

# THE EFFECTIVE COMPETITION STANDARD

A New Standard for Antitrust

REPORT BY **MARSHALL STEINBAUM** AND **MAURICE E. STUCKE**  
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# Executive Summary

The economy faces a market power crisis. Rampant consolidation and vertical integration leave consumers, workers, suppliers, and competitors powerless and disadvantaged. In highly consolidated markets, consumers have limited choice and little power to pick their price, quality, or provider for the goods and services they need. Workers are met with massive employers and have little agency to shop around for competitive wages and benefits. Suppliers can't reach the market without paying powerful intermediaries for the privilege or succumbing to acquisition.

This market power imbalance is due, in large part, to lax antitrust law and enforcement. The Federal Trade Commission and Department of Justice are intended to monitor and prevent monopolies with market power from forming “in their incipiency.” But of late, they have failed. This is due to the **consumer welfare standard**, which identifies and judges harm to competition only by its potential effect on consumers—and rarely with respect to anything other than prices. The consumer welfare standard fails to define “welfare” and ignores adverse effects on workers, suppliers, quality, and innovation. It is not only ambiguous, but it is also inadequate to the task of preserving competition throughout the supply chain, in the labor market, and in the economy as a whole.

This trend is reversible. It is imperative that the consumer welfare standard be replaced, and in this paper, we present an alternative: the **effective competition standard**. This framework restores the primary aim of antitrust laws, namely to protect competition wherever in the economy it has been compromised, including throughout supply chains and in the labor market. The new standard we propose articulates several essential goals: 1) to protect individuals, purchasers, consumers, and producers; 2) to preserve opportunities for competitors; 3) to promote individual autonomy and well-being; and 4) to disperse and de-concentrate private power.

Concretely, we call for amendments to Sections 1 and 2 of the Sherman Act and Sections 2 and 7 of the Clayton Act in order to prioritize enforcement against vertical integration and to create bright-line indicators for anticompetitive behavior. These measures are essential to track and understand how best to halt and reverse the economy's market power crisis.

Most importantly, we must keep in mind that the consumer welfare standard that has predominated for the past 40 years is not statutory. As such, it can be easily lifted; nothing prevents courts and the federal antitrust agencies from enforcing the federal antitrust laws as Congress intended them. On the other hand, if the agencies and courts won't fix the economy's market power problem, Congress must. What has been lacking in the past is an alternative way forward, now clearly laid out in the pages below. The changes we call for are essential to protect our competitive markets, as well as individuals and the economy at large. To stop harmful market consolidation, the antitrust rules must be updated and strongly enforced.



# Introduction

America, as legal and economic scholars are increasingly noting, has a market power problem. The emerging evidence points to less competition, greater concentration, greater market power, and widening wealth and income inequality. Americans are not benefitting from the meager competition that exists in many industries because the current state of competition law benefits the select few—at the expense of nearly everyone else.

We have antitrust laws that are supposed to deal with concentrated economic power. The problem is that the antitrust laws have been hijacked in two ways. First, ideologues changed the legal standard from addressing a variety of goals to focusing solely on the concept of consumer welfare. Second, some courts and enforcers went even further than confining antitrust solely to consumer welfare and instead promoted economic policies that neither improved our welfare nor promoted competition. Recent Supreme Court decisions, including *American Express*<sup>1</sup> and the U.S. District Court’s decision in favor of AT&T, the largest pay-television distributor in the country, acquiring media conglomerate Time Warner,<sup>2</sup> illustrate how antitrust, under the prevailing **consumer welfare standard**, has been distorted beyond all recognition. The courts have elevated the burden of proof on the government and other antitrust plaintiffs to such an extent that the Sherman and Clayton Antitrust Acts have become unenforceable for many anticompetitive practices.

If the United States continues with a light-if-any-touch antitrust review of mergers and to turn a blind eye to abuses by dominant firms, concentration will likely increase, competition and our well-being will decrease further, and power and profits will continue to fall into fewer hands. When monopolies are recognized as an inevitable, permanent part of the economic order, President Woodrow Wilson warned, our last, unwelcome recourse is regulation, where the government risks being captured.<sup>3</sup> Unfortunately, that’s where we are: a compromised antitrust technocracy that benefits the few at the expense of the many. Start-ups, small and midsize firms, and Americans more broadly—as workers, consumers, and democratic citizens—are left to the beneficence or spite of a few powerful, but arbitrary, corporations.

Luckily, this trend is reversible—if we restore antitrust as a guarantor of effective competition. To tackle today’s market power problem, we offer an **effective competition antitrust standard** to replace the prevailing consumer welfare standard, which courts and scholars have interpreted differently (and at times inconsistently), and to outline a series of policy reforms that would implement the new standard. The effective competition standard restores the primary aim of the antitrust laws, namely, the dispersion and deconcentration of significant private power wherever in the economy it is to be found, including throughout supply chains and in the labor market.

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<sup>1</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

<sup>2</sup> *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), appeal filed (D.C. Cir., July 13, 2018).

<sup>3</sup> WOODROW WILSON, *THE NEW FREEDOM* (1918).



*To tackle today's market power problem, we offer an effective competition antitrust standard to replace the prevailing consumer welfare standard.*

Our view is that antitrust has been enormously important for structuring the economy now and in the past, either in favor of concentrating economic power or against it. Though this paper articulates antitrust policies aimed at deconcentrating power, nothing in this paper is intended to argue that antitrust alone can accomplish this urgent objective. Progressive taxation, labor reforms, effective (not captured) regulation, corporate governance, and social welfare policies are only some of the other policy tools necessary. Thus, while strong antitrust enforcement is often an important condition to preserve a competitive market structure, policymakers must use additional methods of structuring economic activity, including sector-specific regulatory structures.

To understand the need for an effective competition standard, it is helpful to initially take a historical perspective. Part I of this paper outlines how U.S. antitrust policy and enforcement have waxed and waned over four cycles, and Part II describes the rise of the consumer welfare standard in the last policy cycle. Part III outlines the operational difficulties that the courts and agencies have experienced in applying the consumer welfare standard. Part IV looks at recent empirical research to see how competition has fared during the past 35 years. The consumer welfare standard, paradoxically, has neither helped consumers nor their welfare. Instead, the U.S. economy has a market power problem, with a small number of firms reaping significant supra-competitive profits in many industries. To promote competition and a more inclusive economy, Part V outlines an effective competition standard, how it differs from the consumer welfare standard, and what needs to happen to implement the effective competition standard into federal antitrust policy. Part VI raises and addresses several objections that the standard may present.



# THE CYCLES OF ANTITRUST ENFORCEMENT

U.S. antitrust policy and enforcement have waxed and waned over four cycles:

- **1900–1920.** After initial administrative neglect and judicial hostility, this era ushered in the promise of antitrust with the breakup of Standard Oil<sup>4</sup> and the enactment of the Clayton Antitrust Act of 1914<sup>5</sup> and the Federal Trade Commission Act<sup>6</sup> to prevent the formation of trusts and monopolies.
- **1920s–early 1930s.** Antitrust activity was rare because administrations generally preferred industry-government cooperation (and, during the early New Deal, economic planning and industry codes of fair competition) over robust antitrust enforcement.<sup>7</sup>
- **Late 1930s–late 1970s.** Antitrust came to represent the Magna Carta of free enterprise.<sup>8</sup> It was seen as the key to preserving widely shared economic prosperity and political freedom.
- **Late 1970s–mid-2010s.** Antitrust contracted under the Chicago, Harvard, and post-Chicago Schools’ neoclassical economic theories, as some U.S. antitrust enforcers and courts adopted the laissez-faire theories and presumptions that disfavored intervention in markets, most centrally with the consumer welfare standard.<sup>9</sup>

Let us consider the third cycle (late 1930s–late 1970s), which was, in many ways, the golden era of antitrust enforcement. At the time, competition was largely seen as an antidote to fascism, and antitrust as the enabler of that competition.<sup>10</sup> As Jeffrey Frieden’s book *Global Capitalism* recounts, under the

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<sup>4</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>5</sup> Pub. L. 63–212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.

<sup>6</sup> 15 U.S.C. §§ 41–58, as amended.

<sup>7</sup> Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN’S L. REV. 569 (2004).

<sup>8</sup> See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972):

“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.”

<sup>9</sup> See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUMBIA BUSINESS L. REV. 1 (2007).

<sup>10</sup> WENDELL BERGE, CARTELS: CHALLENGE TO A FREE WORLD 13, 234–44 (1944); Wilhelm Cohnstaedt, *Germany’s Cartels and State Control: A Revealing Study of the Reich’s Post-War Industrial Monopoly Organizations*, N.Y. TIMES (May 19, 1935), at BR9; John H. Crider, *Roosevelt Calls for Cartels Curb: In Letter to Hull He Says Types of ‘Trusts’ Used by Reich Must Be Ended*, N.Y. TIMES (Sept. 9, 1944), at 1.



fascist economic order the government, directly or through state-owned holding companies, largely controlled the economy.<sup>11</sup>

As the fascist economic order spread throughout Europe, the Middle East, and much of Asia and Africa during this cycle, the **competition ideal** was perceived to be under attack. The competition ideal was the belief, aligned with democratic principles, in dispersing economic and political power from the hands of a few in order to foster greater opportunities to compete, improve, and win. At one point during WWII, the U.S. and the U.K. were the last major supporters of this model.

Mindful of the threat that big business posed to the democratic order, the Roosevelt administration took an aggressive stance toward enforcing the antitrust laws starting in 1937. In April of 1938, President Franklin D. Roosevelt delivered a message to Congress on curbing monopolies. It began:

“Unhappy events abroad have retaught us two simple truths about the liberty of a democratic people.

The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of Government by an individual, by a group, or by any other controlling private power.

The second truth is that the liberty of a democracy is not safe if its business system does not provide employment and produce and distribute goods in such a way as to sustain an acceptable standard of living.

Both lessons hit home.

Among us today a concentration of private power without equal in history is growing.

This concentration is seriously impairing the economic effectiveness of private enterprise as a way of providing employment for labor and capital and as a way of assuring a more equitable distribution of income and earnings among the people of the nation as a whole.”<sup>12</sup>

Roosevelt’s speech kicked off an era of aggressive litigation, whose favorable results were largely upheld by the Supreme Court through the 1940s, setting the stage for the postwar economic boom, underpinned by a vibrant antitrust enforcement policy. Thus, during this third cycle, robust antitrust policy was a central condition necessary for effective competition. To create those conditions, enforcers relied on the

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<sup>11</sup> JEFFRY FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* (2006).

<sup>12</sup> President Franklin D. Roosevelt, *Message to Congress on Curbing Monopolies* (April 29, 1938), <http://www.presidency.ucsb.edu/ws/index.php?pid=15637>.





tools given to them during the first era of antitrust, from 1900 to 1920, but updated them and honed their use on behalf of deconcentrating private power.

Unlike the enforcers' and courts' earlier ambivalence about concentration during the second cycle, Congress after WWII took a much dimmer view of consolidation, seeing the enforcers' and courts' job as to prevent monopolization and trade restrictions in their "incipiency."<sup>13</sup> So, the Clayton Act of 1914, as amended in 1950, gave the agencies and courts "the power to brake this force at its outset and before it gathered momentum."<sup>14</sup>

The Sherman Antitrust Act enabled the Department of Justice (DOJ) to criminally and civilly prosecute unreasonable restraints of trade and monopolistic abuses. This 1890 statute "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," noted the Supreme Court in 1958.<sup>15</sup> "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."<sup>16</sup>

It is also worth mentioning that strong antitrust enforcement during the third policy cycle was often bolstered by the creation and effective use of regulatory agencies and tools that augmented competition policy with other public interest goals and promoted competition.

U.S. antitrust, as part of this competition ideal, was rediscovering the key laws from an earlier era and shaking off the inactivity that had characterized the early New Deal period. This approach was successfully exported after WWII to Europe and Japan to help decentralize economic power and promote an effective competitive process.<sup>17</sup>

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<sup>13</sup> See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n. 32 (1962):

"That § 7 of the Clayton Act was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act was explicitly stated in the Senate Report on the original Act. S. Rep. No. 698, 63d Cong., 2d Sess. 1. See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589, 77 S. Ct. 872, 875, 1 L.Ed.2d 1057. This theme was reiterated in congressional consideration of the amendments adopted in 1950, and found expression in the final House and Senate Reports on the measure. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 ('Acquisitions of stock or assets have a cumulative effect, and control of the market ... may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition.');

S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5, U.S. Code Cong. and Adm. News, 1950, p. 4296 ('The intent here ... is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.'). And see F.T.C., *The Merger Movement: A Summary Report* 6-7."

<sup>14</sup> *Brown Shoe*, 370 U.S. at 317-18.

<sup>15</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>16</sup> *Id.*

<sup>17</sup> WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD* (2003); DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE* (1998); Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1, 1 (2000) (noting that a major goal of Japan "(and one quite consistent with traditional antitrust concerns) was to prohibit exclusionary



# THE RISE OF THE CONSUMER WELFARE STANDARD

Before 1975, the U.S. Supreme Court never mentioned the term “consumer welfare” in an antitrust case.<sup>18</sup> But that changed with the rise of the Chicago School of Economics in the late 1970s, symbolized by the publication of Robert Bork’s book *The Antitrust Paradox* in 1978. During this fourth cycle, Chicago School–influenced enforcers viewed the political and moral cases for antitrust as insufficiently rigorous and somehow diluting antitrust policy from its true purpose: promoting economic efficiency, which the Chicago School frequently conflated with consumer welfare.<sup>19</sup>

The increased technicality of antitrust and the use of strictly neoclassical economic theory to overturn evidence of anticompetitive intent together broadened the gap between antitrust enforcement and public concern. Also discarded was enforcers’ interest in halting the momentum toward concentration, in order to arrest the economic, political, and social harms from concentrated economic power in their incipiency.

