THE SLOGANS AND GOALS OF ANTITRUST LAW

Herbert Hovenkamp*

Contents

INTRODUCTION ................................................................. 1

“BIGNESS” ........................................................................... 7

Brandeis: Protection of Small Firms and Old Technologies ......................... 14

Brandeis’ Efficiency Dilemma ...................................................................... 25

Anti-Bigness Beyond Brandeis ..................................................................... 34

Size or Concentration? .................................................................................. 36

Bigness and Political Power: Trade Associations ......................................... 39

Conclusion ................................................................................................... 43

THE “COMPETITIVE PROCESS” ......................................................... 44

ANTITRUST “WELFARE” TESTS ......................................................... 51

Economic Welfare, Historically Considered ................................................ 54

True Consumer Welfare and Efficiencies .................................................... 63

Measuring “Welfare” in Antitrust Cases ...................................................... 66

Welfare and Damages ................................................................................... 69

Welfare and Output ...................................................................................... 70

Introduction ................................................................................................ 70

Output as a Proxy for Welfare ....................................................................... 72

Product Output and Harm to Labor .............................................................. 76

Possible Output Anomalies .......................................................................... 77

CONCLUSION ...................................................................................... 83

Introduction

The antitrust laws seldom provide precise definitions of the conduct they prohibit, such as driving at more than 70 miles per hour or paying taxes later than an April 15 deadline. Instead, litigants, agencies and courts struggle with language that is far less precise, such as conduct that “restrains trade,” “monopolizes,” or “substantially

*James G. Dinan University Professor, Univ. of Pennsylvania Carey Law School and the Wharton School. Thanks to Erik Hovenkamp, Ioana Marinescu, and Steven Salop for comments on a draft, and to Nikki Bourassa for research assistance.

Electronic copy available at: https://ssrn.com/abstract=4121866
lessens competition.”

EU Law is only slightly more helpful. While Article 101 of the TFEU prohibits several specific types of agreements, most of them are stated in a way that leave considerable room for interpretation. The “abuse … of a dominant position” language of Article 102 is equally ambiguous.

Considering mainly U.S. antitrust law, over the years the courts, enforcement agencies and other writers have attempted to provide direction through brief expressions of purpose. One that is enthusiastically promoted by antitrust’s left is the idea that antitrust should be opposed to “bigness.” A second, advocated by people of

---

3 Id. art. 102, prohibiting:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
diverse ideologies, is that antitrust’s purpose is “protection of the competitive process.”

A third set of approaches ties antitrust policy to some conception of welfare. These have the advantage that they are more aligned with the general economics of welfare, which emphasize competitive markets, productivity and growth, broad opportunities for consumer choice and labor, and the ability of legal policy to deliver prosperity to those who are affected by it. They have the disadvantage of a long history of dispute about meaning and measurement.

The term “consumer welfare” is widely used and criticized as a way of applying these concerns to competition policy. That term has two definitions, however, which can embrace very different approaches to antitrust policy. Failure to appreciate the differences between these two approaches very likely accounts for much of the objection that has been raised to consumer welfare approaches.

Further, an often-missing detail in discussions of consumer welfare as an antitrust goal is that “welfare” is almost never what antitrust policy and litigation actually measure. Rather they focus on two types of evidence that are more accessible – namely, output and price. While antitrust policy often speaks about consumer “welfare” as the appropriate antitrust goal, the thing that it actually measures is either changes in output or changes in price.

None of these expressions of purpose is explicit in the antitrust statutes themselves. They are useful mainly to the extent that they provide additional guidance for interpretation of the statutory language. To have value a statement of purpose must add some meaning to the language that is already in the statutes, without contradicting it. For example, does “consumer welfare” add any substance to Sherman Act §1’s condemnation of contracts that “restrain trade”? Or does the phrase “protection of the competitive

\footnote{See discussion infra, text at notes __.}
process” add much to determining whether particular conduct “monopolizes” or “lessens competition”?

These various expressions can also be described as either slogans or goals. Slogans are intended to produce broad assent, even among people who might disagree strongly about specific rules or outcomes. As a statement of antitrust principles, a slogan is generally pleasing to hear and difficult to dispute. In the abstract, who can disagree with the idea that antitrust should protect the “competitive process”? “Protection of the competitive process” is a slogan, not a goal.

While slogans usually produce widespread assent, they have the disadvantage that they do not define the types of conduct that they do and do not condemn. Indeed, that is why they can claim such broad agreement. In contrast to slogans, the term “goal” implies an identifiable target, such as a soccer goalpost or a basketball hoop. Goals are less likely to claim broad assent. Once a particular goal is accepted, however, it produces more consensus around a particular outcome. This is not to say that goals are easy to measure, and often they are not. Rather, a goal creates a common set of criteria for measurement. It does not remove every dispute about whether a particular player actually scored.

Most of these statements of antitrust’s purpose are fundamentally economic. Here, welfare approaches are the most useful because of their economic definitions of competition, monopoly, and growth, as well as their use of economic tools to interpret evidence. The idea that antitrust should pursue bigness as such is an exception, although even that depends on the criteria that we use to identify “big” actors.

The antitrust statutes themselves and their early interpretation can be helpful. At common law the term “restraint of trade” in Section 1 of the Sherman Act was applied to restrictions on the volume of
output or trade. This formulation preceded any coherent conception of the idea of “welfare” in modern economics, which is largely a creature of the 1920s and 1930s. Early scholarship and case law on the antitrust laws and trusts adopted this output-focused definition, using such phrases as “restrict output” or “restrict production.” The Republican Platform under which Theodore Roosevelt was elected President in 1900 spoke of conspiracies to “limit production” and “control prices.” To “monopolize,” as §2 of the Sherman Act forbids,

---

6 See, e.g., ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932); see also J. R. Hicks, The Scope and Status of Welfare Economics, 27 OXFORD ECON. PAPERS 307 (1975) (arguing that Pigou was originator of modern welfare economics, although conceding that a case can be made for Pareto, who wrote earlier).


8 The 1900 Republican party platform stated:

[W]e condemn all conspiracies and combinations intended to restrict business, to create monopolies, to limit production, or to control prices, and favor such legislation as will effectively restrain and prevent all such abuses,
was a clear reference to an economic conception associated with higher prices and, accordingly, reduced output.\textsuperscript{9} Article 102 of The European Union’s TFEU also refers to abuse of a dominant position as “limiting production.”\textsuperscript{10}

Notwithstanding the overwhelming Progressive influence that guided passage of the Clayton Act in 1914, the substantive provisions all use similar and unambiguously economic terms. They condemn price differences, tying, exclusive dealing and mergers, but only when their effects may be “substantially to lessen competition,” or “tend to create a monopoly.”\textsuperscript{11}

Alternatives that view the purpose of antitrust in terms of non-economic goals such as justice or fairness have been around since the antitrust statutes were passed, but they are not reflected in the statutes and have never claimed broad consensus.\textsuperscript{12} They invariably fall apart when forced to make specific rules. These alternatives usually boil down to some form of small business protectionism, often based on nostalgia for a time gone by when the economy was governed by smaller firms with less organized distribution systems or more

\textsuperscript{10} \textit{See} note \___, \textit{supra}.
\textsuperscript{11} \textit{See} 15 U.S.C. §§ 13 (predatory price discrimination), 14 (tying and exclusive dealing), 18 (mergers).
primitive technology. They also reflect the significant power of trade associations and other organizations that support these groups.\textsuperscript{13}

This paper evaluates the most commonly used expressions about the purpose of antitrust law. The first, control of \textquotedblleft bigness,\textquotedblright has never been a declared goal in antitrust legislation or judicial decision making, and the Supreme Court has repeatedly rejected it as an antitrust goal.\textsuperscript{14} That may change, however, depending on the passage of legislation concerning large digital platforms that Congress is contemplating. At this point whether it is best treated as a slogan or a goal is hard to say. The second, \textquotedblleft protection of the competitive process,\textquotedblright is almost always used as a slogan. While it has rhetorical appeal, no one has yet figured out how it should be applied as a decisional tool. Finally, the idea that antitrust should be concerned with some conception of welfare very likely remains dominant as an articulation of antitrust’s goals, even though ideological abuse and definitional problems have threatened its effectiveness.

\textit{“Bigness”}

While it has never obtained much traction in the legal literature, the idea that antitrust should be concerned with corporate \textquotedblleft bigness\textquotedblright has been popular with the public since the beginning of the antitrust movement, and continues to be so.\textsuperscript{15} It also has the populist rhetorical advantage that it avoids the need for more refined assessment and can make expertise unnecessary. For example, determining whether a firm’s product dominates a properly defined relevant market can be a quite technical exercise. Determining whether a firm is \textquotedblleft big\textquotedblright need not be.

\textsuperscript{13}See discussion \textit{infra}, text at notes __.
\textsuperscript{14}See discussion \textit{infra}, text at notes __.
The stated concern is that “bigness” itself is the evil, often ignoring many characteristics of large firms that are beneficial and even essential to the economy and society. In this sense “bigness” operates in populist antitrust rhetoric much like the word “immigrant” does in right-wing populist political rhetoric, using a single term to mask a complex phenomenon. The anti-immigrant rhetoric ignores the fact that we are a nation of immigrants, that they have always been central to American economic and social development and diversity, and that new immigration is essential to economic growth. In the same way, the large business firm has been a significant driver of American economic growth, innovation, variety, opportunity, and consumer welfare. There is no “curse” of bigness any more than there is a curse of immigrants.

While pre-Sherman Act history is filled with rhetoric about monopoly, as a a legal term it did not refer to firms of large size, but rather to exclusive grants or privileges. For example, the 1623 British Statute of Monopolies, often identified as the source of British anti-monopoly law, did not identify its targets by size. Rather, it condemned “commissions, grants, licenses, charters, and letters patents” that conferred exclusive rights. Pre-Sherman Act common law in both England and America did the same, never referencing large firms as such, but rather products that enjoyed a state-granted exclusive right. Indeed, many of the pre-Sherman Act decisions discussing “monopoly” were in reference to small structures such as a single toll bridge that may or may not have had an implied monopoly

---

right. Even the “monopoly” conferred by a patent was often small. In any event, the patent “monopoly” applies to a particular product or process, saying nothing about the size of its owner.

Nevertheless, fear of “bigness” is deeply rooted in antitrust’s popular history. For example, Progressive novelist Frank Norris presented a fictional California railroad as an “Octopus” in his 1901 novel of that title, with tentacles strangling many aspects of California agriculture and politics. Ida Tarbell adopted the same metaphor in her 1904 History of the Standard Oil Company. That same year Puck magazine printed its famous Standard Oil Octopus cartoon, entitled “Next,” depicting the Standard Octopus’s ominous and ever-expanding dominance over American institutions, encircling even the Capital:

---

18 The most well known was Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge, 36 U.S. 420 (1837), which considered whether a grant of a charter for a toll bridge across the Charles River from Boston to Cambridge implied a monopoly provision when none was stated in the grant. The majority, speaking through Chief Justice Taney concluded that in “grants by the public, nothing passes by implication”). The company in question apparently owned only the one particular bridge. See Reporter’s note, id. at 420, and the Chief Justice’s opinion, id. at 536-537.

19 E.g., Adams v. Burke, 84 U.S. 453, 456 (1873) (speaking of a patent monopoly for an improvement in a coffin lid that enabled an identification plate to be observed even when the lid was open).

20 Note __.

21 Ida M. Tarbell, The History of the Standard Oil Co. 182 (1904) (speaking of Standard’s policy of buying up rivals, who “fell shivering with dislike into the embrace of this commercial octopus…”).

Other Progressive writers used that metaphor even earlier, as did some courts, while still others called it into question.

---

23For example, the racist anti-Chinese cartoonist George Frederick Keller depicted the California railroad system as an octopus in a cartoon entitled “The Curse of California,” in 9 THE WASP 520 (1882). The image is in the digital archives of the National Humanities Center, along with several other early cartoons (1882-1909) portraying the large firm as an octopus. See also LYMAN HORACE WEEKS, THE OTHER SIDE 5 (1900) (“Pulpit and platform, newspaper and magazine vied with each other in condemning “the octopus,” as the trust came to be termed.”).


25In 1900 Progressive economist John Bates Clark described the term “octopus” as inadequate to describe the structural features of trusts. John Bates Clark, Trusts, 15 POL. SCI. Q. 181 (1900). See also Henry R. Hatfield, The Chicago Trust Conference, 8 J. POL. ECON. 1, 8 (1899) (noting the accusation of “octopus” levied against the trusts but suspecting their validity and suggesting that the term reflected “the American proclivity for finding some convenient scape-goat on which any and all evils may be laid.”); Norbert Heinsheimer, The Legal Status of Trusts, 2 COLUM. L. TIMES 51, 58 (1888) (denying that the trust was an octopus; rather it was simply a lower cost way of organizing production).
The Octopus metaphor was brilliant because it captured not only size as such as a menace, but also expansion into secondary markets and control of power in all places where power could be maliciously exerted. The operational and sentient core was the octopus’ body, while the mindless tentacles became its virtually unlimited reach. For example, it was used decades later in opposition to a firm’s vertical integration into related markets.26

The immense popularity of this rhetoric aside, one is hard pressed to find a single antitrust decision that broke up or even disciplined a large firm simply because it was too big. Indeed, early antitrust decisions involving dominant firms typically read like tort decisions, with heavy emphasis on numerous and diverse types of bad conduct.27

Nor is there any coherent basis for attacking bigness as such in the economics literature. Antitrust tests that target mere size do not work if the goal of the antitrust law is to deliver higher output, lower prices, greater consumer satisfaction, greater opportunities for labor, or more innovation. The relationship between these things and firm size is an empirical question, but there is certainly no general evidence that any one of them suffers as firm size is larger. Much of the evidence is to the contrary. Historically, most of the opposition to the emergence of large firms has come from competitors complaining about lower prices or innovations that harmed them.

