Is Antitrust's Consumer Welfare Principle Imperiled?

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IS ANTITRUST’S CONSUMER WELFARE PRINCIPLE IMPERILED?

Herbert Hovenkamp

Abstract

Antitrust’s consumer welfare principle stands for the proposition that antitrust policy should encourage markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low. Such a policy does not protect every interest group. For example, it opposes the interests of cartels or other competition-limiting associations who profit from lower output and higher prices. It also runs counter to the interest of less competitive firms that need higher prices in order to survive. Market structure is relevant to antitrust policy, but its importance is contingent rather than absolute – that is, market structure is a concern when it facilitates reduced output or innovation or leads to higher prices.

Antitrust’s consumer welfare principle is currently navigating between two hazards, both of which threaten the importance of low prices as an antitrust goal. On the right is a general welfare approach best identified with Robert Bork that would permit efficiency claims as an antitrust defense even when the challenged practice leads to higher prices and causes consumer harm. On the left is an emergent “neo-Brandeisian” approach that often regards low prices as the enemy, at least when they come from large firms at the expense of higher cost rivals.

In both cases, the full story is more complex. The general welfare approach as Robert Bork presented it was built on a strong faith that various practices produced cost savings or other efficiencies, whether or not these were provable, as well as considerable doubt that a large menu of practices caused genuine competitive harm. In the process it also approved an approach to antitrust that was very difficult to administer and underdeterrent over a wide range of practices. By contrast, a central claim of the Neo-Brandeis approach is that markets are fragile, threatening monopoly nearly everywhere. Further, antitrust policy should be driven more by political theory rather than economics. While political voices are diverse, making it difficult to identify a single theme, one clear consequence is greater protection for small business. For example, they point with admiration to some of antitrust’s greatest acknowledged disasters, such as the Robinson-Patman Act.

One serious problem facing the neo-Brandeis movement is lack of transparency. The attack on low prices as a central antitrust goal will harm consumers, and vulnerable consumers are most at risk. To the extent that the United States Democratic Party becomes the institution to embrace its concerns, it will be harming its own constituencies the most, and that could spell political suicide.

* James G. Dinan University Professor, Univ. of Pennsylvania Law School and the Wharton School, Philadelphia, PA. For 13th CRESSE Conference on Advances in the Analysis of Competition Policy and Regulation, Heraklion-Crete, Greece Jun29-July1, 2018 (Lawyer’s Keynote Address).
Introduction

Antitrust’s consumer welfare, or “CW,” principle stands for the proposition that antitrust policy should encourage markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low. Such a policy does not protect every interest group. For example, it opposes the interests of cartels or other competition-limiting associations who profit from lower output and higher prices. It also runs counter to the interest of less competitive firms that need higher prices in order to survive. The CW principle believes that market structure is relevant to antitrust policy but that its importance is contingent rather than absolute – that is, market structure is a concern when it facilitates reduced output or innovation or leads to higher prices.\(^1\)

Antitrust policy under the CW principle is currently navigating between two hazards, both of which threaten the importance of low prices as an antitrust goal. On the right is a general welfare approach best identified with Robert Bork that would permit efficiency claims as an antitrust defense even when the challenged practice leads to higher prices and causes consumer harm. On the left is an emergent “neo-Brandeisian” approach that often regards low prices as the enemy, at least when they come from large firms at the expense of higher cost rivals.

The full story is more complex. Relatively few antitrust cases have gone one way or the other depending on the choice of a welfare test. Much more significant were the constraints on how efficiencies and competitive harm should be assessed. Along with his general welfare approach came Bork’s strong faith that various practices produced cost savings or other efficiencies, whether or not these were provable, as well as considerable doubt that these practices caused genuine competitive harm.\(^2\) By contrast, a central claim of the Neo-Brandeis approach is that markets are fragile, with the threat of monopoly everywhere. Further, antitrust policy should be driven more by political theory rather than economics. While political voices are diverse, making it difficult to identify a single theme, one clear consequence is greater protection for small business. To date, the strongest claim of the neo-Brandeis movement remains unverified; that is its assumption that individuals in our society are really better off if they lived in a world characterized by smaller firms and higher prices. Everyone in society is a consumer and consumers vote mainly with their purchasing choices. The neo-Brandeisians still face the formidable task of providing evidence these citizens would be better off in some way in a world of higher cost smaller firms, their market behavior notwithstanding. Further, the neo-Brandeis movement at this writing has not provided much in the way of a calculus for determining how these goals should be defined or applied to specific practices, other than highly general ones of the nature that Amazon should be regulated in some fashion.\(^3\)

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\(^2\) See discussion infra, text at notes __.

\(^3\) See Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710, 797-801 (2017). See also discussion infra, text at notes __.
The “Welfare Tradeoff”

Forty years ago, Robert H. Bork published *The Antitrust Paradox*, which argued forcefully that antitrust policy should be driven by something he called a “consumer welfare” principle. However, Bork did not use the term “consumer welfare” in the same way that most people use it today. For Bork, “consumer welfare” referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers, or perhaps even by all of society. Bork also referred to consumer welfare as “merely another term for the wealth of the nation.”

When economists speak of “welfare,” they typically mean Pareto efficiency, Kaldor-Hicks efficiency, total surplus, or some closely related concept of “general” welfare. What these concepts share is that welfare includes the surplus, or wealth net of costs, enjoyed by all those affected, including producers and consumers as well as others. For example, under Kaldor-Hicks efficiency, sometimes called potential Pareto efficiency, a move is efficient if all gainers gain enough to compensate all losers fully, leaving them indifferent. Actual compensation is not required; it is only necessary that the gains be sufficiently large to produce compensation necessary to make everyone either a winner or indifferent. Bork essentially adopted a version of this conception of welfare, except that he named it “consumer welfare.”

Bork’s idiosyncratic and controversial nomenclature launched a significant debate about economic welfare tests as goals of antitrust policy. On one side are those who espoused a so-called “general welfare” test, which is similar to the welfare effects of perfect competition – i.e., it maximizes the aggregate welfare of all of those who are affected by a particular practice. While such tests seem to come close to Bork’s test they are in fact not quite the same: Bork’s concept of “consumer welfare” included the sum of welfare enjoyed by producers and consumers, but he paid little attention to the welfare effects on third parties.

In contrast to general welfare tests, consumer welfare looks at only one blade of the scissors. If consumers lose from a practice, then it is counted as inefficient, or anticompetitive, even if the consumer losses are completely offset by producer gains. The consumer-welfare model articulates the goal of antitrust as higher output, and thus lower prices. In the classic example, suppose a merger of two large firms creates significant market power, raising prices by $1,000. This merger, however, also produces savings in production costs of $1,200. In this case producers gains from productive efficiency exceed consumer losses. This merger would be proclaimed efficient under Bork’s standard because it produces net gains. It would be unlawful under a consumer-welfare standard, however, because it produces actual consumer losses and we

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8E.g., Meese, *supra* note __;
disregard the producer gains. The most salient characteristic of this merger analyzed under a consumer-welfare test is that it reduces output and raises prices.

These various welfare tests have become a kind of “holy grail” for mainstream antitrust ideology. One advantage claimed for them is that they promise antitrust solutions that are free of excessive ideology or bias induced by special interests. They perform as a sort of analogue to the competitive market in economics. Nevertheless, very considerable bias can show up in the choice of which one of these welfare tests to use. In any event, no welfare test can eliminate the exercise of judgment in competition policy.

One important difference between general welfare and consumer welfare models is that the former are said to require a welfare “tradeoff” between producer gains and consumer losses.9 In a highly influential article Oliver E. Williamson presented one of the most reproduced diagrams in the competition policy literature, which illustrated this tradeoff:10

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9While the consumer welfare model does not require such a tradeoff, it may in some circumstances require a kind of balancing to determine whether the resulting price will be higher or lower. This is not a welfare tradeoff, however, and compares only upward and downward pricing pressure.

A\textsubscript{2}, by contrast, represents the gains in productive efficiency. Rectangle A\textsubscript{3} measures the higher prices paid by consumers, but these are a “wash” because they represent losses to consumers that are precisely offset by producer gains. Even though this merger raises prices, it is efficient if rectangle A\textsubscript{2} is larger than triangle A\textsubscript{1}. Williamson surmised that this might often be the case, and that relatively small efficiency gains could offset fairly large price increases, making the exchange welfare positive. Stated in this way, the case for a general-welfare test seems quite appealing.