Antitrust enjoyed bipartisan support in the third period, from the late 1930s to the late 1970s. But that changed with the incoming Reagan administration, which endorsed the Chicago School with its enforcement priorities, judicial appointments, and amicus briefs to the Supreme Court, casting economics in more partisan terms than it had been in previous periods.<sup>20</sup>

***Adopting the Chicago School’s (flawed) assumptions of self-correcting markets and free entry as a “natural” condition, some courts and enforcers sacrificed important political, social, and moral values to promote their economic beliefs.***

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practices that restricted market access and to ‘democratize’ markets so that entrepreneurs would be provided with a fair opportunity to compete”).

<sup>18</sup> *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 131 n.1 (1975) (Brennan, J., dissenting).

<sup>19</sup> Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 BOSTON COLLEGE L. REV. 551 (2012).

<sup>20</sup> William F. Baxter, *Responding to the Reaction: The Draftsman’s View*, 71 CALIF. L. REV. 618, 630 (1983) (announcing that the DOJ “will consider only those factors that, according to economic theory or empirical evidence, relate to the ease and profitability of collusion” and noting that “An industry trend toward concentration is not a factor that will be considered, even though it has been used in the past”). As now Chief Justice John Roberts said at the time, the Reagan administration’s “antitrust enforcement activities parallel our general concern with excessive regulation.” Memorandum from John Roberts to the Attorney General (May 6, 1982), <http://www.archives.gov/news/john-roberts/accession-60-89-0372/doc004.pdf>. Recently, several scholars have argued that antitrust is governed by an unusual ideological trans-partisan consensus and that

Antitrust during the fourth cycle relied on an incomplete and somewhat distorted conception of competition.<sup>21</sup> Adopting the Chicago School’s (flawed) assumptions of self-correcting markets and free entry as a “natural” condition, some courts and enforcers sacrificed important political, social, and moral values to promote their economic beliefs. Competition, in their view, was innately effective. Thus, there was no need for robust antitrust enforcement to create or maintain the conditions necessary to make competition effective. Market forces could naturally correct the episodic instances of market power, they believed, and could do so far better and more quickly than government intervention. The authorities accepted the increased risks from concentrated telecommunications,<sup>22</sup> financial,<sup>23</sup> and radio industries,<sup>24</sup> among others, for the prospect of future efficiencies and innovation, with the possible harm they might cause to competition assumed to be “disciplined” by the omnipresent threat of free entry.

***Since 1999, the DOJ has brought only one major monopolization case under Section 2 of the Sherman Act. In contrast, the DOJ, between 1970 and 1972, brought 39 civil and 3 criminal cases against monopolies and oligopolies.***

Under Robert Bork’s consumer welfare standard,<sup>25</sup> antitrust enforcement, outside of cartel prosecutions, declined during the fourth cycle (late 1970s–mid-2010s). By the start of the Trump administration, the U.S. had neither a popular antitrust movement nor many significant antitrust prosecutions. The decline in competition and increase in markups in the U.S., as detailed in Part IV, began in the 1980s. A search of the DOJ database in mid-2018 reveals the overall decline in antitrust enforcement (outside of cartels) during this same period. Since 1999, the DOJ has brought only one major monopolization case under Section 2 of the Sherman Act.<sup>26</sup> In contrast, the DOJ, between 1970

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consensus is currently threatened. Whether this is empirically true is questionable. See Ariel Ezrachi, *Sponge*, 5 JOURNAL OF ANTITRUST ENFORCEMENT 49 (2017) (deconstructing the “purity” of antitrust policy). Even if it were true that the ideological range represented among officials and scholars is narrower in ideological terms, an unusual aspect of the current era is that the range of opinion is relatively well-sorted by partisan affiliation, in contrast with the previous three eras we discuss.

<sup>21</sup> For a description of the Chicago School’s conception of competition, see Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931 (1979). For some criticisms, see Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1548 (2011); Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951, 957 (2008).

<sup>22</sup> TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 244-45 (2010).

<sup>23</sup> SIMON JOHNSON & JAMES KWAK, *THIRTEEN BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* 12, 203 (2010); Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the “Too-Big-to-Fail” Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 291 (2011).

<sup>24</sup> Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. COLLOQUY 115, 128-30 (2010).

<sup>25</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978).

<sup>26</sup> U.S. Dep’t of Justice, Antitrust Division Workload Statistics, FY 2007-2016, <https://www.justice.gov/atr/file/788426/download>; U.S. Dep’t of Justice, Antitrust Division Workload Statistics, FY 2000-2009, <https://www.justice.gov/sites/default/files/atr/legacy/2012/04/04/281484.pdf>.



and 1972, brought 39 civil and 3 criminal cases against monopolies and oligopolies.<sup>27</sup> The DOJ brought its last predation case in 1999.<sup>28</sup>

Federal agencies have recently prevailed when they challenged mergers. The Federal Trade Commission (FTC), for example, has been active in challenging hospital mergers and has won other recent merger challenges.<sup>29</sup> In the last few years, the DOJ successfully challenged the mergers of Aetna and Humana,<sup>30</sup> Anthem and Cigna,<sup>31</sup> and (along with the Federal Communications Commission) of AT&T and T-Mobile.<sup>32</sup> Nonetheless, U.S. merger enforcement, which is supposed to prevent competitive harms in their incipiency, now focuses on mergers in only highly concentrated industries.<sup>33</sup> Professor John Kwoka, in examining FTC data on mergers that took place between 1996 and 2011, found a significant decline in antitrust enforcement of mergers in concentrated industries but with a Herfindahl-Hirschman Index (HHI) below 3000.<sup>34</sup> He also determined that reliance on a lower bound of concentration below which mergers should be approved may be misplaced, since there were numerous mergers below that bound that proved to be anticompetitive.<sup>35</sup>

The U.S. antitrust agencies rarely challenge vertical restraints, such as resale price maintenance.<sup>36</sup> Since 2000, the DOJ has challenged few exclusionary practices.<sup>37</sup> The one area of antitrust enforcement that

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<sup>27</sup> U.S. Dep't of Justice, Antitrust Division Workload Statistics, FY 1970-1979, <https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1970-1979>.

<sup>28</sup> The government ultimately lost that case. The court held that tests proffered by government to measure incremental costs of airline's capacity additions were invalid, so that government failed to establish pricing below appropriate measure of cost. *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

<sup>29</sup> For example, see *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016); *Fed. Trade Comm'n v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *Fed. Trade Comm'n v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016); *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

<sup>30</sup> *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017).

<sup>31</sup> *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir.), *cert. dismissed*, 137 S. Ct. 2250, 198 L. Ed. 2d 676 (2017).

<sup>32</sup> U.S. Dep't of Justice, Press Release: Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile: Transaction Would Reduce Competition in Mobile Wireless Telecommunications Services, Resulting in Higher Prices, Poorer Quality Services, Fewer Choices and Fewer Innovative Products for Millions of American Consumers (August 31, 2011), <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile>.

<sup>33</sup> See, e.g., John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 867 (2017).

<sup>34</sup> The Herfindahl-Hirschman Index is a measure of market concentration that squares the market shares of all the firms in a market, and then sums them. It ranges from 0 (perfect competition) to 10,000 (pure monopoly). According to the Horizontal Merger Guidelines, the threshold for a "highly concentrated" market is above 2500. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (Aug. 19, 2010)

<sup>35</sup> Kwoka, *Structural Presumption*, *supra* note 33, at 872.

<sup>36</sup> The last vertical price-fixing case, according to the DOJ's database, was brought over 20 years ago, and was part of a price-fixing cartel. *United States v. Ixtlera de Santa Catarina, S.A. de C.V.*, Civil Action No. 96CV96-6515 (E.D. Pa. filed September 26, 1996), <https://www.justice.gov/atr/case-document/complaint-136>. In its case against Apple and the major e-book publishers, the United States challenged, the District Court held, and Second Circuit affirmed, the conduct as a horizontal price-fixing. Apple was a vertical enabler of the publishers' horizontal price conspiracy, so its conduct was per se illegal under § 1 of the Sherman Act. *United States v. Apple, Inc.*, 791 F.3d 290, 341 (2d Cir. 2015). One can search for horizontal, but not vertical, restraints in the FTC database. Federal Trade Commission, Cases and Proceedings: Advanced Search <https://www.ftc.gov/enforcement/cases-proceedings/advanced-search>.

<sup>37</sup> The DOJ, according to its database, brought its last exclusive dealing case in 2010, and before that in 2002. See *United States v. Blue Cross Blue Shield of Michigan*, Case 2:10-cv-14155-DPH-MKM (E.D. Mich. filed October 18, 2010),



the government continues to pursue with rigor is that of cartel suppression, a province for which there is no shortage in the supply of cases.

The decline in public enforcement in many cases followed adverse court rulings that made the barriers to winning such cases insurmountable. Part of the problem was the courts responding to the perceived (and at times actual) excesses of private antitrust claims. But, in other cases, the agencies' weakening of enforcement actually led the courts. The FTC and DOJ largely stopped prosecuting vertical price-fixing cases long before the Supreme Court ruled that they should be considered under its rule-of-reason legal standard. When the Court did ultimately reach that judgment, it referred to the DOJ and FTC's support for abandoning that long-standing precedent.<sup>38</sup>

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<https://www.justice.gov/atr/case-document/file/489536/download> and *Unites States v. Mathworks*, Civil Action No. 02-888-A (E.D. Va. filed June 21, 2002), <https://www.justice.gov/atr/case-document/file/502536/download>. Its last major litigated cases were over a decade ago. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003); and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). In contrast, the FTC more recently challenged exclusive dealing arrangements. See *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 17-CV-00220-LHK, 2017 WL 2774406 (N.D. Cal. June 26, 2017) (challenging Qualcomm's exclusive dealing arrangements with Apple); *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015). What was noteworthy in *McWane* was that a dissenting FTC commissioner sought a legal standard that would have dramatically limited the agency's ability to challenge exclusionary dealing. Commissioner Wright "insisted that, given the high likelihood that an exclusive dealing arrangement is actually procompetitive, a plaintiff alleging illegal exclusive dealing must show 'clear evidence of anticompetitive effect.'" Under this commissioner's view, the FTC had to show that the exclusionary dealing *caused* the observed price effects. The Eleventh Circuit agreed with the FTC, namely that the dissenting commissioner sought "a new, heightened standard of proof for exclusive dealing cases" that had "no legal support." *McWane*, 783 F.3d at 836.

<sup>38</sup> *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007):

"It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the per se rule with the traditional rule of reason."



# OPERATIONAL DIFFICULTIES IN APPLYING THE CONSUMER WELFARE STANDARD

In 1987, one scholar remarked that the terms “efficiency” and “consumer welfare” “have become the dominant terms of antitrust discourse without any clear consensus as to what they exactly mean” and that consumer welfare “is the most abused term in modern antitrust analysis.”<sup>39</sup> This remains true today. The consumer welfare standard has several infirmities.

## No Well-Accepted Definition of Consumer Welfare

The consumer welfare standard, despite its pleasant populist ring, has not fostered global convergence. It means different things to different competition agencies around the world. For example, 30 of 33 countries in a 2007 survey by the International Competition Network (ICN) identified consumer welfare as an antitrust objective. But most agencies did “not specifically define consumer welfare and appear[ed] to have different economic understandings of the term.”<sup>40</sup>

Similarly, a 2011 ICN survey, although finding “some agreement” among the 57 surveyed competition authorities, identified significant differences.<sup>41</sup> Only 7 of the 57 authorities agreed with the provided definition of consumer welfare.<sup>42</sup> Most (38) of the antitrust authorities had “no explicit definition” of consumer welfare.<sup>43</sup> Some considered consumer welfare to be “a natural result of enforcement activities

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<sup>39</sup> Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1020, 1032 (1987); see also Walter Adams & James W. Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 N.Y.U. L. SCH. L. REV. 939, 943 (1990):

“The apostles of the New Learning monomaniacally insist upon the primacy of “consumer welfare” and “efficiency” as the only “legitimate” goals of antitrust policy. They incessantly demand that all antitrust issues be resolved solely in these terms. But what do “consumer welfare” and “efficiency” mean in New Learning doctrine? To what do they refer? How do they differ from their everyday interpretation? In what context are they applied? What, in their application, do they omit from consideration? With what consequences and implications? Once these questions are examined, the New Learning dissolves into a vacuous tautology.”

<sup>40</sup> Competition officials during the last Bush administration stated that the “promotion of consumer welfare and the organization of the free market economy are the only goals of its antitrust laws...with other economic or social objectives better pursued by other instruments.” Int’l Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/ Substantial Market Power, and State-Created Monopolies 9 (2007) [hereinafter 2007 ICN Report].

<sup>41</sup> Int’l Competition Network, Competition Enforcement and Consumer Welfare—Setting the Agenda 4-6 (2011) [hereinafter 2011 ICN Survey]

<sup>42</sup> *Id.* at 18 nn.34–35 (consumer welfare “relates only to consumer surplus” and excludes “non-economic considerations”).

<sup>43</sup> *Id.* at 19 & n.37.

but not necessarily an underlying goal.”<sup>44</sup> Under this definition, antitrust enforcers promote consumer welfare whenever they act—or do not act. Others defined consumer welfare broadly to include “safeguarding the competitive process,” which in turn encompasses both price and nonprice dimensions.<sup>45</sup> France included “enhancing the competitive process,” “stimulating an efficient allocation of resources,” and “preventing unchecked market power” within its conception of promoting consumer welfare over the long term.<sup>46</sup>

Competition authorities are not the only ones who disagree over the meaning of consumer welfare. The U.S. Antitrust Modernization Commission (AMC), after three years, could not reach unanimity on the term.<sup>47</sup> In 2007, the commission issued a 449-page report on how “antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today.”<sup>48</sup> But the debate before and within the AMC was “about the precise definition of ‘consumer welfare.’”<sup>49</sup> The “[d]ebate continues over whether the Supreme Court implicitly adopted the goal of allocative efficiency or the goal of preventing wealth transfers as the standard by which consumer welfare should be measured.”<sup>50</sup>

Consumer welfare is not a well-defined goal but a generality that incorporates different social, political, economic, and moral values. Robert Bork’s definition of consumer welfare differed from that of other scholars.<sup>51</sup> For Judge Patricia Wald and others, the phrase consumer welfare “surely includes far more than simple economic efficiency.”<sup>52</sup> Other academics discuss, within the definition of consumer welfare, maintaining allocative efficiency, preventing wealth transfers, and preserving consumer choice.<sup>53</sup> Recently, scholars have put forward a further expansion of the concept’s meaning to include “trading partner welfare”<sup>54</sup> and concern with monopsony power in the labor market.<sup>55</sup>

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<sup>44</sup> *Id.* at 10.

