators the power to look at the effect of monopsony power on other sellers, including on workers, and allows antitrust agencies to consider the effect of an action on innovation. They also argue that antitrust policy should remain focused on market activity and be backed by a clear economic analysis of likely effects. These experts acknowledge that bigness often brings benefits that offset costs and risks. Larger companies can more effectively service growing national and international markets, and use efficiencies of scale and network effects to boost productivity. They also possess the resources needed to develop and scale up a new product or innovation.

While many supporters of the consumer welfare standard agree on the importance of issues such as data privacy, income inequality, and the concentration of political power, they argue that consumer protection regulations, tax policy, campaign reform, and other policy realms offer more effective and appropriate responses. Using antitrust to deal with these issues would destroy the progress of the last 40 years, introducing great uncertainty and likely reducing economic growth, while doing little to address their other concerns.

Finally, supporters of the current standard point out that in some cases the goals of the new movement are wrong, particularly protecting both businesses from competition and workers from layoffs generated by increased efficiencies. Where they would break up big companies despite proven efficiencies, or where they would dull the effect of legitimate competition to protect other businesses, especially small businesses, neo-Brandeisian policy would reduce social welfare and in the longer run hurt the very people it claims to protect.

The purpose of this report is not to argue that antitrust should or should not become more aggressive over the next decade. Nor is it to opine on the importance of issues such as income inequality or campaign finance. Rather, it is to argue that antitrust policy should remain firmly wedded to the consumer welfare standard. Specifically, neither firm size nor market consolidation should be attacked absent a clear showing of diminution in consumer welfare or anticompetitive conduct. The report starts with a definition of the consumer welfare standard, and then describes the main arguments of those advocating its overthrow. This is followed by a discussion of why those arguments are not convincing enough to jeopardize a consensus that has served us well for four decades.

DEFINING THE CONSUMER WELFARE STANDARD

The consumer welfare standard is the bedrock of American antitrust law. This is partly because it offers a fairly objective standard for measuring the effect of potential anticompetitive behavior. But it is also because the goal of maximizing consumer welfare and economic efficiency more broadly has a strong claim to public support. While not the only social or political goal in America, increased living standards make the attainment of other goals easier.

While the federal government's 2010 Merger Guidelines do not focus on the consumer welfare standard per se, they do stress that market power should be avoided because it harms consumers:

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.⁵

In other words, the Guidelines stress the importance of maintaining competition because competitive markets are more likely to benefit consumers. The Guidelines also make it clear that Congress intended enforcement to interdict competitive threats in their infancy, and that certainty about the effects of a merger is not required.

Others discuss the goals of competition more specifically. Despite its name, the consumer welfare standard looks at economic benefits more broadly. Bork himself downplayed the focus on consumers, instead stressing the importance of maximizing overall public welfare

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and economic efficiency in general.⁶ Termed the “total welfare standard,” this is fully consistent with an opposition to unregulated monopolies that are unlikely to be challenged by competitors.⁷ Traditional monopolies sheltered from competition—real or potential—reduce output and raise prices. This has two effects. First, it transfers some of the market benefits from the consumer to the monopolist. Bork was explicitly not concerned with these transfers because they did not affect total welfare, just its distribution. But he was deeply concerned with the reduction in output because it lowers overall economic welfare, as some units for which consumers would willingly pay more than the cost of production are no longer produced.

Under this broader standard, mergers that harm consumers, at least in the short run, might still be approved when the harm is outweighed by benefits to the overall economy, including higher productivity. Supporters argue that at least some of the efficiency gains are passed on to society in the form of higher tax revenues and wages. They also argue that firms in technologically dynamic industries usually use the additional revenues to invest in innovation, which they see as eventually benefiting consumers. In fact, the ability to capture supernormal profits may be a critical incentive for companies to innovate.

Others, however, are more focused on making sure consumers benefit, especially in the near term. They tend to be troubled by any policy that transfers welfare from consumers to companies, even when overall welfare increases. University of Pennsylvania professor Herbert Hovenkamp views the inclusion of producer benefits as an attack on the consumer welfare standard, comparable to the attack posed by Brandeis.⁸ Diana Moss of the American Antitrust Institute believes economic efficiencies should only count when they are passed on and thus benefit consumers directly.⁹ She would prevent mergers in which all of the efficiency gains go to companies. And many in this group argue that the Chicago school analysis has been faulty in many ways and has too much influence on antitrust policy, leading regulators to be too lax in enforcing standards.

Regardless, what both views of the consumer welfare standard—the broader and longer-term economic efficiency and innovation view and the more narrow consumer welfare view—have in common is a rejection of the view that antitrust policy should be concerned with protecting companies from competition and workers from layoffs and other social goals (e.g., privacy, democracy, etc.).

However it is defined, the consumer welfare standard has delivered real benefits for the discipline. It has given the antitrust agencies and courts a fairly objective standard for making decisions. Moreover, these decisions are amenable to standard market analysis using economic principles and data, thereby inserting some uniformity into outcomes. It has also freed companies from having to worry that they will become antitrust targets even if they do not engage in clear anticompetitive behavior such as price fixing or enter into mergers that violate the government’s rough guidelines regarding market concentration.

Again, this report is not arguing that other issues, such as income inequality and political influence, are not important. But antitrust’s connection to these and other issues is

tenuous. Other policies are better suited to handle them.¹⁰ Privacy can be adequately protected with consumer protection laws and regulations. Job training, tax policy, and public subsidies can be more effectively focused on income inequality and unemployment. The Federal Communications Commission can take media diversity into account when it is reviewing mergers. Campaign finance reform can help improve both political transparency and democratic processes.

THE ARGUMENTS AGAINST BIGNESS PER SE

It is clear the consumer welfare standard is capable of adequately addressing competition issues. Whether it does so adequately is a matter of opinion. In a recent publication, University of Michigan professor of law David Crane asked neo-Brandeisians whether their dispute was really with the consumer welfare standard or with its implementation, pointing to the “wide scope for disagreement” over what antitrust actions are needed to protect competition.¹¹

One reason for this increased doubt about the ability of the consumer welfare standard to be an adequate north star for U.S. antitrust policy and enforcement comes from a concern—for the most part not reflected in the data—that firms have gotten too big and industries too concentrated. Nonetheless, this concern about bigness has come from unexpected places. In 2015, *The Wall Street Journal* argued that “[a] growing number of industries in the U.S. are dominated by a shrinking number of companies.”¹² *The Economist* has run several stories regarding market consolidation, claiming, “Profits are too high. America needs a dose of competition.”¹³ Even reporters who are normally supportive of competition sometimes mourn the loss of established companies such as Barnes and Nobel (which itself put many small companies out of business).¹⁴ Most of the increase in market concentration has ranged from very low levels to low levels. Moreover, the rise of larger firms in any particular market does not necessarily mean markets are not competitive. One has to take a detailed look at the specific market in question.