Upon examination, however, the Williamson model exhibits important shortcomings. First, it presumes a market that was perfectly competitive prior to the merger and monopolized thereafter. The effect of pre-merger perfect competition is to minimize the amount of consumer harm because the lost sales are taken away from marginal consumers who place a very low value on the product. If price-cost margins were significantly higher prior to the merger (shifting Q\textsubscript{2} and Q\textsubscript{1} to the left), then the amount of wealth taken from consumers would be higher and the gains enjoyed by the producers would be less because they would be spread over lower remaining output.\textsuperscript{11} A merger or other antitrust practice such as Williamson illustrated, which

\textsuperscript{11} This is illustrated in this figure:

It shows the same market as the first figure, and with a merger or other practice that produces the same per unit cost reduction. In this case, however, the market was already noncompetitive to begin with, reflecting prices (P\textsubscript{1}) that were higher than cost (C\textsubscript{1}). The yellow area represents two sets of losses. The upper portion is the traditional deadweight loss, which accrues to both consumers and producers. The lower portion is producer profit losses that result from the output reduction. In this case, unlike Williamson’s example, output is being taken from consumers whose willingness to pay is higher in relation to the product’s cost, and thus was producing greater pre-merger consumers’ surplus. The lower portion of the yellow figure represents lost profits to the seller resulting from the output reduction. Second, because output is already lower to begin with, the efficiency gains resulting from a further output reduction are spread over a smaller number of units (the origin to Q\textsubscript{2} rather than Q\textsubscript{1}). Even though the demand curve is identical to the one in the first figure and the per unit amount of the efficiency gains (the height of the rectangle A\textsubscript{2}) is the same, it is now no longer clear that the “gain” area covered by the red
shifted a market from perfectly competitive to monopolized, would be a very unusual event. In most cases where mergers, joint ventures, or related practices are conducive to the creation of market power, the market is already concentrated to begin with, exhibiting high price-cost margins. As noted below, changing the assumption about pre-merger price-cost margins has an important impact on the relationship between efficiency gains and consumer welfare losses.

Second, the efficiencies that accrue in the Williamson model must take place at lower output levels than prevailed prior to the merger. If the efficiencies were so substantial that they resulted in higher output, then there would be no tradeoff. Consumers and producers would both benefit, and the merger would be approved under both a general-welfare and a consumer-welfare test. Tradeoffs occur only in the area of output-reducing mergers. By far the biggest source of merger-generated efficiencies is economies of scale, but these generally occur at higher rather than lower output.

To be sure, some efficiencies can result from practices that reduce output. One example is plant-specialization economies that increase both single-plant scale economies and market power. For instance, prior to a merger Firm A and Firm B might have been producing forty units of Alpha and forty units of Beta in their respective plants, and in both cases, these output levels may have been inefficiently low. By reorganizing production after the merger, the post-merger Firm AB might produce seventy units of Alpha in one of the plants and seventy units of Beta in the other one. In that case, seventy units might be sufficient to attain productive efficiencies even though that is a lower number than the eighty units that were produced previously. Assuming the post-merger firm had some market power, prices would be higher. We would still have to ascertain whether the increase in productive efficiency resulting from the scale economy outweighed the harm to consumers caused by the ten-unit-output reduction. In any event, the merger alone would not receive this result. The post-merger firm would also have to reorganize its production by switching over portions of each plant. The costs of doing so could range from small to prohibitive depending on the technologies involved.

Other efficiencies may also occur at lower output levels, such as improvements in technology, management, or distribution or procurement, but one must always query whether an output-reducing practice such as a merger is really necessary in order to create such efficiencies. American antitrust merger policy requires that claimed efficiencies be “merger specific,” which means that they could not be attained except via the merger. For other types of practices, such as joint ventures, the equivalent standard is whether there is a reasonably less restrictive alternative that could attain the efficiency but without creating the market power.

A third problem with the Williamson model was the assumption that the merger or joint activity in question created a single-firm monopoly that exercised its power unilaterally while

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other firms were unaffected. Many mergers and other practices challenged under the antitrust laws do not fall into this category. Rather, they create market power because they are thought to facilitate collusion.\(^\text{13}\) That is, by increasing market concentration or creating a dominant firm, they give rival firms in the market an incentive to reduce their own output or increase their prices as well. In such cases, however, the efficiency gains typically accrue only to the merging firm while the price increase affects the entire market. For example, if two 20% firms should merge into a 40% firm, the result might be that the market is more conducive to collusion or oligopoly price leadership. This would permit firms representing the remaining 60% of the market to raise their prices as well. In that case, however, the market-wide output reductions and resulting consumer injury would be experienced across the entire market, while only 40% experienced the efficiency gains. This would make the tradeoff much less favorable.

Finally is the administrability problem, which is one of the most serious impediments to antitrust general welfare tests. While application of any welfare test poses significant difficulties of measurement, in most close cases estimating consumer welfare effects is far easier than measuring general welfare effects that require a tradeoff.

In sum, the famous Williamson figure is an elegant picture that seriously oversimplifies the problem. In order to determine whether efficiency gains to producers exceed losses to consumers, we must measure the areas of rectangle \(A_2\) and triangle \(A_1\) in the picture and net them out. Measuring the efficiency gains requires that we know the size of the cost reduction achieved by this particular practice. That will give us the measurement \(C_2–C_1\), or the height of rectangle \(A_2\). Then, we must also know the output range, from the origin to \(Q_2\), over which the efficiencies occur. We will also have to identify what amount of the efficiency gain consists of fixed costs and what amount consists of variable costs; for only the latter will affect the price. For the tradeoff, we would also need to know the size of the post-merger price increase (\(P_2–P_1\)), and the output reduction (\(Q_2–Q_1\)) over which it would occur. That would give us the two legs of the deadweight loss “triangle.” Demand curves in the real world are never linear, however, meaning that area \(A_1\) is not really a triangle at all. In that case, computing the size of the deadweight-loss area would require computing the location of the actual demand curve, in addition to the size of the two legs.

To the best of my knowledge, no American court has ever based a judgment on an attempt to make these computations and certainly not in any case where the tradeoff is reasonably close.\(^\text{14}\) Of course, not all cases are close. If the merger or joint venture creates no market power, then there is nothing to trade off, so any efficiency gains whatsoever make the transaction positive. This is why a market power or market structure requirement is essential.\(^\text{15}\) The same thing is true in reverse if a merger creates market power but produces no measurable

\(^\text{13}\)See id., §7.

\(^\text{15}\)See Merger Guidelines, supra note __, §§4,5.
efficiency gains. Many other transactions have positive but small power effects or small production efficiency effects, or vice-versa. In these, computing welfare effects would not be difficult because it would not require much technical measurement at all.

In very sharp contrast, assessing the same transaction under a consumer-welfare test is relatively easy. One needs to know whether output (Q₂ to Q₁) has gone down or price (P₁ to P₂) has gone up. That is the only issue to be considered, and the size of the output reduction or price increase does not matter. Further, there is nothing to trade off. Once we know that consumer prices have done up it does not matter how large are the offsetting efficiency gains. In sum, an antitrust policy guided by output effects as a standard is far easier to administer than a general-welfare alternative.

This is not to say that evaluation of a merger or joint venture under a consumer-welfare test is always easy. The hard cases are ones in which a merger or joint venture threatens the exercise of market power, but the defendants claim that the efficiency gains are so substantial that they will fully offset any threatened price increase, producing output that is at least as high as it was prior to the occurrence. This is the standard that the federal antitrust agencies currently apply in evaluating mergers. Nevertheless, the query is simply whether the price is likely to go up or down – much simpler than an inquiry into general welfare effects.

Why a Consumer Welfare Test?

