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Is Antitrust's Consumer Welfare Principle Imperiled?

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Introduction

Forty years ago, Robert H. Bork published *The Antitrust Paradox*, which argued forcefully that antitrust policy should be driven by a principle he named "consumer welfare."[1] 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. Bork referred to consumer welfare as "merely another term for the wealth of the nation."[2] A large part of the welfare that emerges from Bork's model accrues to producers rather than consumers.

When economists speak of "welfare," they typically mean Pareto efficiency, Kaldor-Hicks efficiency, total surplus, or some closely related concept of "general" welfare.[3] What these concepts share is that welfare includes the surplus, or wealth net of costs, enjoyed by everyone 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.[4] Actual compensation is not required, but only 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 misnamed it "consumer welfare."

By contrast, under the modern consumer welfare ("CW") principle antitrust policy encourages 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

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[1] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66, 97 (1978).

[2] *Id.* at 90. *See also* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act*, 85 N.Y.U. L. REV. 659, 691 (2010) (observing that Bork equated "consumer welfare" with "society's total welfare"); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 148 (2011) ("Bork explicitly equated the term 'consumer welfare' with 'the wealth of the nation,' a term that economists would understand as 'social welfare')

[3] *E.g.*, GREGORY MANKIW, PRINCIPLES OF ECONOMICS 134-155 (8th ed. 2016).

[4] *E.g.*, ALAN DEVLIN, FUNDAMENTAL PRINCIPLES OF LAW AND ECONOMICS 29-33 (2015).

interests of cartels or other competition-limiting associations who profit from lower output and higher prices. It also runs contrary to the interest of less competitive firms that need higher prices in order to survive.

The consumer welfare principle is redistributive, although not necessarily in the sense we ordinarily use that term. "General" welfare tests are thought to be indifferent to distribution because the only relevant question is the overall value that accrues to everyone, including consumers and producers. By contrast, the consumer welfare principle favors consumers. If a practice leads to lower output and higher prices the consumer welfare principle disfavors it even though the gains to producers might be larger than any losses to consumers. Using total welfare as a baseline, the CW principle redistributes a certain amount of wealth away from producers and toward consumers, but it does not overtly distribute wealth from wealthy to poor, from employed to unemployed, from capital to labor, or along some other axis that we traditionally associate with redistributive policies.

No policy can be characterized as redistributive except in relation to some baseline. In this case, the CW principle correlates strictly with higher output. It favors those interests, including labor and other suppliers, who profit from higher output, and tends to disfavor those who profit from reduced output. From that baseline a policy would be regarded as redistributive if it prefers an outcome which leads to lower output and higher prices but in order to benefit one or more particular interest groups. For example, the consumer welfare 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.[5]

Antitrust policy under the consumer welfare principle is currently navigating between two hazards at the opposite ends of the ideological spectrum. What these two hazards share in common is that both denigrate the importance of high output and low prices as an antitrust goal. On the right, Bork's general welfare approach would permit efficiency claims as an antitrust defense even when specific efficiencies cannot be proven and the challenged practice leads to higher prices that cause 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 neo-Brandeisian approach is also redistributive, tending to redistribute wealth from larger to smaller firms, particularly when larger firms have lower costs. It also redistributes wealth away from consumers and toward these smaller producers.

[5] *See* discussion *infra*, text at notes __; and Herbert Hovenkamp and Carl Shapiro, *Horizontal Mergers, Markets Structure and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

The full story is more complex. First of all, few antitrust outcomes have depended on the choice of a welfare test. Much more significant were the ways Bork credited evidence of competitive harm and offsetting efficiencies. He believed that most practices challenged under the antitrust laws produced cost savings or other efficiencies. With the exception of naked price fixing, he also doubted that these practices caused genuine competitive harm,[6] and he argued forcefully that efficiencies are not susceptible to individual proof. Rather, they must simply be assumed. The impact of this position is dramatic. As soon as efficiencies must be proven efficiency claims become far more tenuous.[7]

By contrast, a central claim of the Neo-Brandeis approach is that markets are fragile, presenting numerous threats of collusion or monopoly. 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, nearly always at consumers' expense.

To date, the strongest and most central claim of the neo-Brandeis movement remains untested; that is its assumption that individuals in our society would really prefer a world characterized by higher prices, but smaller firms. 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 that most citizens believe they would be better off in a world of higher cost smaller firms selling at higher prices, their market behavior notwithstanding. One problem is that these costs have never been calculated, and another is that they have never been effectively communicated. 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 applied to specific practices, other than highly general ones of the nature that Amazon should be regulated in some fashion.[8]

The "Welfare Tradeoff"

Bork's idiosyncratic definition of "consumer welfare" as including producer profits launched a significant debate about economic welfare tests as goals of antitrust policy. Those favoring a general welfare test believe that antitrust should be seek only to maximize aggregate wealth.[9] While such tests come close to Bork's test they are not identical: Bork's concept of

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[6] *See* discussion *infra*, text at notes __.

[7]E.g. see Herbert Hovenkamp, Appraising Merger Efficiencies, 24 George Mason L. Rev 703 (2017).

[8]*See* Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 797-801 (2017). *See also* discussion *infra*, text at notes __.

[9]*E.g.*, Meese, *supra* note __;

"consumer welfare" included the sum of welfare enjoyed by producers and consumers, but he paid little attention to the welfare effects on third parties.