Large firms often have lower costs and prices than smaller firms. Indeed, that is a principal reason that trade associations made up of smaller firm organized against them.28 For a century, large firms

26 See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding state statute that prevented gasoline refineries from owning service stations in the state; see id. 143 n. 8 (Blackmun, concurring and dissenting in part, and noting that the octopus metaphor was used to describe the practice of refineries acquiring their own retail stations; Justice Blackmun presented this as evidence of legislative capture by the retailers).
27 See Hovenkamp, supra note 12.
28 See discussion infra, text at notes ___.
have paid higher wages than small firms. Although that difference has diminished in recent years, it remains substantial.\textsuperscript{29} Historically, larger firms have also invested more in innovation than smaller firms.\textsuperscript{30} As a result, stating the antitrust threat as “bigness” frequently reduces to an attack on low prices, the well-being of consumers and labor, and promotion of innovation as antitrust goals. Both consumer purchase and labor are “variable” in the sense that both are highly responsive to changes in output. Each is better off as output increases.\textsuperscript{31} The protected class is typically smaller businesses or those that have not modernized their technologies. To be sure, large size may create opportunities for competitive behavior, but in that case the behavior itself should be analyzed.

Size works better as a target if the goal is to protect higher cost or less innovative producers. If a nondominant firm offers higher prices or reduced quality, it will lose too many sales. The market power requirement is designed to address this issue. However, a firm that offers lower prices or greater innovation can injure higher cost or less innovative rivals even if it is not dominant within its market. This


was true of the chain stores, for example, who drove many independent retailers out of business even though they had individually nondominant market shares. In the 1930s even A&P, the large grocery chain that provoked Congress to pass the Robinson-Patman Act, accounted for less than 10% of the national market for purchasing of food for grocery sales. Its share was not more than 20% in any regional market. As a result, the value of bigness tests depends on one’s *a priori* selection of a goal for antitrust policy. Targeting “bigness” as such usually benefits competitors at the expense of consumers and labor.

United States antitrust law has been consistent that large size alone cannot be an antitrust offense. Further, an antitrust policy of condemning “bigness” is not the same thing as a policy of reducing the amount of market power in the economy. To be sure, firm size and market power are correlated in the sense that once a market is defined, size within that market reflects power. But looking at size alone never gets us there. For example, Chrysler as automobile producer is thousands of times larger than the only swimming pool contractor in Ozona, Texas, an isolated community of fewer than 3000 people. But this contractor may wield more market power to the extent that those

32 See discussion *infra*, text at notes __.
34 See, e.g., United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) (“[T]he law does not make mere size an offense . . . .”); United States v. Aluminum Co. of America (*Alcoa*), 148 F.2d 416, 430 n.2 (2d Cir. 1945) (quoting *U.S. Steel*, 251 U.S. at 451); *see also* United States v. Int’l Harvester Co., 274 U.S. 693, 708-09 (1927) (“[Antitrust law] does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct.”); *cf.* United States v. Line Material Co., 333 U.S. 287, 310 (1948) (holding “mere size” of a patent pool was not grounds for condemnation under the Sherman Act). Among more recent decisions, see, e.g., Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 451 (7th Cir. 2020) (quoting the “mere size” statement from *U.S. Steel* and adding that “judicial decisions interpreting Section 2 have long held that simple possession of monopoly power, or the pursuit of it, is not in itself illegal”).
wishing to install swimming pools in Ozona have no good alternatives. Chrysler must compete with Ford, GM, Toyota, Nissan, and others. Notwithstanding its much larger size, Chrysler has much less market power.

The functional difference between “market power” and “bigness” as targets of antitrust is that the market power requirement is directly linked to the threat of higher prices or reduced market output. Market power technically defined is the ability to profit by raising prices above cost.  

Brandeis: Protection of Small Firms and Old Technologies

In a famous dissent in Liggett v. Lee, Justice Brandeis justified the use of discriminatory taxes designed to slow the growth of chain stores because of their large size:

Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the state should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city.

---

36 This is a likely reference to Hicklin v. Coney, 290 U.S. 169 (1933) (upholding state law licensing trucks and taxing them based on weight).
Justice Brandeis viewed the regulation of firm size as not all that different from regulating the weight of trucks or the height of buildings. Most notable was his belief that the chain stores should be limited in size even though monopoly was not in prospect and the chains had not engaged in restraints of trade.

The harms flowing from large corporations that Justice Brandeis enumerated included “encroachment upon the liberties and opportunities of the individual,” fear of “the subjection of labor to capital,” fear of monopoly, and fear “that the absorption of capital by corporations, and their perpetual life, might bring evils “similar to those which attended mortmain.” There was also an unspecified “sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.”

Brandeis was correct that historically business corporation laws “embodied severe restrictions upon size and scope of corporate activity,” and perhaps even as an “expression of the desire for equality of opportunity.” Brandeis then lamented that states had gradually removed these restrictions on corporate size. Large size and their management needs in turn resulted in the transfer of economic power away from owners (stockholders) and toward managers, as well as corporations that were able to dominate the economies and politics of their states. He concluded that “size alone gives to giant corporations

---

38 Liggett, 288 U.S. at 548. “Mortmain” was the English system of feudal land ownership in which the land itself was held in perpetuity, often by the Church, and all occupants served as tenants of various classes.

39 Id.

40 Id.; see also Herbert Hovenkamp, The Classical Corporation in American Legal Thought, 76 GEO. L.J. 1593, 1658-80 (1988) (pointing out that during the Jackson administration the corporation was democratized so that nearly anyone could incorporate).

41 Liggett, 288 U.S. at 550-564 (elaborating on the removal of size limitations in many states but particularly New Jersey and New York) (citing ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932)).

42 Liggett, 288 U.S. at 564-566.
a social significance not attached ordinarily to smaller units of private enterprise.”  

While more permissive corporate law permitting larger firms originated in the states, federal antitrust law has consistently gone along. Section 8 of the original Sherman Act provided that a corporation was to be regarded as a single “person,” and placed no limits on state power to permit corporations of any size or in any area of activity. It required only that they be lawfully organized under state law. In 1888 New Jersey amended its corporate law to permit “holding companies,” or one corporation’s acquisition and ownership of the shares of another. The holding company became a powerful tool for corporate mergers. The government’s first big antitrust merger case was against a railroad merger formed through a New Jersey holding company. Other states began to follow New Jersey. In 1932 James C. Bonbright and Gardiner Means, authors of the leading treatise of the day on holding companies, concluded that “nearly all” of the states had amended their corporation laws so as to permit them.

____________________

43 Id. at 565.
44 The original § 8 of the Sherman Act provided:

That the word “person,” or “persons,” wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

46 Northern Securities Co. v. United States, 193 U.S. 197, 317 (1904) (condemning the merger and holding that “the device of a holding corporation for the purpose of circumventing the law” was ineffectual to circumvent federal antitrust law).
47 Justice Brandeis provided a thumbnail history in Liggett, 288 U.S. at 556 n. 32 (1933).
While opposition to holding companies was part of the 1912 Democrat Presidential antitrust Platform, no provision was ever enacted and the states ignored it. Indeed, President Wilson’s Congress enacted most of the proposals in the Democrat’s antitrust Platform, but not that one.\textsuperscript{49} The Progressive Era Congress and Wilson himself doubled down on the Sherman Act formulation, re-enacting it verbatim in §1 of the Clayton Act, where it remains today.\textsuperscript{50} Brandeis may have found the situation lamentable, but neither state nor federal law paid much attention.

This underappreciated statutory definition of a single “person” to include corporations has generally determined the dividing line between intrafirm “unilateral” conduct and the conduct of those related to one another by contract. For example, the corporate law change that permitted holding companies entailed that an arrangement between a parent and a wholly owned subsidiary would be regarded as a unilateral act rather than a conspiracy.\textsuperscript{51}

Brandeis was not very specific about the types of harms that chain stores threatened. His fears about “encroachment upon liberties” appear to be untethered rhetorical flourish, given that the only threat was from multi-store retailers who were successful precisely because consumers liked them. In any event, the contemporary political

\textsuperscript{49} See DEMOCRATIC PARTY PLATFORM OF 1912 (1912), archived at https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform (“We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies . . . .”). The Platform also called for limitations on interlocking directors, which was adopted in Section 8 of the Clayton Act, 15 U.S.C. § 19, and further limitations on price discrimination, which were adopted in Section 2, 15 U.S.C. § 13. See discussion infra, text at notes __.

\textsuperscript{50} 15 U.S.C. § 12.

movement was frenzied. Several states passed anti-chain legislation in the mid-twenties, and the Depression sharply accelerated the trend. Between 1931 and 1937 twenty-six states passed such laws. During that period Congress also passed the Robinson-Patman Act, intended to limit the growth of large retailers by restricting their ability to obtain or to charge lower prices, and also the Miller-Tydings Act, designed to protect smaller retailers from price cutters by enabling states to permit resale price maintenance, or “fair trade.” The common goal of all of this legislation was to protect the traditional family-owned single store retailer from the competition of larger firms. Populist demagogue Huey Long was one of the early prominent promotors of progressive chain tax legislation, proclaiming that he would “rather have thieves and gangsters than chain stores in Louisiana.”

The chain stores rarely threatened monopoly. First, there were many of them and they competed with each other. Second, they never came close to occupying a monopoly position in the retail

---

58 FREDERICK JOHN HARPER, *THE ANTI-CHAIN STORE MOVEMENT IN THE UNITED STATES*, 1927-1940, at 1-2 (1981) (noting estimates that there were 3000 competing chains, defined as four or more stores, in 1900 but 95,386 chains by 1929).
markets where they sold. They did, however, severely injure the previous generation of single-store operators.

Justice Brandeis acknowledged that the aggregations of capital that corporations produced were “once merely an efficient tool” for conducting private business. While conceding that larger firms can be more efficient he concluded from this that they “can, and should, contribute more to the public revenues.” He added, however, that “the state need not rest the difference in tax rates on a ground so debatable as the assertion that efficiency increases with size.”

Brandeis failed to acknowledge that one purpose of the chain store taxes was not simply to make them pay their fair share, but to drive them out of business entirely. A few years later Representative Wright Patman and seventy-five Congressional co-sponsors proposed “death sentence” legislation that would have done exactly that. The entire chain store episode represent an enormous failure of democratic processes, in which legislatures paid little attention to consumers who

---

59 Id. at 3-4 (finding chain stores represented 4\% of total retailing in 1921, grew to 16\% by 1927 and to 20\% by 1929, and, after that, slowing).
62 Id. at 573.
63 Id. at 572-73.
64 See HARPER, supra note 58, at 322, 387 (“The ‘death sentence’ component to the schedule was a multiplier provision whereby the total tax was to be multiplied by the number of states including the District of Columbia, in which the chain had its stores. Thus a chain like the R. W. Woolworth Co. operating in every state would be liable to a tax of $49,000 on each of its stores in excess of 500.”); 80 CONG. REC. 8133 (1938); 84 CONG. REC. 345-347 (1940); Excise Tax on Retail Stores: Hearings on H.R. 1 Before the H. Ways & Means Comm., 76th Cong. 115 (1940).
were voting with their feet and listened to small retailer associations that were much better organized.

Liggett v. Lee was not an antitrust case but rather a challenge to a state taxation law. Before long, however, the political movement against chain stores would become an antitrust issue with passage of the Robinson-Patman Act in 1936, although it was preceded by state legislation as early as 1913. The Robinson-Patman Act was pure interest group legislation, passed at the behest of the United States Wholesale Grocer Association. Its General Counsel Henry B. Teegarden drafted the bill and was heavily involved in the amending process.

The antitrust movement against the chains presents interesting similarities to the twenty-first century movement against the large digital platforms, including Alphabet (Google), Amazon, Apple, and Meta (Facebook). First, its origins were largely populist, ignoring much of the economics of business organization and innovation. Second, it was a largely reactionary response to significant innovations in retailing and distribution that seriously injured firms committed to older methods. Among these was a dramatic reduction in the demand for independent “brokers,” or intermediaries that were important to

67 See Prohibition on Price Discrimination: Hearings on H.R. 8442 Before the H. Comm. on the Judiciary, 74th Cong. 9 (1935) (“Mr. Teegarden wrote this bill.”); see also PALAMOUNTAIN, supra note 55, at 197-198 (noting Teegarden’s authorship of the bill).
69 See, e.g., Fulda, supra note 57.
small retailers but often absorbed into the vertically integrated operations of the chains.\textsuperscript{70} Third, the movement rested on heavily exaggerated theories of harm as well as poor analysis of the problem. This became particularly apparent with passage of the Robinson-Patman Act.

Finally, the debate was heavily driven by interest group politics.\textsuperscript{71} The movement was supported by established merchants and those with older technologies but who were well organized politically. It rarely offered any benefits to consumers and labor, the other two interest groups most seriously affected. Very largely for this reason the anti-chain store movement withered after a few years in the face of overwhelming consumer choice.\textsuperscript{72} Whether that also happens with the anti-digital platform movement is too early to say.

Justice Brandeis’ dissent in \textit{Liggett} was included in an edited collection of his writings published in 1934 as \textit{The Curse of Bigness}.\textsuperscript{73}

\textsuperscript{70} \textit{Id.} at 1065-68. Brokerage limitations were enacted into the Robinson-Patman Act (“RPA”). See \textit{15 U.S.C. § 13(c); Federal Trade Commission \textit{v.} Henry Broch & Co., 363 U.S. 166 (1960)} (holding a food broker who reduced his commission to close a sale violated the RPA).

\textsuperscript{71} See, e.g., \textit{PALAMOUNTAIN, supra} note 55, at 159-87; Harper, \textit{supra} note 58, at ii (describing trade associations as akin to “medieval guilds”). They often campaigned for regulation preventing individual store expansion (e.g., prohibiting green grocers from selling bread). Many of these trade association activities were expressly sanctioned by the National Recovery Administration during the New Deal. See Harper, \textit{supra} note 58, at iii; see also \textit{United States v. Swift & Co., 286 U.S. 106 (1932)} (refusing to modify earlier Sherman Act consent decree so as to permit large meat packer from selling other groceries, at the behest of the American Wholesale Grocers’ Association).

\textsuperscript{72} See Paul Ingram & Hayagreeva Rao, \textit{Store Wars: The Enactment and Repeal of Anti-Chain-Store Legislation in America}, 110 AM. J. SOC. 446 (2004); see also \textit{PALAMOUNTAIN, supra} note 55, at 183-199 (noting growth of chains notwithstanding the movement).