In comparison to any general welfare test, the administrative cost savings from a consumer welfare test seem to be substantial. But there may be other advantages as well. One problem with general welfare tests is that they may tolerate a significant amount of market power in the economy. There is at least a temporal link between Bork’s more general welfare test and the significant rise of monopoly power in the United States economy. Pretty good evidence exists that since 1980, about the same time that Bork’s book was published and United States antitrust law began a significant rightward turn, market power measured by price-cost margins

16*Id.*, §10.
has been on the rise. Accompanying this has been a dramatic rise in firm profits, but stagnant, virtually non-existent growth in wages.

There are many causes for this divergence that have little to do with competition policy. Nevertheless, one important component is very likely the considerable weight that the Chicago School generally and Bork in particular placed on the impact of efficiency gains, and the skepticism they showed about many types of anticompetitive practices, particularly those that involved unilateral conduct or vertical agreements. Williamson concluded that, consistent with his assumptions including pre-merger competition and a common range of elasticities, a cost reduction from efficiencies of 4% would be sufficient to offset a price increase of 20% and still be welfare positive. Williamson concluded that

The naive model thus supports the following proposition: a merger which yields non-trivial real economies must produce substantial market power and result in relatively large price increases for the net allocative effects to be negative.

Significantly, Williamson’s numbers are thrown completely off if one of Williamson’s assumptions discussed previously fails to obtain. Williamson assumed a market that was perfectly competitive prior to the merger, with prices equal to marginal cost, and that was monopolized thereafter. The result is that an output reduction of a given magnitude reduces consumer welfare by a minimal amount because that reduction is coming out of a region where consumers’ surplus is very small to begin with. This is rarely the case in merger enforcement. In most cases the market was already subject to relatively high cost margins and the challenged

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19Williamson, *Welfare Tradeoff*, supra note __ at 22-23

20Id. at 23.

21See discussion, supra at note __.

22See the figure in note __ and accompanying discussion.
merger or other practice threatens to make them still higher. Further, efficiency gains are distributed over a smaller output. These differences completely upend the benefit-cost balance.

The 2010 Merger Guidelines do a much better job of drawing this line. First, unlike Bork, they take the risk of high market concentration seriously, although somewhat less absolutely than economists considered it to be in the 1950s and 1960s. Then they draw strong inferences of harm from information about post-merger concentration and the increase in concentration caused by the merger. For example, if pre-merger market structure reflects a robust equilibrium of prices near marginal cost, few or perhaps no two-firm mergers in that market would be challenged. Finally, once a prima facie case has been made, they require strong evidence of efficiencies that could not be obtained except by the merger and that are of sufficient magnitude to reverse a predicted price increase. These are rarely found.

As noted previously, ever increasing price-cost margins in the economy may have several explanations other than competition policy. One is increasing uses of technologies with high fixed costs, which entails higher margins between prices and short-run marginal cost. Another is significantly declining labor participation rates, which has much to do with decades of anti-union legal policy and relatively little with antitrust policy. To the existent that wage suppression shows up as retention of profits that would otherwise have been distributed to workers one can expect price-cost margins to rise. A third possibility is increased monopolistic competition as the market offers a greater variety of goods and services, thus blunting the competition among sellers. Antitrust’s role here is controversial. Product differentiation and monopolistic competition were regarded as significant antitrust issues in the 1970s and early 1980s, leading the Federal Trade Commission to develop some theories that today seem far-fetched. One was “shared” monopoly, mainly in breakfast cereals. Another was the FTC’s objection to annual style changes for automobiles and some other products. Today we are more likely to think that

23See Hovenkamp and Shapiro, supra note __.
24That is, the prices would not only have to be at or near marginal cost, the market would also have to be in equilibrium. A two-firm natural monopoly market moving toward the monopoly equilibrium might exhibit marginal cost prices just prior to a merger to monopoly. See Herbert Hovenkamp, Regulation and the Marginalist Revolution (Penn L. & Econ. Res. Paper No. 1-14, June 21, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3181852.
252010 Merger Guidelines, supra note __, §10.
29See, e.g., Bradford Snell, Annual Style Change in the Automobile Industry as an Unfair Method of Competition, 80 YALE L.J. 577 (1971). See Federal Trade Commission, Report on the Motor Vehicle Industry 29 (1939), complaining that annual style changes were favoring larger firms and concentrating
product differentiation is driven by consumer taste and insistence on variety. Indeed, product differentiation has been one of the mechanisms that has enabled many small businesses to survive – by differentiating their products rather than going head-to-head with larger competitors. In addition, the new economy offers a large range of products and services geared to highly individualistic consumer tastes. Less competition purely on product prices is very likely one of the consequences.

But there is more to this story than the adoption of any particular welfare test. The problem was not merely that the general welfare test trades off presumed harm against presumed benefits. It was that Bork gave the benefit of the doubt to efficiency claims while being extremely skeptical about claims of competitive harm. These views were heavily driven by technical elements of Chicago School industrial organization theory, but some of Bork’s individual beliefs went even further. For example, one must add to Williamson’s very generous test for merger efficiencies Bork’s extreme assumptions about the anticompetitive potential of mergers as well as most other antitrust practices. Bork made no denying of the fact that he fundamentally disbelieved in the theory of oligopoly. As a result, mergers should be considered harmless unless they created a single-firm monopoly. 30 He also categorically rejected the idea that merger policy should include any kind of “incipiency” test, even though today the case for such tests seems uncontroversial and required by any theory that identifies price-increasing mergers as harmful. 31

In addition, Bork took extremely benign positions on all vertical practices, concluding that the best rule for them should be virtual per se legality except in a small group of cases thought to facilitate collusion. 32 He also believed that predatory pricing is so unlikely to succeed that the best rule for it should be per se legality. 33 In sum, for practically every practice other than naked price fixing Bork emphasized their efficiencies or harmlessness, while rejecting nearly all theories of competitive harm.

One possible explanation for Bork’s very benign attitudes about competitive harm is that The Antitrust Paradox is very much an “old economy” book. It was published a generation prior to the Microsoft litigation 34 and includes scant mention of intellectual property rights. Bork has a brief discussion about the International Salt case and its presumption that a patent created market power for purposes of tying law, 35 and another brief discussion of the Walker Process case and

32 BORK, ANTITRUST PARADOX, supra note __ at 287-288. See also Hovenkamp, Whatever Did Happen, supra note __ at __.
33 BORK, ANTITRUST PARADOX, supra note __ at 144-148.
bad faith patent infringement suits.\textsuperscript{36} Other than that, intellectual property rights and their potential for anticompetitive use go unmentioned.

Instead, most of the cases Bork does discuss involve traditional production or distribution of hard goods or commodities. For these, Bork had been dealt a winning hand – namely, many theories of competitive harm developed from the 1930s through the 1970s were ill conceived, untested, or even fantastic.\textsuperscript{37} The antitrust control of ordinary distribution systems, including the law of RPM, nonprice restraints, tying, and exclusive dealing, were seriously overdeterrent. For example, the old leverage theory of tying\textsuperscript{38} deserved to be rejected, as did the per se rule for intrabrand restraints,\textsuperscript{39} but neither of these served to justify Bork’s conclusion that tying arrangements and intrabrand restraints are never anticompetitive. The condemnation of horizontal mergers because they produced cost savings, as in \textit{Brown Shoe},\textsuperscript{40} was assuredly wrong, as was the view that vertical mergers were bad because they enabled parents to charge their subsidiaries a monopoly price.\textsuperscript{41} Equally wrong, however, was Bork’s view that all mergers were driven exclusively by efficiency concerns, with no real possibility of competitive harm unless they were mergers to monopoly.

In sum, no particular welfare test answers antitrust’s hard questions. One must also have a substantive theory about when practices are anticompetitive and when they are beneficial. The real meaning of Bork’s views lie not so much in the welfare test that he chose, but rather in his extreme generosity toward efficiency claims and extreme skepticism about claims of competitive harm.

Does adoption of a consumer welfare test require antitrust policy to trade away efficiency for convenience of administration? Perhaps, but not very much and not necessarily any at all. First, as suggested above, it is hard to find even a single case in the United States where the choice of a welfare test has made a difference.\textsuperscript{42} This means that any improvement in efficiency, assuming there is any, would be dwarfed by the savings in administrative costs, because the measurements required by a general welfare test would have to be undertaken in any case that is even moderately close.