Notwithstanding Crane’s claim and some broad-based concerns about lax merger enforcement, it seems clear that at least some people object to the consumer welfare standard itself, regardless of how it is implemented. Much of the neo-Brandeisians’ objections to current practice and its reliance on the consumer welfare standard seem to be about bigness per se. There is a strong feeling that mergers should be challenged and large firms broken up even when companies have done nothing wrong and there is no clear harm to other market participants. A good example of this comes from Lina Khan of the Open Markets Institute:

Focusing antitrust exclusively on consumer welfare is a mistake. For one, it betrays legislative intent, which makes clear that Congress passed antitrust laws to safeguard against excessive concentrations of economic power. This vision promotes a variety of aims, including the preservation of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control. Secondly, focusing on

consumer welfare disregards the host of other ways that excessive concentration can harm us—enabling firms to squeeze suppliers and producers, endangering system stability (for instance, by allowing companies to become too big to fail), or undermining media diversity, to name a few.¹⁵

Marshall Steinbaum of the Roosevelt Institute is direct in his critique: "The consumer welfare standard is an outdated holdover from a discredited economic theory."¹⁶ He and others in this camp would replace the consumer welfare standard with a "competitive market standard."¹⁷ Similarly, Tim Wu of the Columbia Law School would replace the standard with a tighter focus on the protection of competition.¹⁸ Lina Kahn agrees, stating, "Rather than focus on consumer welfare, or any metric, antitrust needs to focus on competition."¹⁹

This is not in fact a semantic difference, but rather an intentional use of a term that has widespread public support to fundamentally reorient U.S. antitrust doctrine and practice. For when the neo-Brandeisians say the focus should be on competition, what they really mean is most, if not all, markets should have very low concentration ratios, even when productivity and innovation are maximized with higher ratios.

To understand this attempt to rebrand antitrust around competition, it is important to understand the history of this movement. According to Barry Lynn, a main proponent and executive director of the Open Markets Institute, the main focus of early antimonopoly law was to inject checks and balances into the economy, largely by protecting the rights of the citizen in their capacity as a producer, not a consumer.²⁰ Carl Bogus of Roger Williams University claims that checking the adverse social and political consequences of concentrations of political power was a clear strand of early antitrust law.²¹ For example, the Federal Trade Commission Act forbade "unfair methods of competition in or affecting commerce," providing the government with a subjective standard it could use even when corporate action did not technically violate the Sherman Antitrust Act or Clayton Act.²² Professor Bogus claims that Congress wanted to protect small businesses even though doing so would result in higher prices and lower output.²³

These views were strongly backed by Louis Brandeis. He believed bigness itself was the problem. As the economic historian Thomas K. McGraw wrote, "Early in his career, Brandeis decided that big business could become big only through illegitimate means. By his frequent references to the 'curse of bigness,' he meant that bigness itself was the mark of Cain, a sign of prior sinning."²⁴ Moreover, large companies would inevitably use their market power not only to raise prices but to acquire social and political power they could in turn use to entrench their hold over the market.

In the face of these dangers, Brandeis argued that temporary economic gains were a fool's bargain:

Americans should be under no illusions as to the value or effect of price-cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the co-operation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.²⁵

In fact, Brandeis was the intellectual leader of a movement to protect small well-to-do local elite businessmen at the expense of workers and consumers, which was opposed by consumer groups and organized labor. From the passage of the Sherman Antitrust Act in 1890 until the 1930s, the champions of this approach to antitrust policy were chiefly local merchants, bankers, and other small business owners threatened by competition from large enterprises. Imagine Mr. Potter in Frank Capra's *It's a Wonderful Life* protecting himself not from the Bailey Brothers Building and Loan, but from Chase Manhattan Bank.

This gets to the real meaning of what a competitive market standard is. For many of today's neo-Brandeisians, the goal is a radical reconstruction of American society, with most industries comprising thousands of small and mid-sized, independently owned businesses, with the remaining few industries, where scale was absolutely necessary, made up of heavily regulated monopolies or oligopolies. Blocking this social engineering vision is the consumer welfare standard.

While this radical deconcentration of industry and a return to an economy of vastly greater numbers of small-scale producers is their ultimate goal, neo-Brandeisians tend to focus their criticism of bigness on the threat to competitor firms and worker interests from monopsony power; the threat to innovation and privacy from monopoly; and the threat to small firms, jobs, income distribution, and democracy from bigness itself.

This report argues that the consumer welfare standard is flexible enough to incorporate many of their concerns. For other concerns, such as privacy and income inequality, policies other than antitrust are best suited to deal with them. But many of their concerns, such as with protecting business from competition and workers from productivity-induced job loss, are concerns that if followed, reduce rather than increase societal welfare. Challenges to incumbents indicate competition is working. Mergers that enable higher productivity lead to higher living standards. Therefore, stopping efficiency-enhancing mergers is not the solution; better help for dislocated workers is.²⁶

THE CONSUMER WELFARE STANDARD HAS THE ABILITY TO INCORPORATE BROADER MARKET HARMS

Over the past 40 years, the consumer welfare standard has evolved to handle new developments such as the Internet, international competition, and global supply chains. Although it continues to evolve, in its current form it can handle many of the objections posed by neo-Brandeisians.

Long-term Price Increases

One claim made by neo-Brandeisians is that antitrust enforcement has been too lax and concentration ratios have gone up, thus leading to higher prices. They believe this is at least partly because the consumer welfare standard concentrates too much on short-term price increases and quality cuts instead of looking at concentration ratios and market structure. Because they think higher concentration ratios inevitably lead to less competition, the failure to preempt concentration early only means regulators will be stuck playing catch up once large firms have established themselves and weakened the competition. This is especially pertinent for merger reviews, as regulators cannot easily undo a merger once they approve it—short of forcing a breakup.

For example, Lina Khan criticizes the current antitrust approach to Amazon because it focuses too much on short-term price and output:

Focusing primarily on price and output undermines effective antitrust enforcement by delaying intervention until market power is being actively exercised, and largely ignoring whether and how it is being acquired. In other words, pegging anticompetitive harm to high prices and/or low output—while disregarding the market structure and competitive process that give rise to this market power—restricts intervention to the moment when a company has already acquired sufficient dominance to distort competition.²⁷

Inherent in her article is the fear that Amazon will use low prices to drive out competition, leaving it free to raise prices or otherwise exert market power at some later time. Regulators concentrating on low prices and higher quality are blind to the longer-term threat.

But the consumer welfare standard allows regulators and courts to focus on long-term changes. It just requires a sound economic analysis that shows the probability of market power at some later date. If neo-Brandeisians feel lax antitrust policy today is setting the stage for monopoly tomorrow, they are really arguing for an application of the consumer welfare standard that concentrates more on long-term effects. What the standard will not give them is the structuralist presumption that prevents even moderate levels of concentration absent any showing of market harm.

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Monopsony Power

A key criticism of the consumer welfare standard is it ignores buyer power—whether of labor or goods. Marshall Steinbaum et al. have criticized Walmart and other big retailers for squeezing small suppliers.²⁸ Others argue that big companies are exerting monopsony power within labor markets.²⁹ Carl Bogus, for example, complains that after a merger, “workers at all levels face a reduction in potential employers.”³⁰

There are two possibilities here. One is the case in which, because of anticompetitive behavior or a merger, a company gets monopsony power over a specific market and uses it to engage in deliberate anticompetitive acts to harm suppliers, including labor. These cases can create harms even though the company is a buyer rather than a seller. The other is the general argument that every time a company merges there is one fewer potential buyer or employer (but not necessarily less demand or fewer jobs). It is clear the consumer welfare standard covers the former cases, because in reality, “consumer” is just a convenient substitute for “counterparty.” A report put out by the American Antitrust Institute, which favors tougher antitrust policy, points out:

“[C]onsumer welfare” does not mean that antitrust protects only consumers. It protects all buyers, including companies, from seller market power. Antitrust also protects sellers from being exploited by powerful buyers and it promotes open markets and entrepreneurial freedom. Moreover, properly conceived, consumer welfare takes into account not only effects on price and output, but also product or service quality and innovation.³¹

In a recent article, Herbert Hovenkamp and Carl Shapiro stated: “As we use this term, applying the ‘consumer welfare’ standard means that a merger is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market.”³²