<sup>45</sup> Compare *id.* (reporting that some countries view promoting consumer welfare as a natural result of competition), with *id.* at 11–12 (reporting that countries identified other goals, such as maintaining effective competition, as distinct from consumer welfare).

<sup>46</sup> *Id.* at 10.

<sup>47</sup> The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–11060, 116 Stat. 1766, 1856–59.

<sup>48</sup> ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 1 (2007).

<sup>49</sup> *Id.* at 26 n.22.

<sup>50</sup> *Id.* at 43 n.19.

<sup>51</sup> Compare Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7, 7–48 (1966) (defining consumer welfare as the “maximization of consumer wealth or consumer want satisfaction”) with Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2255 (2013) (discussing how consumer welfare turned out to be an ambiguous and confusing term).

<sup>52</sup> *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 231 n.3 (D.C. Cir. 1986) (Wald, J., concurring).

<sup>53</sup> LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 12–16 (2d ed. 2006).

<sup>54</sup> C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078 (2018).

<sup>55</sup> Ioana Elena Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, U of Penn, Inst for Law & Econ Research Paper No. 18-8 (Feb. 20, 2018), <https://ssrn.com/abstract=3124483> or <http://dx.doi.org/10.2139/ssrn.3124483>.



Consequently, the term consumer welfare means different things to different people. As F. A. Hayek observed, the welfare of a people “cannot be adequately expressed as a single end, but only as a hierarchy of ends, a comprehensive scale of values in which every need of every person is given its place.”<sup>56</sup>

## Rule of Law Concerns about the Consumer Welfare Standard

Given the varying definitions of consumer welfare that exist, it is not surprising that courts have reached inconsistent results based on their conception of consumer welfare.<sup>57</sup>

Some U.S. courts say that the “reduction of competition does not invoke the Sherman Act until it harms consumer welfare.”<sup>58</sup> But this approach is problematic. If enforcers and scholars have not arrived at a shared, specific definition of consumer welfare, how will courts ascertain when a reduction in competition harms consumers’ welfare? Supporters of the standard may point to easy cases where prices increase and output decreases. But these egregious anticompetitive cases generally fall within antitrust’s per se illegal standard.

Courts generally cannot value, consistent with the rule of law, how much competition can be reduced before harming consumers’ welfare. Indeed, the consumer welfare standard raises several rule-of-law concerns.

One rule-of-law concern is the difficulty in defining the “consumer.” If the consumer is anyone who uses economic goods, or “refers to all direct and indirect users who are affected by the anticompetitive agreements, behaviour or mergers in question,”<sup>59</sup> then every purchaser—from the poorest individual to the wealthiest corporate monopoly—is a consumer. The irony is that small buyers or sellers, in collectively coordinating to boycott a monopoly, could be and have been prosecuted under a consumer welfare standard.<sup>60</sup>

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<sup>56</sup> F.A. HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS—THE DEFINITIVE EDITION 101 (2007).

<sup>57</sup> Compare *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1033–34 (N.D. Cal. 2001) (stating that antitrust laws in promoting consumer welfare do not protect rivalry to obtain a monopoly), with *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) (stating that the Sherman Act protects rivalry to obtain monopoly).

<sup>58</sup> *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995)); *Templin v. Times Mirror Cable Television, Inc.*, No. 94-55002, 1995 WL 314607, at \*2 (9th Cir. May 22, 1995); *Ireland v. Bend Neurological Assocs. LLC*, No. 6:16-CV-02054-JR, 2017 WL 3404970, at \*4 (D. Or. May 23, 2017), report and recommendation adopted, No. 6:16-CV-02054-JR, 2017 WL 3401268 (D. Or. Aug. 8, 2017); *Surf City Steel, Inc. v. Int’l Longshore & Warehouse Union*, No. CV14-05604-BRO (SSX), 2017 WL 5973279, at \*10 (C.D. Cal. Mar. 7, 2017); *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1163 (D. Nev. 2016); *Signature MD, Inc. v. MDVIP, Inc.*, No. CV 14-5453 DMG SSX, 2015 WL 3988959, at \*7 (C.D. Cal. Apr. 21, 2015); *Ice Cream Distribs. of Evansville, LLC v. Dreyer’s Grand Ice Cream, Inc.*, No. 09-5815 CW, 2010 WL 3619884, at \*6 (N.D. Cal. Sept. 10, 2010); *Kinderstart.com LLC v. Google, Inc.*, No. C06-2057JF(RS), 2007 WL 831806, at \*10 (N.D. Cal. Mar. 16, 2007); *Streamcast Networks, Inc. v. Skype Techs., S.A.*, 547 F. Supp. 2d 1086, 1097 (C.D. Cal. 2007); *Fox v. Good Samaritan Hosp.*, No. C-04-00874RMW, 2007 WL 2938175, at \*5 (N.D. Cal. Oct. 9, 2007); *Perry v. Rado*, 504 F. Supp. 2d 1043, 1047 (E.D. Wash. 2007), *aff’d*, 343 F. App’x 240 (9th Cir. 2009); *J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care*, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998).

<sup>59</sup> 2011 ICN Survey, *supra* note 41, at 32.

<sup>60</sup> The Department of Justice, for example, sued DIRECTV and its corporate successor, AT&T Inc., for allegedly acting as the





If the consumer, however, includes poor individuals but excludes monopsonies and other powerful corporate purchasers of goods and services, then the definition becomes more political and subjective. Therefore, the way in which the consumer is defined leads to different interpretations of the consumer welfare standard.

Even if we can identify the consumer, quantifying that consumer's welfare is itself impracticable, if not impossible. Twenty-eight percent of the countries in the 2011 ICN survey, for example, believed that quantifying consumer harm is "not possible."<sup>61</sup> All of those who believed it possible to quantify detriment to consumer welfare recognized difficulties and limitations to such a quantification.<sup>62</sup> Thus, requiring an antitrust plaintiff to show when a reduction in competition harms consumer welfare is illogical when "no easy, non-contestable, method for quantifying harm to consumer welfare" currently exists.<sup>63</sup>

A third rule-of-law concern is the constraint on data availability to assess harm to consumers. Take, for example, Facebook's acquisition of the texting app WhatsApp. Facebook eliminated WhatsApp's nominal fee for some end users, so those consumers would now get the app for free. But the merger threatened users' privacy and arguably eliminated a would-be rival to Facebook's dominant social network. How would the court assess the merger's impact on consumers' welfare in the absence of price or output effects?

*Rather than an objective standard, the consumer welfare standard invites considerable subjectivity—and, more to the point, tolerance of anticompetitive practices.*

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ringleader of a series of unlawful information exchanges between DIRECTV and three of its competitors—Cox Communications Inc., Charter Communications Inc. and AT&T—during the companies' negotiations to carry SportsNet LA, which holds the exclusive rights to telecast almost all live Dodgers games in the Los Angeles area. Complaint, *United States v. DIRECTV Group Holdings, LLC*, Case 2:16-cv-08150 (C.D. Cal. filed Nov. 2, 2016). Another cable company Time Warner Cable (TWC) launched a new regional sports network—the Dodgers Channel—to serve as the exclusive home for Dodgers baseball games. Media reports at the time suggested that TWC would likely seek monthly distribution rates close to \$5 a month per subscriber for the Dodgers Channel. The cable companies balked at the high price. They were trying to lower the price for the right to telecast the Dodgers Channel. Specifically, the complaint alleged that DIRECTV and each of these competitors agreed to and did exchange non-public information about their companies' ongoing negotiations to telecast the Dodgers Channel, as well as their companies' future plans to carry—or not carry—the channel. So here, a monopoly was trying to extract a monopoly price. The cable companies sought to curb the Dodgers' "outrageous increases and excesses." The DOJ never alleged that the defendants' exchange of information caused consumers to pay higher prices. But even if the cable companies sought to prevent a price increase, they nonetheless could be liable for "unlawfully" seeking to obtain a bargaining leverage.

<sup>61</sup> 2011 ICN Survey, *supra* note 41, at 40.

<sup>62</sup> *Id.* at 41.

<sup>63</sup> *Id.* at 88.



The judge could examine the merger’s effects on quality, privacy, innovation, or some kind of quality-adjusted price, where applicable. But the court, under a consumer welfare standard, would have to assess how the trade-off in price and privacy affected consumers’ welfare. Suppose, for example, courts adopted as their definition of consumer welfare, “the individual benefits derived from the consumption of goods and services.”<sup>64</sup> Under this definition, “individual welfare is defined by an individual’s own assessment of his/her satisfaction, given prices and income”; accordingly, measuring consumer welfare “requires information about individual preferences.”<sup>65</sup> Measuring individual preferences is itself difficult. One cannot rely entirely on consumers’ choices, as consumers at times choose poorly and contrarily to their long-term interests.<sup>66</sup> So it is hard to see how a court could assess how much privacy competition could be reduced before harming consumers’ welfare. Would the court use the more privacy-conscious consumers, or those who value privacy less? Or would the courts solely focus on the merger’s impact on price? Rather than an objective standard, the consumer welfare standard invites considerable subjectivity—and, more to the point, tolerance of anticompetitive practices.

Moreover, consumer welfare, if measured on the individual level, does not address restraints and mergers that increase some consumers’ welfare while decreasing others’ welfare. So, the Facebook-WhatsApp merger might benefit those consumers who prefer free texting apps while harming consumers who are concerned about Facebook’s collection of data and the resulting privacy harms. (Consider that, prior to the merger, WhatsApp’s users could have used the Facebook Messenger texting app for free but may have decided not to because of privacy concerns.) Here again, the consumer welfare standard can work against the interests of citizens by promoting the interests of some users (those who value free services) over the interests of other users (those who value privacy).

Indeed, agencies, at times, ignore a merger’s impact on individual consumers, focusing instead on advertisers. One example is radio mergers, where the DOJ still (inexplicably) considers the impact on advertisers, but not listeners.<sup>67</sup>

Economists generally use the concept of **consumer surplus** to measure consumer welfare. But consumer surplus is only readily measured in a static, single-market, partial-equilibrium context. It is of limited use in industries with dynamic competition and for products and services that are offered ostensibly for free. Thus, the ICN-surveyed countries generally did “not seem to wish to be tied to a formal definition of consumer welfare as consumer surplus, and certainly not if consumer surplus is given a narrow definition and confined to price, without due consideration for quality, and other economic criteria.”<sup>68</sup> Furthermore, “there is considerable debate over the degree to which [surplus] corresponds to more theoretically appealing measures of consumer welfare.”<sup>69</sup> Ultimately, proving that

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<sup>64</sup> OECD, GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 29 (1993).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Simona Botti & Sheena S. Iyengar, *The Dark Side of Choice: When Choice Impairs Social Welfare*, 25 J. PUB. POL’Y & MARKETING 24, 26 (2006).

<sup>67</sup> MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 224-28 (2016).

<sup>68</sup> 2011 ICN Survey, *supra* note 41, at 26.

<sup>69</sup> OECD Glossary, *supra* note 65, at 28

a given anticompetitive practice harmed consumers often involves significant labor, time, and other costs, and the necessary data is not always available.

A fourth rule-of-law concern is predictability and objectivity. Taking the mantra that the “antitrust law aims to protect competition, not competitors,” courts begin their analysis of antitrust injury “from the viewpoint of the consumer.”<sup>70</sup> A “prototypical example of antitrust injury” is that consumers “had to pay higher prices (or experienced a reduction in the quality of service) as a result of a defendant’s anticompetitive conduct.”<sup>71</sup> This standard is feasible when defendants illegally fix the price of consumer goods or services.

But proving this kind of antitrust injury in many other antitrust cases, such as when an entrenched firm eliminates a start-up through exclusionary means, is harder.<sup>72</sup> Nor can an antitrust plaintiff prove that consumer welfare was reduced; instead, a plaintiff “must prove that the challenged conduct affected the prices, quantity, or quality of goods or services and not just his own welfare.”<sup>73</sup> So this analysis, as the ICN found, engenders “a relatively high degree of uncertainty in estimations or assumptions used for quantification of detriment to consumer welfare.”<sup>74</sup>

Some courts equate a reduction of consumer welfare with an increase in price or reduction in quality.<sup>75</sup> This, however, says nothing about other important facets of competition, such as innovation, variety, or quality/privacy degradation in digital markets with free goods. At times, this issue divides courts.<sup>76</sup>

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<sup>70</sup> *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) (quoting *Alberta Gas Chems., Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1241 (3d Cir. 1987)).

<sup>71</sup> *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 478 (S.D.N.Y. 2001).

<sup>72</sup> For example, cases such as those documented by Colleen Cunningham, Florian Ederer, & Song Ma, *Killer Acquisitions* (2018), [http://faculty.som.yale.edu/songma/files/cem\\_killeracquisitions.pdf](http://faculty.som.yale.edu/songma/files/cem_killeracquisitions.pdf).

<sup>73</sup> *Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998, 1015 (S.D. Tex. 1997) (quoting *Angelico v. Lehigh Valley Hosp., Inc.*, 87 F.3d 308, 312–13 (E.D. Pa. 1997)).

<sup>74</sup> 2011 ICN Survey, *supra* note 41, at 43.

<sup>75</sup> *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (“Consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality”) (quoting *Rebel Oil Co.*, 51 F.3d at 1433).