Of course, any test can alter incentives. The choice of a consumer-welfare test will tend to favor mergers or other antitrust activities that tend toward increased output. For example, structurally challengeable mergers must produce efficiency gains sufficient to offset any predicted price increase. Firms may have to alter their strategies in order to comply with the law,

\textsuperscript{38}See 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶1710 (4th ed. 2018).
\textsuperscript{39}8 Id., ¶1620 (4th ed. 2017) (resale price maintenance); ¶¶1642-1643 (vertical nonprice restraints).
\textsuperscript{40}Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962); see BORK, ANTITRUST PARADOX, supra note ___ at 198-224.
\textsuperscript{41}Id. at 225-245.
\textsuperscript{42}See discussion supra, text at notes __.
and a few practices that produce only marginal efficiency benefits while threatening competitive harm might be abandoned. Finally, consent decrees can be shaped accordingly. For example, if a merger between two multi-store chains or airlines threatens higher prices in a few markets but not others, then the government may insist on partial divestitures in the markets where consumer harm is predicted.

**Finding the “Consumer” in Consumer Welfare**

The focal point for identifying consumer welfare is the firm or group of firms being accused of an anticompetitive practice, which we call the “defendant.” The consumer welfare principle says that when evaluating the activities of a putative monopolist or cartel the policy concern is with the welfare of that entity’s consumers. Of course, to the extent a particular defendant has market power other consumers in the same market may be similarly affected even if they purchase only from the defendant’s competitors. These are frequently called “umbrella” consumers. They pay higher prices to innocent firms who are able to raise their price under the umbrella produced by the defendant. Antitrust policy should seek out practices that makes these groups worse off by raising price and reducing output.\(^4^3\) Indirect purchasers as well as direct purchasers also qualify as “consumers.” Whether or not they should have a damages action is a relevant question for some purposes, but not for this one.\(^4^4\)

Clearly, the word “consumer” is under-inclusive. For example, if an office stapler cartel sells a box of staplers to Wal-Mart, which in turn sells a stapler at retail to an end user, the consumer welfare paradigm acknowledges both Wal-Mart and the end user as “consumers,” even though we do not ordinarily think of a commercial intermediary as a consumer. Ironically, under the indirect purchaser rule in United States antitrust law, only Wal-Mart and not the end user, or actual consumer, would have a damages action against the cartel. End use consumers do have standing to sue for damages, however, if they are direct purchasers.\(^4^5\) Further, even indirect purchasers can obtain an injunction.\(^4^6\)

Another under-inclusion is the supply side of the market. The stapler manufacturer requires both steel and labor as inputs, and it might impose anticompetitive restraints in either of these markets, thus reducing output and suppressing the price that it pays. The harm from monopsony, as opposed to monopoly, has been well recognized in antitrust for decades,\(^4^7\) and has recently received renewed attention in the literature, particularly with respect to labor markets.\(^4^8\)

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\(^{43}\)On the extent to which so-called “umbrella” purchasers are covered under United States law, *see* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶347 (4th ed. 2014).

\(^{44}\)On this issue, *see id.*, ¶346.


\(^{46}\)AREEDA & HOVENKAMP, *supra* note __, ¶346d.


Clearly suppliers, including suppliers of labor, are not “consumers” in the conventional usage. Nevertheless, the injury that results from the exercise of monopsony power – i.e., buy-side monopoly power – as technically similar to the injury caused by monopoly. In both cases the defendant reduces output. The effect is higher prices to purchasers and lower outlays to suppliers. As a result, all of the reasons for protecting traditional “consumers” under the consumer welfare principle apply to suppliers as well. The only thing that does not fit very well is the label “consumer.”

Some have suggested the term “trading partners” as an alternative to consumers – that is, antitrust should be concerned with “trading partner welfare.”49 That term has the advantage that it covers both downstream and upstream trades; that is, it applies to entities to whom the defendant sells as well as those from which it buys. Rhetorically, however, the term is certainly not an improvement. Further, it requires an explanation every time one uses it. It is also underinclusive to the extent that it does not encompass people two or three times removed from the violator. For example, if Acme Stapler company sells staplers to Wal-Mart, which in turn sells one to a retail customer, we do not ordinarily think of Acme and the customer as “trading partners,” although that term would apply to the relationship between Acme and Wal-Mart. The same thing would apply to indirect sellers on the supply side.

What we really want is a name for some class of actors who is injured by either the higher buying price or the lower selling price that attends a monopolistic output reduction. In the case of a traditional consumer the primary cause of this injury is higher prices. In the case of a supplier, including a supplier of labor, the primary cause is lower selling prices. In both cases there are also injuries from those who are forced out of the market. These include would be consumers who no longer purchase as a result of a monopoly price increase, and suppliers, including labor, who no longer provide their goods or services in response to a price suppression. For administrative reasons it may be important to distinguish those who deal directly with the defendant from those who deal indirectly. But the passed on injury they suffer is the same as that experienced from direct dealers.

I would stick with the word “consumer,” but with the understanding that it is a term of art. Although antitrust policy is clearly concerned with competitive injuries to suppliers, to date supplier injury is the focal point of only a small percentage of the cases.

Measuring Competitive Harm to Labor or Other Suppliers

Supplier welfare issues could represent a significant growth area for antitrust. Although antitrust’s ambit of protection has always covered suppliers, including labor, the problem has

received only secondary attention in the case law. Recent literature on labor market concentration suggests that it is time to reconsider that position.

In doing so, however, we must also address some very significant measurement problems. Here the problems are more empirical than conceptual. Monopsony injury is experienced by the seller as lower receipts, but not every lower price paid to a seller is an injury caused by monopsony. Indeed, not even every injury that results when a firm reduces the volume of its purchases is the result of monopsony. Some may result from increased efficiency.

One important disjunction between monopoly and monopsony is the robustness of alternative explanations for these phenomena. When a naked cartel raises its price, we do not ordinarily permit a defense that price-fixing is cheaper than competition. Collusion can eliminate the cost of competitive bidding, which can be high in some markets.\(^5\) The cost of assembling a bid on a complex construction project can be high, but to the best of my knowledge no court has ever held that these costs justified naked collusion as an alternative.\(^6\) A cartel might also be a way of allocating a scarce commodity. For example, in the 1960s the U.S. Federal Trade Commission condemned a cartel of pasta manufacturers who responded to a temporary shortage of high quality durum semolina wheat by agreeing to make pasta consisting of 50% farina wheat, which was inferior.\(^7\)

For monopsony the situation is very different. Now the complaint is about low prices, which can result from either monopsonistic output suppression or cost reductions that result from efficiency gains. While antitrust policy wants to condemn the former it has no reason to condemn the latter. The most important theoretical difference between monopsony and efficiency in procurement is the impact on output. A firm or cartel monopsonizes in the purchasing market by suppressing output. By contrast, cost savings that result from efficiency should result in increased purchases, as well as increased output in the market in which the firm sells.\(^8\) While that observation is helpful, the distinction is not always easy to prove. We must

\(^5\)While it can eliminate the cost of competitive bidding it does not always do so. For example, in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified and aff’d, 175 U.S. 211 (1899), the pipe cartel employed a very elaborate scheme of internal bidding in order to determine the winner and the cartel price that could easily have been more costly than honest bidding. Accord United States v. Romer, 148, 363 F.3d 359 (4th Cir. 1998). The elaborate scheme is described in 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶1905 (4th ed. 2018); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ¶4.1c (5th ed. 2015); GEORGE J. STIGLER, THE THEORY OF PRICE 230-231 (3d ed. 1966).

\(^6\)See 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶1907c (4th ed. 2018); see, e.g., FTC v. Alliant Techsystems, Inc., 808 F. Supp. 9, 22 (D.D.C. 1992) (refusing to offset higher prices that would result from eliminating competitive bidding against alleged cost savings from elimination of competitive bidders).

\(^7\)In re National Macaroni Manufacturers Assn., 65 F.T.C. 583 (1964), enforced, 345 F.2d 421 (7th Cir. 1965).

\(^8\)If the firm is a competitor in the selling market its output will increase as its marginal costs decline. If it has market power in the selling market it will both increase its output and reduce its price.
point to some empirical evidence that indicates either efficiency or monopsony. That can be surprisingly difficult. Nevertheless, there are a few evidentiary signals.