Nearly all of the selections except for two Supreme Court dissents were written prior to his appointment to the Court in 1916. The other dissent that the authors selected was in New State Ice Co. v. Liebman. The majority struck down an Oklahoma statute that required commercial ice producers to obtain a license, which required proof of “public convenience and necessity.” Justice Brandeis rationalized this requirement by arguing that ice production included equipment that was subject to interest on loans and depreciation. As a result, the success of a business depended on the volume of trade that each firm obtained. The purpose of this requirement was to “protect the public interest by preventing waste.” Of course, any industry with fixed costs would fall into that category. Second, he observed that Oklahoma had declared the business of producing ice to be a “public utility.” Justice Brandeis said little about the merits of this declaration other than the fact that ice should be healthy, but he observed that the declaration of which industries are public utilities is a prerogative of the state.

The ice licensing requirements had been created at the behest of the National Association of Ice Industries, an interest group of independent ice producers organized into separate state associations. At the time of the litigation the Associations’ members controlled 84% of the ice commercially produced in the United States. Some states

74 285 U.S. 262 (1932).
75 Id. at 281-82 (Brandeis, J., dissenting).
76 Id. He continued, “The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one’s choice should be denied.” Id.
77 Id. at 283.
78 Id. at 284.
had even gone so far as to regulate the price of ice.\textsuperscript{80} One concern of the Association was ice sales from ice “peddlers,” or travelling sales agents that gave large ice plants a bigger delivery range.\textsuperscript{81} They emerged as the market experienced rapid growth in the 1920s through the development of cheaper electric ice plants that typically undersold established producers. The result was that the industry experienced excess capacity just as it was on the verge of collapsing.\textsuperscript{82}

In addition to combatting the peddlers, the ice industry also used other means to restrict output. For example, the FTC’s 1925 \textit{Report} on trade associations observed that one trade association rule made it “unethical” for a truck delivering ice cream to also sell ice.\textsuperscript{83} The harm there seems clear: given substantial joint costs for equipment, the cost of delivering ice and ice cream together from the same vehicle undoubtedly was lower than the cost of delivering each one separately.

The more imposing and ultimately fatal threat to the ice industry was not the peddlers, however, but rather electric

\textsuperscript{80}See Southwest Utility Ice Co. v. Liebmann, 52 F.2d 349, 355 (10th Cir. 1931) (noting that Arkansas and Oklahoma regulated ice prices and including a description of the industry).

\textsuperscript{81}On the role of peddlers, see State ex rel. Kimbrell v. People’s Ice, Storage & Fuel Co., 246 Mo. 168 (1912) (sustaining a quo warranto claim that large ice companies who employed peddlers were attempting to monopolize market).

\textsuperscript{82}See L. B. Breedlove, \textit{The Ice Industry: Its Economies and Future}, 8 J. LAND & PUB. UTILITY ECON. 234 (1932). For fact findings in the lower court, see New State Ice Co. v. Liebman, 42 F.2d 913, 917-18 (1930) (“[I]t is clearly shown the act of the Legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice . . . [andl enhancing the price charged . . . .”].


Electronic copy available at: https://ssrn.com/abstract=4121866
repetition. The traditional means of refrigeration had been ice harvested from frozen lakes or, a little later, manufactured in plants. The mechanical refrigerator, which was first introduced into retail establishments and a little later into homes in the early twentieth century, threatened that dominance. In his 1922 presidential address to the Association of Ice Industries, President J.G. Black called the electric refrigerator a “menace” that needed to be controlled. “There are some places and conditions,” he warned, “where a machine will render a more satisfactory service than we can hope to with ice.” The ice industry pursued various strategies, including long term contracts on subsidized ice boxes, intended to lock customers into the older ice technology.

Like the chain store, however, the electric refrigerator was simply too attractive to the typical consumer, who “wants the

---

84 For a good brief history of the industry, see A. R. Stevenson, Jr., Refrigeration, 208 J. FRANKLIN INST. 143 (1919).
86 See JONATHAN REES, REFRIGERATION NATION: A HISTORY OF ICE, APPLIANCES, AND ENTERPRISE IN AMERICA (2013) (detailing the rise of American mechanical refrigerator, its introduction into American homes early in the twentieth century, and the decline of the ice industry).
87 See J.G. Black, President, Nat’l Assoc. of Ice Indus., President’s Address (Oct. 11, 1922), in PROC. OF THE FIFTH ANN. CONVENTION OF THE NAT’L ASSOC. OF ICE INDUS., at 36; Breedlove, supra note 82 at 237, 240 (noting, in 1932, the significant extent of mechanical refrigerator encroachment on the ice industry); Lisa Mae Robinson, Safeguarded by Your Refrigerator: Mary Engle Pennington’s Struggle with the National Association of Ice Industries, in RETHINKING HOME ECONOMICS: WOMEN AND THE HISTORY OF A PROFESSION (Sarah Stage & Virginia B. Vincenti eds., 1997). Commercial cooling of building interiors exhibited a similar war between ice and condensation technology and electric air conditioning. See Bernard Nagengast, A History of Comfort Cooling Using Ice, 1999 ASHRAE J 49.
88 See Rich Ling & Oscar Westlund, Cold Comfort: Lessons for the Twenty-First Century Newspaper Industry from the Twentieth Century Industry, 4 MEDIA INDUS. #2 (2017), online at https://quod.lib.umich.edu/m/mij/15031809.0004.202?view=text;rgn=main
Two things about Brandeis’s dissents stand out. First is the extent to which he aligned his interests with small firms, even those committed to obsolete distribution methods and technologies, and at the expense of consumers and others who benefit from more robustly competitive and innovative markets. The second is that his concern about bigness was limited to large individual firms. He disregarded the much more substantial threat posed by trade associations. In both the chain store situation and the ice industry situation the real threat to competition came not from large individual firms, but from associations of small firms who had substantial political power to compensate for their lack of productive efficiency or technology. For example, the FTC’s 1925 Report on trade associations concluded that virtually all of the associations were involved in lobbying for legislation.

Brandeis’ Efficiency Dilemma

Brandeis’s hostility to chains and other large sellers reflected an antinomy in his own beliefs about business efficiency. In a 1914 address to the U.S. Chamber of Commerce he acknowledged that firms can attain greater efficiency through growth. However, they reached maximum efficiency “at a fairly early stage.” From that point “the disadvantages of size outweigh in many respects the advantage of size.” The one advantage that the large firm continued to hold, he argued, was in the “collection and getting of knowledge.”

---

89 Breedlove, supra note 82 at 241.
92 The address was published as “The Democracy of Business.” See LOUIS D. BRANDEIS, The Democracy of Business, in The Curse of Bigness: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 137, 140 (Osmond K. Fraenkel & Clarence M. Lewis eds., 1934) [hereinafter Curse of Bigness].
93 Id.
this he also included research laboratories, which “can be maintained only by great concerns.”

For Brandeis, most efficiency came not from size but rather from management. He was an enthusiastic follower of “Taylorism,” or “scientific management,” which attempted to instruct firms in cost reducing or time saving processes. In 1914 he argued to the short-lived United States Commission on Industrial Relations that organized labor should embrace scientific management. They could be induced to do so by a “fair distribution of profits,” together with ongoing participation of labor in the development of efficient methods. “If labor is given such representation, I am unable to find anything in scientific management which is not strictly consistent” with their interests.

Efficiency expert Frederick Winslow Taylor’s ideas about cost savings were not rooted in economic industrial organization theory, but rather in the mechanical economics of business management, standardized cost accounting, assembly line production, repetition, and labor specialization. This emphasis led to an alternative

94 Id.
98 See FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911).
“industrial organization” literature more aligned with schools of business management and systems engineering than with economics.99

Brandeis was a lifelong supporter of labor. One irony, however, is that his preferred approach to efficiency almost certainly produced more alienation and disaffection among labor than did large firm size or vertical integration.100 For example, Dexter Kimball’s popular 1913 text on “industrial organization,” written by an engineer rather than an economist, lamented the “degradation of labor” that resulted from Taylorite methods.101

Brandeis’ niece, Josephine Goldmark, took Brandeis’ side in her 1912 book, Fatigue and Efficiency.102 She defended Taylor’s efforts to improve efficiency through the use of timed, repetitive motions that she believed enabled workers to produce the same amount with less energy, and thus less fatigue.103 She appeared to assume that employers would respond to this increased efficiency by giving labor more leisure rather than simply increasing output expectations.

One particular feature of the Taylorite theories of industrial organization was de-emphasis of large firm size as an important factor in business growth. For example, the third edition of Kimball’s Industrial Organization text concluded that management costs went up disproportionately as firms became larger. As a result there was “reason to believe that many” large firms “have passed the point where

101 KIMBALL, supra note 99, at 17-29.
102 JOSEPHINE GOLDMARK, FATIGUE AND EFFICIENCY (1912).
103 Id. at 195-200.
any great gain in productive efficiency can be had through further division of labor and the use of labor-saving machinery.”104 On the other hand, he spoke favorably about vertical integration, which he saw as helping firms assure their supply and position their production best so as to meet their needs.105 At one point he talked about the cost of marketing as a “disgrace to our intelligence,” but did not suggest shifts to internal production as an alternative.106 His few references to vertical control applied almost exclusively to labor management issues.107

Labor would have none of it. Taylorism was one area in which Brandeis and organized labor, which was righteously opposed to scientific management, were perpetually at odds.108 Taylorism emphasized cost savings from duplication and rote repetitive motion, with workers assigned a narrow range of tasks that they performed over and over. Progressive labor economist John R. Commons described the object of Taylorism as

not that of a substitute machine, but an analysis of the very motions that constitute the skill itself; the breaking up of these motions into their elementary parts; the elimination of waste motions and the selection of time-saving motions; the timing of each motion by a stop watch, and the recording of both time-saving motions and their standard times on instruction sheets, by which almost any unskilled laborer can learn quickly to do the work.109

In 1916 the United States Commission on Industrial Relations published a study of the issue, authored by Robert Hoxie, a political

104 KIMBALL, supra note 99, at 54 (3d ed. 1925).
105 Id. at 35.
106 Id. at 425.
107 Id. at 94 (describing the relationship between workers, foremen, superintendents and general managers).
economist from the University of Chicago. Hoxie’s study came to mixed conclusions, but generally more aligned with those of Commons.\textsuperscript{110} One of his most important observations was that because of its emphasis on rote repetitive motion, scientific management tended to prefer unskilled work over that of the tradesmen, in the process leading to lower wages. Ultimately, he concluded, scientific management was good for firms but bad for labor.\textsuperscript{111} He did believe that many of the problems were correctable through greater labor participation in workplace decisions.\textsuperscript{112}

One thing Taylorism did offer was at least a partial escape from size. By advocating repetitive and standardized processes rather than large scale production, Taylorism was able to present a mechanism for achieving efficiency without the need for large firms. Brandeis was swimming against the tide, however. For example, the chain stores themselves were also followers of scientific management,\textsuperscript{113} and they found substantial savings that accrued to multistore operations.\textsuperscript{114} For example, by changing management policies and merging wholesale and retail functions, the chain stores were able to distribute at lower costs than independents could do.\textsuperscript{115} Advocates of scientific management could believe that it was these managerial cost savings rather than larger size that explained the success of the chains.\textsuperscript{116}

\begin{footnotesize}
\textsuperscript{110} Robert F. Hoxie, Scientific Management and Labor (1916).
\textsuperscript{111} Id. at 138.
\textsuperscript{112} Id.
\textsuperscript{113} See, e.g., Walter S. Hayward & Percival White, Chain Stores: Their Management and Operation, at ii, 94 (1925) (applying principles of scientific management to operation of retail chains).
\textsuperscript{115} Taylor, supra note 98, at 53.
\textsuperscript{116} Id. at 51. However, much of what Taylor described actually referenced economies of scale. For example, “Expert buyers are employed at large salaries-salaries that in most cases the store under one roof could not afford to pay-yet the buying cost per store is small.” Id.
\end{footnotesize}
Brandeis had a difficult time believing that large firms undersold smaller ones because they had lower costs. Rather, he argued in Taylorite fashion, firms actually grew too large to be economical.\textsuperscript{117} He professed no concern whatsoever about a firm’s “natural” growth.\textsuperscript{118} By contrast, growth to a very large size was “unnatural,” in that it was achieved by antitrust violations, including anticompetitive mergers that enabled firms to grow to a size where they actually had higher costs.\textsuperscript{119}

Brandeis’ view of the relationship between large enterprise and efficiency provides some insight into why the Robinson-Patman Act was such a dismal failure. It largely sidestepped the true reasons that the chains were attractive to so many customers, particularly in lower income ranges. The imagined reasons were not related to economies of scale or vertical integration, but rather discriminatory pricing. That theory commanded much more political energy than economic validity.

The Robinson-Patman Act pictured the chain store problem almost exclusively in terms of pricing rather than structure or scale. Further, the focus had shifted from the concern with predatory pricing expressed during the Progressive Era and manifested in original §2 of the Clayton Act.\textsuperscript{120} At that time it was thought that selective predatory pricing was an important tool for excluding competitors. Because it

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{117} See BRANDEIS, CURSE OF BIGNESS, supra note 92, at 135. On this point, see Comment, Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined, 66 YALE L.J. 69, 72 (1956).
\item \textsuperscript{118} See id. at 114 (“[T]here is nothing in our industrial history to indicate that there is any need whatever to limit the natural growth of a business in order to preserve competition”); see also id. at 109 (“[C]ompetition is in no sense inconsistent with large scale production and distribution”).
\item \textsuperscript{119} Id. at 105, 124-131.
\item \textsuperscript{120}As a result, the Act had been held not to reach price discrimination as between two different resellers. See, e.g., Mermen Co. v. FTC, 288 F. 774 (2d Cir. 1923), cert. denied, 262 U.S. 759 (1923). However, a few years later the Court changed its mind. See George Van Camp & Sons v. American Can Co., 278 U.S. 245 (1929).
\end{itemize}
\end{footnotesize}
was selective it was also discriminatory, in that the perpetrator was thought to finance predation in one area by charging higher prices in other areas.

The 1930s focus moved to the idea that the large chains grew as they did because they were able to force suppliers to sell to them at lower prices than smaller stores obtained. Advocates described this as a “subsidy” favoring the larger retailers. Congressman John G. Utterback of Maine, Chair of the House Subcommittee on the Robinson-Patman Act, believed that the Act was intended to permit one firm to receive a benefit that placed a burden on other firms. For example, if two purchasers were competing sellers and

the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination.\(^\text{121}\)

The FTC followed this pattern in early RPA decisions such as *Champion Spark Plug* (1939), where it alleged that as a result of differential prices those paying the higher price were forced to support other buyers who paid less.\(^\text{122}\) The FTC’s own study of the chain stores in 1934 concluded that the ability to receive lower buying prices accounted for part of the difference between chain store and single store prices.\(^\text{123}\) It also acknowledged, however, that much of the

---

\(^{121}\) 80 Cong. Rec. 9416 (1936).