<sup>76</sup> For example, in responding to the dissenting circuit judge (Kavanaugh), the D.C. Circuit recently observed:

“Furthermore, the dissent’s assumption that the prices paid by consumers (regardless of the quality of the resulting product) are the sole focus of antitrust law is flawed. The principal objective of antitrust policy is to maximize consumer welfare *by encouraging firms to behave competitively.*” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 133 S.Ct. 1351, 1363, 185 L.Ed.2d 392 (2013) (emphasis added) (quoting I P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 100, at 4 (2006)).

This single-minded focus on price ignores that in highly concentrated markets like this one, lower prices, if they occur at all, may be transitory. Owing to the lower level of competition in highly concentrated markets, when presented with lower supply-input prices, companies have a greater ability to retain for themselves the input savings rather than pass them on to consumers. The Clayton Act, as the Supreme Court “ha[s] observed many times, [is] a prophylactic measure, intended primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485, 97 S. Ct. 690, 50 L.Ed.2d 701 (1977) (internal quotation marks and



This also leads some courts far afield. For example, the U.S. District Court for the Eastern District of Wisconsin, under its narrow conception of consumer welfare, dismissed an antitrust complaint, in part because “reduced innovation as a result of defendants’ conduct does not create an inference of raised consumer prices or reduced output.”<sup>77</sup>

Courts cannot simply assume that, because prices did not increase and output did not decrease as a result of the restraint, consumer welfare was not diminished. Nonetheless, that is precisely what the Supreme Court recently opined. The Court noted that, under its unwieldy rule-of-reason framework, the plaintiff “has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.”<sup>78</sup> But in two-sided markets for credit cards, the antitrust plaintiff would have to assess the restraint’s effect on both sides of the market and prove that the restraint had an overall anticompetitive effect. Absent showing an overall increase in price of credit card transactions or a reduction in output of credit card transactions as a result of the restraint, the antitrust claim fails.

## Difficulty in Reconciling the Consumer Welfare Standard with Upstream Abuses

In devising any legal standard for evaluating monopsony claims (i.e., those arising from buyer rather than seller market power), the critical threshold issue is what harm counts. As Germany’s antitrust agency, the *Bundeskartellamt*, observed, one must discuss abuses of buyer power “in terms of the basic objectives of competition law.”<sup>79</sup>

The consumer welfare standard is hard to reconcile with anticompetitive restraints that affect only upstream sellers and not consumers. If courts and agencies were to apply a consumer welfare standard, can employers collude to depress wages if they showed that it had no anticompetitive effect on consumers, or even reduced prices for them? Can the antitrust laws allow mergers to monopsony (think milk processors and slaughterhouses), which harms farmers but not consumers? Can bidders collude in retail auctions? Under a consumer welfare standard, the answer is arguably yes. Of course, this would be inconsistent with the aim of the federal antitrust laws. So, the agencies simply ignore the consumer welfare standard and revert to an effective competition standard in select cases.

Shortly after the Sherman Act’s enactment, the U.S. courts recognized harm to sellers, independent of

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citation omitted). The ability of a firm to obtain lower prices for inputs for its product (here, provider services) should, especially in light of the prophylactic nature of the Clayton Act, be viewed skeptically when high market concentrations may have the future effect of permitting capture of those savings...”

*Anthem*, 855 F.3d at 366–67.

<sup>77</sup> *Edgenet, Inc. v. GSI AISBL*, 742 F. Supp. 2d 997, 1013 (E.D. Wis. 2010).

<sup>78</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

<sup>79</sup> Org. for Econ. Co-operation & Dev. [OECD], *Monopsony and Buyer Power*, at 175, OECD Doc. DAF/COMP(2008)38 (Dec. 17, 2009) OECD.



any harm to downstream consumers.<sup>80</sup> One early prosecution was brought against stockyard owners who bought and slaughtered livestock for human consumption.<sup>81</sup> The defendants directed their purchasing agents at the stockyards “to refrain from bidding against each other when making purchases of such livestock, and by these means inducing and compelling the owners of such livestock to sell the same at less prices than they would receive if such bidding were competitive.”<sup>82</sup> The fact that consumer surplus increased did not excuse the bid-rigging:

“Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices, may, as against the producer be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman [A]ct as now interpreted, restraint of trade.”<sup>83</sup>

Likewise, in 1948, the Supreme Court held that the Sherman Act applies to buyer cartels that only injure sellers, not customers or consumers.<sup>84</sup> According to the Court:

“[The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”<sup>85</sup>

Several U.S. courts rejected a consumer welfare screen for evaluating a monopsony’s behavior.<sup>86</sup> As one

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<sup>80</sup> See PETER C. CARSTENSEN, *COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE* ch. 2 (2017); William K. Jones, *Concerted Refusals to Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73 (1989) (noting how “the Supreme Court has never ruled that producers are excluded from the protection of the antitrust laws and has frequently held to the contrary”).

<sup>81</sup> *United States v. Swift & Co.*, 122 F. 529 (C.C.N.D. Ill. 1903), *modified*, 196 U.S. 375 (1905).

<sup>82</sup> *Id.* at 530.

<sup>83</sup> *Id.* at 534.

<sup>84</sup> See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235–36 (1948).

<sup>85</sup> *Id.* (citations omitted).

<sup>86</sup> See, e.g., *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) (“Highmark’s improperly motivated exercise of monopsony power, like the collusive exercise of oligopsony power by the cheese makers in *Knevelbaard*, was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans.”); *Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1133–34 (10th Cir. 2002) (rejecting the defendant’s claim that a monopsony is not actionable unless it injures consumers by forcing up the price of the end product as inconsistent with the Court’s treatment of monopsony cases that “strongly suggests that suppliers ... are protected by antitrust laws even when the anti-competitive activity does not harm end-users.”); *Dyer v. Conoco, Inc.*, No. 93-2801, 1995 WL 103233, at \*5 (5th Cir. Feb. 21, 1995) (“Our cases have recognized that sellers to a monopsony or oligopsony can establish antitrust injury. They can do so because ‘[i]n the monopsony or oligopsony price fixing case ... the seller faces a Hobson’s choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all.’” (alteration in original) (citation omitted) (quoting *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158 (5th Cir. 1979)); *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1043 (D.C. Cir. 1991) (recognizing monopsony as an exception to an antitrust consumer welfare goal); *New Mexico Oncology &*

lower court said:

“This contention—questionable even in the monopoly context—certainly cannot apply to monopsony claims.

In contrast to a monopoly, in a monopsony the buyer uses its market power to damage competition among upstream market participants. In such a situation, the direct victims are competitors and suppliers rather than competitors and customers.”<sup>87</sup>

Similarly, the U.S. antitrust agencies do not use consumer harm to screen mergers.<sup>88</sup> To dispel any uncertainty, their 2010 horizontal merger guidelines include an illegal merger that does not directly harm consumers:

“*Example 24:* Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.”<sup>89</sup>

U.S. antitrust agencies prosecute mergers to monopsony that affect solely upstream suppliers, and not consumers.<sup>90</sup> The agencies have also identified a number of no-poaching agreements, which harm workers but not necessarily consumers.<sup>91</sup>

So, the United States does not use consumer welfare to screen buyer-power claims. Several reasons for this stance exist.

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*Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 54 F. Supp. 3d 1189, 1206 (D.N.M. 2014) (“Notwithstanding numerous statements to the effect that the primary or even exclusive concern of antitrust is ‘consumer’ welfare, upstream, or monopsony, injury to suppliers is treated in largely the same way as injury to consumers.” (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ET AL., ANTITRUST LAW ¶ 350b (2007)); *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 352 (D. Vt. 2010) (asserting that defendants’ “coercive acts perpetuated the monopoly and monopsony, disciplined those that sought to challenge it, cowed those who might venture a similar challenge, and produced the allegedly artificially depressed fluid raw milk prices that Plaintiffs received and which allegedly caused them injury”); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1151 (W.D. Wash. 2005) (finding that “[i]njury to competition can occur by monopsony just as it may result from monopoly”).

<sup>87</sup> *White Mule Co. v. ATC Leasing Co.*, 540 F. Supp. 2d 869, 888 (N.D. Ohio 2008) (citations omitted).

<sup>88</sup> U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 12, at 33 (August 19, 2010) (“Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell”).

<sup>89</sup> *Id.* § 12, at 33.

<sup>90</sup> See, e.g., Complaint, *United States v. Danone S.A.*, Case 1:17-cv-00592 (D.D.C. filed April 3, 2017); Complaint, *United States v. Cargill, Inc.*, No. 1:99CV01875 (D.D.C. July 8, 1999).

<sup>91</sup> For example, the DOJ in 2018 found that Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world’s largest rail equipment suppliers, had for years maintained unlawful agreements not to compete for each other’s employees. U.S. Dep’t of Justice, *Press Release: Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (April 3, 2018), <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.



First, the Sherman and Clayton Acts, like some other jurisdictions' competition laws, do not identify consumer welfare as the primary objective or require the agencies and courts to use consumer welfare as a screen.

Second, U.S. legislators were concerned about the adverse impact of buyer power on sellers, apart from any injury to consumers.<sup>92</sup> In arguing for a federal competition law, Senator John Sherman said:

“These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessities of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of speculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.”<sup>93</sup>

Third, a consumer welfare screen produces anomalous results. If the U.S. courts required the plaintiff to prove consumer harm in cases involving buyer power, otherwise per se illegal and criminally prosecuted behavior would become per se legal. A bid-rigging cartel composed of ultimate buyers, for example, would be per se legal, while its counterpart sellers, if they colluded, would be incarcerated and fined. Not surprisingly, the United States does not distinguish between buyer and seller cartels; it actively prosecutes buyer cartels without considering their impact on consumer welfare.<sup>94</sup>

Consequently, the consumer welfare standard suffers numerous infirmities. It provides little guidance as an antitrust goal. There remains no consensus on what the term actually means or who the consumers are. Furthermore, under any of the current definitions, there remains “no easy, non-contestable method for quantifying harm to consumer welfare that will work for all cases.”<sup>95</sup>

Although some courts, particularly those in the U.S. Court of Appeals for the Ninth Circuit, require the plaintiff to show how the defendants' actions adversely impact consumer welfare, this requirement

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<sup>92</sup> See, e.g., 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2435 (2013) (collecting Congressional concerns of trusts using their power against upstream suppliers, depressing input prices below competitive levels and transferring wealth from powerless price takers to combinations of competitors).

<sup>93</sup> 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman).

<sup>94</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance For Human Resource Professionals (October 2016), <https://www.justice.gov/atr/file/903511/download> (noting that the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements); OECD, *supra* note 80, at 247 (noting how the DOJ “brought 70 criminal cases against buyer cartels” from 1997–2006).

<sup>95</sup> 2011 ICN Survey, *supra* note 41, at 45.



cannot be taken literally. The “connection between consumer welfare and the practical enforcement of competition law is not always straightforward,” concluded the 2011 ICN survey; “there may be a considerable gap between policy statements and practice.”<sup>96</sup> It cannot be reconciled with the harms from monopsony power, wage-fixing and no-poaching agreements, and buyer cartels.

Although U.S. courts and agencies mention consumer welfare as a competition policy objective, in reality, they are more concerned about preserving competition.<sup>97</sup> This raises other issues, including characterizing competition, as the term is not self-defining, and determining the goals of competition law. But the monopsony cases show that competition policy is principally concerned about promoting a competitive process that promotes material well-being and quality-of-life factors, along with political, moral, and social values.

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<sup>96</sup> *Id.* at 3.

<sup>97</sup> See, e.g., *Anthem*, 855 F.3d at 366–67.





## HOW THE CONSUMER WELFARE STANDARD HAS NOT HELPED CUSTOMERS OR THEIR WELFARE

The infirmities of the consumer welfare standard would be less alarming if the welfare of consumers actually increased over the past 35 years. If that were the case, one could quibble that their welfare might have increased a little more under a better antitrust standard, but it would be a question of degree. The sad reality, however, is that competition, under the consumer welfare standard, has diminished significantly in many markets.

The consumer welfare standard, it turns out, benefited neither consumers nor their welfare. As antitrust scholar Jonathan Baker recently noted,

“The U.S. economy has a ‘market power’ problem, notwithstanding our strong and extensive antitrust institutions. The surprising conjunction of the exercise of market power with well-established antitrust norms, precedents, and enforcement institutions is the central paradox of U.S. competition policy today.”<sup>98</sup>

First, competition has decreased in many markets. We are seeing greater profits to a handful of firms in highly concentrated markets.

A 2018 working paper by Jan De Loecker and Jan Eeckhout provides support to the observation of increases in overall market power.<sup>99</sup> The study examined the financial statements of more than 70,000 firms in 134 countries and used a cost-based method, rather than a demand-driven approach, thus avoiding controversial assumptions as to market definition or consumer preferences. It identified a steady rise in markups (i.e., the ratio of price to the marginal cost of production) since 1980.<sup>100</sup> Between 1980 and 2016, markups have risen the most in North America and Europe and have risen the least in emerging economies in Latin America and Asia.<sup>101</sup>

A 2018 International Monetary Fund (IMF) working paper provides further evidence of the decline in competition in the United States and other developed economies.<sup>102</sup> The study analyzes the data of

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<sup>98</sup> Jonathan B. Baker, *Market Power in the U.S. Economy Today* (March 2017), <http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today/>.

<sup>99</sup> Jan De Loecker and Jan Eeckhout, *Global Market Power*, NBER Working Paper 24768 (June 2018), <http://www.nber.org/papers/w24768>.

<sup>100</sup> *Id.* at 5 (finding that since 1980 there has been globally a steady rise from a markup of around 1.1 to a markup of 1.6 in 2016; mark-ups increased in the 1980s and 1990s, were “virtually flat” in 2000s, and sharply increased in the last few years).

<sup>101</sup> *Id.* at 1, 8.