First, when efficiency gains account for the reduction in a firm’s expenditures, there is often some observable change in the nature of inputs or the structure of operations that helps explain it. For example, consider the merger of two automobile manufacturers, such as Chrysler and Jeep. One likely consequence is a reduction in the number of dealerships, because a single dealer can now sell and service brands formerly requiring two dealers. This consolidation is not an exercise of monopsony power but simply an efficient reorganization of resources. Further, it should be evidenced by a reduction in the number of dealerships, with the elimination of some personnel that have now become duplicative. In the case of a merger, of course, this will not happen until after the merger has occurred, which serves to make pre-acquisition assessment more difficult. At the same time, accompanying this reduction in dealerships should be an increase in the number of units sold. As a firm’s costs go down its output increases. For example, a post-merger firm that begins to purchase an input in larger quantities than the two pre-merger partners and obtains a lower price is not likely suppressing its outlay in order to suppress prices.

By contrast, if the labor market is concentrated and the only thing that changes is the bargaining relationship, then an exercise in monopsony power becomes a more serious possibility. Even here, however, there are alternative explanations. For example, the sell side of the labor market may already be exhibiting countervailing power. One thing to look for, although it will not always be helpful, is upward vs. downward pressure on output. Complicating this is the fact that the individual laborer’s supply curve behaves in peculiar ways, largely because laborers have utility functions that are more behavioral in nature, rather than strictly neoclassical cost functions. For example, a cut in wages may actually induce laborers to work more in order to maintain subsistence or customary lifestyle levels. By contrast, an increase in wages may sometimes induce workers to work less because higher wages afford them the opportunity for more leisure. Thus at certain points the labor supply curve might be backward bending. These issues all serve to make the analysis of labor supply in antitrust cases very difficult. For example, if wages are already near subsistence levels a cartel of employers to suppress wages further may result in more rather than fewer hours of employment.

So it is important to examine other methodologies. For example, buy-side harm can also be inferred indirectly from high concentration, just as it is on the selling side in merger cases. The empirical work that has been done in labor markets suggests correlations between concentration and price that resemble those on the sell side. Less developed at this writing, but

56 See Marinescu and Hovenkamp, supra note __; Naidu, Posner & Weyl, supra note __; Azar, Marinescu, & Steinbaum, supra note __. On the correlation between price-cost margins and concentration in product sale markets, see Hovenkamp & Shapiro, supra note __.
perhaps promising, is the use of the same kind of “upward pricing pressure” techniques that are currently used in product merger analysis to estimate “unilateral effects” of mergers.57

Antitrust’s Left Flank – Reviving Old Debates

Proponents of more general welfare tests come at the consumer welfare principle from the right. But another attack originates on the left. This group has been dubbed “hipster antitrust” by some critics, but called the “new Brandeis School” by its followers.58 To the extent they have articulated their positions, they say some things that consumer welfarists can agree with, although some that they cannot. Overall, the movement is not enthusiastic about the use of economics in antitrust and appears to believe that economics should either be subordinated to political theory or abandoned entirely.59

Accompanying this comes very considerable suspicion about markets generally, quite aside from monopoly.60 Proponents of the new Brandeis school often write longingly about the early nineteenth century when the economy was much simpler and property and contract rules were deemed sufficient to govern markets.61 While the word “Luddite” is probably too strong, they also exhibit strong ambivalence about innovation, particularly when the firms who engage in it become large.62 Along with this comes an aversion to business organizations that result in cost savings. Among these are large technological networks such as Google and Facebook,63 and hospital purchasing organizations, which are associations of hospitals that band together in


60 See, e.g., K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 10-13 (2017).

61 E.g., BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 103, 223-224 (2010). Id. at 103: during the first half of the nineteenth century, the citizens of the young United States made themselves free to use their state legislatures to ensure that their markets were open and well regulated and that the incorporations of power necessary to achieve any particular large-scale project were limited in scope and duration. That is, the citizens of the United States ensured that we alone, as a people, would be masters of our own markets and that we alone, as a people, would be masters of our corporations.

62 Id., Ch. 6.

order to procure supplies at lower cost, but in the process exclude some higher cost suppliers from their purchasing.\textsuperscript{64}

The political and economic theory underlying the new Brandeis movement largely replicates the “Progressive critique” of history and politics originating around 1900 and stretching well beyond the New Deal.\textsuperscript{65} That writing saw corporations as powerful and largely harmful forces in American society, viewing large firms as hijacking American business from smaller, independent companies.\textsuperscript{66} The Progressive critique believed that business consolidations, or “trusts,” were invariably harmful.\textsuperscript{67} The New Brandeis movement restates concerns that Berle and Means articulated nearly a century ago about the separation of ownership and control in the business corporation.\textsuperscript{68} The Progressive critique and the New Brandeis movement also believe that exclusionary strategies such as predatory pricing are a common

\textsuperscript{64}Id. at 151-155, relating the account of Retractable Technologies, which was unsuccessful in getting its retractable syringe included in many group purchasing orders. See Retractable Tech., Inc. v. Becton Dickinson & Co., 842 F.3d 883 (5th Cir. 2016) (rejecting antitrust claims).

\textsuperscript{65}E.g., CHARLES A. AND MARY R. BEARD, HISTORY OF THE UNITED STATES (1921). The leading intellectual history of the earlier part of the period was VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (3 vols., 1927-1930). For a good revisionist critique see RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON (1968).

\textsuperscript{66}E.g., HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 105-135 (1909); HERBERT CROLY, PROGRESSIVE DEMOCRACY (1914); BENJAMIN PARKE DE WITT, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS (1915) (especially Ch. 7, 113-142, on the business corporation); ADOLF BERLE AND GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (arguing that separation of ownership and control led to corporate social irresponsibility).

\textsuperscript{67}See, e.g., JOHN BATES CLARK, THE CONTROL OF TRUSTS (1901); JOHN BATES CLARK, THE PROBLEM OF MONOPOLY: A STUDY OF A GRAVE DANGER AND OF THE NATURAL MODE OF AVERTING IT (1904); ERNST VON HALLE, TRUSTS, OR INDUSTRIAL COMBINATIONS AND COALITIONS IN THE UNITED STATES (1900); WILLIAM M. COLLIER, THE TRUSTS (1900); RICHARD T. ELY, MONOPOLIES AND TRUSTS (1900); ELLIOT JONES, THE TRUST PROBLEM IN THE UNITED STATES (1924). See also Frederic. J. Stimson, Trusts, 1 Harv. L. Rev. 132 (1887); John Bates Clark, The ‘Trust’: a New Agent for Doing an Old Work: or Freedom Doing the Work of the Monopoly, 52 New Englander 223 (1890); MYRON W. WATKINS, INDUSTRIAL COMBINATIONS AND PUBLIC POLICY (1927). And see JOHN MAURICE CLARK, SOCIAL CONTROL OF BUSINESS 49 (1923). On antitrust during this period, see Richard Hofstadter, “Whatever Happened to the Antitrust Movement,” in the THE PARANOID STYLE IN AMERICAN POLITICS (1965), reprinted in THE MAKING OF COMPEITITION POLICY: LEGAL AND ECONOMIC SOURCES 221-251 (Daniel A. Crane & Herbert Hovenkamp, eds., 2013). See also HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, Chs. 21-22. And see ELLIOT JONES, THE TRUST PROBLEM IN THE UNITED STATES 66-72 (1924) (attacking vertical integration as anticompetitive); Myron Watkins and Frank A. Fetter, Relative Efficiency of Large, Medium-Sized and Small Business (TNEC Monograph # 13, 1939) (arguing that large firms are less efficient than smaller ones).

\textsuperscript{68}BERLE & MEANS, supra note __; cf. LYNN, CORNERED, supra note __, 230 (speaking of separation of ownership and control as “double socialization,” with the result that no one had the motives of the “real owner” of property).
device by which firms create dominant positions\(^{69}\) or force targeted firms to merge.\(^{70}\) At least up to this writing, the New Brandeis writers simply restate these positions and do little to engage revisionist critics from the 1960s and after.