\(^{123}\) Fed. Trade Comm’n, *Final Report on the Chain Store Investigation* 53-59 (1934) [hereinafter Chain Store Report]. The Report concluded only that overall advantages in purchasing prices accounted for 9% to 10% of the price differences between chains and independents; the
savings resulted from large scale purchasing. For example, speaking of wholesale grocers it observed that single store operators who organized into cooperatives for purchasing could make up an “appreciable proportion” of these price differences.\textsuperscript{124}

Many of the suspicious practices were concessions given to larger operators who performed certain functions for themselves, including advertising,\textsuperscript{125} brokerage, and freight.\textsuperscript{126} While discriminatory pricing was a factor, the \textit{Report} concluded that the “integration of the functions of manufacturer, wholesaler, and retailer” were very important as well.\textsuperscript{127} The \textit{Report} also observed that the Chains operated at lower margins than independents did.\textsuperscript{128}

The FTC’s orientation toward protection of consumers frequently placed it into conflict with the Brandeis vision that was always on the lookout for small firms. For example, the FTC \textit{Study} concluded that lower income people used the chains more than higher income patrons.\textsuperscript{129} That difference later emerged as a significant variable in the question of why the poor and people of color paid more for food in both inner city and rural areas, reflecting chain store

\begin{footnotesize}
\textsuperscript{124} \textit{CHAIN STORE REPORT}, supra note 123, at 56-57.
\textsuperscript{125} \textit{See id.} at 86 (“Chains in many lines possess an important advantage through their ability to use newspaper advertising where the independent retailer cannot afford to do so. Moreover, the newspaper advertising of the chains tends to be much more effective than that of the independents owing to the multiple outlets of the chains . . . .”).
\textsuperscript{126} \textit{Id.} at 60.
\textsuperscript{127} \textit{Id.} at 66.
\textsuperscript{128} \textit{Id.} at 68.
\textsuperscript{129} \textit{Id.} at 66.
\end{footnotesize}
preferences to locate in the suburbs.\textsuperscript{130} Inner city residents were largely relegated to small single store operators.

In contrast to the Brandeis view, the Chain Store \textit{Report} also advocated strongly against the graduated state taxes on chains,\textsuperscript{131} concluding that the “consuming public” would end up paying them.\textsuperscript{132} It expressed particular opposition to taxation efforts intended to drive chains out of business:

To tax out of existence the advantages of chain stores over competitors is to tax out of existence the advantage which the consuming public have found in patronizing them, with a consequent addition to the cost of living for that section of the public.\textsuperscript{133}

Congress passed the Robinson-Patman Act (RPA) in 1936, ignoring much of the FTC’s \textit{Report}. The Act misfired badly. It ignored both economies of scale and vertical integration, which accounted for a large portion of chain store growth, and focused exclusively on prices, although with low prices rather than high ones being the evil.

The statute’s myopic focus on pricing led it to be a significant inducement to further vertical integration. The RPA applies only to “sales” and required that both the higher priced and the lower priced transaction be sales to independent entities. Transfers between the divisions or subsidiaries of a single firm were not covered.\textsuperscript{134} As a result, a firm that was already vertically integrated could avoid the Act

\textsuperscript{130} See, e.g., Judith Bell & Bonnie Maria Burlin, \textit{In Urban Areas: Many of the Poor Still Pay More for Food}, 12 J. PUB. POL’Y MKTG 268 (Robert N. Mayer & Debra L. Scammon eds., 1993) (biggest variable was lack of chain stores in inner city areas).

\textsuperscript{131} See discussion \textit{supra}, text at notes __.

\textsuperscript{132} See CHAIN STORE REPORT, \textit{supra} note 123, at 81-82.

\textsuperscript{133} \textit{Id.} at 91.

\textsuperscript{134} On this requirement, see 14\textsuperscript{th} HERBERT HOVENKAMP, \textsc{Antitrust Law} ¶ 2312 (4th ed. 2020).
with respect to all transfers within the integrated part of the firm. For example, if a chain owned its own dairies, farms, processing plants or delivery trucks transfers among these entities were not “sales” under the Act. Further, the threat of liability for sales induced firms to vertically integrate so they could avoid RPA liability – obviously not the result that the Act’s framers intended.\footnote{See, e.g., Marius Schwartz, \textit{The Perverse Effects of the Robinson-Patman Act}, 31 \textit{Antitrust Bull.} 733 (1986).} To the extent that vertical ownership reduced a firm’s costs it provided a double benefit: not only was it justifiable on its own terms, but it also became a means of avoiding RPA liability. In other situations, firms avoided the Act by simply refusing to deal with smaller, higher cost buyers.\footnote{See Reinhold P. Wolff, \textit{Monopolistic Competition in Distribution}, 8 \textit{L. & Contemp. Probs.} 303, 315 (1941).} The courts found these refusals to be lawful.\footnote{See Comment, \textit{Refusals to Sell and Public Control of Competition}, 58 \textit{Yale L.J.} 1121, 1132-1133 (1949). However, one court did find that A & P’s practice of vertically integrating with suppliers in order to avoid the RPA was a restraint of trade in violation of the Sherman Act. \textit{See United States v. New York Great A & P Co.}, 67 F. Supp. 626 (E.D. Ill. 1946), \textit{aff’d}, 173 F.2d 79 (7th Cir. 1949).} In any event, the chain stores experienced rapid growth, not very much hindered by the Robinson-Patman Act.\footnote{See Frederick M. Rose, \textit{The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective}, 57 \textit{Col. L. Rev.} 1059, 1061-1062 (1957) (noting rapid growth of chains following World War II).}

The RPA was a lamentable use of antitrust to target large firm size without understanding the economic issues. It represents little more than capture by small firms or those dedicated to the preservation of obsolete business methods or technology. In the process, such protections are disdainful of consumers and labor, the two largest interest groups that benefit from high output and low prices.

\textbf{Anti-Bigness Beyond Brandeis}

Justice Douglas, who succeeded to Justice Brandeis’ seat on the Supreme Court in 1939, also cited concerns about bigness without
regard to market power. In fact, Brandeis and Douglas are the two Justices who favored using the antitrust laws to pursue size for its own sake – but always in dissents. In his dissent in United States v. Columbia Steel Co., Justice Douglas protested against the Supreme Court’s refusal to condemn a merger of steel producers because of deficiencies in the government’s market definition. Sidestepping the market definition issue, Justice Douglas concluded that “What we have here is the problem of bigness.” However, he then analyzed the problem entirely in terms of the power of large firms to control market prices. In the process he acknowledged that control over prices is not a function of pure size but rather of a firm’s abilities to control the market.

Concerns about bigness as such have sometimes made it into the legislative history of United States antitrust statutes. In his analysis of the 1950 amendments to the merger provision, Derek C. Bok observed that much of the debate over the revision of §7 pertained to non-economic values. He observed that a:

curious aspect of the debates is the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency. To be sure, there were allusions to the need for preserving competition. But competition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature.

140 See id. at 509-10, 527-28.
141 Id. at 535 (citing BRANDEIS, THE CURSE OF BIGNESS, supra note 92).
142 Id. at 536.
143 Id. He later acknowledged that the merger led to control of about 3% of the market. Id. at 538.
144 See Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 HARV. L. REV. 226, 236-37 (1960); see also Bok, supra, at 324 (discussing Milk Producers Ass’n v. United States, 362 U.S. 458
However, Bok also noted the House Report on the Bill, stating that it was intended to authorize intervention against mergers whose effect “may be a significant reduction in the vigor of competition,” although the effect “may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.”\textsuperscript{145} It elaborated:

Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.\textsuperscript{146}

Bok concluded that there was little consensus about the extent to which the statute should incorporate values unrelated to economic competition, or whether it should incorporate such values at all. Most of the statements he quoted were complaints about the fact that concentration had become too high, not about size as such.\textsuperscript{147}

Size or Concentration?

Notwithstanding the views of Justices Brandeis and Douglas, market concentration and market power, not size, have almost always been the principal target of antitrust, even during the mid-twentieth century heyday of antitrust aggressiveness. To be sure, the interest group politics promulgated by trade associations also advocated against size as such, and the Robinson-Patman Act was passed without a market power requirement. Beyond that the Court has never equated

\textsuperscript{145} Id. at 237 (quoting H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949)).
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 228-238.
mere size with competitive harm. Even the Progressives (Brandeis and Douglas aside) were focused on market dominance and concentration rather than size. The tools for measuring concentration had been developed by Progressive economists at the beginning of the twentieth century, and generally relied on census data to determine the number of firms in a market and their shares. That approach has always been fraught with problems, but it continues to be used.\textsuperscript{148}

United States antitrust policy has never condemned a merger without regard to market share or the ability to exercise market power,\textsuperscript{149} although the market share numbers that triggered a challenge were once very small in comparison to the numbers we use today.\textsuperscript{150} The \textit{Brown Shoe} decision actually went further than any serious reading of either the amended statute or its legislative history would authorize. Its condemnation of the merger followed only after a lengthy analysis of the relevant market\textsuperscript{151} and its assumptions about concentration.\textsuperscript{152} Nevertheless, it also approved the district court’s conclusion that the merger was harmful because it enabled Brown Shoe to sell shoes at a lower price than its rivals, or to offer higher quality at the same price.\textsuperscript{153} That, of course, would be a threat posed

\textsuperscript{148} On the Progressive development, see Hovenkamp, \textit{supra} note 12.

\textsuperscript{149} The Hart-Scott-Rodino Act, 15 U.S.C. § 18a, does define its requirements for pre-merger notification of larger acquisitions in terms of large dollar size rather than market share, but these requirements are driven by concerns for administrative convenience and have nothing to do with the liability standard. As the Merger Guidelines make clear, the measurement of market power or market concentration remains dispositive. \textit{See} U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010) [hereinafter Horizontal Merger Guidelines], https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.


\textsuperscript{151} \textit{Brown Shoe}, 370 U.S. at 320-325.

\textsuperscript{152} \textit{Id.} at 315, 316-17 (“rising tide of economic concentration”); \textit{see also id.} at 331-333 (“trend toward concentration”).

\textsuperscript{153} \textit{Brown Shoe}, 179 F. Supp. 721, 738 (E.D. Mo. 1959), \textit{aff’d}, 370 U.S. 294 (1962) (condemning the merger because it gave the post-merger firm decisive advantages, resulting in “lower prices or in higher quality for the
by bigness without regard to market share. Depending on the extent of scale economies or the cost savings made available by vertical integration, even a larger firm with a small market share could undersell smaller rivals. Further, the natural consequence of lower costs and prices would be firm growth at the expense of higher cost firms.

_Brown Shoe_ and _Columbia Steel_ together illustrate something important about the relationship between absolute size and control over prices. If large size leads to lower prices reflecting economies of scale or vertical integration, as _Brown Shoe_ conceded, then a large firm can have a significant influence even though its market share is relatively small. That was also true of the chain stores, which drove smaller firms out of business by the thousands, even though the chain stores themselves had not achieved dominant market positions.\(^{154}\) By contrast, if the fear is of high prices, then mere large size cannot be the culprit; the firm must also occupy enough of the market to have an impact on market wide output.

The requirement of high share of a relevant market is driven entirely by the fact that the feared evil is high prices, not low ones. This difference strikes to the heart of antitrust policy. If the goal is to protect higher cost firms from a bigger firm’s lower prices, then market share may not matter; simple bigness is the problem. However, if the goal is to protect consumers and labor from market dominance and the resulting higher prices, then actual dominance of the market must be either present or realistically threatened.

Justice Douglas acknowledged as much in his dissent in _Standard Oil Co. of California v. United States\(^ {155}\)_ a year after _Columbia Steel_. In an odd flip from his strongly pro-interventionist antitrust views, he dissented from the Supreme Court’s condemnation

\(^{154}\) _See_ discussion _supra_ text at notes __.

\(^{155}\) 337 U.S. 292 (1949).
of Standard Oil’s exclusive dealing agreements with retail gasoline stations. Standard’s exclusive dealing contracts, which prohibited Standard branded gasoline stations from offering multiple brands of gasoline, covered 16% of the gasoline retailers in the area. If such contracts threatened higher prices it is hard to see how a coverage of 16% could be sufficient; customers could find ample alternatives. But that was not the basis of Justice Douglas’ dissent. He was concerned that the majority’s disapproval of exclusive dealing contracts would force the oil companies to “build service-station empires of their own.” To the extent that single-branding enabled them to operate more efficiently, they would simply build their own gasoline stations. Single branding decisions could become unilateral conduct unreachable by the antitrust laws.

Concerns about bigness as such are not based on any coherent theory relating size to prices, unless we really do want to follow Justices Brandeis and Douglas down the rabbit hole that antitrust should be concerned about protecting smaller firms or those dedicated to older technologies. That leaves noneconomic concerns. For example, the fear may be that large firms have more undesirable political power.

Bigness and Political Power: Trade Associations

Business unquestionably wields considerable political power. Over the history of antitrust and even including Brandeis’ era, however, far more damaging consequences resulted from the activities of trade associations than of large individual firms. In fact, trade association involvement in the Brandeisian disputes over the

156 Id. at 315 (Douglas, J., dissenting).
157 Id. at 295.
158 Id. at 320.
159 For an excellent study covering this period, see Joseph C. Palamountain, Jr., Politics of Distribution, supra note 55.
chain stores and the licensing of ice production was only a tiny tip of the iceberg. Legal historian Lawrence Friedman once observed that the vast majority of occupational licensing restrictions in the United States did not originate with governments but rather with trade associations protecting their turf.\footnote{Lawrence M. Friedman, 

That exposes another problem with bigness tests: market dominating trade associations are much more likely to harm competition than are large individual firms, and they have a more successful history of doing so. Trade associations can profit significantly from collusion. On the other side, they are less likely to yield the kind of integration and coordination that make larger firms more efficient. One thing that they are good at is lobbying. These conclusions are no different than the explanation of why we apply more aggressive antitrust rules to cartels than we do to single firm conduct.