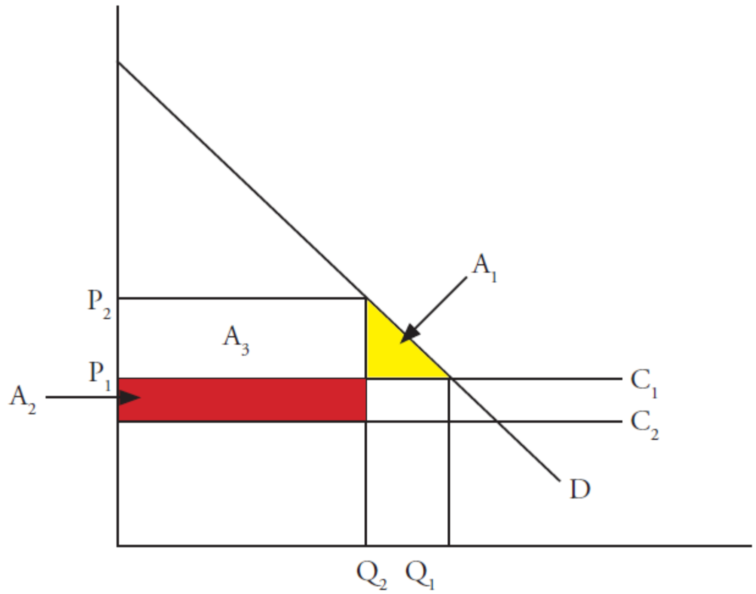
In contrast, consumer welfare focuses entirely on output and, correspondingly, low prices. If consumers lose from a practice, then it is counted as anticompetitive, even if the consumer losses are completely offset by producer gains. In the classic example, suppose a merger of two large firms creates significant market power, raising prices by $1,000. This merger also produces savings in production costs of $1,200. In this case producer gains from productive efficiency exceed consumer losses. This merger would be approved under Bork's standard because it produces net gains. It would be unlawful under a consumer welfare standard, however, because it produces lower output and actual consumer losses and we disregard the producer gains. The most salient characteristic of this merger analyzed under a consumer welfare test is that firm output goes down as a consequence of the merger, and prices accordingly go up.

These alternative welfare tests have become a kind of holy grail for mainstream antitrust thought today. 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 a welfare test or the way in which it is applied. No welfare test can eliminate the exercise of policy 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.[10] In an influential article Oliver E. Williamson presented one of the most reproduced diagrams in the competition policy literature, which illustrates this tradeoff:[11]

[10]While 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.

[11]Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21 (1968).



This figure, which resembles Williamson's, illustrates a market that was competitive prior to a merger, joint venture, or other antitrust practice that simultaneously produces market power and cost savings. Prior to this practice, the market was competitive, with price (P_1) equal to cost (C_1). The practice did two things simultaneously. First, it created market power enabling the firms to raise their price to P_2. Second, however, it produced efficiency gains facilitating a cost reduction to C_2. In the figure, the triangle A_1 is the "deadweight loss," or efficiency loss, occasioned by the price increase and corresponding output reduction. Rectangle A_2, by contrast, represents the gains in productive efficiency. Rectangle A_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_2 is larger than triangle A_1. Williamson surmised that this might often be the case, and that relatively small efficiency gains could offset large price increases, making the exchange welfare positive. For example, under a typical assumption about elasticities of demand, a cost reduction of 4% would be sufficient to offset a price increase of 20% and be welfare neutral. "More generally," Williamson concluded, "it is evident that a relatively modest cost reduction is usually sufficient to offset relatively large price increases" across the most typical range of demand elasticities.[12] He concluded that "a merger which yields nontrivial real economics must produce substantial market power and result in relatively large price increases for the net allocative

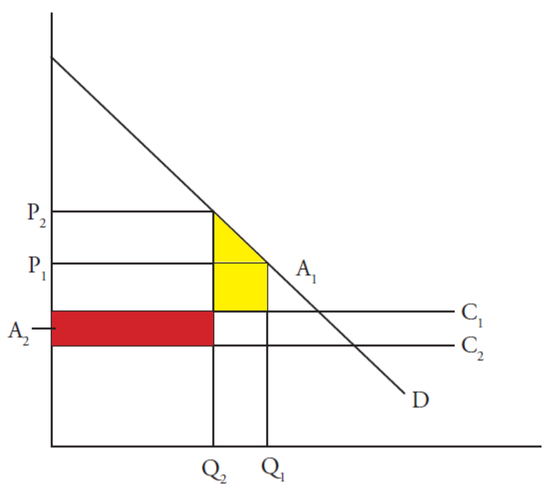
[12] Williamson, id. at 22-23.

effects to be negative."[13] 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 or other antitrust event, but 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_2 and Q_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.[14]

[13] Id. at 23.

[14] The following figure illustrates:



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_1) that are higher than cost (C_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_2 rather than Q_1). Even though the demand curve is identical to

A merger or other antitrust practice such as Williamson illustrated, which shifted a market from perfectly competitive to monopolized, would be very unusual. In most cases where mergers, joint ventures, or related practices are conducive to the creation of market power, the market already exhibits high price-cost margins. Changing the assumption about pre-merger price-cost margins has an important impact on the relationship between efficiency gains and consumer welfare losses. It serves to reduce the efficiency gains, because they will be spread over a lower output, and it increases consumer welfare losses to the extent they are taken away from consumers whose surplus is higher.[15]

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 are so substantial that they result in higher output, then there is 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 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. 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 achieve 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

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the one in the first figure and the per unit amount of the efficiency gains (the height of the rectangle A_2) is the same, it is now no longer clear that the "gain" area covered by the red figure is greater than the "loss" area of consumer deadweight loss + producer profit loss defined by the yellow figure A_1. In general, the higher are the price-cost margins prior to the merger, the greater the efficiency gains that would be needed in order to offset these losses.

[15] *See* the figure, *supra* note 14.

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.[16] 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 its assumption that the merger or joint activity in question created a single-firm monopoly. Many mergers and other practices challenged under the antitrust laws create market power because they facilitate collusion or other forms of coordinated interaction.[17] 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% experience 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 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 above figure 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

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[16] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* §10 (2010), available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[17] *See id*., §7.