Existing competition policy also applies not just to monopsony, but to anticompetitive behavior toward suppliers, whether businesses or workers. For example, when a company takes specific action to limit competition within the labor markets, antitrust laws apply. In 2010, the Department of Justice (DOJ) filed a civil antitrust complaint against six high-tech companies that had agreed not to cold call one another’s employees but used other means to attract workers.³³ A class action suit resulted in a recovery of \$415 million.³⁴ Earlier this year, the Department sued two railroad equipment suppliers for entering into agreements not to solicit each other’s employees.³⁵ A joint document by the two leading antitrust agencies clearly states, “The DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other’s employees.”³⁶ More recently, several national fast-food chains dropped the practice of using noncompete agreements after being challenged by a group of state attorneys general.³⁷

Innovation

Neo-Brandeisians claim that market concentration impedes innovation—and that the consumer welfare standard ignores this fact.³⁸

Regarding the claim that the consumer welfare standard does not adequately take into account nonprice harms such as reduced product quality and slower innovation, it in fact does incorporate nonprice harms, including threats to innovation. Specifically, it allows regulators to focus on the long-term trajectory of value and price, and take innovation effects directly into consideration. As UC Berkeley professor Carl Shapiro points out, the consumer welfare standard defines welfare broadly and encompasses nonprice aspects such as improved product variety and more rapid innovation.³⁹ This is also clear from the merger guidelines themselves, which explain that potential effects are put in terms of price changes “[f]or simplicity of exposition,” and that nonprice terms and conditions that adversely affect customers also matter, including “reduced product quality, reduced product variety, reduced service, or diminished innovation.”⁴⁰

Moreover, according to Joshua Wright of George Mason University, between 2004 and 2014, the Federal Trade Commission (FTC) challenged 164 mergers, alleging harm to innovation in 54 of them.⁴¹ For example, former FTC Commission Terrell McSweeney wrote that in 2014, “The FTC challenged the proposed acquisition of EagleView Technology by Verisk Analytics.... The FTC closely examined whether likely future competition between the merging parties would offer customers ever more innovative products.”⁴² More recently, DOJ prevented two potential mergers based on the likely effect to research and innovation.⁴³ DOJ guidelines on horizontal mergers explicitly consider whether a merger is “likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.”⁴⁴

Neo-Brandeisians also argue that innovation is maximized by less-concentrated market structures. In a concentrated market, they argue, companies face less pressure to innovate, and innovators face higher barriers to entry. Over time, the structure of the market produces stagnation. Bogus, for example, cites research that shows small businesses are more inventive than large firms.⁴⁵ The Roosevelt Institute claims, “Rather than investing in research and development (R&D) to generate innovative products, corporations have relied on lax merger regulation to buy out competitors, or they have employed a litany of anti-competitive practices to prevent them from entering the market in the first place.”⁴⁶

The empirical evidence regarding these claims, however, is debatable, and in some cases simply lacking. For example, more recent studies using better data from the National Science Foundation show that large firms invest more in R&D activities and enjoy higher returns on innovation output per dollar invested in R&D.⁴⁷

Moreover, these questions regarding innovation and market structure must be looked at market by market, and the desirability of any particular market change should be judged by whether it increases innovation or harms consumers. In the process of this investigation, it

is very important to keep in mind that while bigness in some cases may pose a threat, in other cases, it is critical to innovation.⁴⁸ William Baumol, a leading scholar of innovation economics, has written: “In markets without too much difficulty of entry, an increase in concentration in the longer run may not be ascribable to attempts by firms to achieve monopoly power but, rather, to innovation and the resulting technological changes that make it efficient for output to be provided by firms that are larger than previously was the case.”⁴⁹

In fact, many studies have shown innovation and competition can be modeled according to an inverted “U” relation, with both too much and too little competition producing less innovation. A study of U.K. manufacturing firms discovered this relationship: Competition above a certain level reduces the high profits successful innovators earn and are able to reinvest in their next round of innovation.⁵⁰ Others, including F.M. Scherer and Toshihiko Mukoyoma have found similar patterns.⁵¹ Similarly, in a study of U.S. manufacturing firms, Aamir Hashmi found that too much competition led to slightly less innovation.⁵² Firms need to be able to obtain “Schumpertarian” profits to reinvest in innovation that is both expensive and uncertain. As Carl Shapiro notes, “Innovation incentives are low if ex-post competition is so intense that even successful innovators cannot earn profits sufficient to allow a reasonable risk-adjusted rate of return on their R&D costs.”⁵³

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The pharmaceutical industry offers an example of this even as neo-Brandeisians often point to this industry as an example of the dangers of bigness. The Roosevelt Institute complains that: “Instead of investing in R&D, many pharmaceutical companies plan their business models around their ability to purchase smaller firms that have shouldered the burden of developing new products.”⁵⁴ Carl Bogus asks rhetorically: “When, for example, a large pharmaceutical company buys a small firm that invented a potentially profitable new drug, should the law care that there will be one less firm in the industry?”⁵⁵

The pharmaceutical industry has indeed migrated to a model wherein small companies often perform initial research and are then purchased by large companies. But there are good reasons for this. First, having breakthrough research performed by small companies allows them to be much more focused and lets investors bet on specific therapies or diseases with the assurance company owners have a high stake in their success. OK, but why allow big companies to buy them just when the technology looks most promising? Because the process of testing and marketing a drug is very complicated and time consuming. Federal laws regarding testing, labeling, and marketing are very detailed and complex, so a large firm is much more likely to successfully bring a new drug to market. Also, given the difficulties in performing an initial public offering, investors increasingly look to an acquisition as a way of cashing out and obtaining the capital to invest in the next company. Moreover, given the fact that in 2014 domestic pharmaceutical firms devoted 43.8 percent of their gross value added to research and development, it is hard to argue that consolidation is hurting innovation.⁵⁶

Finally, the argument that bigness hurts innovation would have more power if the markets it targets were characterized by low investment and profit-taking. But many of these companies are investing heavily in R&D. Of the top 10 global R&D spenders, half are U.S. technology companies (Amazon, #1; Alphabet [Google], #2; Intel, #3, Microsoft, #6, and Apple, #9).⁵⁷ Together, they invested approximately \$65 billion in R&D in 2017. Big Internet platforms, for example, have made large bets on a wide variety of technologies outside their normal services, including virtual reality, driverless cars, artificial intelligence, broadband coverage, drones, and cloud services. Regardless of whether these investments pay off for shareholders, it is hard to argue that society will not benefit greatly.

In summary, irrespective of one's view on the relationship between firm size and innovation, the consumer welfare standard enables antitrust officials to effectively consider the effects on innovation.

Addressing Companies With Free Business Models

Others have claimed that the consumer welfare standard focuses exclusively on prices, and that this leaves regulators ill-equipped to deal with new business models based on free services. For example, Internet platforms such as Google and Facebook let people use their services for free, so because the consumer welfare standard focuses largely on price effects from unfair competition, it is hard to argue that these and other similar companies are hurting consumers.

But neo-Brandeisians point to the large market share of such companies. Roosevelt Institute fellow K. Sabeel Rahman wrote, "Google too is the subject of monopoly concerns thanks to its dominance in information gathering."⁵⁸ Activist David Bollier agrees, "The problem is that conventional antitrust regulation isn't really equipped to deal with information economy platforms, which tend to connect buyer and sellers in more efficient ways while offering very low prices."⁵⁹

But in fact, conventional antitrust guided by the consumer welfare standard is well equipped. This is because these companies make most of their money by charging other companies to place ads in front of their users (an activity in which they face lots of competition). And antitrust handles this aspect well because it does—or at least should—define the relevant market as the ad market, not the search or social network market. Moreover, to the extent any of these Internet companies use their market power in anticompetitive ways, such as by manipulating organic web searches to disadvantage a rival, the consumer welfare standard is more than adequate to deal with it. On the user side, some neo-Brandeisians argue that the focus on prices overlooks potential nonprice effects that could harm consumers. One of the most frequent objections is to the large amounts of data users must give up in order to use services such as Google Search or Facebook.⁶⁰ This data can raise obvious privacy concerns. Although the consumer welfare standard handles nonprice threats, privacy issues are best handled with specific policy regulations, not general antitrust law.