On predatory pricing, both the earlier literature and the New Brandeisians define it very broadly, even to include market development. So, for example, Amazon is thought to be guilty of predatory pricing, not because it sells a product at a price below its costs, but rather because its investment in product promotion entails that it experiences losses during the early developmental stages.\(^{71}\) Just as the Progressive critique, the New Brandeisians adhere to a variety of “leverage” theories – which neo-Brandeisians sometimes term “pincer” monopoly\(^{72}\) -- that firms can use power in one market to extend their position into adjacent markets. For example, they might charge monopoly prices in some markets in which they operate in order to subsidize predatory pricing in more competitive markets.\(^{73}\) The progressive critique and the New Brandeis movement are both also ambivalent or even downright hostile toward intellectual property rights.\(^{74}\) Both hold strong views about the extent of and harm caused by industrial concentration and high entry barriers.\(^{75}\) Both the Progressive critique and the New Brandeisians


\(^{70}\) Cf. LYNN, CORNERED, supra note __. 32-42, 211-218 (using as an example the brewers Luxottica and InBev).

\(^{71}\) Cf. LYNN, CORNERED, supra note __.16-22.

\(^{72}\) See, e.g., TARBELL, STANDARD OIL, supra note __ at 398 (Standard’s use of dominance in a pipeline to force capitulation by other shippers). See also Frederic J. Stimson, a Harvard law professor and eventual U.S. ambassador to Argentina, who wrote three years before the Sherman Act was passed:

Take the Philadelphia gas, for instance (and the name is purposely misquoted), a company which owns gas-works in a hundred cities. Say that in two of these are competing works, and that the gas costs the company sixty cents a thousand; a price at which the competing company can also live. The Philadelphia company puts its price in those two cities down to ten cents a thousand, and charges its patrons sixty-one cents in the other ninety-eight cities. The profits of the Philadelphia company remain the same, but its only two remaining rivals are ruined. Stimson, Trusts, supra note __ at 134. Of course, the theory assumes that Philadelphia gas was not previously charging its profit-maximizing price in the 98 markets. If it were, a price increase would produce less rather than greater profits. Stimson’s best known legal publication was POPULAR LAW-MAKING: A STUDY OF THE ORIGIN, HISTORY, AND PRESENT TENDENCIES OF LAW-MAKING BY STATUTE (1911).

\(^{74}\)E.g., DE WITT, supra note 133 (use of patents to “choke off competition and gain control of an industry”); cf. LYNN, CORNERED, supra note __. Ch. 6.

are highly suspicious of vertical integration,\textsuperscript{76} including practices such as tying and exclusive dealing by which suppliers control their dealers.\textsuperscript{77}

One characteristic of the New Brandeis movement is a belief that centrist antitrust has focused too much on economics and not sufficiently on the political power that is capable of creating monopoly. In the process it has ignored other values such as fairness or even small business protectionism.\textsuperscript{78} What is far less clear is exactly how these goals should be weighed and balanced against each other. Also missing at this stage is any serious discussion of remedies, except for some very general statements to the effect that perhaps the best fix for Amazon is regulation.\textsuperscript{79} The movement does not appear to be concerned about high prices. While they are obsessed with what they regard as excessive concerns about efficiency, they do not appear to see efficiency as having much to do with lower prices.\textsuperscript{80} Indeed, sometimes its protagonists write as if low prices are the evil to be avoided.

Certainly large firms can wield political power and often do. But cartels of smaller firms do it too. For example, Louis D. Brandeis, the namesake of the neo-Brandeis movement, certainly said many things in opposition to monopoly. However, he also devoted considerable effort to organizing cartels of smaller firms to protect themselves from aggressive price cutters. Beginning around 1912 Brandeis began a campaign to overrule or limit the Supreme Court’s Dr. Miles decision condemning resale price maintenance (RPM) under a per se rule. This opposition to RPM did not come from those concerned with free riding or other externalities involving point of sale services that might lead to inefficiency.\textsuperscript{81} Rather, it came from small sellers banding together simply to force manufacturers to guarantee them higher margins.\textsuperscript{82} The Fair Trade League and various “open price” associations also campaigned heavily to permit information exchanges intended to blunt “cutthroat” competition.\textsuperscript{83} As a Supreme Court Justice, Brandeis


\textsuperscript{76} E.g., \textsc{Arthur R. Burns}, *The Decline of Competition* (1936) (blaming much of the observed decline in competition on vertical integration); see also \textsc{Simons}, *Positive Program*, supra note \textsuperscript{2}, 20-21 (vertical integration as anticompetitive)


\textsuperscript{78}A good summary of these various arguments is \textsc{Lynn}, Cornered, supra, note __.

\textsuperscript{79}Khan, *Amazon*, supra note __ at 797-801.

\textsuperscript{80}See \textsc{Lynn}, Cornered, supra note __ at 136-137.

\textsuperscript{81}On these rationales for RPM, see \textsc{Herbert Hovenkamp}, *Federal Antitrust Policy: The Law of Competition and Its Practice* §11.3 (5th ed. 2015).

\textsuperscript{82}See \textsc{Sawyer}, *American Fair Trade*, supra note __ at 109-112.

\textsuperscript{83}Their champion here was \textsc{Arthur Jerome Eddy}, *The New Competition: An Examination of the Conditions Underlying the Radical Change That Is Taking Place in the Commercial and
himself wrote a stinging dissent in a decision striking down a statute that attempted to limit the growth of chain stores.\textsuperscript{84} Brandeis’ concern was the injury caused by the chains’ lower prices, blamed this phenomenon on the “corporate form” that enabled chain operations,\textsuperscript{85} and yearned for the day when retailers were not incorporated or their size was limited.\textsuperscript{86} His dissent expressed no concern whatsoever about the adverse impact of higher prices on consumers.

In sum, the neo-Brandeis movement hardly reflects new thinking on these issues. The same themes have appeared and reappeared over antitrust history. They were a prominent feature of Brandeis’s campaigns in the 1910s.\textsuperscript{87} They reappeared in force during the Great Depression, culminating in the Robinson-Patman Act in 1936 – perhaps the most protectionist piece of antitrust legislation ever passed.\textsuperscript{88} They were somewhat less successfully promoted in the late 1960s and 1970s, but undermined by Richard Nixon’s election\textsuperscript{89} just as the Chicago School was finding its voice in legal antitrust circles.\textsuperscript{90} To this day a large portion of antitrust’s “state action” doctrine is concerned with state legislation by which interest groups of smaller businesses seek to protect themselves from lower prices or superior technologies offered by others.\textsuperscript{91}

Moving forward a century, the ebooks case returned to some of these issues.\textsuperscript{92} Several book publishers fixed the price of ebooks, which Amazon sold, and forced Amazon to raise its retail prices. Notably, both Apple and the publisher cartel members were corporations. Some of the publishers such as Hachette, Harper-Collins, and Simon & Schuster, were in fact quite large, although not as large as Amazon. While Amazon did sell ebooks at low prices, these were responsive to major changes in technology that occurred in the book market. Amazon’s price reflected a reality in which the marginal cost of supply was very low, approaching zero except

\begin{itemize}
\item INDUSTRIAL WORLD (1912). \textit{See also} MILTON NELSON, OPEN PRICE ASSOCIATIONS (1923); FRANKLIN D. JONES, TRADE ASSOCIATION ACTIVITIES AND THE LAW (1922).
\item Liggett v. Lee, 288 U.S. 517 (1933) (striking down a state statute that applied a progressive tax at a higher rate as a chain owned more stores).
\item Id. at 548-549.
\item Id. at 553-554.
\item SAWYER, AMERICAN FAIR TRADE, \textit{supra} note ___.
\item Most recently in North Carolina State Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015) (state authorized cartel of dentists excludes teeth whitening by nondentists such as cosmetologists, who charged lower prices).
\end{itemize}
for royalties. Even today books whose copyrights have expired, and are thus royalty-free, are often sold by both Amazon and others at a price of zero.

Apple organized a cartel of book publishers to impose higher prices on Amazon. There is no conceivable way that this cartel can be thought to be in the best interest of consumers. Amazon did for a time sell some ebooks as a price that “roughly matched the wholesale price of many of its ebooks.” The New Brandeis literature suggests that this was predatory pricing.