A significant portion of antitrust law’s “state action” doctrine is concerned with the anticompetitive activities of trade and
professional associations who have lobbied governments and obtained anticompetitive restrictions. The number of such decisions exceeds the antitrust challenges to unilateral conduct by a wide margin.

While Brandeis repeatedly expressed concerns about the power of very large firms, he was a lifelong supporter of “fair trade” and similar associations. These were often little more than fronts for dealer cartels intended to keep lower cost rivals out of the market. That was true of the Dr. Miles antitrust case that initially condemned resale price maintenance. The Court was breaking up a cartel that used RPM as an enforcement mechanism against a discounter. Too much of the history of trade associations shows their members banding together to support resale price maintenance or to oppose chain stores, new market entry by more aggressive sellers, or in some cases even market shifting innovations.

In a large study of “open price” trade associations in 1925, the FTC observed that many of the complaints against them involved

165 See Open-Price Trade Associations Report, supra note 83. So-called Open Price trade associations involved agreements among groups of competitors to make prices and terms public and often to limit discounting, but to avoid explicitly fixing prices. They were heavily studied in the 1910s and 1920s. See, e.g., H.R. Tosdal, Open Price Associations, 7 AM. ECON. REV. 331 (1917). The principal treatise, which largely defended them, was
resale price maintenance,\textsuperscript{166} much of which was facilitated by trade associations.\textsuperscript{167} In addition, trade associations promulgated numerous ethical codes that were little more than disguised attempts either to facilitate price fixing or else to prevent firms from integrating into new areas.\textsuperscript{168} In its 1919 decision in Eastern States Lumber Ass'n v. United States,\textsuperscript{169} the Supreme Court applied the Sherman Act to condemn a small lumber retailer association’s rule that forbade dealing with lumber suppliers who had integrated into retailing.

In 1955 Edward F. Howrey, Chairman of the FTC, lamented that a significant part of his agency’s workload consisted of investigating price fixing, price information exchanges and related practices by trade associations intended to limit price competition

\textsuperscript{166} See Open-Price Trade Associations Report, supra note 83, at 47.


\textsuperscript{168} Id. at 253.

\textsuperscript{169} Id. at 275-280 (discussing such attempts by the National Association of Gummed Tape Manufacturers and the National Paper Trade Association); id. at 81-82 (tracing how the Sugar Institute, similarly, was ultimately condemned by Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936)); id. at 256 (describing how various associations, including the Western Confectioners Association, promulgated ethical codes discouraging discounts or rebates); id. at 284 (describing how the code made it unethical to invade the territory of a competitor); id. at 288 (describing how the code made it unethical for a member of Wisconsin Canners’ Association to sell directly to A & P rather than to independent cannners); id. at 304 (describing how, for funeral directors, code made it unethical to advertise prices).

\textsuperscript{169} 234 U.S. 600 (1914).
among members.\textsuperscript{170} That trend has continued. As many as one-third of cartel cases arise out of trade association activities.\textsuperscript{171}

Conclusion

Should antitrust policy be concerned with single-firm bigness itself, without regard to market dominance? To be sure, some very large firms dominate their markets, and antitrust’s stated concern with monopoly includes those. But markets consist of products, not firms, and many large firms are not dominant players in the products that they sell. Nevertheless, the idea that antitrust is really about bigness has always had a place in populist rhetoric, and has preoccupied a significant portion of the generalist press. Ultimately the arguments about using the antitrust laws to target size for its own sake reduce to some form of protection for small business, preferences about pricing that favor smaller and higher cost firms, or concerns that new technology may disfavor smaller established firms.

The concerns about large absolute size do show up in the hostility directed against large internet platforms. As a general proposition the concern is rarely high prices and only occasionally monopoly. Overall, the large platforms sell their services and goods either at a very low price or else at a price of zero, although some third parties such as advertisers may pay high prices. Consumer satisfaction with these firms is generally high.\textsuperscript{172}


\textsuperscript{172} See https://www.statista.com/statistics/185966/us-customer-satisfaction-with-google/ (Google); https://www.marketingcharts.com/industries/retail-and-e-commerce-118573 (brand loyalty, Amazon #1, Apple #2);
Considering today’s large digital platforms, they are not monopolies in most of the markets in which they operate. There are some exceptions. Google Search has a dominant share (exceeding 90%) of the consumer search market. Amazon very likely has a monopoly position (about 81%) in ebooks, assuming that ebooks are a distinct market from print books. But neither Facebook nor Amazon has anything close to monopoly power in the vast number of individual products and services that they sell. Currently pending legislation such as the self-preferencing bill may change that because it defines covered platforms in terms of gross size and may not have an effective market power requirement.\textsuperscript{173}

The “Competitive Process”

While consumer welfare may be the most commonly stated goal of the antitrust laws, “protection of the competitive process” is very likely a close second.\textsuperscript{174} Claims that antitrust should seek to


promote the competitive process are certainly less objectionable than alternatives that represent the views of particular interest groups, such as attacks on bigness as such.

The idea of a “competitive process” rationale provides us with little, however, unless the term “competitive process” itself has some definition. The term may imply an important value that liberal democracy places on process. Within that framework it may stand for a kind of minimalism that requires antitrust policy to umpire the competitive game but little more, much as a dedication to “free markets” operates as a highly generalized principle of economic freedom to trade.175 Consistent with that, it may refer to situations in which private actors set up rule making institutions such as standard setting organizations. Antitrust law then queries whether decision making in these organizations is consistent with a competitive process but is loathe to review the substantive decisions themselves.176 The assumption in such cases must be that the market works well enough when left to itself, provided that people play by the rules.

For example, in Rambus, Inc. v. FTC,177 the D.C. Circuit found that the defendant’s violations of rather poorly articulated standard setting rules were not acts of monopolization under a stated “competitive process” test.178 There was no exclusion, as §2 of the Sherman Act requires. More dubiously, in FTC v. Qualcomm, Inc.,179 the Ninth Circuit found that violations of an obligation to engage in

---

176 See Leslie, DOJ’s Defense, supra note 174 (appearing to use “competitive process” this way). See also Silver v. NYSE, 373 U.S. 341 (1963) (where stock brokerage was heavily governed by private rules, plaintiff was entitled to procedures similar to those in public adjudication of rights).
177 522 F.3d 456 (D.C. Cir. 2008).
178 Id. at 463-466.
179 969 F.3d 974, 990 (9th Cir. 2020).
FRAND licensing\(^{180}\) did not violate the antitrust laws under a competitive process formulation, even though there was exclusion and higher prices. In that case, “protection of the competitive process” did not even obligate a firm to follow its own agreed-upon rules, and even in the presence of competitive harm. That makes “competitive process” rationales a toothless instrument for pursuing anticompetitive conduct.

Most antitrust litigation does not arise in markets governed by private institutional rules such as those involved in standard setting. In that case, what are the rules? Within our Constitutional public law system, the process rationale for property and liberty rights falls back on the Fifth and Fourteenth Amendments, with their protections of established property rights, notice, opportunity to be heard, reasoned decision making, and Equal Protection. The staunchest laissez faire liberal is almost always a strong believer in the institutions of contract and property law, as well as procedural due process.\(^{181}\)

If conduct is not covered by a valid contract or unlawful on some other ground, we are largely at an impasse. As an antitrust goal, protection of the competitive process suffers from one substantial weakness: It does not say anything. The “competitive process” can mean pretty much what anyone thinks it means.\(^{182}\) As a result it embraces mutually inconsistent antitrust ideologies.

\(^{180}\) FRAND is a system for cross-licensing patents that operate on a common technology on “fair, reasonable, and non-discriminatory” terms. *See generally* Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORN. L. REV. 1683 (2020).


Consider the simple example of tying arrangements, or a seller’s requirement that a buyer purchase two things together. A hospital might refuse to provide surgical services unless the patient uses the hospital’s own anesthesiologist. Assuming that this policy is not legally defective on other grounds, what does a “competitive process” rationale say about it in an antitrust challenge? The policy excludes rival anesthesiologists, but nearly every agreement excludes the resources covered by that particular agreement. What else are they excluded from, and with what effect? Under the now largely repudiated leverage theory the tie may be thought to generate higher prices, but the free market enables firms to set any price they wish. The tie may enable the hospital to price discriminate, but many sales policies subject to free market competition do that. We might begin with a strong short run purchaser welfare premise that in a free market every buyer should have the right to purchase things in whatever package she desires, but that policy would lead to such things as people insisting on shirts without their buttons, bananas without their peels, or automobiles without their tires. We might attach a market power requirement, on the assumption that a competitive firm could not get away with imposing a tie unless it is harmless. But such a requirement serves only to make harm plausible, not necessary. Even a monopoly clothier should probably be able to insist that people purchase shirts with their buttons.

In sum, an antitrust concern articulated as protection of the competitive process does not give us much help unless we have some substance to tell us what is intelligent policy and what is not. In tying law economics has provided most of that substance, with its concerns about exercises of market power, production or transaction cost savings, price discrimination, disputes over the existence of harmful

---

184 On ties and leverage, see 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1701b, 1710 (4th ed. 2019).
185 Id. ¶ 1711.
186 Id. ch. 17D-1.
187 Id. ch. 17C.
leverage, foreclosure, and the like. The term “competitive process” adds nothing to these.

This toothlessness may explain why protection of the competitive process has been embraced by both liberals who want to expand antitrust enforcement and conservatives who want to shrink it. Justice Breyer cited it to complain that American Express’s policy of forbidding merchants from encouraging defections from its high fees harmed the competitive process. He also invoked it to approve NYNEX’s exclusive arrangement for purchasing equipment removal services when the harm occurred only to a single competitor. Justice Stevens used the term in a dissent to conclude that the competitive process required protection of the independence of individual traders, and this required continuation of a rule forbidding maximum resale price maintenance. By contrast, in his dissent in Albrecht v. Herald Co., which had initially established the per se illegality of maximum resale price maintenance, Justice Harlan concluded the opposite. He believed that the competitive process required supplier freedom to enforce maximum resale prices. As far as consumer harm is concerned, Justice Harlan had the better of this argument – striking down maximum resale price maintenance agreements under a per se rule almost invariably benefits individual dealers with market power at the expense of consumers.

188 For a catalog of these harms, see 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1703-11 (4th ed. 2018).
Some lower court decisions have equated the competitive process with high output or low prices. When Justice Breyer was on the First Circuit he identified harm to the “competitive process” as conduct that “obstructs the achievement of competition’s basic goals – lower prices, better products, and more efficient production methods.” Those are admirable goals, but a focus on consumer welfare and output gets to them much more directly. A ninth Circuit decision indicated that antitrust concerns for the “competitive process” foreclosed the condemnation of “economic behavior that benefits consumers.” These formulations effectively equate the competitive process with some formulations of a consumer welfare test. Others, including Microsoft, use the term to distinguish conduct that harms competitors from conduct that harms consumers. Still others use it to explain that conduct that harms the “competitive process” is different from conduct that merely harms competitors. In its

194 See, e.g., Fishman v. Estate of Wirtz, 807 F.2d 520, 536, 566 (7th Cir. 1986); Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984) (holding protection of competitive process should “discourage practices that make it hard for consumers to buy at competitive prices”).
196 See discussion infra, text at notes __.
197 Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 903 (9th Cir. 2008).
198 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (“[I]t must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.”); accord Camp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1988).
199 St. Luke’s Hosp. v. ProMedica Health Sys., Inc., 8 F.4th 479, 486 (6th Cir. 2021) (“The focus is on guarding the competitive process and on protecting the welfare of consumers, not on ensuring the economic fortunes of competitors.”); Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1280 (10th Cir. 2012) (describing the primary concern of antitrust law as “corruption of the competitive process, not the success or failure of a particular firm”); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020) (describing need for the conduct to harm the competitive process).
200 See Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 308 (3d Cir. 2007) (“Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive.”); Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 21 (1st Cir. 2004) (similar).
decision in FTC v. Qualcomm, Inc., the Ninth Circuit used it in this way to exonerate exclusive selling practices even though it also acknowledged that the defendant’s activities resulted in higher prices. That outcome seems to be inconsistent with either a defensible competitive process test or a consumer welfare test.

In May 2022, the head of the Antitrust Division attempted to rescue a competitive process standard. After pointing out the many deficiencies in consumer welfare standards, he stated a preference for a wide-ranging competitive process standard that invoked such statements as that the Sherman Act is a “comprehensive charter of economic liberty,” promoting structures that are good for our democracy and our society.” Mr. Kanter also illustrated some possibilities. The standard would require “treating employees with respect” because they have the right to leave. That might suggest a stronger policy about enforcement of noncompete agreements. To the extent it simply requires employers to behave more respectfully toward employees, however, it seems untethered from antitrust policy. Mr. Kanter also suggested that under this approach consumers, farmers, and everyone else “should have the free opportunity to select among

201 969 F.3d 974, 989 (9th Cir. 2020) (“Allegations that conduct ‘has the effect of reducing consumers’ choices or increasing prices to consumers do[,] not sufficiently allege an injury to competition . . . [because] [b]oth effects are fully consistent with a free, competitive market.’” (quoting Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012)).


203Kanter’s Handler Lecture, supra note 202 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (applying per se rule to condemning tying agreement in which railroads sold land subject to “preferential routing” clauses under which owners must use the railroad for shipping unless another carrier gave better rates)).
alternative offers.” That might indicate greater intervention against vertical restraints, although the Supreme Court decision that Kanter quoted for that proposition actually condemned a horizontal agreement that limited competitive bidding. 204

How much of this will be articulated in Antitrust Division enforcement policy is unclear. The devil, of course, is in the details and this speech was not explicit about how it would apply antitrust law in situations in which alternative non-economic interests should be considered.

In sum, “protection of the competitive process” is a slogan, not a goal. As an abstract proposition it may claim broad assent, but there is little room for optimism that it can ever be a useful device for making real decisions. Antitrust lawyers can assert protection of the competitive process as a goal, just as economists can proclaim a commitment to “free markets” or lawyers may urge people to “do justice.” But none of these does much to focus the range of disputes.