<sup>102</sup> Federico J. Díez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications*, IMF Working Paper WP/18/137 (June 2018), <https://www.imf.org/en/Publications/WP/Issues/2018/06/15/Global-Market-Power-and-its-Macroeconomic-Implications-45975> [hereinafter IMF Study].

companies from various sectors in 74 countries and considers how market concentration, corporate profits, and investment in innovation interconnect. Similar to the findings in De Loecker and Eeckhout’s 2018 study, the IMF working paper unveils a significant increase of markups between prices and marginal costs of publicly traded firms in developed economies.

And like De Loecker and Eeckhout’s 2018 study, the IMF paper found that markups of U.S. firms increased by a sales-weighted average of 42 percent between 1980 and 2016.<sup>103</sup> Markups in the U.S., the study found, “have increased across all major industries, and not only technology ones.”<sup>104</sup> This 42 percent increase in markup was higher than the markups of firms in other advanced economies, which increased by an average of 35 percent during the same period. According to the study, the rise in measured markups is associated with increased market power and market concentration.

A 2017 study by De Loecker and Eeckhout, in which they used firm-level data on the accounts of publicly traded firms in the U.S., found “that markups have been relatively constant between 1950 and 1980 at around 20% above marginal cost.”<sup>105</sup> (This was during the period of robust and bipartisan antitrust enforcement during antitrust’s third policy cycle.) But from 1980 onward, “there has been marked change in this pattern, with markups steadily rising from 18% to nearly 67% in 2014, a three and a half fold increase.”<sup>106</sup> Over a 35-year period, “that is an increase in the price level relative to cost of 1% per year.”<sup>107</sup>

As concentration has significantly increased in many U.S. industries, innovation has weakened. As the 2018 IMF report found, despite the higher returns to capital, businesses in markets with rising concentration and less competition are investing relatively less in research. The IMF study found that high markups are

“correlated initially with increasing and then with decreasing investment and innovation rates. This non-monotonicity is more pronounced for firms that are closer to the technological frontier. More concentrated industries also feature a more negative relation between markups and investment and innovation.”<sup>108</sup>

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<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.*

<sup>105</sup> De Loecker & Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, NBER Working Paper No. 23687 (2017), <http://www.nber.org/papers/w23687>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* For other recent scholarship on the complex relationship between market concentration and innovation, see Ariel Ezrachi & Maurice E. Stucke, *Digitalisation and Its Impact on Innovation: Report Prepared for the European Commission*, DG Research & Innovation (July 2018) (collecting recent scholarship on how an increase in competition [from an initial low position] increases the rate of innovation, but that high levels of competition decrease the rate of innovation).

<sup>108</sup> IMF Study, *supra* note 103, at 1.



Others have also identified the correlation among increased dominance, increased profits, and decreased competition.<sup>109</sup>

Markets are also becoming less dynamic, with relatively fewer entrants.<sup>110</sup> The head of the Council of Economic Advisers under the Obama administration noted, in 2016, a slowdown in the creation of new businesses, with top firms capturing more market share:<sup>111</sup>

“A partial explanation for the decline in firm entry rates may be found in increased barriers to entry. These barriers to entry can come in the form of advantages that have accrued to incumbents over time. For example, increased economies of scale may mean that incumbents experience lower costs than new firms, making it harder for entrants to compete. Or demand-side network effects—when a product or service increases in quality the more people use it—may tip the scale in favor of a single provider. Incumbent advantages may also come in the form of successful political lobbying, in which incumbent firms have the resources to lobby for rules that protect them from new entrants.”<sup>112</sup>

On an individual level, most of us are not benefitting from these trends. Higher markups come not from greater efficiencies but from greater market power.<sup>113</sup> This means higher prices for consumers. U.S. labor

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<sup>109</sup> See, e.g., Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?* (October 2016), [https://finance.eller.arizona.edu/sites/finance/files/grullon\\_11.4.16.pdf](https://finance.eller.arizona.edu/sites/finance/files/grullon_11.4.16.pdf); Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L.J. FORUM 960 (2018); William Lazonick, *Profits Without Prosperity*, HARVARD BUSINESS REVIEW (September 2014), <https://hbr.org/2014/09/profits-without-prosperity>; Alexandra Scaggs, *On Juggernaut Companies and Profit Margins*, FINANCIAL TIMES (July 25, 2017), <https://ftalphaville.ft.com/2017/07/25/2191784/on-juggernaut-companies-and-profit-margins/>.

<sup>110</sup> Titan Alon et al., *Older and Slower: The Startup Deficit’s Lasting Effects on Aggregate Productivity Growth*, NBER Working Papers, no. 23875 (2017); Ryan Decker et al., *Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.*, NBER Working Papers, no. 21776 (2015).

<sup>111</sup> “In 1982, young firms [those five-years old or younger] accounted for about half of all firms, and one-fifth of total employment,” observed Jason Furman, Chairman of the Council of Economic Advisers. But by 2013, these figures fell “to about one-third of firms and one-tenth of total employment.” Jason Furman, Chairman, Council of Economic Advisers, *Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth* (September 16, 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916\\_searle\\_conference\\_competition\\_furman\\_ce\\_a.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_ce_a.pdf); see also Brian K. Krumm, *Fostering Innovation and Entrepreneurship: Shark Tank Shouldn’t Be the Model*, 70 ARK. L. REV. 553 (2018).

<sup>112</sup> Furman, *supra* note 113.

<sup>113</sup> One study, for example, showed that the increase in concentration levels has implications for firm performance, as concentration levels affect profitability, innovation, and returns to investors:

“First, the increase in industry concentration levels is associated with remaining firms generating higher profits through higher profit margins. The results indicate that the increase in profit margin is due to increased market power, rather than simply an increased efficiency because of changes in economies of scale. Second, mergers in industries that become more concentrated enjoy more positive market reactions, consistent with the idea that market power considerations are becoming a key source of value during these corporate events. Finally, firms in industries that become more concentrated experience significant abnormal stock returns, suggesting that considerable portion of the gains accrues to shareholders. In general, our findings suggest that despite popular beliefs, competition may be weakening over time.”



markets have become less fluid, with workers less likely to move between jobs, industries, occupations, and locations, even as the consumer welfare standard was supposedly aimed at making the economy more efficient.<sup>114</sup> Another disturbing sign in the U.S. is how the share of income going to capital has risen and the share of income going to labor has fallen.<sup>115</sup>

In sum, under antitrust's consumer welfare standard, competition is diminishing, harming consumers, workers, and innovation.<sup>116</sup>

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Grullon et al., *supra* note 111.

Another study presented a “superstar firm” model for the labor share change. David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, NBER Working Paper (May 1, 2017), <http://www.nber.org/papers/w23396>. Their model is “based on the idea that industries are increasingly characterized by a ‘winner take most’ feature where a small number of firms gain a very large share of the market.” The study hypothesizes that:

“...markets have changed such that firms with superior quality, lower costs, or greater innovation reap disproportionate rewards relative to prior eras. Since these superstar firms have higher profit levels, they also tend to have a lower share of labor in sales and value-added. As superstar firms gain market share across a wide range of sectors, the aggregate share of labor falls. Our model, combined with technological or institutional changes advantaging the most productive firms in many industries, yields predictions that are supported by Census micro-data across the bulk of the U.S. private sector. First, sales concentration levels rise across large swathes of industries. Second, those industries where concentration rises the most have the sharpest falls in the labor share. Third, the fall in the labor share has an important reallocation component between firms—the unweighted mean of labor share has not fallen much. Fourth, this between-firm reallocation of the labor share is greatest in the sectors that are concentrating the most. Fifth, these broad patterns are observed not only in U.S. data, but also internationally in European OECD countries. Notably, the growth of concentration is disproportionately apparent in industries experiencing faster technical change as measured by the growth of patent-intensity or total factor productivity, suggesting that technological dynamism, rather than simply anti-competitive forces, is an important driver of this trend.”

But the study's authors acknowledge that their findings could be consistent with another story, namely “firms initially gain high market shares by legitimately competing on the merits of their innovations or superior efficiency. Once they have gained a commanding position, however, they use their market power to erect various barriers to entry to protect their position.” The model proposed by Autor et al. also implies that as the “superstar” market share has increased, markups charged by superstar firms ought to have *decreased*—even as the total dollar profits earned by the superstars increases. The reason is that the superstars gain market share because they are assumed to operate more efficiently and consumers become more price-sensitive, and so even though they sell more units, they charge a lower per-unit markup. In fact, the evidence from De Loecker and Eeckout (2017) and others mentioned above is inconsistent with this implication. The superstar model also implies aggregate productivity growth as output shifts to firms with higher total factor productivity, but as the studies referenced previously find, aggregate productivity growth is anomalously low.

<sup>114</sup> Furman, *supra* note 113. See also José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, NBER Working Papers, no. 24147 (2017).

<sup>115</sup> Barkai alternatively calculates the return to capital as equal to its cost, and concludes that both the capital and labor shares in the economy have fallen, while the profit share of output has increased from around 5 percent to 15 percent. Simcha Barkai, *Declining Labor and Capital Shares*, Working Paper (2016).

<sup>116</sup> See also Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.*, NBER Working Paper No. 23583 (July 2017), <https://www.nber.org/papers/w23583>. The paper used a mixture of firm- and industry-level data to test the implications of higher U.S. and foreign competition on both leader and industry investment. To test the idea that firms that do not face the threat of entry have less incentive to invest and innovate, the study used Chinese import exposure. Industries “most affected by Chinese competition saw a decline in the number of domestic firms, but at the same time, leaders in these industries increased investment the most.” Firms “in industries with higher excess entry in the 1990s invested more in the 2000s, after controlling for firm fundamentals.” Others, however, question the magnitude of overall

Antitrust policy has contributed to this market power problem. After all, antitrust is supposed to play a critical role in promoting open and competitive markets. Each year, federal antitrust agencies review more than a thousand mergers, of which only a small percentage are investigated and an even smaller percentage are challenged. These mergers touch on billions of dollars in commerce involving all types of products and services.

Entrusted with the critical role of merger review, the federal antitrust agencies, however, are still tinkering with dated price-centric economic models built on unrealistic assumptions of human behavior. Unlike the weather forecaster, the federal antitrust agencies today cannot state with any empirical basis how often they and their dated economic models actually got it right in predicting a merger's effect on prices.

Professor John Kwoka collected the recent post-merger reviews. As Kwoka cautioned, “the number of observations is not especially large, classifications are sometimes difficult, the data have other limitations, and selection issues abound.”<sup>117</sup> Nonetheless, the post-merger review data also highlight our market power problem. The available data, he concluded, suggest that the U.S. competition agencies are inadequately enforcing the competition laws. Of the 53 post-merger reviews with price estimates in 16 different industries, “40 or 75.5 percent report post-merger price increases.”<sup>118</sup> As Kwoka concluded, “[c]ollectively, these results suggest that merger control in these studied cases may overall be too permissive, that the remedies chosen may be inadequate to the task of preserving competition, and that conduct and conditions remedies may be especially ineffective.”<sup>119</sup>

Other recent scholarship has shown that institutional investors may soften competition because of their significant ownership stakes in competing firms in concentrated industries.<sup>120</sup>

Profit margins are widening, with a few firms reaping a significant share of the gains. The reduction in competition in the U.S., as De Loecker and Eeckhout, among others, point out, coincides with a decrease in labor's share of profits, low-skill wages, labor force participation, labor flows, migration rates, and the start-up rate of new firms, because of higher barriers erected by incumbents; a slowdown in output and

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increased concentration levels in well-defined markets and the impact on competition. See, e.g., Carl Shapiro, *Antitrust in a Time of Populism* (October 24, 2017), <http://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf>.

<sup>117</sup> John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on US Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 644 (2013).

<sup>118</sup> *Id.* at 631–2 (the average increase was 9.40 percent, ranging from a 0.06 percent up to a high of 28.4 percent; with 13 transactions (24.5 percent of the total) found to result in price decreases, which average 4.29 percent and range from 0.04 percent to 16.3 percent in absolute value; the survey included three joint ventures and four airline code-shares; of the three joint ventures “(all in petroleum), two reported price increases while one reported a decrease. The magnitudes are all small, and average a positive 0.43 per cent. On the other hand, all four of the studied airline code-sharing arrangements are found to have resulted in price decreases.”); see also JOHN E. KWOKA, JR., *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015).

<sup>119</sup> Kwoka, *Does Merger Control Work?*, *supra* note 119, at 641.

<sup>120</sup> Eric A. Posner, Fiona M. Scott Morton, & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 708 (2017).



GDP; and an increase in wage inequality.<sup>121</sup>

Likewise, as worker mobility and competition have declined since the late 1970s, wealth inequality has grown.<sup>122</sup> Income inequality in the United States, *The Economist* magazine reported in 2012, was “on a scale that matches, or even exceeds, the first Gilded Age.”<sup>123</sup> But what does income and wealth inequality have to do with competition law? As the past acting chair of the FTC argued, “Antitrust is a precision tool, designed to remedy specific harms to the process of competition, not to address macroeconomic issues.”<sup>124</sup>

But income inequality, as Senator Sherman noted, was a key impetus for the antitrust law:

“The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.”<sup>125</sup>

In his book *The Price of Inequality: How Today’s Divided Society Endangers Our Future*, Joseph E. Stiglitz argues that our growing wealth and income inequality are not the natural byproducts of a market economy but the result of policy decisions.<sup>126</sup> Stiglitz first details the bleak picture of America’s stark income and wealth inequality during the past 30 years: the stagnant living standards, the growing economic insecurity and poverty, and the decline in social mobility. Stiglitz’s central thesis is that this bleak picture did not appear naturally. Economic policies entail choices, and all economic policies have distributive consequences. Much of America’s economic inequality resulted from deliberate legal and enforcement decisions, whereby the government, over the past 30 years, failed to protect the 99 percent. Instead, the economically powerful used the government to enrich themselves at society’s expense.