We have shown that the consumer welfare standard can and does address many nonprice harms, specifically including incipient threats to innovation. It is worthwhile mentioning some of the ways in which Internet platforms create significant value to the economy. A recent report mentions five:

1. Improving resource use by making it easy for sellers to find buyers.
2. Increasing competition by bringing new buyers and sellers into the market.
3. Reducing transaction costs, including the cost of finding a partner, agreeing on a transaction, and enforcing the bargain.
4. Reducing asymmetric information between buyers and sellers so that both know what they are getting.
5. Allowing sellers to circumvent regulatory restrictions and deliver new services to underserved markets.⁶¹

The main goal of antitrust is to protect competitive markets. It does this fairly well. It is not equipped to handle other important social issues, such as inequality, privacy, and the concentration of political power even when market concentration worsens them.

By challenging the position of established industries, Internet platforms allow new entities, including small businesses, to expand both their supply chains and their markets. They also deliver valuable services to consumers, often for free. Finally, they force large incumbent firms to innovate in order to remain profitable. Each of these effects enhances competition rather than diminishing it. It would be a mistake to stifle this innovation because of a fear of future threats to competition, especially when the consumer welfare standard is capable of handling those threats whenever they appear.⁶²

CASES WHERE POLICIES OTHER THAN ANTITRUST ARE MORE EFFECTIVE AND MORE APPROPRIATE

In many cases, antitrust policy is just not equipped to handle important social policy issues. The main goal of antitrust is to ensure consumer welfare, including maximizing economic welfare. It is able to do this fairly well, even if some believe enforcement has been too lax in the last several decades. However, it is not equipped to handle other important social issues, such as inequality, privacy, and the concentration of political power, in part because there are irreconcilable tradeoffs between them. In these and related issues, other policy tools are much better equipped to handle them.

Privacy

Given the growth of the data economy, a significant amount of attention has focused on the threat data poses to both competition and privacy. Antitrust attorneys Maurice Stucke and Allen Grunes argue that the ability to amass large amounts of personally identifiable data raises entry barriers by favoring market concentration and dominance.⁶³ With respect to privacy, they make three interrelated arguments. First, they argue that privacy and competition goals can become intertwined when firms collect large amounts of personal data.⁶⁴ The risk to privacy is therefore higher when this data gives a company more market power. Second, they believe natural competition will not give consumers the privacy protections they want because the market advantage given to companies with large amounts of data will prevent the rise of competitors that might offer consumers greater

protection.⁶⁵ Finally, Stucke and Grunes argue that even though consumers freely give away large amounts of personal data, policymakers cannot be sure that this reflects their true preferences unless consumers are fully informed about the costs and benefits of their actions and the market offers a full range of options to match different preferences.⁶⁶

Yet all these and other concerns can be adequately addressed by privacy policy.⁶⁷ To begin with, consumer protection bodies, such as the FTC's Bureau of Consumer Protection, the Consumer Financial Protection Bureau, and attorneys general in the various states and territories are each empowered to act when companies violate their stated privacy policies. Public opinion and class action suits can also impose significant penalties on companies that either misuse or do not adequately protect their customers' data. And whenever neo-Brandeisians believe consumer privacy is not adequately being protected, they can lobby for stronger and more comprehensive privacy legislation.

Moreover, the possession of large amounts of data also does not confer as much of a competitive advantage as some people fear. In a recent paper, economists Anja Lambrecht and Catherine E. Tucker found little evidence that the mere possession of large amounts of data protects a company from a superior product offering, because data is seldom inimitable, rare, valuable, or nonsubstitutable.⁶⁸ There are several reasons of this:

1. The volume of data is often less important than the algorithms or business practices that derive value from it.
2. Large amounts of data are often available privately to any party that wants to buy it. The key constraint is translating the data into a competitive product.
3. Data often has a short shelf life. Any market advantage it provides is temporary.
4. Data is easily transferable and non-rivalrous. Sharing it with one party does not preclude giving it to others.

Corporate Political Power

Neo-Brandeisians argue that the growth in size of large companies leads to a concentration of political power that then influences policy both by affecting the outcome of elections and by influencing existing lawmakers and regulators. Barry Lynn puts it starkly: "On one side you have Jeff Bezos [head of Amazon] and on the other side you've got democracy."⁶⁹ The Roosevelt Institute describes the process:

By creating larger firms and enabling them to generate excess profits, consolidation increases the number of businesses with the means necessary to invest in serious lobbying efforts, including the number of firms whose business models depend on doing so. Rather than attempting to satisfy broad constituencies of disparate interests, politicians are tempted to cater to a select few: those who can afford to both amplify their voices and offer campaign funds in exchange for political favors.⁷⁰

To start with, it does not hold that breaking up a larger firm into two firms will reduce corporate political power. If anything, their overall lobbying budget as two separate firms might very well increase. But leaving that aside, it seems logical that a large firm will have more political influence than a smaller firm, and that it will use that influence to press for policies in its favor. But the issue is slightly more complicated. First, large firms are not always on the same side. Companies in different industries, or companies in the same industry but in different parts of the supply chain, often oppose each other. In this case, the lawmaker is hit with conflicting pressures. Internet service providers and entertainment producers are both lobbying hard on net neutrality regulations. But they largely oppose each other. Internet providers want loose rules that would let them manage their networks more freely, while “edge providers” want assurances about access and price.

Another good example concerns the steel industry. Steel producers have largely supported increased tariffs on steel imports, viewing it as an opportunity to raise prices and increase profits. The automobile industry, which uses steel as an input, opposes them, arguing that it will drive up costs and harm international competitiveness. In such cases, it is possible for the two sides to spend a great deal of time and effort to no avail.

While a large company probably has more influence than a small one, it does not necessarily have more influence than a hundred small companies. And small companies vastly outnumber large ones—and many are well organized.

While a large company probably has more influence than a small one, it does not necessarily have more influence than a hundred small companies. And small companies vastly outnumber large ones—and many are well organized. According to Maplight, most of the top ten spenders on lobbying from 2008 to 2016 were trade associations, not individual corporations. The top spenders were the U.S. Chamber of Commerce, the National Association of Realtors, the U.S. Chamber of Commerce Institute for Legal Reform, and the Pharmaceutical Research & Manufacturers Association. Only three corporations—General Electric, Boeing, and AT&T—appeared in the top 10. The rest were trade or professional associations.⁷¹ Of the top 20 PACs, three represented small business (National Association of Realtors, National Beer Wholesalers, and Credit Union National Association) and four others represented unions (Carpenters & Joiners Union, International Brotherhood of Electrical Workers, Operating Engineers Union, and National Air Traffic Controllers Association).⁷²

This is one reason why small businesses as a group benefit from many policy advantages at the local, state, and national level. Small firms are currently entitled to special preferences for government contracting, looser regulations, subsidized loans, and lower tax rates. A main reason both GM and Chrysler needed to declare bankruptcy during the Great Recession was it provided the only way to adjust their agreements with local dealerships, which were largely protected by state law. Even today, these laws make it difficult for any automaker to sell directly to consumers. In their book *Big is Beautiful*, Robert Atkinson and Michael Lind described many of the ways in which small businesses as a group tilt the playing field in their favor, often at the expense of their customers.⁷³