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.[18] Indeed, Bork himself described the problem of actual quantification of productive efficiencies in a specific case as "utterly insoluble."[19] Of course, not every case is 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.[20] The obverse is true if a merger creates market power but produces no measurable efficiency gains. In these, computing welfare effects would not be difficult.

In very sharp contrast, assessing the same transaction under a consumer welfare test is relatively easy. One needs to know whether output (Q_2 to Q_1) has gone down or price (P_1 to P_2) 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

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[18]Canadian law, which is more consistent with a general welfare test, provides one controversial decision. *See* Comm'r of Competition v. Superior Propane Inc., 2003 FCA 53 (Can.); Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 455 (2005); Darwin V. Neher et al., *Lessons from the Superior-ICG Merger*, 12 GEO. MASON L. REV. 289, 290 (2003)

[19]BORK, PARADOX, *supra* note __ at 126.

[20]*See Merger Guidelines*, *supra* note __, §§4,5.

antitrust agencies currently apply in evaluating mergers.[21] Nevertheless, the query is simply whether the price is likely to go up or down – much simpler than an inquiry into general welfare effects.

The Importance of the Consumer Welfare Test to Antitrust Policy

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 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. 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 has been on the rise.[22] Accompanying this has been a dramatic rise in firm profits, but stagnant, virtually non-existent growth in wages.[23]

Many of the 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

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[21]*Id*., §10.

[22]Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 9, NBER Working Paper No. 23687 (Aug. 24, 2017), available at http://www.nber.org/papers/w23687. For example, the authors concluded that average markups were about 18% in 1980 but 67% in 2017. *See also* Jonathan B. Baker, *Market Power in the U.S. Economy Today* (Wash. Center for Equitable Growth, March 2017), available at http://cdn.equitablegrowth.org/wp-content/uploads/2017/03/16154837/032017-baker-antitrust-ib.pdf. (exploring numerous explanations). The conclusions about European markets are more diverse and less robust. *See* John P. Weche & Achim Wambach, *The Fall and Rise of Market Power in Europe* (ZEW Discussion Paper #18-003) (2018), available at https://www.econstor.eu/bitstream/10419/173383/1/1011811367.pdf. See also Karl Smith, *Markups and Market Power* (Niskanen Center Aug. 23, 2017), available at https://niskanencenter.org/blog/markups-market-power/ (concluding that the markups are in fact quite skewed, with firms with larger market shares enjoying higher markups). Largely in accord is the Growth Economic Blog, *Rising Markups and Falling Productivity* (Aug. 26, 2017), which observes that the Loecker and Eeckhout data focused on large publicly traded firms, not small business.

[23]*See, e.g.*, David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms* (MIT working paper, May 1, 2017), available at https://economics.mit.edu/files/12979; Jose Azar, Ioana Marinescu, and Marshall Steinbaum, *Labor Market Concentration* at 7-8 (NBER Working Paper No. 24147, Dec. 2017), available at http://www.nber.org/papers/w24147.

particular placed on the impact of unproven but presumed efficiency gains, and the skepticism they showed about anticompetitive practices, particularly those that involved unilateral conduct or vertical agreements. As noted previously, Williamson concluded that a cost reduction from efficiencies of 4% would be sufficient in many cases to offset a price increase of as much as 20% and still be welfare positive.[24]

But Williamson's numbers are thrown completely off if one of his assumptions 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.[25] The result is that an output reduction of a given magnitude reduces consumer welfare by a small amount, because that reduction is coming out of a region where consumers' surplus is small to begin with. Further, efficiency gains in that area are large, because they are spread over a relatively large output.[26] This is rarely the case in merger enforcement. For most challenged mergers price-cost margins were high prior to the merger. The Agencies[27] and economists generally consider high pre-merger margins to be a danger signal indicating prior oligopoly or collusion, or other competitive concerns.[28] Further, in such cases any efficiency gains are distributed over a smaller output.[29] These differences completely upend the benefit-cost balance that Williamson hypothesized. The problem is not limited to mergers. The same thing is true of joint agreements facilitating either collusion or exclusion, and certainly unilateral practices. The vast majority of the plausible claims occur in markets that were already exhibiting high price cost margins before the practice occurred.

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.[30] Then they draw strong inferences of harm from

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[24]Williamson, *Welfare Tradeoff*, *supra note* __ at 22-23

[25]*See* discussion, *supra* at note __.

[26]*See* the figure in note __ and accompanying discussion.

[27] *See* 2010 Horizontal Merger Guidelines, *supra* note __, §§2.2.1, 4.1.3.

[28]*See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 69-72 (2010); Joseph Farrell & Carl Shapiro, *Recapture, Pass-Through, and Market Definition*, 76 ANTITRUST L.J. 585 (2010); Jonathan B. Baker, *Contemporary Empirical Merger Analysis*, 5 GEO. MASON L. REV. 347 (1997).

[29]*See* note __, *supra*.

[30]*See* Hovenkamp and Shapiro, *supra* note __; *and see* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010), available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf

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[31] 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, enforcement policy requires 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.[32] 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 use 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, although it may also reflect an antitrust policy inattentive to labor market monopsony.[33] 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.[34] 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.[35] Another was the FTC's objection to annual

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[31] That 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*, __ Fl. L. Rev. __ (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3181852.

[32] 2010 Merger Guidelines, *supra* note __, §10.

[33] *See* discussion *infra*, text at notes __; and Ioana Marinescu and Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, __ IND. L.J. ___ (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124483.

[34] *See* Hovenkamp, *Regulation and Marginalist Revolution*, *supra* note __.