In providing a panorama of how various government policies increased wealth and income inequality—including the deregulation of the financial sector, various corporate-welfare programs, the regulatory race to the bottom, the attack on unions, biased tax and bankruptcy policies, the permissiveness toward predatory lending, and macroeconomic policies that prized inflation over unemployment—Stiglitz notes

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<sup>121</sup> De Loecker & Eeckhout, *supra* note 106, at 31.

<sup>122</sup> “Wealth Inequality,” *Inequality.Org* (blog), accessed September 8, 2018, <https://inequality.org/facts/wealth-inequality/>.

<sup>123</sup> Zanny Minton Beddoes, *For Richer, for Poorer*, *THE ECONOMIST* (October 13, 2012), <https://www.economist.com/special-report/2012/10/13/for-richer-for-poorer>.

<sup>124</sup> Maureen K. Ohlhausen, Acting Chair, Federal Trade Commission, *Competition Policy at the FTC in the New Administration* (September 11, 2017), <https://www.ftc.gov/public-statements/2017/09/competition-policy-ftc-new-administration>.

<sup>125</sup> 21 CONG. REC. 2460 (daily ed. March 21, 1890); see also Jonathan B. Baker, Jonathan Sallet, & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 *YALE L.J.* 1916 (2018) (noting how “one leading proponent of antitrust reform captured the prevailing mood when he warned of the ‘gross inequality in the distribution of wealth and income which giant corporations have fostered’”) (quoting *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 570 (1933) (Brandeis, J., dissenting)).

<sup>126</sup> JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012).



how lax antitrust enforcement went hand in hand with these other policy choices. The wealthy devised better ways to attain, maintain, and exploit their market power. Stiglitz criticizes how judges and policymakers were educated in the Chicago School ideologies of self-correcting, presumptively efficient and competitive markets, even when the economic literature was refuting these claims. Other factors that Stiglitz attributes to monopolies' durability are network effects and new business tactics to resist entry (such as Microsoft's notorious FUD strategy of fear, uncertainty, and doubt). But the rent-seeking problem ultimately for Stiglitz was weak enforcement of the competition laws. Other antitrust scholars have reached a similar conclusion,<sup>127</sup> while some disagree.<sup>128</sup>

***Much of America's economic inequality resulted from deliberate legal and enforcement decisions, whereby the government, over the past 30 years, failed to protect the 99 percent.***

Today's growing inequality matters, because society overall pays a stiff price. We end up with a less stable, less efficient economy that generates less growth, less public investment, and less opportunity. Our democracy is weakened with greater voter disillusionment, greater distrust in our government, and greater disillusionment as the 99 percent are disempowered. Society ends up with more rent-seeking, more lobbyists, and a greater misallocation of economic resources. Ultimately, there is an underinvestment in human capital. The greatest cost imposed on society is "the erosion of our sense of identity in which fair play, equality of opportunity, and a sense of community are so important."<sup>129</sup>

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<sup>127</sup> See, e.g., Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 294 (2017); Sean Ennis, Pedro Gonzaga & Chris Pike, OECD Competition Division, *Inequality: A Hidden Cost of Market Power* (2017), <https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf> (exploring the impact of competition on inequality by developing a model to illustrate how higher profits from market power, and associated higher prices, could influence the distribution of wealth and income; analyzing data from eight OECD countries—Canada, France, Germany, Korea, Japan, Spain, the United Kingdom and the United States—the model, for an average country in the sample, estimates that market power increases the wealth of the richest 10 percent by between 12 percent and 21 percent for a range of reasonable assumptions about savings behavior, while it reduces the income of the poorest 20 percent by between 14 percent and 19 percent); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1272 (2016) (noting the rise of horizontal shareholdings in recent decades which helps explain why income inequality has also risen in those recent decades, and how antitrust enforcement against horizontal shareholdings in concentrated markets thus offers the promise of improving management compensation, increasing economic growth and employment, and reducing income inequality); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1-28 (2015) (2015).

<sup>128</sup> See, e.g., Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 98 (2018) (surmising that "a significant amount of wealth inequality results from innovation, not from anticompetitive practices," and that even if "a correlation exists between competition and more equal wealth distribution, that hardly justifies an antitrust policy at odds with an output maximization goal" as the "consumer-welfare principle already serves to eliminate exercises of market power that reduce output, whether or not the result is more desirable wealth distribution"); Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016) (discussing how exercises of market power can have complex, crosscutting effects that undermine the generality of a monopoly regressivity claim).

<sup>129</sup> STIGLITZ, THE PRICE OF INEQUALITY, *supra* note 128, at 117.



## THE NEED FOR A NEW ANTITRUST STANDARD

Antitrust, historically, was never about promoting allocative efficiency or some inchoate consumer welfare standard. Instead, antitrust was about promoting the social, political, and economic benefits from an effective competitive process.<sup>130</sup>

Unsurprisingly, all but one of the competition agencies surveyed by the ICN cited “[e]nsuring an effective competitive process” as an objective of the monopolization laws.<sup>131</sup> As the former head of the DOJ’s Antitrust Division noted, “[t]he analytical approaches of U.S. agencies and the European Commission (‘EC’) are more similar than ever before. Importantly, we agree with the EC that ‘what really matters is to protect an effective competitive process and not simply protect competitors.’”<sup>132</sup>

There is no doubt the goal of promoting an effective competitive process has its own infirmities. It simply shifts the debate to a larger, unresolved issue—namely, defining an effective competitive process. No consensus exists in the United States or elsewhere on an effective competition process or a unifying theory of competition. Without one, antitrust becomes a tautology. The goal of competition law is “promoting competition by discouraging anti-competitive behaviour.”<sup>133</sup>

What constitutes an effective competitive process can vary by audience. It can include protecting consumers, encouraging creativity in business activities, achieving efficiency and fairness to small and midsize enterprises, and promoting competition for wages and benefits.

**Thus, to provide courts and agencies greater guidance, we first propose the following effective competition standard:**

*Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws.*

Let us unpack each of these elements.

<sup>130</sup> See, e.g., Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253, 2256 (2013).

<sup>131</sup> 2007 ICN Report, *supra* note 41, at 6.

<sup>132</sup> Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, *Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness*, Remarks as Prepared for The Council on Foreign Relations (Oct. 8, 2009), <https://www.justice.gov/atr/speech/striving-optimal-balance-antitrust-enforcement-single-firm-conduct-antitrust-remedies-and> (quoting European Commission, *Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 4-5, 6 (December 3, 2008)).

<sup>133</sup> CUTS Ctr. for Competition, Inv. & Econ. Regulation, *Towards a Healthy Competition Culture...*, (2003), <http://www.cuts-ccier.org/pdf/thcc.pdf>.



“Preservation of competitive market structures”: Antitrust policy is an important tool to promote, preserve, or restore a competitive market structure. When it is impossible to create the conditions necessary to make competition effective, then we must resort to other methods of structuring economic activity.

“Protect individuals, purchasers, consumers, and producers”: Antitrust law protects market participants throughout the supply chain. This includes individuals, consumers, workers, and upstream suppliers. It also means that the resiliency of the supply chain itself is to be protected. This is entirely consistent with “protecting competition, not competitors,” but it recognizes that competition is not a natural state, nor can it be ensured with narrow reference only to consumer surplus—which is inconsistent with the case law, antitrust laws’ legislative history, and economic evidence that upstream anticompetitive behavior can have significant distortionary effects.

“Preserve opportunities for competitors”: It is a fundamental value to have competition at every level of the supply chain and for upstream firms to have access to the market without coercion, interference, or discrimination by powerful and potentially vertically integrated middlemen.

“Promote individual autonomy and well-being”: The courts have historically interpreted the antitrust laws as “the Magna Carta of free enterprise” and as “important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>134</sup> Competition policy can foster an inclusive economy that promotes important values, including autonomy and overall well-being.<sup>135</sup> This is especially important with respect to buyer power—and particularly when that power is exercised in labor markets. The Clayton Act’s language that labor is not a commodity reflects this wisdom.<sup>136</sup> Many individuals rely on their labor to earn their living. In economic terms, that supply by individual workers is highly inelastic. As a result, workers can often be exposed to coercion by powerful employers. At times, as the recent no-poaching cases reflect, workers may not even be aware of the coercion.<sup>137</sup> Antitrust enforcement in labor markets must prevent that coercion which would be absent in competitive markets and the structural rectification of any situation where such coercion will likely arise.

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<sup>134</sup> *Topco*, 405 U.S. at 610.

<sup>135</sup> Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 *FORDHAM L. REV.* 2575 (2013).

<sup>136</sup> 15 U.S.C. § 17 (“The labor of a human being is not a commodity or article of commerce.”).

<sup>137</sup> Two economists studied the role of covenants in franchise contracts that restrict the recruitment and hiring of employees from other units within the same franchise chain. The provisions, for example, effectively prohibit employees from moving among restaurants of the same corporate chain—prohibiting one Little Caesars employee from accepting employment from another Little Caesars franchise location for higher pay. They found that “no-poaching of workers agreements” were included in a surprising 58 percent of major franchisors’ contracts, including McDonald’s, Burger King, Jiffy Lube, and H&R Block. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (Sept. 2017), <http://arks.princeton.edu/ark:/88435/dsp014f16c547g>. Thereafter, several states have targeted no-poach provisions that appear in lengthy franchise agreements that owners of franchises sign with corporate headquarters. Employees were generally unaware the provisions even existed. See Washington State Office of the Attorney General, Press Release: *AG Ferguson Announces Fast-food Chains Will End Restrictions on Low-wage Workers Nationwide* (July 12 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers>.



“Disperse private power”: A fundamental aim of antitrust is to prevent anticompetitive and antidemocratic pressures that arise from concentrated economic power and to ensure an inclusive, equitable distribution of power throughout the economy, including throughout supply chains and within firms.<sup>138</sup> Competitive markets can also limit the ability of shareholders and managers to exploit other stakeholders and historically disadvantaged groups that are excluded or marginalized from the economy.

*Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws.*

## How Would the Effective Competition Standard Modify the Status Quo?

The effective competition standard differs from *both* the consumer welfare standard and the total welfare standard<sup>139</sup> in that it expressly departs from the partial-equilibrium analysis of a single market as the basis for antitrust analysis. The effective competition standard further differs from the consumer welfare standard in several additional, important ways:

- First, a substantial lessening of competition suffices. Enforcers and courts need not ramble through the wilds of economic theory to prove how the lessening of competition harms the welfare of consumers, nor balance the harms to one set of stakeholders against the supposed benefits for another.<sup>140</sup>

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<sup>138</sup> William E. Kovacic, Module 1: Origins and Aims of Competition Policy, Int'l Competition Network (May 2011), <http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html> (discussing the Sherman Act's political and economic objectives); see also Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051-52 (1979) (“It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws,” and any antitrust policy that excluded such political values “would be unresponsive to the will of Congress.”); Louis B. Schwartz, *Justice and Other Non-economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076 (1979) (“[P]utative economic gains should not be the exclusive or decisive factors in resolving antitrust controversies.”).

<sup>139</sup> The total welfare standard, now largely abandoned, cares only about economic efficiency and takes no stance as to how surplus is split between consumers and sellers. In more concrete terms, it locates antitrust harm to competition only in negative output effects and does not consider increases in price as evidence that competition has been harmed.

<sup>140</sup> Proving consumer harm is often difficult on the selling side—especially for intermediary goods. Proving buyer power's adverse impact on the ultimate consumer is even more problematic and difficult. A consumer welfare screen, when actually applied, gives an incomplete and distorted measure of consumer harm. Antitrust enforcers typically consider the challenged behavior's immediate effect on prices. If retail prices remain unchanged (or decline), then the competition authority, under a consumer harm screen, would likely conclude that the challenged practice is competitively neutral or pro-competitive. They would not investigate further the complaints over buyer power, and would likely dismiss any non-price concerns as too

- Second, it recognizes that competition needs competitors. Thus, it takes a tougher stance on monopolistic, predatory, and exclusionary practices, which often reduce the competitive opportunities for entrants and competitors.
- Third, unlike the consumer welfare standard, which considers the impact only on consumers, the effective competition standard protects market participants throughout the supply chain, including workers and sellers.
- Finally, by eliminating the precarious step of how the lessening of competition will harm consumers' welfare, the effective competition standard restores the purpose of the Clayton Act to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." As Congress noted, "A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."<sup>141</sup>

To promote competition and innovation in our heavily concentrated markets, the effective competition standard would depart from today's light-touch antitrust policies in the following areas:

### 1. Stronger Presumptions in Merger Review

Merger policy is meant to prevent anticompetitive harms in their incipiency. The rise of market power, through mergers and acquisitions (M&A) activity, and concerns of underenforcement illustrate the shortcomings of today's merger review. Under the effective competition standard, courts and agencies would apply stronger presumptions in mergers involving concentrated markets, including limits on dominant firms' ability to acquire smaller rivals and vertical mergers where either party is dominant in any market.

### 2. Tougher Position on Monopolies and Monopsonies

Under the Supreme Court's consumer welfare standard, monopolies charging high prices somehow became "an important element of the free-market system."<sup>142</sup> There is no sound economic evidence that

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tenuous or speculative. This exposes one fundamental difficulty in measuring consumer welfare. Buyer power can harm consumers, albeit indirectly. Upstream sellers are also consumers, such as farmers with less money to purchase goods. Our welfare is further reduced when negative externalities increase, such as when farmers with tighter margins cut corners by polluting more, engaging in less sustainable farming, allowing a more dangerous workplace, and hiring underage workers. Competition authorities generally do not consider these other harder-to-quantify harms, which may exceed the short-term benefits from lower prices. The authorities lack the tools to assess the short- and long-term harms arising from buyer power (e.g., less variety and innovation). Thus if a monopsony depresses wages in a local community, which in turn increases the taxpayers' costs, would that be factored in the agency's consumer welfare screen? Unlikely.

<sup>141</sup> *Brown Shoe*, 370 U.S. at 323 n. 39 (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 6, U.S. Code Cong. and Adm. News 1950, p. 4298).