Finally, it has not been made clear that the main threat to our democracy comes from large firms per se.⁷⁴ The biggest source of the type of campaign spending allowed by the *Citizens*

United decision have been rich individuals, not corporations. By the end of September 2016, the top 50 “megadonors” and their relatives gave 37 percent of all the money that went into super political action committees (PACs).⁷⁵

Nonetheless, there are many problems with our political system, and the concentration of power is undoubtedly one of them. Its biggest effect may be that it produces a stalemate between vested interests that prevents Congress and the administration from implementing reasonable compromises to our most pressing problems, not in producing legislation that clearly benefits one side over another. But, again, antitrust is a poor remedy. A recent paper by Carl Shapiro begins with the statement that the corrupting power of money in politics is “perhaps the gravest threat to democracy in America.”⁷⁶ But he opposes sacrificing the consumer welfare standard to deal with it:

Nor can antitrust be the primary policy for dealing with the corruption of our political system and the excessive political power of large corporations; that huge problem is better addressed by campaign finance reform, a better-informed citizenry, stronger protections for voting rights, and far tougher laws to combat corruption. Trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire.⁷⁷

WHERE POLICY SHOULD NOT INTERFERE WITH LEGITIMATE COMPETITION

In two main areas, neo-Brandeisians seek to attain goals that would demonstrably reduce living standards. The harms they complain of, particularly lost jobs from increased efficiency and reduced market share or even bankruptcy by business competitors, are the inevitable outcomes of the creative destruction that allows better products, better processes, and better value to displace the status quo no matter how uncomfortable it may be for those affected. This process has resulted in steady improvements to living standards. Sheltering firms and workers from this process, rather than increasing support for workers negatively affected, would reduce living standards for all Americans.

Protecting Businesses From Competitors

Aside from their concerns about bigness, neo-Brandeisians seem to have a romantic attachment to small businesses. Carl Bogus, in discussing the 228 companies the United States Steel Corporation purchased while Woodrow Wilson was president, laments:

Those companies had previously been located in 127 cities and towns. They had been important not only to the local economies but also to the social and cultural fabric of their communities. Their top executives ... understood that the prosperity of their companies was tied to the well-being of their communities, and they often acted as city fathers urging elected officials to do the right thing. When local firms were ripped from their roots and headquartered somewhere else, communities were impoverished.⁷⁸

Brandeis shared this belief. He wrote that “[p]ractically every trust created has destroyed the financial independence of some communities.”⁷⁹ As Supreme Court Justice William O. Douglas put it:

[T]here is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.⁸⁰

But this sentiment is largely misguided. It is true that the ability to start and own your own business is foundational to the American ethos. But the purpose of antitrust laws, and economic policy in general, should not be to protect small companies from legitimate competition. There is no reason to favor small producers over individual consumers, especially when the latter are far more numerous. Nor does the decline of some small firms represent a failure of competition. Rather, the instance of a large firm charging lower prices or offering a superior product, even if it gains a dominant market position, should be seen as the result of competition rather than a failure of the competitive process.⁸¹

Some, like Herbert Hovencamp, argue that Congress’s chief concern in writing some of the original laws was to protect small business “even though the result of such protection would be lower total output and higher consumer prices.”⁸² But others supported antitrust legislation to ensure fairer competition, not to prevent the inevitable industry consolidation that industrialization made possible and even required. In 1905, “trust-buster” Teddy Roosevelt told Congress, “I am in no sense hostile to corporations. This is an age of combination, and any effort to prevent combination will not only be useless, but in the end, vicious...”⁸³

Moreover, society and the economy have changed dramatically since then. The beauty of those original laws is they allowed antitrust policy to evolve to fit the modern day. If voters ever want to return to more localized control and lower living standards, it should be the result of Congressional legislation that reflects the will of the majority, not the regulatory actions of a few people with an old theory.

Protecting Workers From Layoffs

Neo-Brandeisians frequently claim mergers and increased concentration lead to job loss as companies get more productive. Some extend this concern by arguing that mergers resulting in layoffs should be rejected.

For example, Marshall Steinbaum and colleagues bemoan the fact that firms sometimes cut workers when they merge: “In 2009, pharmaceutical giant Pfizer acquired Wyeth and announced it would cut 20,000 jobs worldwide; after combining in 2015, Kraft-Heinz

The purpose of antitrust laws, or economic policy in general, should not be to protect small companies from legitimate competition. There is no reason to favor small producers over individual consumers, especially when the latter are far more numerous.

announced plans to cut 5 percent of its workforce; most recently, rumors swirled about cuts to Whole Foods’s workforce following its sale to Amazon.”⁸⁴

Job losses like these should not be surprising. Considerable research has found that many mergers allow firms to eliminate redundancies, gain greater economies of scale, and improve efficiencies. For example, a report by the U.S. Bureau of Labor Statistics noted: “Mergers are found to have a positive impact upon TFP [total factor productivity] growth, accounting for 0.36 percentage points of total factor productivity growth between census years.”⁸⁵

Although understandable, the worry about job displacement from higher efficiency (as opposed to uncompetitive behavior, poor macroeconomic policy, or overregulation) should not concern us, especially when both unemployment and productivity are so low. The often-forgotten truth is that in the long run, the quantity of jobs is set by factors such as demographics and cultural expectations. The quality of the jobs—particularly how much they pay—is determined by productivity. Inhibiting productivity improvements in order to save jobs in the short term will lower living standards in the long term. Rather than limit productivity-enhancing mergers, we should channel our concern over displaced workers into better income support, training, and reemployment programs⁸⁶.

IS MARKET CONCENTRATION HARMING CONSUMERS?

The neo-Brandeisian case is premised on the presumption that market concentration is both occurring and harming consumers—hence the implication that previous antitrust enforcement has been too lenient. This opinion is increasingly shared, despite a lack of evidence for it. *The New York Times* editorial board declared: “It is increasingly clear that officials have allowed too many mergers.”⁸⁷ Likewise, *The Economist* has argued that two-thirds of economic sectors became more concentrated between 1997 and 2012.⁸⁸

But it is not clear that this concentration reflects reality at the place where competition really matters: when a specific customer tries to purchase a specific product. In an excellent review of the evidence, Carl Shapiro believes the evidence is at best mixed, pointing to several reasons.⁸⁹ First, the 50-firm ratio used by some analysts, such as the Council of Economic Advisors, gives little indication about the actual amount of concentration. Markets can be very competitive with far fewer than 50 firms. Second, the two-digit industry groupings are too broad, possibly reflecting the movement of successful, efficient firms into related activities rather than a lack of choice for specific products.

Third, calculating revenue shares within a market is usually done on a national basis, yet many of the relevant markets are local. In this respect, consider what would happen if a small town started with four locally owned restaurants. Let us assume two were purchased by national chains, while a third chain set up a new restaurant. The industry as a whole would become more consolidated on the national level, but citizens of the town would enjoy five choices rather than four. This case is instructive. Neo-Brandeisians would lament the change, claiming the town had lost something valuable in the decline of local control. But the movement merely reflects the growing role of large firms in the national economy,

telling us little about either the degree of competition where it matters or broader trends in market power.⁹⁰ Is this a problem? Not if the general shift from local firms to national firms is the result of national firms providing greater value to their customers, at least from the perspective of competition policy—which is what antitrust should focus on.⁹¹

Shapiro also points out that data used to compute firm-concentration ratios often does not include imports, which have risen in importance over the past few years due to economic growth abroad, declining transportation costs, and trade agreements.⁹² He concludes that the economic data used by studies showing markets have become more concentrated do demonstrate that larger firms have systematically gained business relative to smaller ones. While he admits this reflects worrisome increases in concentration in some markets, he asserts that the data does not allow one to measure concentration in the relevant antitrust markets.⁹³ When looking at the actual increases in concentration the data shows, Shapiro's conclusion is:

So far as I can determine, the bulk of what has been written in the popular press simply *assumes* that an increase in concentration indicates a decline in competition—even if the resulting level of the four-firm concentration index is only 30% or 40%, meaning that quite a few firms continue to compete.⁹⁴

This assumption is likely to be false in many cases. The increase in concentration is often the result of competition in which more productive firms that utilize more investment and innovation pull away from the crowd. It is also likely because moving from a local economy to an international one involves economies of scale, but also requires the investment of more capital. Finally, the growth of Internet companies is clearly driven by the presence of network effects.⁹⁵ All these factors allow larger firms to deliver more value to consumers. An informed view of whether concentration in a particular market leads to higher prices or less innovation therefore requires a detailed examination of the market itself.