[35] *See*, *e.g.* *In re* Kellogg, 99 F.T.C. 8 (1982) (dismissing complaint – "“we should not undertake to restructure an industry under Section 5 of the FTC Act without a clear supportive signal from Congress"); *and see* Richard Schmalensee, *The New Industrial Organization and the Economic Analysis of Modern Markets, in Advances in Economic Theory* 253, 258-65 (W. Hildenbrand ed. 1982); *and see* Thomas Campbell, *Predation and Competition in Antitrust: the Case of Nonfungible Goods*, 87 COLUM. L. REV. 1625 (1987).

style changes for automobiles and some other products.[36]

Today we are more likely to think that product differentiation is driven by consumer taste and insistence on variety. In and of itself it is not generally regarded as competitively harmful, and certainly not to the extent that product differentiation withoutmore should be regarded as an antitrust violation. 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.

It should be clear now that there is much 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 at that time, but some of Bork's individual beliefs went 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 disbelieved the theory of oligopoly. As a result, mergers should be considered harmless unless they created a single-firm monopoly.[37] 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.[38]

In addition, Bork took extremely benign positions on all vertical practices, concluding that the best rule for them should be virtual per se

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[36]*See, 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 the industry. *See also* Harold G. Vatter, *The Closure of Entry in the American Automobile Industry*, 4 OXFORD ECON. PAPERS 213 (1952).

[37]*See* BORK, ANTITRUST PARADOX, *supra* note __, 221-222. On this debate within the Chicago School, *see* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, __ NOTRE DAME L. REV. __ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097452.

[38]*See* Herbert Hovenkamp, *Prophylactic Merger Policy*, __ HASTINGS L.J. __ (2018) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090650.

legality except in a small group of cases thought to facilitate collusion.[39] He also believed that predatory pricing is so unlikely to succeed that the best rule for it should be per se legality.[40] 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.

Bork provided little in the way of evidence for these positions. Indeed, he attempted to protect his theories from attempts at falsification by arguing that efficiencies were not susceptible to proof or disproof in particular cases.[41] "The problem of technical efficiencies alone is likely to be beyond the capacities of the law," he wrote.[42] He argued at some length that specific productive efficiencies in a particular case could never be quantified.[43] For that reason he rejected any notion that antitrust policy should include a case-specific "economies defense."[44] Rather, it should simply assume that efficiency justifications overwhelmed the explanations of most challenged practices. He also disagreed with Williamson on this point, who had argued for an economies defense in antitrust cases.[45]

The view toward efficiencies expressed in the 2010 Horizontal Merger Guidelines categorically rejects Bork's position. The Guidelines unambiguously require an efficiencies defense to a prima facie unlawful merger, with the burden of proof on the defendant.[46] Bork's position is also inconsistent with modern statements of the rule of reason, which require a prima facie case of harm, and then shifts the burden of proof to the defendant to show offsetting defenses.[47] At least in dicta, that formulation was accepted by all members of the Supreme Court in the 2018 *AMEX* case.[48] Most

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[39]BORK, ANTITRUST PARADOX, *supra* note __ at 287-288. *See also* Hovenkamp, *Whatever Did Happen*, *supra* note __ at __.

[40]BORK, ANTITRUST PARADOX, *supra* note __ at 144-148.

[41] Id. at 126.

[42] *Id*. at 126-127.

[43] *Id*. at 127-128.

[44] *Ibid*.

[45]*See id*. at 127.

[46]2010 Merger Guidelines, *supra* note __, §10:

> … it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

[47]*See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶1504-1511 (4th ed. 2017).

[48]Ohio v. American Express Co., 138 S.Ct. 2274 (2018). *See* Erik Hovenkamp, *Platform Antitrust*, __ J. CORP. L. __ (2019), currently available at

generally, it reflects considerable advances in industrial organization theory and econometrics that have occurred since the late 1970s.

One possible explanation for Bork's very benign attitudes about competitive harm is that, not only does *The Antitrust Paradox* not reflect subsequent advances in economics, it is also very much an "old economy" book. It was published a generation prior to the *Microsoft* litigation[49] and includes scant mention of intellectual property rights. Bork has a brief discussion of the *International Salt* case and its presumption that a patent creates market power for purposes of tying law,[50] and another brief discussion of the *Walker Process* case and bad faith patent infringement suits.[51] 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.[52] 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[53] deserved to be rejected, as did the per se rule for intrabrand restraints,[54] 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 *Brown Shoe*,[55] was assuredly wrong, as was the view that vertical mergers were bad because they enabled parents to charge their subsidiaries a monopoly price.[56] Equally

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219396. See also Herbert Hovenkamp, Platforms and the Rule of Reason: the American Express Case, 2019 Columbia Bus. L. Rev. 35.

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

[50]*Id*. at 366-367, discussing International Salt Co., Inc. v. United States, 332 U.S. 392 (1947).

[51]*Id*. at 352-355, discussing Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

[52]On the antitrust treatment of vertical practices at mid-twentieth century, *see* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970, Ch. 12 (2015).

[53]*See* 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1710 (4th ed. 2018).

[54]8 Id., ¶1620 (4th ed. 2017) (resale price maintenance); ¶¶1642-1643 (vertical nonprice restraints).

[55]Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962); *see* BORK, ANTITRUST PARADOX, *supra* note __ at 198-224.

[56]*Id*. at 225-245.

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, one cannot answer antitrust's hard question simply by adopting a particular welfare test. One must also have a substantive theory about when practices are anticompetitive and when they are beneficial, as well as a theory about how harms and benefits are to be proved. The real meaning of Bork's views lay not so much in the welfare test that he chose, but rather in his extreme generosity toward efficiency claims, to the point of accepting them without proof, 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 observed previously, it is hard to find even a single case in the United States where the choice of a welfare test has made a difference.[57] 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 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, 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 accused of an anticompetitive practice, which we call the "defendant." The consumer welfare principle says that when evaluating a defendant's activities the policy concern is primarily with the welfare of that entity's consumers. Of course, 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. For example, consumers may pay higher prices to innocent competitors of a cartel

[57]*See* discussion *supra*, text at notes __.

when the price fixers control less than the entire market.[58] 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.[59]

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.[60] Further, even indirect purchasers can obtain an injunction.[61]

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,[62] and has recently received renewed attention in the literature, particularly with respect to labor markets.[63]

Suppliers, including suppliers of labor, are clearly not "consumers" in the conventional usage. Nevertheless, the injury that results from the exercise of monopsony power – i.e., buy-side monopoly power – is 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

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[58]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).