**Antitrust “Welfare” Tests**

Welfare tests promise something that neither concerns about size nor about the competitive process can deliver -- namely, a measurable goal associated with the health of the economy and the well being of its citizens. The meaning of “consumer welfare” has unfortunately became corrupted and controversial and it has always been beset by problems of measurement. At the atmospheric level it

---

204 *Id.* (quoting Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 695 (1978)). The published speech also cited two additional horizontal decisions with parentheticals. *See id.* n.21 (citing FTC v. Indiana Fed’n of Dentists, 476 U.S. 447, 459 (1986), for the proposition that “Limiting consumer choice by impeding the ‘ordinary give and take of the market place’ cannot be sustained under the Rule of Reason.” (internal citation omitted) and citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107, for the proposition that “A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”).
is hard to disagree with the proposition that the antitrust laws should have something to do with the welfare of consumers. Indeed, “Protecting America’s Consumers” is part of the FTC’s masthead.\textsuperscript{205} That serves to explain its value as a slogan. But can it be more than that?

This subsection considers the two versions of the consumer welfare test that dominate antitrust policy debate today, as well as an approach to consumer welfare that is more focused on the things that courts can and do actually measure – namely, output or price.

Two definitions of consumer welfare have dominated the antitrust debate, although people have not always appreciated the difference. One is a actually a misnomer that Robert Bork adopted from Nobel prize economist Oliver Williamson and should more accurately be called a “welfare tradeoff” model. That was the name that Williamson himself gave it.\textsuperscript{206} Under that model antitrust policy addresses practices that can have both monopoly-creating and cost-reducing effects. A practice should be unlawful if the monopoly loss exceeds the cost savings.\textsuperscript{207}

The alternative definition is that antitrust should seek to maximize the net welfare of consumers. We refer to this as “true consumer welfare”\textsuperscript{208} to distinguish it from the welfare-tradeoff definition, or the definition most generally used in welfare economics, which contemplates trading off gains and losses. If offsetting efficiencies to an increase in market power are to be considered, it is only when the cost savings that they generate are so significant that consumers are left unharmed. A variation of this version is

\textsuperscript{205} See FTC.gov.
\textsuperscript{207} See discussion infra, text at notes __.
incorporated into the current editions of the Merger Guidelines. Whether it stays there in the next round of revisions is unclear, given that both the head of the Antitrust Division and the Chair of the FTC have challenged the consumer welfare standard generally, although not necessarily the specific application in the Merger Guidelines. Of course, given the malleability of a competitive process standard, a merger rule that requires consumers to be held harmless could also be consistent with that standard.

One thing that both versions of the consumer welfare principle seek to avoid is bringing in concerns that, while certainly important, are not related to consumer welfare. In his May, 2022, Handler lecture Assistant Attorney General Kanter spoke rather generally about using antitrust law to promote freedom. He also faulted the consumer welfare standard for the idea that “antitrust cases should be reduced to econometric quantification of the price or output effects” of challenged conduct. In addition he criticized the consumer welfare test for being blind to “workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy.” The latter is a valid criticism of the Bork welfare-tradeoff model of consumer welfare, which ignored the situation of workers in particular. It is not an appropriate criticism of true consumer welfare properly defined as the welfare of consumers and those who benefit from increased output.

209 See Horizontal Merger Guidelines, supra note 149, § 10 (accepting an efficiencies defense to a merger only if the efficiencies are sufficient so as to prevent price increases). More generally, see id. § 1 (“The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise . . . . A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”).
210 See Kanter’s Handler Lecture, supra note 202; Lina M. Khan, Amazon’s Antitrust Paradox, 126 YALE L.J. 710, 710 (2017).
211 See Kanter’s Handler Lecture, supra note 202.
212 See Hovenkamp, supra note 31.
That standard benefits all suppliers, including workers, as well as purchasers.\textsuperscript{213}

Whether AAG Cantor’s remaining concerns acquire any traction in antitrust policy remains to be seen. A test case would be one in which consumers and labor and other input suppliers are not injured by any of the criteria that we use to identify consumer harm but the conduct should be prosecuted under the antitrust laws anyway. That could easily take antitrust into other areas of legal policy best served by alternative statutory systems.

**Economic Welfare, Historically Considered**

“Welfare” tests in neoclassical economics date to the early part of the twentieth century, and usually associate welfare with Pareto optimality or a little later with models that contemplated tradeoffs between winners and losers.\textsuperscript{214} Those tests considered whether winners from a policy change gained enough to compensate losers fully for their gains, and are an important foundation for modern cost-benefit analysis.\textsuperscript{215}

The more particular term “consumer welfare” had scattered uses prior to the 1960s, often in association with practices such as commercial fraud and false advertising,\textsuperscript{216} or sometimes with “home

\textsuperscript{213}Id.


\textsuperscript{216}This was particularly true in reference to the Wheeler-Lea Act of 1938, 15 U.S.C. §52, et seq., which extended the coverage of the FTC Act to unfair or deceptive acts or practices. See, e.g., Saul Nelson, Representation of the Consumer Interest in the Federal Government, 6 L. & CONTEMP. PROB. 151 (1939); Milton Handler, The
economics,” which was the economics of managing a household. In the United States, Progressives and a little later Institutionalist economists called for increased attention to consumers in economic theory. In the 1950s John Kenneth Galbraith, the most influential public economist of his time, used the term in reference to lower consumer prices. He addressed the antitrust laws mainly to deal with the argument that the existence of countervailing buyer power would make the antitrust laws unnecessary, because imbalances would be righted in the market. While Galbraith rejected that conclusion, he did suggest that the concept of countervailing power spoke in favor of antitrust exemptions for labor unions and agricultural combinations – two interest groups that bargained across the table from large manufacturers.

A more explicit focus on the relationship between consumer welfare and antitrust policy emerged in the work of Oliver Williamson in the 1960s. He hypothesized a welfare tradeoff that occurs when a practice results simultaneously in output-reducing monopoly and productive efficiency. A practice should be deemed a welfare improvement and thus lawful under the antitrust laws, he reasoned, if the production cost savings that it generated was greater than the economic loss occasioned by increased monopoly.


219 See John Kenneth Galbraith, Countervailing Power, 44 AM. ECON. REV. 1 (1954); see also JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1956).

220 See GALBRAITH, Countervailing Power, supra note 219, at 5-6.

221 Id. at 6.

Williamson did not use the term “consumer welfare” in his original proposal, although he did speak of loss of consumers’ surplus from increased monopoly power. Aggregate consumers’ surplus, which is output multiplied by the surplus consumers obtain from each transaction, should be the same thing as consumer welfare. Surplus in this context refers to the difference between a consumer’s willingness to pay and the actual price. For example, if a consumer is willing to pay $4 for a loaf of bread but is able to buy it for $3, that transaction yields a $1 surplus.

Williamson’s welfare tradeoff model would condone higher consumer prices and their attendant output reductions, provided that the welfare loss occasioned by this monopoly was at least offset by gains in productive efficiency. That also suggested that price increasing conduct could increase welfare. Further, he concluded, in most instances relatively modest efficiency gains would be enough to offset fairly significant price increases.

In 1978 Robert Bork borrowed the Williamson model but renamed it “consumer welfare.” That name has stuck and has become very influential, particularly in more conservative antitrust circles. This figure, taken from Bork’s book, illustrates the model:

---


224 Williamson, *Economies, Id.* at 22 (“A relatively modest cost reduction is usually sufficient to offset relatively large price increases.”).
Williamson and later Bork hypothesized a situation in which a market was initially competitive, operating at price $P_1$ and output $Q_1$. $P_1$ equaled $AC_1$, or average cost. The figure, which Williamson described as "naïve," did not include marginal costs and did not distinguish fixed from variable costs. At that point a merger, joint venture, or some other practice simultaneously gave that firm market power, enabling it to raise prices and producing the traditional monopoly "deadweight loss" designated by shaded area $A_1$. At the same time, however, this practice produced productive efficiency gains that reduced the firm’s average costs from $AC_1$ to $AC_2$, producing the cost savings, or efficiency gains, designated by shaded area $A_2$. According to both Williamson and Bork, this practice should be regarded as welfare reducing, and thus unlawful under the antitrust laws, only if the deadweight loss area $A_1$ was larger than the cost saving rectangle designated $A_2$.

A few things about the model are noteworthy. By identifying the deadweight loss triangle designated $A_1$ as the social cost of

---

225 Williamson’s article never mentioned fixed, variable, or marginal costs.
monopoly, Williamson and Bork adopted an estimate at the very lowest end of the range of estimates. It did not include resources anticompetitively spent in acquiring monopoly or the value of the destroyed investments of rivals.\textsuperscript{226}

In addition, Williamson’s model began with an assumption of prior perfect competition, or at least of prices equal to cost, and then assumed a practice such as a merger that created the monopoly. However, if one begins with the far more realistic assumption of a market that is already fairly noncompetitive to begin with, a much greater productive efficiency gain would be needed in order to offset the increased deadweight loss.\textsuperscript{227}

The administrative costs and uncertainties that attach to applying the welfare-tradeoff model are frightful, at least in close cases. One would have to quantify the deadweight loss from the resulting monopoly and then offset that against the dollar amount of the efficiency gains. Quantifying the loss of consumers’ surplus would require information about the shape of the demand curve over the reduced output. For this reason, the welfare-tradeoff test has never actually been applied in a case brought under United States antitrust law.\textsuperscript{228}


The model also strictly measured the tradeoff between competition and the emergence of single firm monopoly. However, both Williamson and Bork applied the model to mergers and joint ventures, where the more realistic threat was of increased market concentration and collusion-like behavior. But in that case the price increase and output reduction would be market wide, while the productive efficiency gains would apply only to the particular firms that merged. For example, if two firms in a market of five identical firms should merge and cause a market wide output reduction, the effect of the increased prices would apply across the entire market, but only the two merging firms, with an aggregate 40% market share, would attain the productive efficiencies. In that case the deadweight loss could be two and a half times larger than the Williamson estimate.\textsuperscript{229}

Another deficiency of the model was that it simply assumed perfectly competitive costs that were not affected by the challenged practice. That is, the firm(s) supply costs were a black box. They apparently purchased in a perfectly competitive market for inputs, including labor, both prior to and after the challenged practice. If the firms had any degree of monopsony power in input markets including

\textsuperscript{229} In the case of “unilateral effects” mergers, where only the merging parties experience the price increase, the outcome would be closer to the one Williamson envisioned. See Horizontal Merger Guidelines, supra note 149, § 6.
labor, however, then the model understated the deadweight loss, perhaps significantly.\textsuperscript{230}

Another feature of the Williamson-Bork model was its completely unrealistic assumptions about efficiency and output. In the figure reprinted from Bork’s book the challenged practice resulted in significantly lower per unit costs, even as it reduced output from $Q_1$ to $Q_2$. The figure suggests an output reduction of roughly one half. In any real situation the output decrease could be less than or more than that, depending on the amount of market power that the practice created, the magnitude of the efficiency gains, and the shape of the demand curve.

Neither Williamson nor Bork elaborated on the types of practices that could result simultaneously in cost savings and output reductions of such magnitudes. Is this simply an example of what Ronald Coase called “blackboard economics” -- something that can be drawn with chalk but has little application in the world?\textsuperscript{231} The most prominent cost savings that accrues from practices that are challengeable under the antitrust laws is economies of scale, but these generally accrue at higher rather than lower output. There is also the problem of fixed costs. Per unit fixed costs go up as output goes down, and the AC lines in the figure refer to all costs, both fixed and variable. Efficiency gains accompanying such a significant output reduction suggests that fixed costs in this industry must not be very high. But if that is the case, then what is the source of the monopoly? This is not necessarily to suggest that the picture describes an empty set, but only that the circumstances are not very common and must be proven.

Bork himself had a very peculiar idea about the relationship between efficiency, output and firm size. In describing his consumer welfare principle, he declared that “any efficiencies associated with a firm’s size are very likely to outweigh any restriction of output on the

\textsuperscript{230}See Hovenkamp, supra note 31.

consumer welfare scale. In his mind a firm could apparently attain efficiencies by having a bigger “size” while yet producing less than it had been before. But what is “size” referring to, if not output?

When we think of a firm’s size for economic or antitrust purposes, we usually consider output to be the unit of measurement. A firm that produces 1000 automobiles per time period is larger than one that produces 900. Could we use revenue as an alternative measure? For example, a firm that sells $1000 in product is larger than one that sells $900. In that case the difference might be that the firm with the larger “size” is earning monopoly profits. As a result its revenue may be larger even as its unit production is smaller. Another possibility is capitalization, or market value. For example, a firm with a larger plant that cost more money is bigger than one with a smaller plant. One might even imagine that a firm’s “size” is measured by the number of its employees.

But Bork was speaking about “efficiencies associated with a firm’s size,” and that could not be revenue. Rather it must be some kind of productive economy. Perhaps “size” refers to structural economies of scale without regard to actual production. For example, a firm might develop a technology that had very low costs and was able to undersell rivals, but then operate that technology at a very low rate of output. Looking at the firm’s technology we might compute its size in relation to the most efficient output level rather than the amount that the firm is actually producing.

A common characteristic of such cost-reducing technologies is that the cost savings apply at higher output because that is the way fixed costs are amortized. That is to say, the larger capital intensive firm is more efficient, but the efficiencies obtain only at the higher output rate. Could it produce at a lower rate than it did with the older technology and still have lower per unit average costs? Perhaps, but

\footnote{ROBERT H. BORK, THE ANTITRUST PARADOX (1978).}
such a result would be sufficiently counterintuitive that it would have to be proven.

This is not to say that a firm could not build a large low cost plant and then operate it at inefficiently low levels. The FTC once even alleged this. But the “welfare tradeoff” model clearly does not contemplate that, because it requires trading actual efficiency gains against consumer losses. All that one gets by operating a very large efficient plant at inefficiently low levels is a great deal of wasted resources, high per unit costs, and higher prices if the firm has market power. Those hardly sound like a recipe for efficiency gains.