Elaine Tan, in a study of the share of the economy held by large firms in the United States from 1931 to 2000, found, “When big business is defined as the largest 200 or 500 non-financial corporations, its share of assets was never as high as it was during World War II, and was declining or stable after the merger wave of the late-1960s.”⁹⁶

Even where concentration increased, the data does not necessarily show a decline in effective competition. In their book *Big is Beautiful*, Robert Atkinson and Michael Lind note that from 2002 to 2012, 59 percent of 792 six-digit-level industries saw an increase in the market share of the four largest firms (the C4 ratio), while the others saw either no increase or a decrease. Even where there was an increase, most were small changes from already very low levels:

[T]he C4 ratio for the administrative and support and waste management and remediation services industry increased 32 percent between 2002 and 2012. But the share held by the largest four firms increased from just 6

percent to 8 percent, hardly evidence of monopoly power. Likewise, retail C4 increased by 23 percent, but from just 11 percent to 14 percent. In fact, the majority of the C4 increases were in industries that were relatively unconcentrated. Just 16 percent of the industries that saw a rise in the C4 ratio had a C4 ratio higher than 40 percent in 2002, and just 19 percent had a C8 ratio of more than 50 percent.⁹⁷

In addition, if concentration were really increasing to the point where market power was rampant, one would expect to see significantly higher corporate profits. However, as Atkinson and Lind show, from 1994 to 2013, profit rates (defined as net income as a share of total receipts) grew almost three times faster for firms with less than \$5 million in revenue than they did for firms with incomes of more than \$50 million.⁹⁸ In 2013, net income as a share of receipts was 7.1 percent for corporations with net receipts of less than \$500,000. For corporations with receipts of \$250 million or more, the ratio was just 6.8 percent—hardly evidence of supranormal profits from monopolies.⁹⁹

It is not clear how neo-Brandeisianism should be applied if the interests of workers, incumbent firms, and consumers all matter equally.

IS NEO-BRANDEISIANISM WORKABLE?

Even if all the neo-Brandeisian arguments were valid—which they are not—it is not clear that the broader antitrust standard could be implemented in an intelligent way. There are several problems. One impetus for the rise of the consumer welfare standard was that the concentration on market structure and size resulted in a confusing array of antitrust cases that sometimes seemed to impose economic costs without achieving any larger social gains. In contrast, the consumer welfare standard gives antitrust agencies and the courts a clearer objective for determining whether a merger or practice, such as lowering prices below marginal cost in order to attract more users to one side of a platform, threatens competition.

It is not clear how neo-Brandeisianism should be applied if the interests of workers, incumbent firms, and consumers all matter equally. In his inquiry to followers of Brandeis, Crane also asks how policymakers should choose when the interests of different parties conflict.¹⁰⁰ In at least some cases, courts will have to make decisions that will lead to higher prices or fewer choices in return for protecting incumbent businesses or saving jobs. But how much, and when? Conflicts are inevitable, even between legitimate priorities. But they are likely to be minimized when separate policies pursue separate goals. When one policy is asked to pursue many contradictory goals, confusion is inevitable, and it is unlikely any of the goals will be pursued efficiently.

Even if policymakers could decide on the right priorities, breaking up large companies would be extremely hard to accomplish. Will Rinehart of the American Action Forum points out that breaking up the Internet platforms would require the government to break up both integrated working teams and the underlying technology, something it is ill-suited to do. It would also need to create and enforce a regulatory system that separates the firm from other markets.¹⁰¹ He points out that the history of government-imposed breakups has been ineffective, imposing significant economic costs without achieving much benefit for

consumers or competitors.¹⁰² A detailed review of the government’s attempts to impose structural remedies under the Sherman Act concluded:

[W]ith one exception, the break up [sic] of AT&T in 1984, there is very little evidence that such relief is successful in increasing competition, raising industry output, and reducing prices to consumers. The exception turns out to be a case of overkill because the same results could have been obtained through a simple regulatory rule, obviating the need for vertical divestiture of AT&T.¹⁰³

Finally, a significant shift toward the principles advocated by Brandeis would bring a dramatic increase in government power. The nation’s founders, and even Brandeis, were also deeply worried about this. Yet some current followers of Brandeis seem to welcome an increase in government power. But that power might not be used to further social welfare. A number of experts worry that regulatory capture will result in additional government powers being coopted by big business.¹⁰⁴ Plus, additional powers could lead to antitrust being coopted by a president to accomplish political goals, including rewarding friends, punishing enemies, or pushing for certain kinds of speech.

WHY COMPLICATE ANTITRUST LAW?

The consumer welfare standard enjoys broad support among antitrust scholars and practitioners. This is because the standard brings clarity to a field that lacked it, and has done at least a reasonably effective job of protecting market competition, especially when markets are properly defined and economic efficiency is properly valued. A number of experts argue for stronger enforcement, especially against mergers. But even they agree that consumer welfare, broadly defined, should remain the focus of debate.

In contrast, the neo-Brandeisian attack against bigness in all its forms would launch government on an ill-defined mission to shape markets to its liking. The result would be a greater shift in antitrust enforcement whenever a new administration assumes power. This would invite more uncertainty and greater partisanship at a time when the nation clearly needs less of each.

This report has also made the case that, to the extent other national priorities clash with the consumer protection standard, other, more focused policies should deal with them. Congress has several tools, should it choose to use them, to deal with the decline in small business formation, the rise in income inequality, regional decline, wage stagnation, privacy concerns, and political reform. In contrast, antitrust enforcement is incapable of fixing these issues—and the neo-Brandeisian vision fails to tackle these ills directly. Instead, it seeks to return the country to a time when Main Street, and small-scale plutocrats, ruled daily life. When the business leaders of a town did not need to worry about national—let alone international—competitors. When consumers could not bypass those entrenched interests who controlled the local economy by ordering from national powers such as Sears & Roebuck, Macy’s, or Amazon.

It is difficult enough to ask regulators to worry about the direct effects of a merger or competitive strategy. Asking them to also account for a myriad of indirect effects with no particular ranking as to importance invites chaos.

Perhaps America would be better off returning to a smaller, more local world ruled by local merchants. The link between living standards and happiness is at least ambiguous. However, doing so would certainly mean a decline in national income and wages, which in turn would make it more difficult to raise the capital needed to come up with new advancements in health care, information technology, and science. The issue is probably moot because, although history may repeat itself, it does not operate in reverse. Such a dramatic change would have serious repercussions for the Earth's ability to sustain growing populations, America's leadership of the free world, and individual freedom altogether. Any attempt to even try should be the product of Congress, backed by the informed desires of American voters.