[59]On this issue, *see id.*, ¶346.

[60]Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

[61]2 AREEDA & HOVENKAMP, *supra* note __, ¶346d.

[62]*E.g.*, Mandeville Island Farms v. American Crystal Sugar, Inc., 334 U.S. 219 (1948). On monopsony and its economic effects, *see* ROGER D. BLAIR AND JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (rev. ed. 2010).

[63]*See* Ioana Elena Marinescu and Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, ___ IND. L.J. (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124483; Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, ___ HARV. L. REV. ___ (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129221; C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018).

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."[64] 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 reduced output and higher prices. In the case of a supplier, including a supplier of labor, the primary cause is reduced output and lower selling prices. In both cases there are also injuries to 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 Suppliers, Including Labor

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 and wage suppression suggests that it is time to reconsider that position.

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[64]*See* Hemphill & Rose, *supra* note __; Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018) (using the term "trading parties").

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.[65] Assembling competitive bids is costly, but to the best of my knowledge no court has ever held that these costs justified naked collusion as an alternative.[66] 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 (soft) wheat, which was inferior.[67]

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 product 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,

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[65] 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).

[66] *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).

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

as well as increased output in the market in which the firm sells.[68] While that observation is helpful, the distinction is not always easy to prove. We must 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 susbsistence or customary lifestyle levels.[69] 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.[70] These issues all serve to make the

[68]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.

[69] See, e.g., Maryke Dessing, Labor Supply, the Family and Poverty: the S=Shaped Labor supply Curve, 49 J. Econ. Behavior & Org. 433 (2002).

[70]See Giora Hanoch, The "Backward-Bending Supply of Labor, 73 J. Pol. Econ.

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.[71] Less developed at this writing, but 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.[72]

Antitrust's Left Flank – Reviving Old Debates

Proponents of more general welfare tests come at antitrust's 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.[73] To the extent they have articulated their positions, they say some things that consumer welfarists can agree with, although many 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.[74] They also propose solutions that are broadly redistributive, although consumers are not the beneficiaries; rather the benefits flow mainly to smaller firms or those that are wed to older technologies that have been displaced or threatened by newer ones, digital platforms in particular.

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502 (1965)

[71]*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 __.

[72]*See* 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶914 (4th ed. 2016). Naidu, Posner & Weyl, *supra* note __ attempt an equivalent methodology which they style "downward wage pressure."

[73]*See* Konstantin Medvedovsky, *Hipster Antitrust – A Brief Fling or Something More?*, CPI ANTITRUST CHRONICLE (April, 2018), available at https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Medvedovsky.pdf; Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014), who also notes some self-comparisons to Jefferson and Madison. *See also* Lina Khan, *The New Brandeis Movement*, 9 J. EUROPEAN COMP. L. & PRACTICE 131 (2018).

[74]*E.g.*, Zephyr Teachout and Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POLICY 38 (2014).

The neo-Brandeis movement also exhibits deep suspicion about markets generally, quite aside from monopoly.[75] Its proponents sometimes write longingly about the nineteenth century when the economy was much simpler and property and contract rules were deemed sufficient to govern markets. For example:

> 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.[76]

As a matter of history, that view seems naïve. The first half of the nineteenth century was dominated by major interest group clashes over many aspects of government economic policy, including monopoly, the business corporation, banking, and patent rights.[77] Not many words in nineteenth century discourse evoked more political heat than "monopoly."[78] To be sure, the technological landscape was different, thanks largely to differences in transportation and communication technology, but the conflicts over monopoly and economic power were prominent nonetheless.

While the word "Luddite" is probably too strong, the Neo-Brandeisians exhibit strong ambivalence about innovation, particularly when the firms who engage in it become large.[79] Along with this comes an aversion to business organizations that result in cost savings. Among these are large technological

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

[76]*E.g.*, BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 103, 223-224 (2010).

[77]*See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1990); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996). On patent law and the debates over intellectual property monopoly, *see* Herbert Hovenkamp, *The Emergence of Classical Patent Law*, 58 ARIZ. L. REV. 263 (2016).

[78]*See, e.g.*, STEVEN L. PIOTT, THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST (1985). On the Jackson Era, *see* HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA (rev. ed. 2006). On the post-Civil War era, *see* GRETCHEN RITTER, GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865-1895 (1999)

[79]LYNN, CORNERED, *supra* note __, Ch. 6.

networks such as Amazon, Google and Facebook,[80] and hospital group purchasing organizations, which are associations of hospitals that band together in order to procure supplies at lower cost, but in the process exclude some higher cost suppliers from their purchasing.[81]

The political and economic theory underlying the new Brandeis movement resembles the "Progressive critique" of history and politics originating during the Gilded Age and stretching well beyond the New Deal.[82] That writing saw corporations as powerful and largely harmful forces in American society, viewing large firms as hijacking American business from smaller, independent companies.[83] The Progressive critique believed that business consolidations, or "trusts," were invariably harmful.[84]

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[80]*See* Lina Khan, *The Separation of Platforms and Commerce*, 119 COL. L. REV. ___ (2019) (forthcoming), abstract available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180174.

[81]*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).

[82]*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).

[83]*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).

[84]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 COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES 221-251 (Daniel A. Crane

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.[85] The Progressive critique and the New Brandeis movement also believe that exclusionary strategies such as predatory pricing are a common device by which firms create dominant positions[86] or force targeted firms to merge.[87] 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.[88] Just as the Progressive critique, the New Brandeisians adhere to a variety of "leverage" theories – which neo-Brandeisians sometimes term "pincer" monopoly[89] -- 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

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& 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).