A far more plausible explanation is that Amazon was engaging in promotional pricing, which is very common by sellers seeking to establish themselves in a market. Even these prices fell far short of driving ebook prices down to competitive equilibrium levels.

The New Brandeis writing about Amazon’s alleged predatory pricing confuses predatory pricing with product development. Predatory pricing involves charging a below cost price in order to create a monopoly and earn monopoly profits later. By contrast, development of a new product or line may require a firm to encounter losses at an early stage, but later producing profits. The all important difference is that product development does not depend on exclusion of rivals and subsequent charging of monopoly prices, but only the ability to get one’s own output up to the point of profitability and, if needed, amortize fixed costs. Promotional pricing is often associated with introduction of a new technology or product. For example, a firm that spends a great deal developing a patent drug may require five years of sales in order to recoup its investment. These five years of losses do not suggest predatory pricing. Rather, many worthwhile investments do not produce instant payoffs. A firm might also require several years of promotional efforts in order to make a new product profitable. Indeed a rule that condemned product investment as predatory would impose unimaginable social costs.

New Brandeisians also speak of harm caused by Amazon’s vertical integration. But who is being harmed, and how? Amazon does not make very much of anything, so there is certainly not significant vertical integration in the traditional sense. They speak of “fulfillment-
by-Amazon” (FBA) as an example of competition-destroying vertical integration.101 FBA is a voluntary service that independent sellers who use the Amazon website can invoke if they want Amazon to ship their products for them and manage sales. Here, not only is there no claim that FBA injures consumers; it does not even injure smaller companies who want to sell through Amazon and take advantage of FBA, which is voluntary. The vast majority of businesses who make online sales feel that they have been benefitted rather than injured by Amazon’s FBA.102 The only conceivably injured party is competing shippers such as UPS. But here, Lina Khan claims on the same page that the prices that Amazon was paying to UPS were so low that UPS was forced to charge other customers higher prices. If that is true, then UPS was benefitted rather than injured by FBA. In sum, fulfillment-by-Amazon appears to be a practice in search of a victim.

The debate about antitrust’s noneconomic goals is hardly new either, even in response to the Chicago School. Already in the 1970s Chicago School opponents argued that antitrust had an important “political content”103 that could not be ignored, and that antitrust policy must consider “justice” or fairness as important noneconomic goals.104 The more centrist Areeda-Turner treatise, whose first volumes were published in 1978 and 1980, argued that economic analysis should dominate antitrust policy, although they left some room for other values. However, Areeda and Turner rejected “fairness” as a goal of antitrust policy, concluding that it was “a vagrant claim applied to any value that one happens to favor.”105 Speaking of populism, they noted its concerns about big business, but also observed that a “large, powerful, and highly visible firm can also be a scapegoat for political demagoguery.”106 In criticizing their view Louis Schwartz observed that “fairness is so deeply ingrained in the antitrust tradition” that any attempt to reject it in favor of an exclusively economic antitrust jurisprudence “assumes the proportions of radical historical revisionism.”107

Nevertheless, Areeda and Turner also concluded that efficiency and populist goals were “broadly consistent,” because both favored competitive markets rather than concentrations of power:

… the goals of dispersed power and wider business opportunities are served by an antitrust policy which eliminated monopoly not attributable to economies of scale or superior skill, and which prevent those mergers, agreements, or practices which obstruct

101 Id. at 775-776.
102 See discussion infra, text at notes __.
105 1 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶109, at 21 (1978).
106 Id. at 22.
efficient competition. Populist goals and efficiency goals are consistent over a wide range. \textsuperscript{108}

Is there a difference between the New Brandeis School and some of these predecessors? One difference is the extent of the hostility toward efficiency. In fact, some of the Open Market postings speak as if low prices are the evil that antitrust should be combatting, rather than the other way around. For example, they complain that the focus on high prices is much greater in later editions of the government’s Merger Guidelines than it was in the initial (1968) Guidelines – as if that were a bad thing. \textsuperscript{109} They argue that a concern with efficiency lacks support in the legislative history. \textsuperscript{110} It is true that the framers did not often articulate efficiency as such as an antitrust goal. Clearly, however, they were concerned about high prices, \textsuperscript{111} and it is essential that the connection not be lost.

This is significant, because under the modern (non-Borkean) consumer welfare principle, low prices are the dog and efficiency is but the tail. Efficiencies are accepted as a defense only to the extent that a practice leads to prices that are no higher than they were before the practice was put into place. Or to say this differently, low prices and high output are the true goal of antitrust, and efficiency is merely a means of attaining it.

On the one hand the neo-Brandeis movement is highly suspicious of government, and particularly of its power over the economy. It observes, quite correctly, that government is prone to corruption and special interest domination. \textsuperscript{112} Lynn himself yearns for the American economy prior to the Civil War. He describes this as a period in which economic decision making was overwhelmingly private and corporations were severely restricted to performing activities that were deemed to be in the public interest. \textsuperscript{113} The real problem, he believes, started with the explosion in the growth of the corporation during the gilded Age. \textsuperscript{114} These arguments, which closely follow the arguments made by the progressive critique of economic development, \textsuperscript{115} exhibits the same impulses: it strongly emphasizes the role of politics in economic change, while paying little attention to changes in technology that provide at least as powerful an explanation.

\textsuperscript{108} AREEDA AND TURNER, ANTITRUST LAW, supra note __, ¶110 at 23.
\textsuperscript{110} E.g., Khan, Amazon, supra note __ at 719-722 and passim.
\textsuperscript{111} Excellently summarized in Robert Lande, Wealth Transfers as the Original and Primary concern of Antitrust: the Efficiency Interpretation Challenged, 50 HASTINGS L.J. 871 (1999) (examining the legislative history).

\textsuperscript{112} LYNN CORNERED, supra note __, 24, 99-102. See also Lynn, “Consumer Welfare Standard,” supra note __.
\textsuperscript{113} LYNN, CORNERED, supra note __, 223-224.
\textsuperscript{114} Id. at 225.
\textsuperscript{115} See discussion supra, text at notes __.
At the same time, however, members of the movement argue for much more heavy-handed regulation, and not in behalf of consumers.

If experience has taught us anything about this expressly political, anti-economic approach to antitrust is that it rarely accomplished anything. It produced a great deal of rhetoric, some remedies that were frequently very badly tailored to the challenged practices and calculated to do more harm than good.\(^{116}\) Viewing the monopoly problem as political but without providing a roadmap for analyzing specific practices is a recipe for ineffectiveness and, what is worse, special interest capture. One cannot simply lament that Amazon has grown too large.\(^{117}\) We also need specific rules and remedies for identifying what exactly Amazon is doing that should be remedied and what those remedies should look like. Clearly customers are not complaining about monopoly prices. If suppliers are complaining, what are the relevant practices and how are they injured?\(^{118}\) If there was predatory pricing in the ebook market, what is the evidence? It does not do to describe “harm to the diversity and vibrancy of ideas in the book market” as a rationale for antitrust relief\(^{119}\) -- at least not unless we can supply some metric and insistence on proof of causation. Measured by revenue, book sales in the United States have risen continuously over the past decade.\(^{120}\) The ebook revolution has moved the price of books downward. Everyone seems to be making money. Authors’ contracts calling for a strict percentage of sales prices had to be revised but that is underway. Brick and mortar book sellers have suffered, but their injury has resulted largely from a technology – direct electronic distribution – that has made them superfluous. It is not antitrust purposes to force distribution channels to maintain institutions that no longer perform a valuable function.\(^{121}\)

In addition, refocusing antitrust policy so as to make political theory the driver will return us to repeated cycles of special interest capture and protected local monopoly. A good illustration is the way that the neo-Brandeisians treat one of their legislative darlings, the

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\(^{117}\) *E.g.*, Khan, *Amazon*, supra note __.

\(^{118}\) Khan herself acknowledges that customers are happy. Id. at 713-716.