It is difficult enough to ask regulators to worry about the direct effects of a merger or competitive strategy. Asking them to also account for a myriad of indirect effects with no particular ranking as to importance invites chaos. We are much better off sticking with the experience of 40 years than returning to the distant past.

ENDNOTES

1. Robert D. Hershey, Jr. “Alfred E. Kahn Dies at 93; Prime Mover of Airline Deregulation,” *The New York Times*, December 28, 2010, <https://www.nytimes.com/2010/12/29/business/29kahn.html>.
2. Robert Bork, *The Antitrust Paradox: A Policy at War with Itself*, (Basic Books, 1978).
3. Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (New York: Belknap Press, 1984).
4. Robert D. Atkinson and Michael Lind, *Big is Beautiful*, (Cambridge: MIT Press, 2018).
5. U.S Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, 2, <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.
6. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 110-12.
7. Jonathan M. Jacobson, “Another Take on the Relevant Welfare Standard for Antitrust,” *The Antitrust Source*, August 2017, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_jacobson_7_21f.auth_checkdam.pdf.
8. Herbert Hovenkamp, “Is Antitrust’s Consumer Welfare Standard Imperiled?” (University of Pennsylvania, Institute for Law & Economics Research Paper 18-15, August 29, 2018), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3240271_code23858.pdf?abstractid=3197329&mirid=1.
9. Testimony of Diana Moss Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, Hearing on: The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, December 13, 2017, 6, <https://www.judiciary.senate.gov/download/12-13-17-moss-testimony>.
10. Alden F. Abbott, “Antitrust and the Winner-Take -All Economy,” (Heritage Foundation, January 23, 2018), 3, <https://www.heritage.org/sites/default/files/2018-01/LM-224.pdf>.
11. Daniel A. Crane, “Four Questions for the Neo-Brandeisians,” *Antitrust Chronicle*, April 2018, 2, <https://www.competitionpolicyinternational.com/wp-content/uploads/.../CPI-Crane.pdf>.
12. Theo Francis and Ryan Knutson, “Wave of Megadeals Tests Antitrust Limits in U.S.,” *Wall Street Journal*, October 18, 2015, <https://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306>.
13. “Too Much of a Good Thing,” *The Economist*, March 26, 2016, <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing>.
14. David Leonhardt, “Save Barnes and Noble!”, *The New York Times*, May 6, 2018, <https://www.nytimes.com/2018/05/06/opinion/save-barnes-noble.html>.
15. Lina M. Khan, “Amazon’s Antitrust Paradox,” *Yale Law Journal*, vol. 126 (2017), 743 (footnotes omitted).
16. Marshall Steinbaum, “The Consumer Welfare Standard is an Outdated Holdover From a Discredited Economic Theory,” (Roosevelt Institute, Next New Deal blog, December 11, 2017), <http://rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory/>.
17. Brian Beutler, “How Democrats Can Wage War on Monopolies—and Win,” *The New Republic*, September 16, 2017, <https://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win>.
18. Tim Wu, “After Consumer Welfare, Now What? The ‘Protection of Competition’ Standard in Practice,” *CPI Antitrust Chronicle*, April, 2018, <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf>.

19. Quoted in Robert Levine, “Antitrust Law Never Envisioned Massive Tech Companies Like Google,” *Boston Globe*, June 13, 2018, <https://www.bostonglobe.com/ideas/2018/06/13/google-hugely-powerful-antitrust-law-job/E1eqlQ01g11DRM8I9FwxO/story.html>.
20. Testimony of Barry Lynn Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, Hearing on: The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, December 13, 2017, 3, <https://www.judiciary.senate.gov/download/12-13-17-lynn-testimony>.
21. Carl T. Bogus, “The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust,” *University of Michigan Journal of Law Reform*, vol. 49:1, 38, (2015).
22. *Ibid*, 60.
23. *Ibid*, 63, 75.
24. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*, 108.
25. Louis Brandeis, “Business—A Profession,” 1914, first published in *Harper’s Weekly*, November 15, 1913, <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-15>.
26. Robert D. Atkinson, “How to Reform Worker-Training and Adjustment Policies for an Era of Technological Change,” (Information Technology and Innovation Foundation, February 2018), <https://itif.org/publications/2018/02/20/technological-innovation-employment-and-workforce-adjustment-policies>.
27. Khan, “Amazon’s Antitrust Paradox.”
28. Marshall Steinbaum, Eric Harris Bernstein, and John Sturm, “Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities,” (Roosevelt Institute, February 2018), 42, <http://rooseveltinstitute.org/wp-content/uploads/2018/03/Powerless.pdf>.
29. Jose Azar, Ioana Marinescu, and Marshall I. Steinbaum, “Labor Market Concentration,” (National Bureau of Economic Research Working Paper 24147, December 2017, <http://www.nber.org/papers/w24147>.
30. Bogus, “The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust,” 10.
31. American Antitrust Institute, “A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward,” Policy Statement, September 28, 2016, 8, <http://www.antitrustinstitute.org/sites/default/files/AANatCompPolicy.pdf>.
32. Herbert Hovenkamp and Carl Shapiro, “Horizontal Mergers, Market Structure, and Burdens of Proof,” *Yale Law Journal*, vol. 127, (2018), 2000-01.
33. Department of Justice, “Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements” Press release, September 24, 2010, <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.
34. Jeff John Roberts, “Tech Workers Will Get Average of \$5,770 Under Final Anti-Poaching Settlement,” *Fortune*, September 3, 2015, <http://fortune.com/2015/09/03/koh-anti-poach-order/>.
35. Department of Justice, “Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees,” Press release, April 3, 2018, <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.
36. Department of Justice and the Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals,” 4, October, 2016, <https://www.justice.gov/atr/file/903511/download>.

37. Brittany Shoot, “Several More Restaurants Drop ‘No Poach’ Contract Clauses Following Threat of Lawsuit,” *Fortune*, August 22, 2018, <http://fortune.com/2018/08/22/panera-sonic-applebees-fast-food-restaurants-drop-no-poach-agreements/>.
38. Steinbaum et al., “Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities.”
39. Testimony of Carl Shapiro Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, Hearing on: The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, December 13, 2017, 3, <https://www.judiciary.senate.gov/download/12-13-17-shapiro-testimony>.
40. U.S Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 2.
41. Joshua D. Wright, “Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality,” (George Mason Law & Economics Research Paper No. 17-35, August 15, 2017), <https://papers.ssrn.com/sol3/abstractid=3020068>.
42. Remarks of FTC Commissioner Terrell McSweeney, “Understanding Innovation and Its Role in U.S. Merger Review,” 18th International Conference on Competition, Berlin, Germany, March 16, 2017, https://www.ftc.gov/system/files/documents/public_statements/1176893/berlin_international_conference_on_competition_final.pdf.
43. Diana L. Moss, Questions for the Record, Hearing Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?*, December 15, 2017, <https://www.judiciary.senate.gov/download/moss-responses-to-questions-for-the-record>.
44. U.S Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, Section 6.4.
45. Bogus, “The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust,” 10.
46. Steinbaum, et al., “Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities,” 7-8.
47. Anne Marie Knott and Carl Vieregger, “Reconciling the Firm Size and Innovation Puzzle,” (Washington, DC: U.S. Census Bureau, Center for Economic Studies, Paper 16-20, March 2016), <https://www2.census.gov/ces/wp/2016/CES-WP-16-20.pdf>.
48. Robert D. Atkinson and Michael Lind, *Big is Beautiful*, (Cambridge: MIT Press, 2018).
49. William J. Baumol, *The Free-Market Innovation Machine* (Princeton, NJ: Princeton University Press, 2002), 176.
50. Phillip Aghion, et al., “Competition and Innovation: An Inverted-U relationship,” *Quarterly Journal of Economics*, vol. 120:2 (2005): 701-28, <https://doi.org/10.1093/qje/120.2.701>.
51. F.M. Scherer, “Market Structure and the Employment of Scientists and Engineers,” *American Economic Review*, vol. 57:3 (1967): 524-531; Toshihiko Mukoyama, “Innovation, Imitation, and Growth with Cumulative Technology,” *Journal of Monetary Economics*, vol. 50:2 (2003): 361-380.
52. Aamir Rafique Hashmi, “The Inverted-U Relationship Revisited,” *Review of Economics and Statistics*, vol. 95:5, (2013), 1653-68, <http://ssrn.com/abstract=2012918>.
53. Carl Shapiro, “Competition and Innovation: Did Arrow Hit the Bull’s Eye?” in *The Rate and Direction of Inventive Activity Revisited*, ed. Josh Learner and Scott Stern, (Cambridge: NBER Books, 2012), 372.
54. Steinbaum, et al., “Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities,” 27.
55. Bogus, “The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust,” 23.
56. Organization for Economic Cooperation and Development, *Health at a Glance*, chart 10.13, <http://dx.doi.org/10.1787/888933605616>.