[85] 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). On the development and meaning of separation of ownership and control, *see* HOVENKAMP, OPENING, *supra* note __ at 172-183.

[86] *E.g.*, IDA TARBELL, THE STANDARD OIL COMPANY 156, 188, 236 (1904); Edward S. Roger, *Predatory Price Cutting as Unfair Trade*, 27 HARV. L. REV. 139 (1913); HERBERT FRANCIS TAGGART, MINIMUM PRICES UNDER THE NRA 38 (1936). One of the most influential early attempts to debunk these claims was John S. McGee, *Predatory Price Cutting: the Standard Oil (N.J.) Case*, 1 J. L. & ECON. 137 (1958). *See also* LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890-1940 at 277-279 (2018). *See also* Butler D. Shaffer, *In Restraint of Trade: Trade Associations and the Emergence of "Self Regulation*," 20 SW. U. L. REV. 289, 317 (1991).

[87] *Cf.* LYNN, CORNERED, *supra* note __, 32-42-, 211-218 (using as an example the brewers Luxottica and InBev).

[88] E.g., Khan, *Amazon's Antitrust Paradox*, *supra* note __ at 756-761.

[89] LYNN, CORNERED, *supra* note __,16-22.

operate in order to subsidize predatory pricing in more competitive markets.[90] The progressive critique and the New Brandeis movement are both also ambivalent or even hostile toward intellectual property rights.[91] Both hold strong views about the extent of and harm caused by industrial concentration and high entry barriers.[92] Both the Progressive critique and the New Brandeisians are highly suspicious of vertical integration,[93] including practices such as tying and exclusive dealing by which suppliers control their dealers.[94]

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[90] *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. The theory irrationally 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).

[91]*See* discussion *supra,* text at notes __; and see DE WITT, *supra* note __at 133 (use of patents to "choke off competition and gain control of an industry"). On late nineteenth century hostility toward patents as monopolistic, *see* HOVENKAMP, OPENING, *supra* note __, Ch. 10.

[92]HENRY CALVERT SIMONS, A POSITIVE PROGRAM FOR LAISSEZ-FAIRE 20-21 (1934). *See also* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 292 (1966, reprint 1995). On Simons and the subsequent evolution of the Chicago School on issues pertaining to industrial concentration, *see* Robert Van Horn, *Chicago's Shifting Attitude Toward Concentrations of Business Power* (1934-1962), 34 SEATTLE UNIV. L. REV. 1537 (2011). On the New Brandeis movement and entry barriers, *see* Khan, *Amazon's Antitrust Paradox, supra* note __ at 719-720, 768-770.

[93]*E.g,.* ARTHUR R. BURNS, THE DECLINE OF COMPETITION (1936) (blaming much of the observed decline in competition on vertical integration); *see also* SIMONS, POSITIVE PROGRAM, *supra* note __, 20-21 (vertical integration as anticompetitive).

[94]On the history of hostility toward vertical integration in mid-twentieth century

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 argues, antitrust policy has ignored other values such as fairness or protection of small business.[95] What is far less clear is exactly how these goals should be weighed and balanced against each other in the assessment of particular practices. 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.[96] 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.[97] 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.[98] Rather, it came from small sellers banding together simply to force manufacturers to guarantee them higher margins.[99] The Fair Trade League and various "open price" associations also campaigned heavily to permit information exchanges intended to blunt "cutthroat" competition.[100] As a Supreme Court Justice,

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antitrust policy, *see* HOVENKAMP, OPENING, *supra* note __, Ch. 12; on the reaction, *see* Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L.J. 983 (2014). Cf. Carbice Corp. v. Patents Development Corp., 283 U.S. 27 (1931) (per Justice Brandeis -- condemning nonforeclosing tie in competitive market under patent misuse doctrine). *Cf*. LYNN, CORNERED, *supra* note __, 16-22, 27-30, 160-161.

[95]A good summary of these various arguments is LYNN, CORNERED, *supra*, note __.

[96]Khan, *Amazon*, *supra* note __ at 797-801.

[97]*See* LYNN, CORNERED, *supra* note __ at 136-137.

[98]On these rationales for RPM, *see* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §11.3 (5th ed. 2015).

[99]See SAWYER, AMERICAN FAIR TRADE, *supra* note __ at 109-112.

[100]Their champion here was ARTHUR JEROME EDDY, THE NEW COMPETITION: AN EXAMINATION OF THE CONDITIONS UNDERLYING THE RADICAL CHANGE THAT

Brandeis himself wrote a stinging dissent in a decision striking down a statute that attempted to limit the growth of chain stores.[101] Brandeis' concern was the injury caused by the chains' lower prices. He blamed this phenomenon on the "corporate form" that enabled chain operations[102] and yearned for the day when retailers were not incorporated, or their size was limited.[103] 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.[104] 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.[105] They were somewhat less successfully promoted in the late 1960s and 1970s, but undermined by Richard Nixon's election[106] just as the Chicago School was finding its voice in legal antitrust circles.[107] 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.[108]

Moving forward a century, the *eBooks* case returned to some of these

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IS TAKING PLACE IN THE COMMERCIAL AND INDUSTRIAL WORLD (1912). *See also* MILTON NELSON, OPEN PRICE ASSOCIATIONS (1923); FRANKLIN D. JONES, TRADE ASSOCIATION ACTIVITIES AND THE LAW (1922).

[101]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).

[102] Id. at 548-549.

[103] Id. at 553-554.

[104]SAWYER, AMERICAN FAIR TRADE, *supra* note __.

[105] 15 U.S.C. §13. *See* discussion *infra*, text at notes __.