<sup>142</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (surmising that the "opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth").



monopoly pricing improves our welfare or is a necessary condition to spur innovation.<sup>143</sup> In fact, competition appears to be more conducive to innovation than monopoly.<sup>144</sup> The effective competition standard would rectify several shortcomings of the Court’s economic policymaking under Section 2 of the Sherman Act—which is imperative if the economy’s existing and growing market power problem is to be reversed, as opposed to merely slowed.

First, the effective competition standard would clarify what constitutes the offense of monopolization and that of monopsonization. Namely, the plaintiff must show that (1) a defendant has, and exercises, significant market power; (2) this power excludes some potential, and limits some actual, competition; and (3) this power is not attributable solely to a defendant’s ability, economies of scale, research, or natural advantages.

Rather than having antitrust plaintiffs undertake a precarious, time-consuming, and costly ramble through the wilds of economic theory under the Supreme Court’s unwieldy rule-of-reason standard, the effective competition standard would promote prima facie violations of Section 2 of the Sherman Act, as discussed in Part V.c. The essential thrust of monopolization policy under the effective competition standard would be to impose a more restrictive competition policy than prevails by default on firms with significant market power. To prevent monopolies and monopsonies from leveraging their power across markets, the standard would prohibit their vertical integration into other markets, where the integration may foster the monopolist’s or monopsonist’s ability and incentives to distort competition.

The new standard would also clamp down on other anticompetitive practices by monopolies that the Court has basically legalized under its consumer welfare standard, such as predatory pricing,<sup>145</sup> or significantly truncated, such as refusals to deal.<sup>146</sup> Some courts today state that monopolies have no obligation to deal.<sup>147</sup> The effective competition standard would simplify the legal standards for predatory

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<sup>143</sup> For the infirmities of the Court’s reasoning, see, for example, Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497 (2009).

<sup>144</sup> Jonathan B. Baker, *How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007).

<sup>145</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). For some of the criticisms of the decision, see Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 340 (2010); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000) (noting how modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational, the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy, and the sophisticated empirical case studies that confirm the use of predatory pricing strategies, but that the courts have failed to incorporate the modern writing into judicial decisions, relying instead on earlier theory that is no longer generally accepted).

<sup>146</sup> See, e.g., Eleanor M. Fox, *Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153, 154 (2005) (“In post-Trinko refusal to deal cases, lower courts now typically recite the catechism that plaintiffs state a cause of action only if the facts fall within Aspen’s narrow exception from the no-duty-to-deal principles, or within a nearly obliterated essential facilities doctrine”).

<sup>147</sup> *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 698681, at \*4 (N.D. Ill. Feb. 22, 2017):

As, Judge Easterbrook explained, Aspen Skiing and arguments “demand[ing] that holders of market power cooperate with rivals” represent “the last gasp of the old school antitrust.” Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol’y 439, 441–42 (2008). Post-Trinko, “[m]any of these themes bit the dust”; no longer does “even a monopolist ha[ve a] general duty to cooperate



pricing and refusal to deal, and it would foster greater convergence with the European Union standard.

### 3. Reorient Courts and Enforcers to Look More Often Upstream

Antitrust laws in the United States are meant to protect sellers and workers. One positive sign was the DOJ, in 2016, announcing its intention to “criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers.”<sup>148</sup> The agency, along with the FTC, affirmed that workers, like other sellers, are entitled to the benefits of a competitive market for their services.<sup>149</sup>

But when they look upstream, enforcers and courts should not assume that monopsonies are the mirror images of monopolies. That is often a mistake made today.<sup>150</sup> In the leading monopsony case, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Supreme Court’s initial premise was that monopoly and monopsony power were economically similar and shared a close theoretical connection.<sup>151</sup> Given the “kinship” between monopoly and monopsony power, the court suggested “that similar legal standards should apply” to monopolization and monopsonization claims.<sup>152</sup> But developing the legal standards for evaluating monopsonization claims is more complex than simply mirroring monopolization standards.

Courts, when reviewing monopolization claims, typically require the defendant’s market share to be very large—often 70 percent or more.<sup>153</sup> If courts and agencies assume that monopsony is the mirror

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with rivals.” *Id.* at 442.

<sup>148</sup> U.S. Dep’t of Justice, Press Release, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (October 20, 2016), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals>.

<sup>149</sup> *Id.*

<sup>150</sup> See Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L. J. 1509 (2013).

<sup>151</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321–22 (2007); see also *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (noting that because “the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[,] ... [a] greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question” (citation omitted) (internal quotation marks omitted)); *Growers 1-7 v. Ocean Spray Cranberries, Inc.*, No. CV 12-12016-RWZ, 2015 WL 13649090, at \*4 (D. Mass. May 14, 2015) (monopsonization is “is essentially the ‘mirror image’ of traditional monopolization”); *GMA Cover Corp. v. Saab Barracuda LLC*, No. 4:10-CV-12060, 2012 WL 642739, at \*6 (E.D. Mich. Feb. 8, 2012), *adopted by* No. 10-CV-12060, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012); *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 324 (D.D.C. 2011); *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011); *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 n.9 (D. Mass. 1995); FTC & DOJ, *Improving Health Care: A Dose of Competition* ch. 6, at 13 (2004) [hereinafter *Health Report*]; Marius Schwartz, *Econ. Dir. of Enforcement, U.S. Dep’t of Justice Antitrust Div., Buyer Power Concerns and the Aetna-Prudential Merger* (Oct. 20, 1999), available at <http://www.justice.gov/atr/public/speeches/3924.pdf> (“The textbook case of monopsony is the mirror image of monopoly”).

<sup>152</sup> 549 U.S. at 321–22.

<sup>153</sup> See *Smith Wholesale Co. v. Philip Morris USA, Inc.*, 219 F. App’x 398, 409 (6th Cir. 2007) (56% market share insufficient); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992) (55 percent share insufficient); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1430–31, 1443 (6th Cir. 1990) (finding 19 to 29 percent market shares insufficient and noting that “[t]here is substantial merit in a presumption that market shares below 50 or 60 percent do not



image of monopoly, and that a 50 percent market share is insufficient for monopolization claims, should they similarly conclude that a 50 percent market share is insufficient for monopsonization claims?

### ***Developing the legal standards for evaluating monopsonization claims is more complex than simply mirroring monopolization standards.***

Some agencies and courts fall in this trap. One U.S. district court dismissed a claim under Section 2 of the Sherman Act because the market share of approximately 40 percent did not meet “the threshold of what it takes to establish monopoly or monopsony power.”<sup>154</sup>

One important distinction between monopoly and monopsony is the market share needed to infer significant power. Retailers with a 20 percent market share can enjoy significant buyer power over sellers.<sup>155</sup> The FTC and DOJ recognize the difficulty, “in the abstract, to state market share thresholds for such monopsony concerns.”<sup>156</sup> Rather than rely on market-share thresholds alone to find monopsony power, the agencies correctly encourage the courts to consider several interrelated factors: (1) a large market share on the part of the purchaser; (2) an upward sloping or somewhat inelastic supply curve in the input market; and (3) an inability or unwillingness for new purchasers to enter the market or current

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constitute monopoly power” (internal quotation marks omitted)); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (observing that “it is doubtful whether sixty or sixty-four percent” is sufficient “and certainly thirty-three per cent is not”); *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 725 (E.D. Tenn. 2011) (noting that *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir. 1979), found that “75–80 percent or greater is a ‘starting point’ in assessing monopoly power”); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 394 (M.D.N.C. 2002) (“Seventy to seventy-five per cent is generally considered the minimum market share necessary to support a finding of monopoly power.”), *aff’d sub nom. R.J. Reynolds Tobacco Co. v. Philip Morris USA, Inc.*, 67 F. App’x 810 (4th Cir. 2003); but see *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 968 (10th Cir. 1990) (“[M]arket share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.”); *Broadway Delivery Corp. v. United Parcel Serv. of Am.*, 651 F.2d 122, 128 (2d Cir. 1981) (stating that “exclusive focus on market share percentages can produce a distorted picture of market power”); *Kolon Indus., Inc. v. E.I. du Pont de Nemours & Co.*, No. 3:11cv622, 2012 WL 1155218, at \*11 (E.D. Va. Apr. 5, 2012) (considering besides market share defendant’s “ability to maintain power over pricing and competition ‘for a significant period without erosion by new entry or expansion’” (quoting 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 501, at 111 (3d ed. 2007))).

<sup>154</sup> *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d at 727; see also *Lima LS PLC v. PHL Variable Ins. Co.*, No. 3:12-CV-1122 (WVE), 2013 WL 12286066, at \*1 n.1 (D. Conn. Dec. 17, 2013) (“The equation for measuring market power in monopsony is a “mirror image” of the relationships creating market power in a seller.”).

<sup>155</sup> Carstensen, *supra* note 81, at 58. In *Toys “R” Us, Inc. v. FTC*, the market shares fell below the ordinary thresholds for monopolization claims: The retailer Toys “R” Us accounted for “20% of the national wholesale market and up to 49% of some local wholesale markets.” 221 F.3d 928, 937 (7th Cir. 2000). The affected toy manufacturers collectively accounted for about 40% of the traditional toy market. Nonetheless, the FTC found, and the circuit court affirmed, that the group boycott, which the retailer orchestrated, was having its intended anticompetitive effect. Toys “R” Us “was remarkably successful in causing the 10 major toy manufacturers to reduce output of toys to the warehouse clubs, and that reduction in output protected [Toys “R” Us] from having to lower its prices to meet the clubs’ price levels.” *Id.* One could distinguish Toys “R” Us as a group boycott, rather than a monopsony case. Moreover, Toys “R” Us was not the textbook monopsonist that bought fewer toys to depress the wholesale price. Nevertheless, Toys “R” Us, despite its relatively low market share, had enough buyer power to accomplish its anticompetitive plan. The retailer—without a large market share—wielded its buyer power to coerce the toy manufacturers to raise the costs of Toys “R” Us’s rivals, the warehouse clubs.

<sup>156</sup> Health Report, *supra* note 153, at ch. 6, at 17.



purchasers to expand the amount of their purchases in the market.<sup>157</sup>

Consequently, under the effective competition standard, courts and agencies can lessen the risk of false negatives by looking beyond market-share thresholds upstream. Even in properly defined markets, buyers with low market shares at times can exert tremendous power. In their ability to decide when, whether, and from whom to buy a perishable product, and how much of that product to purchase, buyers perhaps have relatively more power than sellers; thus, buyers in these industries can discipline sellers more effectively from exercising market power than sellers can discipline buyers. It may also be that sellers in some industries are more dependent on the buyers than the buyers are dependent on the sellers. Depending on the elasticity of demand of the fringe buyers and overall supply, firms with relatively low market shares can enjoy as much, if not greater, buyer power as firms with higher market shares.<sup>158</sup>

The issue of false positives, however, remains. Monopsonists can have low market shares, but many buyers with low market shares are not monopsonists. Likewise, all monopsonists possess buyer power, but not all firms with buyer power are monopsonists.<sup>159</sup> Reduction in sellers' output is not the telltale mark of monopsony, as buyers, for example, can price discriminate.

Therefore, in assessing upstream abuses, agencies and courts should use a sliding scale: The lower the alleged monopsonist's market share, the greater the plaintiff's burden in showing (1) the fringe buyers' inability to acquire more of the sellers' output and (2) the sellers' inability to easily and cheaply produce and sell other products, in other locales, or to other buyers. Granted, this is, at times, a matter of degree. The defendant can be a "hard-nosed actor in the market,"<sup>160</sup> but not a monopsonist.

Thus, a rule of thumb is the buyer's coercion.<sup>161</sup> Coercion implicitly incorporates both elasticity of demand of the fringe buyers and overall supply; as the sellers' price is depressed, there remain few alternative buyers or alternative selling opportunities to rescue the exploited sellers from their captivity to the buyer. Although market power "ordinarily is inferred from the seller's possession of a predominant share of the market,"<sup>162</sup> the Supreme Court found that underlying market power is

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<sup>157</sup> *Id.*

<sup>158</sup> One can argue that market-share thresholds are arbitrary for both monopsony and monopoly claims. Indeed, the same factors to show monopsony power, despite a relatively low market share, could show monopoly power. In other words, when the elasticity of supply by fringe sellers and the elasticity of consumer demand are both low, a firm with a 43 percent market share could also exercise monopoly power. Plaintiffs, however, rarely challenge the monopolization caselaw's market-share thresholds *per se*. Instead, the litigants typically debate whether the market should be defined more broadly or narrowly.

<sup>159</sup> "Indeed," observed the U.S. competition authorities, "because one of the purposes of managed care is to lower prices closer to a competitive level, it can be difficult to determine when a managed care purchaser is exercising monopsony power." Health Report, *supra* note 153, ch. 6, at 18.

<sup>160</sup> *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 727 (E.D. Tenn. 2011).

<sup>161</sup> See Albert A. Foer, *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?*, AAI Working Paper No. 16-02 (September 29, 2016), <https://www.antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper%20No.%2016-02.pdf>.

<sup>162</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992).



coercion, namely, “the power ‘to force a purchaser to do something that he would not do in a competitive market.’”<sup>163</sup> The more the evidence shows that the firm is forcing sellers to do things that they would not otherwise do in a competitive market, the more likely the firm is a monopsonist, even when its market share is relatively low. The stronger the evidence of the buyer’s coercion, the stronger the inference of monopsony.

Moreover, there is strong evidence to suspect that monopsony power can be projected upstream at two or even three removes from the site of the dominant monopsonist. One recent study finds that powerful retail and manufacturing distributors can secure substantial price concessions from their suppliers, who in turn impose the reduced margins on their workforce in the form of lower wages and more precarious working conditions.<sup>164</sup>

To habituate the agencies to look upstream, the new standard would require agencies and courts to consider whether a merger may substantially lessen competition or tend to create a monopsony for upstream labor, supplier, and product markets.<sup>165</sup> The reforms under the Sherman Act would also apply upstream to include anticompetitive restraints by buyers and monopsonization claims. Claimed efficiencies cannot amount to (or be derived from) anticompetitive behavior in upstream markets.