-
57. Strategy &, “The 2017 Global Innovation 1000 Study,” <https://www.strategyand.pwc.com/innovation1000#GlobalKeyFindingsTabs4>.
 58. K. Sabeel Rahman, “Curbing the New Corporate Power,” *Boston Review*, May 4, 2015, <http://bostonreview.net/forum/k-sabeel-rahman-curbing-new-corporate-power>.
 59. David Bollier, “How to Rein in Monopoly-like Network Platforms?” May 7, 2015, <http://www.bollier.org/blog/how-rein-monopoly-network-platforms>.
 60. Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (New York: Oxford University Press, 2016).
 61. Christopher Koopman, Matthew Mitchell, and Adam Thierer, “The Sharing Economy: Issues Facing Platforms, Participants, and Regulators,” (public interest comment submitted to the Sharing Economy Workshop, Federal Trade Commission, May 26, 2015: 2-3), <https://www.mercatus.org/system/files/Koopman-Sharing-Economy-FTC-filing.pdf>.
 62. Joe Kennedy, “Why Internet Platforms Don’t Need Special Regulation,” (Information Technology and Innovation Foundation, January 2016), <https://itif.org/publications/2016/01/05/why-internet-platforms-dont-need-special-regulation>.
 63. Stucke and Grunes, *Big Data and Competition Policy*, 7.
 64. *Ibid*, 4.
 65. *Ibid*, 5-6.
 66. *Ibid*, 10.
 67. Joe Kennedy, “The Myth of Data Monopoly: Why Antitrust Concerns About Data are Overblown,” (Information Technology and Innovation Foundation, March 2017), <https://itif.org/publications/2017/03/06/myth-data-monopoly-why-antitrust-concerns-about-data-are-overblown>.
 68. Anja Lambrecht and Catherine E. Tucker, “Can Big Data Protect a Firm From Competition?” *Antitrust Chronical*, vol. 1:12 (January 2017).
 69. Alex Shephard, “How Amazon is Changing the Whole Concept of Monopoly,” *New Republic*, June 29, 2017, <https://newrepublic.com/article/143376/amazon-changing-whole-concept-monopoly>.
 70. Steinbaum, et al., “Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities,” 46.
 71. Maplight.org, “Lobbying: Top Spenders,” <http://maplight.org/us-congress/lobbying> (accessed September 21, 2018).
 72. Open Secrets, Top 20 PAC Contributions to Candidates, 2017-2018, <https://www.opensecrets.org/pacs/toppacs.php>. (accessed September 21, 2018).
 73. Atkinson and Lind, *Big is Beautiful*, 221-39.
 74. *Ibid*.
 75. Anu Narayanswamy, Aaron Williams, and Matea Gold, “Meet the Wealthy Donors Who are Pouring Millions into the 2016 Elections,” *Washington Post*, November 2, 2016, <https://www.washingtonpost.com/graphics/politics/superpac-donors-2016/>.
 76. Shapiro, “Antitrust in a Time of Populism,” 3.
 77. *Ibid*, 29.
 78. Bogus, “The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust,” 4-5.
 79. Louis D. Brandeis, *Other People’s Money: And How the Bankers Use It*, (Martino Publishing Company (2009) (1914)), 152.

-
80. *Standard Oil Co. of California v. United States*, 337 U.S. 293, (1949), (Douglas, J., dissenting) 318-19, <https://supreme.justia.com/cases/federal/us/337/293/>.
 81. Testimony of Carl Shapiro, “The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?,” 3.
 82. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, (4th ed. 2011), 59.
 83. Quoted in Atkinson and Lind, “The Myth of the Roosevelt ‘Trustbusters,’” *The New Republic*, May 4, 2018, <https://newrepublic.com/article/148239/myth-roosevelt-trustbusters>.
 84. Steinbaum et al., “Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities,” 34.
 85. Michael D. Giandrea, “Industry Competition and Total Factor Productivity Growth,” BLS Working Paper 399 (Washington, DC: U.S. Bureau of Labor Statistics, September 2006), 2, <https://www.bls.gov/ore/pdf/ec060110.pdf>.
 86. Robert D. Atkinson, “How to Reform Worker-Training and Adjustment Policies for an Era of Technological Change.”
 87. Editorial Board, “How Mergers Damage the Economy,” *New York Times*, October 31, 2015, https://www.nytimes.com/2015/11/01/opinion/sunday/how-mergers-damage-the-economy.html?_r=0.
 88. “Too Much of a Good Thing,” *The Economist*.
 89. Shapiro “Antitrust in a Time of Populism,” 7-21.
 90. *Ibid*, 9.
 91. *Ibid*, 11.
 92. *Ibid*, 12.
 93. *Ibid*, 13.
 94. *Ibid*, 15 (emphasis in original).
 95. Kennedy, “Why Internet Platforms Don’t Need Special Regulation.”
 96. Elaine S. Tan, “Champernowne Model Estimates of Aggregate Concentration in the US, 1931–2000,” working paper, 2008, 3 (last revision), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285070.
 97. Atkinson and Lind, *Big is Beautiful*, 200-01.
 98. IRS, SOI Tax Stats, Statistics of Business (Table 5. Selected Balance Sheet, Income Statement, and Tax Items, by Sector, by Size of Business Receipts), <https://www.irs.gov/uac/soi-tax-stats-table-5-returns-of-active-corporations>.
 99. Atkinson and Lind, *Big is Beautiful*, 204.
 100. Crane, “Four Questions for the Neo-Brandeisians,” 5.
 101. Will Rinehart, Breaking Up Tech Companies Means Breaking Up Teams and the Underlying Technology,” (American Action Forum, July 23, 2018), <https://www.americanactionforum.org/insight/breaking-up-tech-means-breaking-up-technology-and-teams/>.
 102. Will Rinehart, “A History of Failure: Government-Imposed Corporate Breakups,” (American Action Forum, June 27, 2018), <https://www.americanactionforum.org/insight/a-history-of-failure-government-imposed-corporate-breakups/>.
 103. Robert W. Crandall, “The Failure of Structural Remedies in Sherman Act Monopolization Cases,” (AEI-Brookings Joint Center for Regulatory Studies, Working Paper 01-05, March 2001), i, <https://www.brookings.edu/research/the-failure-of-structural-remedies-in-sherman-act-monopolization-cases/>.
 104. Testimony of Joshua D. Wright Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, Hearing on: The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, December 13, 2017, 5, <https://www.judiciary.senate.gov/download/12-13-17-wright-testimony>.

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