[106] See, for example, the fate of the interventionist Neal Report, which was undermined by the election of Richard Nixon. *Report of the White House Task Force on Antitrust Policy* (May 27, 1969), 115 Cong. Rec. 11, 13890 (1969). See Herbert Hovenkamp, *The Neal Report and the Crisis in Antitrust*, 5 COMPETITION POLICY INT'L 217 (April 30, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348707.

[107]*E.g.*, RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); Richard A. Posner, The Chicago School of Antitrust Analysis, 127 U.Pa.L.Rev. 925 (1979). *Cf.* Frederic M. Scherer, *The Posnerian Harvest: Separating the Wheat from Chaff*, 86 YALE L.J. 974 (1977) (reviewing RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976)).

[108]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).

issues.[109] 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 for royalties.[110] 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.[111]

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.[112] Amazon did for a time sell some ebooks as a price that "roughly matched the wholesale price of many of its ebooks."[113] The New Brandeis literature suggests that this was predatory pricing.[114] 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.[115] 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

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[109]United States v. Apple, Inc., 992 F. Supp. 2d 263, 266 (S.D.N.Y. 2014), *aff'd*, 787 F.3d 131 (2d Cir. 2015).

[110] For an analysis of the cost changes justifying radical price reductions, *see* Herbert Hovenkamp, *Antitrust and Information Technologies*, 68 FLA. L. REV. 419, 437-445 (2016).

[111]Examples include JANE AUSTEN, PRICE AND PREJUDICE; or ALEXANDRE DUMAS, THE THREE MUSKETEERS. All in all, Amazon offers more than 50000 titles at a price of zero. See https://smile.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Ddigital-text&field-keywords=free+kindle+books&rh=n%3A133140011%2Ck%3Afree+kindle+books&ajr=0. Other sources of free ebooks include Free-Ebooks.Net, at https://www.free-ebooks.net/; and Gutenberg, at http://www.gutenberg.org/.

[112]Even members of the New Brandeis movement acknowledge this. *See* Khan, *Amazon*, *supra* note __ at 758 (noting that the publishers feared that Amazon's aggressive pricing for ebooks "would permanently drive down the price that consumers were willing to pay for all books.").

[113] United States v. Apple, Inc., 952 F.Supp.2d 638, 649 (S.D.N.Y. 2013). In an earlier decision that court undertook a lengthy analysis of the predatory pricing claim and found it unsupported. United States v. Apple, Inc., 889 F.Supp.2d 623, 640-644 (S.D.N.Y. 2012).

[114]Khan, *Amazon, supra* note __ at 757 & n. 240.

[115]*See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶746 (4th ed. 2015).

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.[116] 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 patented drug may require five years of sales in order to recoup its investment. But 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.[117] 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.[118] 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,[119] mainly because of FBA's fulfillment network that gives it uncompared proximity to customers nationwide.[120] 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"[121] that could not be ignored, and that antitrust policy must consider "justice" or

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[116] *See id*., Ch. 7C.

[117] Khan*, Amazon's Antitrust Paradox, supra* note __ at 792-797.

[118] *Id*. at 775-776.

[119] *See* discussion *infra*, text at notes __.

[120] See Khan, Amazon, supra, note __ at 777-778.

[121] Robert Pitofsky, *The Political Content of Antitrust*, 127 UNIV. PA. L. REV. 1076 (1979). *See also* Lawrence Sullivan, *Antitrust, Microeconomics and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980).

fairness as important noneconomic goals.[122] 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."[123] 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."[124] 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."[125]

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 efficient competition. Populist goals and efficiency goals are consistent over a wide range.[126]

Is there is 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

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[122] *E.g.*, Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 UNIV. PA. L. REV. 925 (1979). *See also* Lawrence Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977). For a brief retrospective, see Harry First, *Woodstock Antitrust*, CPI ANTITRUST CHRONICLE 1 (April 2018) (dating the era from 1969 to 1979).

[123] 1 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶109, at 21 (1978).

[124] *Id*. at 22. On the meaning and history of antitrust populism, with a good collection of sources, *see* Barak Orbach, *Antitrust Populism*, 14 NYU J. L. & BUS. 1 (2017). Orbach defines antitrust populism as "the use of thin ideas, exaggerations, and anxieties to advance antitrust theories," with "anti-bigness" as a uniting force." On the claims of antitrust populism tested against the evidence, *see* Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. 2017 (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

[125] Louis B. Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 UNIV. PA. L. REV. 244, 251 (1979), citing HANS THORELLI, THE FEDERAL ANTITRUST POLICY 67-68, 91-96 (1955).

[126] AREEDA AND TURNER, ANTITRUST LAW, *supra* note __, ¶110 at 23.

are the evil that antitrust should be combatting. 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.[127] They argue that a concern with efficiency lacks support in the legislative history.[128] 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,[129] 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 or an explanation 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 and yearns for its image of the American economy prior to the Civil War.[130] Under this perspective the problem started with the explosion in the growth of the corporation during the gilded Age.[131] Just as the progressive critique, the argument 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. 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 it is that political approaches have rarely

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[127]*See, e.g.*, Barry Lynn, "The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?" Testimony before the Senate Committee on the Judiciary: Subcommittee on Antitrust, Competition, and Consumer Rights, December 13, 2017.

https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf (no page numbers).

[128]*E.g.*, Khan, *Amazon*, *supra* note __ at 719-722 and *passim*.

[129]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).

[130]LYNN CORNERED, *supra* note __, 24, 99-102. *See also* Lynn, "Consumer Welfare Standard," supra note __.

[131] Id. at 225.

accomplished anything. They have 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.[132] 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.[133] 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. Customers appear not to be complaining about monopoly prices. If suppliers are complaining, what are the relevant practices and how are they injured?[134] 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," in the words of one neo-Brandeis critic,[135] as a rationale for antitrust relief -- 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.[136] The ebook revolution has moved the price of that portion of the book market 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.[137] Brick and mortar

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[132]Arguing this point very forcefully was Richard Hofstadter, *Whatever Happened…*, *supra* note __; *see also* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement*, 93 NOTRE DAME L. REV. 483 (2018).