Another factor essential to the welfare-tradeoff model is a strict requirement that the productive efficiencies that produced the tradeoff be essential to the particular merger or other event that created the

233See Dupont de Nemours & Co., 96 FTC 653 (1980) (titanium dioxide). Also see Oliver E. Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 YALE L.J. 284 (1977), which the Dupont case relied on, as well as Michael Spence, Entry, Capacity, Investment and Oligopolistic Pricing, 8 BELL J. ECON. 534 (1977), and Paul Joskow & Alvin Kleverick, A Framework for Analyzing Predatory Pricing Policy, 89 YALE L.J. 213 (1979). The Commission ultimately dismissed the complaint, reading the record as fully consistent with the proposition that DuPont, which had the most efficient known technology, had simply built a very large plant in contemplation of future expansion, concluding:

When DuPont conceived its strategy in 1972, its estimates of demand growth and supply shortfall seemed reasonable, and there has been no suggestion to the contrary. In competing for this growth, DuPont realized that even expansion of its existing plants to their practical limits could not satisfy all of the additional demand expected through the early 1980s. A new plant would be required. To build such a plant at efficient scale, afforded by DuPont's developed technology, meant that there would be little, if any, room left for expansion by competitors. Yet, to deny DuPont the opportunity to compete for all of the projected demand growth unduly penalizes its technological success. To require respondent to build a smaller, less efficient plant, or no plant, under these circumstances would be an unjustified restraint on competitive incentives and an unjustified denial of the benefits of competition to consumers.

Dupont de Nemours, 96 FTC at *66.
monopoly. The 2010 Horizontal Merger Guidelines reflect this requirement by insisting that a claimed efficiency be “merger specific.”\textsuperscript{234} If the gains can be achieved in a way that threatens competition less, the merger will not be approved.

For example, on underappreciated alternative to mergers, particularly in tech, is non-exclusive licensing of technology.\textsuperscript{235} Among the many acquisitions that large digital platforms make of tiny firms, the principal assets of interest are often intellectual property rights. The acquisition of a non-exclusive license would give the acquiring firm everything it needs to improve its own technology, but the acquired firm’s technology would remain on the market and available to others.\textsuperscript{236} When the most important component of an acquired firm is its intellectual property rights, the merger’s proponents should be required to show that a non-exclusive intellectual property license would not provide operational results roughly as good as those provided by the merger.

**True Consumer Welfare and Efficiencies**

People have observed that the antitrust statutes never speak of efficiencies.\textsuperscript{237} Indeed, they never use that word or any other phrase that makes the same association, such as cost reduction or quality

\textsuperscript{234} *See* Horizontal Merger Guidelines, *supra* note 149, § 10 (“The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.”).

\textsuperscript{235} The Guidelines mention licensing as an alternative in a footnote but provide no detail. *See id.* §10 n.13.


improvement. Of course, the statutes also fail to mention many other things that people have come to believe are important to antitrust analysis, such as industrial concentration, market power, bigness, or the per se rule.

An answer that is more to the point is that while the statutes do not mention efficiencies, they do include a requirement of competitive harm. This requirement is articulated in different ways in different provisions, such as “restrain trade,” “monopolize,” or ‘substantially lessen competition.” Further, the importance of efficiencies arises in two different ways. First, it can refer to “offsets,” in the sense that a proven efficiency might defend against an actual price increase or output reduction. In that case the absence of efficiency language might be important. Second, however, efficiencies can refer to cost savings that are so substantial that no harm ever occurs in the first place. In that case we do not even need an efficiency defense, for there is no competitive harm to begin with.

One particular shortcoming of the welfare tradeoff model is that it is willing to condone true competitive harm in the form of reduced output and higher prices, provided that those losses are offset elsewhere by productive efficiency gains. An act that the model ends up justifying can cause actual harm to competitors and labor as a result of higher prices and lower output. It is justified because it produces even greater gains to the defendant.

The true consumer welfare model does not make this error because it acknowledges only those efficiencies within the second classification. Efficiencies are relevant, but only if they are substantial enough to offset completely competitive harm, with the result that

---

238 See discussion supra, text at notes ___.
there is no harm at all. The most important example of this is merger policy under the Merger Guidelines, which start out by predicting the price and output effects of a merger. If that analysis predicts harm offsetting efficiencies will be allowed, but only if they are sufficient to reverse the predicted price increase completely.240 That is, there is no net harm. In that case the absence of efficiency language in the antitrust statutes is irrelevant. For example, if a merger threatens to raise price from $8 to $10, it could be defended by evidence that efficiencies would drive the price back to $8 or less. In that case the merger law’s “substantially lessen competition” standard has not been met.

The Merger Guidelines approach suggests a template for the assessing efficiency claims for any restraint whose price or output effects can be estimated. Efficiencies are and must be relevant. Ignoring them would be a sure way to ruin the economy. On the other side, naïve acceptance can serve to exonerate harmful restraints. One important principle here is that the defendants are the creators of any efficiencies that they offer. As a result, they are in the best position to carry the burden of showing that other affected people – consumers and labor in particular – will be unharmed.241

The assessment problem for restraints other than mergers can be difficult, however. On the price-increase side mergers of competitors are relatively simple: just as cartels, they unify pricing and increase the post-merger firms’ effective market share. Horizontal contractual restraints may sometimes do this, but they may not. In some, such as restraints on innovation, measuring price/output effects could be impossible.242

240 See Horizontal Merger Guidelines, supra note 149, § 10.
Measuring “Welfare” in Antitrust Cases

For all of the attention that has been given to consumer welfare as a guiding principle for antitrust, one thing that has largely escaped notice is that courts almost never measure “welfare” and are rarely able to do so. The things that they actually measure are almost always changes in output or changes in price. They infer welfare effects, if at all, from these measurements.

Consider figure 2 below. Some version of it is commonly used in elementary economics and some antitrust classes to illustrate the effects of monopoly on consumer welfare, which is measured by consumers’ surplus. The figure shows that when price as set at marginal cost, which is the competitive level ($P_c$), consumers’ surplus (welfare) is equal to triangle 1-3-6. By contrast, when the price is set at the monopoly level ($P_m$), consumers surplus has been reduced to triangle 1-2-4.

**Figure 2**

Note a few things about this figure. *First*, as output increases, consumers’ surplus also increases. *Second*, as price increases, consumer surplus goes down. *Third*, like all triangles the consumers’ surplus triangle has three sides – in this case defined by price, output, and the demand curve. In the picture the demand curve is a straight
line, making a true triangle, which means that someone who knew both the output and the price could easily compute the consumer surplus as the area of the resulting triangle. Because welfare is the same as consumers’ surplus, measurement is easy.

But most demand curves are not linear. Most common demand curves are very likely convex to the origin, and if demand is lumpy they can be irregular. This is true, for example, when purchasers are arrayed in several distinct but internally homogenous groups. Within each group demand is fairly constant, but it changes as you move from one group to the next. As a result, computing actual consumers’ surplus requires detailed information about the shape of the actual demand curve through the relevant range.

Note also, however, that the first two propositions above continue to apply even if the demand curve is nonlinear. For any given demand curve welfare goes up as output goes up, and welfare goes down as price goes up. Further, antitrust condemns specific practices, not monopoly as such. As a result, in most cases the best evidence that we use to estimate competitive consequences are either changes in market wide output or changes in price. If we can show either that a particular practice increases market output or decreases price, we can at least presumptively infer an increase in consumer welfare.

To be sure, the inference might be subject to some exceptions. Perhaps a decline in nominal output corresponds to a quality improvement, or a particular practice may increase output but also increase price. Perhaps a practice such as resale price maintenance changes the shape or slope of the demand curve in some way. We turn to those later.

It is also important not to confuse firm output with market output. For example, a practice such as a boycott or exclusive vertical

---
243 With a linear demand curve, consumer surplus would equal half the product of the output leg and the price leg.
244 See discussion infra, text at notes __.
contract might increase the output of the firms employing that restraint, but it does so by excluding rivals. If the restraint is anticompetitive, market wide output will generally go down. Although dealing with this is not conceptually difficult, it can be a measurement difficulty.

Courts deciding antitrust cases rarely attempt to measure actual consumer welfare changes, which would require knowledge about the shape of the demand curve. What they actually measure is changes in price or changes in output, and they infer conclusions about consumer welfare from that. This is not necessarily a problem, however. Courts do not need to know the amount of welfare gains or losses that result from a practice. They need know only whether market output or price have increased or decreased.

The existence of efficiencies that result from a practice complicates this analysis. Models for assessing mergers often draw conclusions about welfare, largely in order to account for efficiency offsets. But the fundamental question under the Merger Guidelines is still whether the merger will yield a higher price, not whether it will increase consumer welfare. Indeed, the 2010 Horizontal Merger Guidelines, never speak of consumer welfare at all, but only about price effects.

Under the Guidelines approach, competitive harm is largely inferred from the absence of a price increase, with one exception: The Guidelines contemplate efficiencies defined in terms of “lower prices,


\[^{246}\text{See Horizontal Merger Guidelines, supra note 149, § 1 (speaking of mergers that enhance market power, defined as mergers that “raise price, reduce output, diminish innovation, or otherwise harm customers….”).}\]

\[^{247}\text{They also never speak of the “competitive process.”}\]
improved quality, enhanced services, or new products.” As a result, a merger that yields a higher quality product might qualify even though the nominal price of the product goes up. By contrast, under a total welfare standard – which the Guidelines reject – one can have mergers that increase both welfare and the price of an unchanged product.

Efficiencies, at least in the simple case, equal the amount of cost savings on each unit of production multiplied by the number of units. Measurement of efficiencies is more complex if the efficiencies occur with respect to fixed as well as variable cost. Nevertheless, the principle is the same: in order to quantify historical cost savings over a defined period, one needs to know the size of the per unit cost reduction and the number of units produced.

Welfare and Damages

If a private plaintiff is seeking damages, these have to be measured, and that might suggest that welfare losses have to be computed. In fact, none of our methodologies for assessing antitrust damages requires a calculation of welfare losses.

First of all, the antitrust damages provision does not require it. The measure given in §4 of the Clayton Act, “threelfold the damages

248 See Horizontal Merger Guidelines, supra note 149, § 10.
251 One problem is that an efficiency that reduces only a fixed cost will not immediately be reflected in a lower market price. By contrast, a variable cost efficiency typically is.
by him sustained," describes a purely private loss to the plaintiff, not a social loss, and certainly not a net social loss. The plaintiff’s individual loss might be an element in the welfare loss, but no more than that.

In consumer cases damages are measured by the price increase ("overcharge") paid by actual purchasers. Under an “umbrella” theory some courts permit damages based on purchases from non-participants in cartels who were able to raise their prices. No downstream party has a cause of action for the traditional deadweight loss, which consist of purchases that were not made at all. In sum overcharge damages measurements reflect the wealth transfer that results from a cartel or other practice, but do not pick up the welfare loss.

The same thing is true of damages for exclusionary practices. Such plaintiffs are typically either actual or incipient competitors, and the measure of their damages is the value of lost investment, sometimes including anticipated lost profits. These losses may very roughly track to losses of market wide output that accompanies an antitrust violation. For example, in an attempt to get market output down a cartel might boycott a maverick rival, and the loss in market wide output might provide the basis for measuring the excluded rival’s lost sales. But that would be a measure of lost output, not of welfare.

Welfare and Output

Introduction

As noted above, while antitrust tests of legality are often phrased in terms of “welfare,” in fact the evidence that courts rely on is almost always based on either output effects or price effects. A useful and practical way of stating a test is that antitrust law should

254 Id. ¶ 348.
255 Id. ¶ 397.
condemn conduct when it is covered by an antitrust statute and has the effect of reducing market wide output. Price increases will work too, provided that they result from market wide output reductions. One qualification is that low prices are the goal on the output side of the market. One the input side, where the concern is output suppression, the goal is actually higher prices. For example, restraints in labor markets tend to reduce wages anticompetitively. By contrast, welfare on both the output and input sides of the market is lessened by an output reduction.

While an output definition of competitive harm does not expressly invoke a consumer welfare principle, it benefits all of those whose welfare is associated with that of consumers. Consumers and input suppliers, including labor, are better off as market output increases. As a result, output or price driven approaches largely duplicate the result of a true consumer welfare test, but they are more precise about what is being measured.

Considering effects in labor markets is critical because, first of all, labor is mainly a variable cost and demand for it is very sensitive to output. Second, when it comes to output responses consumers are in the driver’s seat: when output increases or decreases consumers decide their purchasing behavior. Labor largely follows along.

This output-focused formulation has several conceptual and practical advantages over the various articulations of the “consumer welfare” principle for antitrust law. First, it addresses the fact that labor, which benefits from greater job opportunities and more competitive wages, stands in a position analogous to that of consumers. Workers almost always benefit from higher production. Second, as an operational standard, output is easier to measure than welfare and almost always produces the correct result. So the welfare goal of the antitrust laws is best stated as encouraging markets to

---

256 See discussion infra, text at notes __.
257 See Hovenkamp, supra note 31.
produce the highest sustainable output. The word “sustainable” distinguishes a few situations such as predatory pricing, in which output can be anticompetitive because it is too high. This results from the fact that legally accepted definitions of predatory pricing require proof of prices below cost, which are not sustainable in the long run.258

The disadvantages of an output-based standard are, first, that output can be difficult to measure, although it is never as hard to measure as welfare is. Second, there may be cases when output and economic welfare do not pull in the same direction — that is, where higher output actually results in lower welfare, or vice-versa. The value of an output standard depends on how frequently these situations occur, how often they yield unacceptable results, and whether they can be identified and controlled.259 In the discussion below we suggest that they are either sufficiently minor that they can be ignored or else clearly detectable. In decades of antitrust litigation under the rule of reason, none of them has ever determined an antitrust outcome.

**Output as a Proxy for Welfare**

Welfare generally increases as output increases. There may be exceptions — situations where welfare declines as output increases, or vice-versa. For example, the sale of 100 loaves that each generate a consumers’ surplus of $1.00 will create more welfare than the sale of 150 loaves that generate a surplus of 50¢ per loaf. How often this occurs and whether it is an antitrust problem of consequence is considered below.260

Measuring output can be easy or difficult, depending on the situation. If firms produce a standardized product, such as identical bolts, measuring output may entail no more than counting the number

---

259 See discussion infra, text at notes __.
260 See discussion infra, text at notes __.
of units. In addition to the cardinal units, however, output also includes quality, which is more difficult to measure, and also innovation, which is the most difficult.

Offsetting this is the fact that output does not generally need to be quantified in order to establish an antitrust violation, although lost sales may occasionally have to be estimated in order to compute damages. Further, an output reduction can often be inferred from circumstances even when it cannot be precisely measured.