\(^{119}\) See id. at 767

Amazon's conduct would be readily cognizable as a threat under the pre-Chicago School view that predatory pricing laws specifically and antitrust generally promoted a broad set of values. Under the predatory pricing jurisprudence of the early and mid-twentieth century, harm to the diversity and vibrancy of ideas in the book market may have been a primary basis for government intervention. The political risks associated with Amazon's market dominance also implicate some of the major concerns that animate antitrust laws. For instance, the risk that Amazon may retaliate against books that it disfavors—either to impose greater pressure on publishers or for other political reasons—raises concerns about media freedom. Given that antitrust authorities previously considered diversity of speech and ideas a factor in their analysis, Amazon's degree of control, too, should warrant concern.

\(^{120}\) https://www.statista.com/statistics/560733/book-publishing-revenue-usa/. Measured by unit they have been flat, indicating that the per copy price has trended upwards.

\(^{121}\) See Hovenkamp, *Technology*, supra note __.
Robinson-Patman Act. Barry Linn describes this statute as “the clearest statement of political intent,” of protecting smaller dealers from price discrimination that favored larger dealers. He continues:

… [T]here are many excellent economic reasons to outlaw or control giant trading firms and retailers. These include their tendency to strip entire systems of their profits and thereby harm the machines, technologies, and people under their power. The authors of Robinson - Patman went out of their way to make sure we understood that although they were aware of this problem, their goal was not economic but political. The point of the law, they wrote, was to “protect the weak [from] the strong.” The “public interest” was best served not by efficiency but by keeping “trade and industry divided among as many different parties as possible.”

Lina Khan agrees, suggesting that the Act’s “prohibition against price discrimination effectively curbed the power of size.” In the process she praised the Supreme Court’s Utah Pie decision, in which a firm successfully used the statute to protect its local near monopoly position from competitive entry.

The historical record of the Robinson-Patman Act shows a very different reality. The statute was one of the strongest instances of legislative capture by a special interest group in the entire body of antitrust law. It was drafted by H.B. Teegarden, general counsel for the United States Wholesale Grocers Assn., and its principal purpose was to protect small wholesale grocers from A&P company, whose multistore operations threatened the livelihood of many family owned grocery stores. The purpose did represent a value that the New Brandeisians applaud, which was to keep prices high for the benefit of very small retailers. In fact, however, this jumbled mess of a statute never succeeded in achieving even that highly questionable goal. The K-Marts, Wal-Marts, and McDonald’s of the world all grew up as it was being aggressively enforced. Because the statute applied only to “sales,” it undoubtedly fostered a great deal of vertical ownership integration. For example, a manufacturer who feared running afoul of the statute by selling to two independent dealers at different prices could avoid the problem simply by acquiring one or both dealers. Ironically, the statute did not even protect small business effectively. For example, it was used to condemn cooperatives of small firms that were organized so they could purchase goods at a lower price, which would have been a distinctly Brandeisian solution. One court noted that small dealers had “formed the cooperative associations * * * for the purpose of achieving a measure of competitive parity with their larger,

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122 114-115, citing WRIGHT PATMAN, THE ROBINSON_PATMAN ACT: WHAT YOU CAN AND CANNOT DO UNDER THIS LAW 3 (1938). In a footnote Lynn laments the decline in RPA enforcement. Id. at 271-272 n. 29.
123 Khan, Amazon, supra note __ at 724.
124 Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). Utah Pie was actually not decided under the Robinson-Patman Act but rather under original §2 of the Clayton Act, which condemned “primary line” price discrimination as a form of predatory pricing.
more aggressive rivals.”

It condemned its actions under the Robinson-Patman Act nonetheless.

Conclusion: Trading Off Consumer Welfare

One significant advantage that the CW principle has over alternative approaches focused on general welfare is that the CW approach does not require a tradeoff between higher consumer prices and efficiency gains. Rather, if consumer prices are higher, or output lower, we condemn the practice without regard for the welfare gains that result from the efficiency. Factually, of course, the CW principle can tolerate very large firms. Economies of scale, network economies or other cost savings may create economic preferences for larger firms or collectives, provided that their gains are passed on to consumers. If properly applied, however, the one thing it should not tolerate is ever increasing amounts of market power in the economy.

Just as general welfare proposals, the neo-Brandeisian approach to antitrust also requires a tradeoff – but it would be a far more difficult tradeoff to manage than even a general welfare approach contemplates. The neo-Brandeis approach would trade off low prices and high output in favor of a set of goals defined as curbing excessive political power or large firm size, or perhaps values expressed by such things as loss of individual autonomy. The “Curse of Bigness,” as Brandeis himself put it, is an independent value in antitrust policy, to be pursued even if it harms consumers by leading to higher prices. So far the Neo-Brandeis movement has been characterized by a great deal of ad hoc complaint of the nature that firms such as Amazon and Google are too big. Who the victims are, and exactly how they are injured, remains distressingly unclear.

Assuming for the moment that this goal is defensible, we would still need a metric for applying it. As decades of antitrust litigation has shown, antitrust is not good at balancing. The advantage of the consumer welfare principle is that economics gives us a set of tools for assessing the conditions that are conducive to high output and lower prices, and thus for examining the practices claimed to challenge them. That is not to say that employing these tools is easy, but over the years we have been able to improve their usefulness.

More ominously is the disregard for democratic values that the New Brandeis approach pursues. It rests on the as yet unverified assumption that people have a set of concerns about large firm size that are not expressed in their market behavior. After all, firms such as Amazon grow very large only because people buy there, perhaps even as they verbalize concerns about small retailers. For their part, small retailers who take advantage of online sales generally report a positive rather than a negative impact from firms such as Amazon.

We can debate if we


127 See discussion supra, text at notes __.


129 Small retailers themselves generally report a positive impact from online sales, with more than 80% reporting increases. 68% reported “positively” to the question “How have Amazon and other online
want whether opinion polls or markets are more accurate reflectors of preference, but in this case to the best of my knowledge there are not even opinion polls indicating that people who understand the consequences would prefer a world of small but higher priced firms.

While this paper defends the CW principle, it also acknowledges that antitrust could do better than it has protecting consumer interests. Several practices, such as tacit collusion, predatory pricing law’s recoupment requirement, and the status of indirect purchaser plaintiffs, need to be re-examined. Further, anticompetitive practices affecting labor markets need to be taken more seriously. While antitrust policy is certainly not the only reason wages fail to keep up with economic growth, its lack of attention in this area is at least a partial contributor. One place that antitrust under the consumer welfare principle and neo-Brandeisian antitrust policy can agree is that concentration does matter, although they currently disagree about how it should be included in the calculus of competitive harm. The antitrust concern with high concentration is a means to an end – namely, control of higher prices – rather than an end in itself.

Antitrust policy should also be more concerned than it currently is with anticompetitive mergers. One area in particular is large tech firm acquisitions of smaller highly innovative rivals. Another is vertical mergers. For example, Amazon’s acquisition of Quidsi in 2010 very likely warranted closer scrutiny than it received. Quidsi was a nascent competitor, selling diapers and other household products. When Quidsi initially resisted Amazon’s overtures Amazon cut its own price on several products that Quidsi also produced. The use of aggressive pricing to reduce the value of a takeover target or force it to sell out is often alleged to be an anticompetitive strategy, and it is certainly worth a second look.

The important point, however, is that established antitrust tools are up to these tasks. More importantly, every story has two sides and the consumer welfare principle is the best mechanism for assessing the harm that they cause. Mergers such as the Amazon acquisition of Quidsi should not be pursued simply because they make Amazon bigger or stretch its activities into new markets. They should be condemned when they enable Amazon to reduce output, diminish quality, or charge higher prices, perhaps by choking off an emergent competitor. In

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130 For a thoughtful discussion, pointing out the strengths and weaknesses of both methodologies in political markets, see S. G. Kou and Michael E. Sobel, *Forecasting the Vote: A Theoretical Comparison of Election Markets and Public Opinion Polls*, 12 POLITICAL ANALYSIS 277 (2004).
131 See discussion supra, text at notes __.
133 See Khan, *Amazon*, supra note __ at 768-769.
sum, these are fixes that result from proper application of the consumer welfare principle, not from jettisoning it.

Finally is the problem of transparency, which I believe will ultimately prove dispositive. The Neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most. For example, to the extent that the United States Democratic Party becomes the institution to embrace its concerns, it will be harming its own constituencies the most. As a result, to the extent that is communicated in advance it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.