[133]*E.g*., Khan, *Amazon*, *supra* note __.

[134]Khan herself acknowledges that customers are happy. Id. at 713-716.

[135]See i*d.* 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.

[136] https://www.statista.com/statistics/560733/book-publishing-revenue-usa/. Measured by units they have been flat, indicating that the per copy price has trended upwards. https://www.statista.com/statistics/240088/total-book-sales-of-the-us-book-market-by-quantity/.

[137] See, e.g., June Sproat, *What are the Publishing Standard Royalty Rates?* (July

book sellers have suffered, but their injury has resulted largely from a technology – direct electronic distribution – that has made them superfluous to the ebook segment of the market. It is not antitrust purposes to force distribution channels to maintain institutions that no longer perform a valuable function.[138]

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 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. "[139]

Lina Khan agrees, suggesting that the Act's "prohibition against price discrimination effectively curbed the power of size."[140] In the process she praised the Supreme Court's *Utah Pie* decision, in which a firm successfully used an earlier version of the statute to protect its local near monopoly position from competitive entry.[141]

The historical record of the Robinson-Patman Act shows a very different reality. The statute was one of the strongest instances of legislative

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19, 2017), available at https://penandthepad.com/publishing-standard-royalty-rates-5019879.html (noting that ebook royalty rates (25%-50%) are moving higher than for print books (10%-15%)).

[138] *See* Hovenkamp, *Technology*, supra note __.

[139] 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.

[140] Khan, *Amazon*, *supra* note __ at 724.

[141] 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 was passed in 1914 and condemned "primary line" price discrimination as a form of predatory pricing.

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.[142] 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 aggressively low priced K-Marts, Wal-Marts, and McDonald's of the world all grew up even 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, more aggressive rivals."[143] It condemned its actions under the Robinson-Patman Act nonetheless.

Conclusion: Trading Off Consumer Welfare

Much of the debate about the appropriate role of antitrust in the economy comes down to one question: Why do firms become large? For the neo-Brandeis movement, just as for the progressive critique a century earlier,[144] the driver was politics and lax legal policy, including antitrust enforcement. For more centrist antitrust, the principal driver has been technology and innovations in distribution, but coupled with a certain amount of anticompetitive practice.

Of course, if bigness is a consequence of nothing more than politics, then we can reduce the size and reach of business firms without significant welfare loss. Consumers might even benefit. By contrast, if technology and innovation are a significant contributor to bigness, then deconcentration will

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[142] *See* FREDERICK ROSE, PRICE DISCRIMINATION UNDER THE ROBINSON_PATMAN ACT 10-13 (1962); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000).

[143] Mid–South Distributors v. FTC, 287 F.2d 512, 514 (5th Cir.), cert. denied, 368 U.S. 838 (1961) (organization of small purchasers of automobile parts); accord Standard Motor Prod., Inc. v. FTC, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826, 80 S.Ct. 73 (1959).

[144] *See* discussion *supra*, text at notes __.

come at a cost, and perhaps a very large one. The question then becomes whether this cost is one that members of a democratic society will be willing to bear.

One significant advantage that the consumer welfare principle has over alternative approaches focused on general welfare is that it does not require a tradeoff between higher consumer prices and efficiency gains.[145] Rather, if consumer prices are higher, or output lower, we condemn the practice, largely without regard for productive efficiency gains. Factually, of course, the consumer welfare 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. 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.[146] 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, exactly how they are injured, and what is the appropriate remedy remain 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.[147] 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, without excessive amounts of balancing. 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

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[145]*See* discussion *supra*, text at notes __.

[146]LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (1934).

[147]*See* Herbert Hovenkamp, *Antitrust Balancing*, 12 NYU J. L. & BUS. 369 (2016).

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.[148] We can debate if we want whether opinion polls or markets are more accurate reflectors of preference,[149] 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 consumer welfare 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.[150] 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 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.[151]

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. 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

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[148] 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 retailers impacted your business's sale." Of these, two-thirds sell through their own websites, 24% through Amazon, and 22% through eBay. The numbers add up to more than 100 because several retailers use multiple platforms. See https://www.insureon.com/resources/research/small-business-online-sales-revenue-poll (last visited June 12, 2018).

[149] 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).

[150] *See* discussion *supra*, text at notes __.

[151]See Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

Amazon cut its own price on several products that Quidsi also produced.[152] 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.[153] Another is vertical mergers, recently evidenced in the government's unfortunate loss in the *AT&T/Time-Warner* case.[154] As that decision itself lamented, the Government stopped updating the vertical merger Guidelines more than 30 years ago.[155] Since that time mainstream economic understanding of the anticompetitive potential of vertical mergers has increased significantly.[156]

For the most part, established antitrust tools are up to these tasks. Further, 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 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 it 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.

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[152]See Khan, *Amazon*, *supra* note __ at 768-769.

[153]Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, 94 J. POL. ECON. 266 (1986). On the theory, *see* Christopher R. Leslie, *Revisiting the Revisionist History of Standard Oil*, 85 S.CAL. L. REV. 573 (2012); Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic theory and Legal Policy*, 88 GEO. L.J. 2239 (2000).

[154] United States v. AT&T, ___ F.3d ___, 2019 WL 921544 (D.C.Cir. Feb. 26, 2019).

[155] Id. at __.

[156] See, e.g., Steven C. Salop, Invigorating Vertical Merger Enforcement, 127 Yale L.J. 1962 (2018); Serve Moresi & Steven C. Salop, VGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers, 79 Antitrust L.. 185 (2013); Michael H. Riordan, Competitive Effects of Vertical Integration, in HANDBOOK OF ANTITRUST ECONOMICS 145 (Paolo Buccirossi ed., 2008).