For example, we can easily infer that a naked cartel on either the buying or the selling side of the market reduces output. That is enough for condemnation and all that the per se rule demands. If a private plaintiff wants to obtain damages, then quantification of some kind will be in order, but it is typically quantification of the over- or undercharge, not of the change in output. Cartel damages are based on sales that are actually made. The output reduction certainly causes injury in fact to those who did not buy from the cartel as a result of the price increase. They do not have standing to sue for unmade sales, but they may in some cases obtain damages for purchases of substitute products whose price increased with the cartel price. In any event, none of this requires an estimate of welfare losses.

A case like Ohio v. American Express, Inc., is a little tougher, but not much. The anti-steering rule that was challenged prevented a merchant from offering a customer a discount for using a less costly card. Had that transaction been permitted it would have resulted in lower prices to both the merchant and the consumer in every situation in which the customer would have accepted the offer. As a result, it was at least prima facie an output reducing restraint. Then under the rule of reason the only remaining question was whether there

---

261 See discussion supra, text at notes __.
263 See id. ¶ 347.
was a justification. The free rider justification that the defendant offered made no sense because Amex’s perks attached specifically to card use. As a result, a customer who switched to a different card would be giving up these perks, and no free riding was involved.\textsuperscript{265} The majority stated a consumer welfare principle for antitrust but ignored or misunderstood too many important facts. Once we know that the anti-steering rule caused higher consumer prices and higher net merchant fees in every case that applied it, we have enough for the government to obtain an injunction.\textsuperscript{266}

A damages action by either merchants or card users would require them to quantify their losses. The merchants would have to estimate the dollar value of the transactions that would have been steered to a cheaper card absent the rule, as well as the difference in merchant acceptance fees between the two groups of transactions. The customers would have to make similar estimates of the losses that accrued to them. These could involve difficult calculations, but there is no obvious reason that an expert would be unable to perform them. The important principle driving these calculations is that the Clayton Act does not require an estimate of welfare losses to establish damages. The relevant language, “threefold the damages by him sustained,”\textsuperscript{267} refers strictly to the private losses suffered by each individual plaintiff. These are typically less than the welfare losses caused by the offense, but in any event computation of welfare losses is unnecessary.

Liability, although not damages, in the \textit{Actavis} decision was easy as well.\textsuperscript{268} The pay-for-delay pharmaceutical patent settlement that the Court correctly disapproved considerably increased the price of affected pharmaceuticals, perhaps for several years. That should

\begin{footnotesize}
\begin{enumerate}
\end{enumerate}
\end{footnotesize}
have been enough to condemn it, perhaps with some lingering to consider whether the Patent Act prevented that result. In this case it did not.269

As private antitrust actions following from Actavis reveal, the problem can become much more complex when we need to show causation and private harm.270 The FTC easily succeeded in creating an inference of higher consumer prices, but that was all it needed to do. For a plaintiff seeking damages the hard question would be how much higher and for how long. These issues are more difficult and have frustrated many private plaintiffs.271

Exclusionary practices damages are conceptually a little closer to the monopoly output reduction. For example, in the Amex case, discussed above, competitors such as Visa and Mastercard may also have been injured by the anti-steering rule.272 They lost transactions that customers would have placed on their cards but for the anti-steering rule. By the same token, a firm that is boycotted from a market loses its sales in that market, and this output reduction enables the anticompetitive price increase. Damages in such cases are based on

269 See Aaron Edlin, Scott Hemphill, Herbert Hovenkamp, & Carl Shapiro, Activating Actavis, 28 ANTITRUST 16 (2013).
270 See Kevin B. Soter, Causation in Reverse Payment Antitrust Claims, 70 STAN. L. REV. 1295 (2018).
271 Id.
272 A less plausible alternative theory is that the AmEx’s higher merchant fees gave alternative cards an opportunity to collude, raising their own fees. That may have been true previously, when Visa and MasterCard also imposed anti-steering rules. In that case the rules may have facilitated price comparison and evasion of collusion. In 2011, prior to the AmEx litigation, Visa and MasterCard agreed in a consent decree not to impose anti-steering rules. See United States v. Am. Express Co., 2011 WL 2974094 (E.D.N.Y. July 20, 2011) (approving proposed consent judgment and showing Visa and Mastercard but not AmEx agreed to abandon their anti-steering rules).
lost sales or lost profits. This means that each wrongfully excluded firm can obtain damages based on its own provable losses.273

Product Output and Harm to Labor

Output is what a firm produces and sells and that creates consumer surplus when consumers purchase. In the ordinary course, consumers are better off as output is larger. This is also true of intermediaries, or those who resell or deal between the selling firm and the consumers.

The input side of the market is where the firm purchases labor plus the other materials and services that it requires. Assuming that the demand for labor is a variable cost, demand for it is strongly correlated with product output.274 A firm may have differing amounts of market power in the markets into which it sells and those in which it buys. In general, however, as a firm’s product output goes up or down its need for labor follows in the same direction and amount.

Depending on whether the power is on the output side or the input side, a firm exercises market power by reducing its output or else by reducing its purchases. The general result of an exercise of market power on the selling side is that the firm sells less but charges higher prices. A firm exercising market power on the input side procures less but also pays less. For example, if a cartel of sugar beet purchasers exercised buying market power it would purchase fewer beets and pay less for them.275 The output of sugar beet refiners is sugar, and it would produce less in proportion. Whether the price of the sugar would rise depends on whether the firm has market power in the market where it sells. It should be clear, however, that the fundamental concern of competition law is to produce sustainable and competitive levels of output on both the buying side and the selling side.

274 For elaboration, see generally Hovenkamp, supra note 31.
One important consequence is that restraints that reduce product output can cause labor harm just as much as consumer harm. Antitrust law does not often give employees standing to sue for harms in the product market, but that does not change the fact that the private as well as social cost of monopoly in the product market should also include the cost of any anticompetitive loss in the labor market.

Possible Output Anomalies

Output does not necessarily correspond to welfare, or even to consumer welfare. They usually, but not invariably, move in the same direction. In a few situations output may increase or remain unchanged as consumer welfare decreases. How often this actually occurs is hard to say. How often it makes a difference in antitrust policy is impossible to say with very much precision either, although in this case “never” is far closer to the truth than any significantly higher number.

Perhaps the most common example of anticompetitively higher prices that are not accompanied by an output reduction is the successful single-customer/single-product cartel. Suppose a market contains three competing contractors who bid against each other for a single customer’s project. The colluding contractors would estimate the buyer’s reservation price and bid close to that amount. The result is that the buyer pays more for the project but it buys anyway, so output does not go down, at least for this particular iteration of the price fix. In that case measurement of output effects alone would show no harm. Welfare losses are also easy to compute. They equal the difference between the competitive price and the cartel price.

As soon as the quantity is anything other than binary, however, there would be output effects. For example, suppose that the three

276 See 2A PHILLIP E AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 352 (5th ed. 2021); see also Hovenkamp, supra note 31.
278 A reservation price is the most the buyer is willing to pay.
sellers were bidding to supply the buyer with its needs for paper clips for one year. The cartel would still make the sale, and there is still only a single buyer. But the buyer’s needs for paper clips would decrease in response to the higher price. In cases with multiple buyers the effect of the cartel price increase would also be to reduce the number of sales. In sum, output and welfare move together with the idiosyncratic exception of the one-off cartel to a single buyer.

An argument has also been made that vertical restraints can sometimes reduce welfare even as they increase output. Figure 3 below illustrates the problem. A vertical restraint such as resale price maintenance forces dealers to engage in greater nonprice competition, typically by adding in services that they would not offer at a lower price point. The impact of this practice, however, could be to increase the reach to marginal customers, who are on the edge of the market and agree to purchase only because of the added service. By contrast, inframarginal customers, who would have purchased anyway, are injured: they pay a higher price for services that they do not value.

---

In the figure the added services shift the demand curve from $D_1$ to $D_2$ by bringing in the more marginal customers, but at the same time consumer prices rise from $P_1$ to $P_2$. Output rises from $Q_1$ to $Q_2$. Welfare, however, decreases. Prior to the resale price maintenance consumer welfare was triangle A-D-E, but afterward it is A-B-C, which is very likely smaller. That is, output and consumer welfare can move in opposite directions.

The first question one might ask about this story is whether it describes a real thing or is just another example of blackboard economics. Here, it seems at least conceivable that the gains to the marginal customers would be more than offset by losses suffered by the inframarginal customers. Measuring it empirically would be extraordinarily difficult. Indeed, at this writing vertical nonprice restraints have been assessed under the rule of reason for almost 50 years, and RPM has been under the rule of reason for fifteen years. There appears not to be a single case in which this rationale was given to support condemnation of a vertical restraint.

---

Even if such a situation were to be discovered, would it satisfy the statutory requirement that the conduct “restrain trade.” Historically, that term has been reserved for conduct that reduces output, or the amount of trade flowing through the market. That is, the text of the Sherman Act suggests a change in output, not a change in welfare. Of course, the Sherman Act was developed by people who very likely had little knowledge of the difference between output and welfare. In any event, nothing suggests that they identified restraint of trade with a reduction in consumer surplus. They did, however, identify restraints with higher prices, and RPM clearly produces those.

Another problem, which is more fundamental for antitrust policy, is that this practice has nothing to do with vertical restraints and, indeed, not even very much to do with monopoly. It in fact results from the fact that while products are packages of individual features, not all customers value each feature by the same amount. They buy because the price of the package is lower than the value they place on it. Further, selecting the appropriate package does not require a vertical restraint. It can result from entirely unilateral conduct.

For example, suppose that the publisher of a daily newspaper decides to add a Sports section, increasing the paper’s price by 5¢. The sports section increases the paper’s circulation to the “marginal” customers, who are those that now purchase only because of the added sports section. It might injure others who are asked to pay the additional 5¢ but do not read the sports section. Whether welfare goes up or down is an empirical question. It is certainly possible that the addition of the sports section produces greater circulation but less welfare.

In this case, adding the sports section is a unilateral act. Further, it has nothing to do with either vertical restraints or, very

---

282 See discussion supra, text at notes __.
283 See discussion supra, text at notes __.
likely, monopoly. Rather, it reflects the fact that a newspaper is a product whose value to consumers is “lumpy,” in the sense that some customers value one section more than others, but the most cost effective way to distribute the paper is to put all of them together at a common price.

Indeed, retailers both large and small make equivalent decisions all the time when they decide how to package their offerings. For example, Costco’s offering customers free bits of breakfast sausage on a toothpick provides no benefit to vegetarians, but the additional product and labor costs will be passed on to everyone. The local gasoline station’s provision of free air for tires benefits only those people who don’t have their own tire pumps. One could go on with this list, but the point should be clear. Even if we wanted to condemn this kind of behavior the administrative costs of doing so would be astonishing.

A third possibility of a disconnect between output and welfare is price discrimination. While price discrimination has been heavily modelled in the economic literature it has never played a decisive role in antitrust enforcement. As a general matter, its welfare effects are loosely but not invariably coordinated with output effects. Price discrimination that reduces output reduces welfare. This proposition was established for third-degree price discrimination in the 1920s, and for second degree price discrimination more recently. The more

---

284 One possibility is that the newspaper added the sports section in order to exclude a rival publication that reported on sports. Even here, however, we would not ordinarily consider new entry, an output increasing practice, as unlawfully exclusionary.
285 On its relevance for antitrust policy, see 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 721 (4th ed. 2022).
relevant question for our purposes is whether there are instances of price discrimination that increase output and reduce welfare.

Some instances of price discrimination can simply be predatory pricing. This was the theory of original §2 of the Clayton Act and was applied by the Supreme Court in *Brooke Group, LTD v. Brown & Williamson Tobacco Corp.* The answer here is that cutting price below cost in one area of geographic or product space while not in another can be unlawful, but only if the prices are below a relevant measure of cost. Further, under current law the predation must be followed by a period of recoupment, as *Brooke Group* required. In any event, this situation is governed by the requirement that the relevant output be “sustainable.” Predatory pricing under this definition is not sustainable.

Second-degree price discrimination effected by tying arrangements has been heavily modeled and seems to be well understood. In nearly all cases it results in higher output and may or may not increase welfare, depending on the circumstances. To illustrate, suppose the seller of a digital printer sells the printer at a very low price or even gives it away, but ties toner cartridges and puts an overcharge into the cartridge price. In that case customers benefit from the lower printer price but are harmed by the higher cartridge price. Because different customers use the cartridges in differing amounts, higher volume users will tend to be harmed more as the aggregate of cartridge overcharges becomes larger, and at least some of them could be harmed. On the other side, the firm sells more printers.

---

289 See Erik N. Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925 (2010). For some counterexamples, limited to situations where the tying firm is an absolute monopolist and the tied product market is perfectly competitive, see Elhauge & Nalebuff, supra note 287.
Once again we have to consider whether this practice “restrains trade.” Further, in terms of consumer harm we need to consider that it benefits some customers while harming others. As a litigation reality check, the use of tying to effect price discrimination has been known since the 1950s, but has never determined the legality of a tie. Finally, it is noteworthy that the practice does not require monopoly but only relatively modest amounts of product differentiation. For example, even when razors are sold in a competitive market they may be subject to tying if they are differentiated.

Conclusion

Antitrust is properly focused on competition. Those concerns are explicit in the original Sherman Act and even in the Clayton Act, passed during the height of the Progressive Era. Although Supreme Court Justices Brandeis and his successor Justice Douglas articulated antitrust’s goals as targeting large size, no courts have taken the bait. Nor should they. Among antitrust’s slogans and goals, the pursuit of “bigness” is a useless and damaging alternative, calculated to injure both consumers and labor.

While concerns expressed as protection for the competitive process have acquired some traction, the term lacks sufficient definition and does not create a meaningful target for measurement. It readily claims assent largely because it is consistent with just about any goal that one happens to choose. “Protection of the competitive process” operates as a slogan, not as a goal.

291The Supreme Court did once suggest in dicta that a tie “can increase the social cost of market power by facilitating price discrimination.” Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984). But price discrimination was not involved in that case and, in any event, the Court exonerated the tie.
292See, e.g., Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971) (condemning variable proportion franchise tie imposed by struggling franchisor).
Welfare standards are the ones that everyone loves to hate. First, they have the capacity to operate as actual goals. They provide a mechanism for measurement, which is not to say that measurement is easy. They also align best with defensible overall goals for the economy, which emphasize productivity, economic growth, wide accessibility of products and services, and broad opportunities for labor. Difficulties in implementation should not be an excuse for replacing them with something much worse.