#### 4. Right of Market Access

The remarkable feature of exclusive dealing cases is that private antitrust plaintiffs almost always lose.<sup>166</sup> The effective competition standard would restore presumptions against exclusive dealing as well as other vertical restraints by firms that individually or collectively possess significant market power. Hence, any significant restraint by a dominant firm on other companies’ freedom to compete should generally require a legitimate justification. Such an approach would allow for contracts and other restraints that promote competition. The new standard, consistent with the developments on competition law outside of the U.S., would deter dominant gatekeepers or technology platforms from engaging in exclusionary behavior, the effect of which has the significant potential to foreclose competitors and diminish competition.<sup>167</sup>

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<sup>163</sup> *Id.* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)).

<sup>164</sup> Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, 83 AMERICAN SOCIOLOGICAL REVIEW 213 (2018).

<sup>165</sup> For the deficiencies under the earlier approach and harms from restraints and mergers upstream, see Carstensen, *supra* note 81, at 105-16, 128-31, 260-63; see also Alan Krueger & Eric Posner, *Policy Proposal: A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* (Feb. 27, 2018), [http://www.hamiltonproject.org/papers/a\\_proposal\\_for\\_protecting\\_low\\_income\\_workers\\_from\\_monopsony\\_and\\_collusion](http://www.hamiltonproject.org/papers/a_proposal_for_protecting_low_income_workers_from_monopsony_and_collusion) (recommending that the agencies’ merger guidelines include a new section that directs the government to screen mergers based on their likely effects on labor markets).

<sup>166</sup> See, e.g., *Morales-Villalobos v. Garcia-Llorens*, 316 F.3d 51, 55 (1st Cir. 2003) (“many of these antitrust cases brought by excluded medical care providers are ultimately decided against plaintiffs, usually after summary judgment or trial”).

<sup>167</sup> See, e.g., Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740—Google Search (Shopping)) (notified under document number C(2017) 4444), [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112(01)).





## 5. Vertical Restraints

Vertical price-fixing was for decades per se illegal under the Sherman Act. Then, in 2007, a divided Supreme Court, without any new empirical evidence, decided that the restraint should be evaluated under its more deferential rule-of-reason standard.<sup>168</sup> This decision stems from earlier, empirically-suspect dictum that the antitrust laws primarily are concerned about *interbrand* competition, and not *intra-brand* competition.<sup>169</sup> While that may be true of generic products, it is not true of branded differentiated goods. Try negotiating a better price for a BMW with the price of an Audi or Mercedes (interbrand competition) versus the price of that same BMW offered by another dealer (intra-brand competition.) The effective competition standard would create a strong presumption against price and nonprice vertical restraints.

## 6. Looking Beyond Price Effects

Competition agencies recognize that anticompetitive behavior can affect not only price and output but also quality, variety, services, privacy protection, and innovation. Nonetheless, the courts usually measure an injury to competition “by a reduction in output and an increase in prices in the relevant market.”<sup>170</sup> The effective competition standard would require the courts and agencies to look beyond price effects in mergers, anticompetitive conduct, and monopolization and monopsonization cases, including impact on other important, nonprice parameters of competition (such as quality, choice, and privacy). In weighing these potentially offsetting effects against each other, courts are not to offset harm to competition for one set of stakeholders with benefits for another when there is no mechanism for compensation, as is usually the case.

The effective competition standard would also recognize that when a company violates the antitrust laws, the harm can be compounded when the conduct violates other laws meant to protect historically disadvantaged groups that have been excluded or marginalized from the economy (such as the civil rights laws). This would include illegal market allocations on the basis of historically disadvantaged groups’ race and identities.

## 7. Relief

The effective competition standard would employ a preference for structural remedies to promote competitive market structures. Ironically, in the *Standard Oil* decision—which introduced the weak rule-of-reason analysis that has become so unwieldy—the Supreme Court also supported strong

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<sup>168</sup> *Leegin Creative Leather Prod.*, 551 U.S. at 893.

<sup>169</sup> *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 70 n. 19 (1977) (stating that interbrand competition “is the competition among the manufacturers of the same generic product television sets in this case and is the primary concern of antitrust law”).

<sup>170</sup> *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011) (internal quotation omitted).

structural remedies, including breaking up the monopoly and monopsony.<sup>171</sup>

During the 1912 presidential election, Theodore Roosevelt and Woodrow Wilson debated antitrust's relationship with monopolies. Under Roosevelt's approach, we should accept the state of affairs as the natural evolution of technology and the economy. Because monopolies represent the natural evolution of market power, the thinking went, the government should simply regulate them. Roosevelt had misgivings about breaking up Standard Oil: "What we should have is a much stricter governmental supervision of these great companies, but accompanying this supervision should be a recognition of the fact that great combinations have come to stay and that we must do them scrupulous justice just as we exact scrupulous justice from them."<sup>172</sup>

Under Roosevelt's approach, monopolies and monopsonies are impossible to break apart because they are inevitable. Moreover, the powerful firms may be deemed necessary to compete internationally. At times, the monopoly or joint venture delivers significant efficiencies and pro-competitive benefits, which would be lost if broken up. Thus, dominant firms are indispensable for national security, industrial productivity, and efficiency. As Roosevelt argued for his generation of monopolies, they would be under the government's "continued, trained, watchfulness guard."<sup>173</sup> The belief is that the government can secure the efficiencies and strategic benefits from the monopolies, while deterring the abuses. But even with these regulations, the monopolies will likely remain.

Under the Wilson/Brandeis approach, monopolies/monopsonies are neither natural nor inevitable. Most do not naturally arise from offering superior service or business acumen. Instead, they grow artificially and by government support, allowing them "privileges and exemptions which [they] ought not to enjoy."<sup>174</sup>

Under the Wilson/Brandeis approach, many of today's dominant firms represent the weak antitrust

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<sup>171</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 77–78 (1911):

"But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

<sup>172</sup> Letter from President Theodore Roosevelt to Arthur B. Farquhar (Aug. 11, 1911), in Theodore Roosevelt: Letters and Speeches 652, 652 (Louis Auchincloss ed., 2004).

<sup>173</sup> Progressive Party Platform of 1912 (August 7, 1912), <http://teachingamericanhistory.org/library/document/progressive-platform-of-1912/>.

<sup>174</sup> Woodrow Wilson's Acceptance Speech of His Nomination by the Democratic Party for the President of the United States, in THE PUBLIC, Volume 15, at 776 (edited by Louis Freeland Post, Alice Thatcher Post, Stoughton Cooley 1912).



enforcement over the past 35 years, where some U.S. enforcers and courts espoused more laissez-faire theories and presumptions that disfavored intervention in markets. To have the federal government monitor the monopolies' watchmen would increase its already significant power over our economy, privacy, and well-being. Eventually the regulator itself will be captured by the regulated. After all, its failure to tame the monopolies will reflect the government's regulatory failures.

Thus, under a Wilson/Brandeis approach, the way to promote competition, individual autonomy, and industrial freedom is through safeguarding the competitive process. Ultimately, in response to the trusts and monopolies, Congress, during the Wilson administration, enacted in the Clayton and Federal Trade Commission Acts. Unlike the Sherman Antitrust Act of 1890, which had several loopholes, the Clayton and FTC Antitrust Acts sought to prevent the formation of trusts and monopolies. One important way is to prevent mergers that may substantially lessen competition or tend to create a monopoly or monopsony.

Thus, if we leave the monopoly/monopsony in place, we wind up regulating a powerful firm that has every incentive to look for other ways to exploit its power and that will thus be motivated to navigate around whatever regulatory regime is put in place. The best antidote is not in regulating monopolies and monopsonies, but in promoting competition. Thus, at a minimum, enforcers need to prevent monopolies/monopsonies from getting bigger. This means enforcing the Clayton Act as it was intended: cracking down on mergers and anticompetitive practices—such as Google diverting search engine traffic to its own comparison shopping service, while burying its rivals' services on the fourth page of results. The goal is to thwart these anticompetitive risks in their incipiency. Doing so would also open the pathways for disruptive innovation.

*The best antidote is not in regulating monopolies and monopsonies, but in promoting competition.*

It also means blocking mergers rather than allowing the merger to go through with myriad behavioral conditions (as was the case of Comcast-NBCU,<sup>175</sup> Google-ITA Software,<sup>176</sup> and TicketMaster-LiveNation<sup>177</sup>). The current head of the Antitrust Division, examining the general failure of these behavioral remedies, has endorsed structural remedies in merger challenges.<sup>178</sup>

Finally, if the anticompetitive abuses continue, our trust-busters might have to break up these monopolies and monopsonies.

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<sup>175</sup> See Modified Final Judgment filed in *United States v. Comcast Corp.*, Case No. 1:11-cv-00106-RJL (D.D.C. filed Aug. 21, 2013), <https://www.justice.gov/atr/case-document/file/492176/download>.

<sup>176</sup> See Final Judgment filed in *United States v. Google Inc.*, Case No. 1:11-cv-00688-RLW (D.D.C. filed Oct. 5, 2011), <https://www.justice.gov/atr/case-document/file/497636/download>.

<sup>177</sup> See Final Judgment filed in *United States v. Ticketmaster Entertainment, Inc.*, Case No. 1:10-cv-00139 (D.D.C. filed July 30, 2010), <https://www.justice.gov/atr/case-document/final-judgment-180>.

<sup>178</sup> Makan Delrahim, *Keynote Address to the American Bar Association's Antitrust Fall Forum* (Speech, November 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.



## What Needs to Happen to Implement the Effective Competition Standard into Federal Antitrust Policy?

The existing consumer welfare standard is not statutory. It represents the industrial policy promoted by the Chicago, post-Chicago, and Harvard School adherents. Given the mounting evidence that antitrust policy, under the consumer welfare standard, has not increased competition, and the standard's operational difficulties, the standard should be scrapped.

Thus, we can rectify the market power problem through different avenues:

1. Courts and agencies, without any legislative action, can enforce the federal antitrust laws as Congress intended them. Nothing prevents courts and the federal antitrust agencies from actually doing this. The effective competition standard, while new, is actually consistent with the legislative aim of the Sherman and Clayton Acts.
2. The FTC can use its authority under the FTC Act, as Congress intended, to reach these anticompetitive practices and mergers through rule-making.<sup>179</sup>
3. Congress could amend the Sherman and Clayton Acts to clearly prescribe the effective competition standard and delineate legal presumptions for common anticompetitive restraints to effectuate the standard.
4. Congress could enact a new civil antitrust statute, and also delegate power to the FTC to make regulations for specific per se illegal rules and presumptions under the new standard.
5. Congress could choose not to pass the effective competition legal standard itself but instead pass other specific measures that would effectuate the standard (as outlined below in Part V.c).

*It is apt for Congress to rectify antitrust policy and to promote an inclusive economy—one that benefits more than 1 percent of the population and promotes a healthy democracy.*

The first two options are possible. The FTC's broader mandate under Section 5 of the FTC Act is intended to stretch beyond the Clayton and Sherman Acts. But the composition of the current Supreme Court, the time and expense to undo the damage caused by the Court's excursions in economic theory, the incentives of the antitrust agencies to undertake this change, and the continuing harm to the public in the interim all call for legislative action. It is apt for Congress to rectify antitrust policy and to promote an inclusive economy—one that benefits more than 1 percent of the population and promotes a healthy democracy.

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<sup>179</sup> See, e.g., Rohit Chopra, *Comment of Federal Trade Commissioner Rohit Chopra*, at 5, Hearing #1 on Competition and Consumer Protection in the 21st Century (2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1408196/chopra\\_-\\_comment\\_to\\_hearing\\_1\\_9-6-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf).



This brings us to the third and fourth options. Other jurisdictions, like Germany, have recently updated their competition laws for the digital economy.<sup>180</sup> While Congress has amended the federal antitrust laws over the years, it hasn't significantly changed the substance of the federal antitrust laws for over 60 years. Part of this may be attributable to the Sherman Act being viewed as common law. Another factor is that the Act imposes both criminal and civil liability. No doubt, any statutory changes must account these factors.

In amending U.S. competition laws, Congress will likely confront the issue of whether it needs to change only the standard (e.g., adding the language of an effective competition standard) and/or specific presumptions and per se rules to promote that standard.

Under the rule-of-law principles, the courts' role should be to interpret the antitrust laws based on (1) the original laws and (2) precedent that is true to the original laws. It would not interpret the acts based on what it believes to be the latest economic thinking on competition policy.<sup>181</sup> By declaring specific principles, Congress would be assured that the courts, under a rule of law, would construe the antitrust laws to further those principles, and would circumscribe the courts from arbitrarily reaching standards (or results) inconsistent with those principles.

Thus, we advocate two components: *first*, to recognize that antitrust law invariably promotes multiple economic, political, and social objectives, rather than a single idiosyncratic economic goal. Every country's competition law likely encompasses, but does not necessarily rank, multiple economic, social, moral, and political goals. Few countries today, internationally or in the U.S., believe that antitrust policy should promote only a single narrow economic objective. Even those who still believe this disagree about how to define that economic objective narrowly to minimize trade-offs, improve predictability, and promote individuals' welfare.

***Indeed extractive firms, like monopolies and oligopolies, typically lead to extractive governmental policies, where a few profit at the expense of the many. This is why we need more robust rules to ensure that collective values are achieved in the face of private interest.***

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<sup>180</sup> Germany, in 2017, for example, amended its competition law to specify that direct and indirect network effects be considered in assessing a firm's market position. § 18 (3(a)) of the Act against Restraints of Competition (Competition Act-GWB), last amended by Article 10(9) of the Act of 30 October 2017, [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6).

<sup>181</sup> See Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 749 ("Trinko Court's pronouncements on this score stand merely as a naked assertion of a policy preference that has been rejected since the passage of the antitrust laws themselves.").



The issue is not whether competition policy should incorporate noneconomic values. Rather the issue is the degree of freedom that courts and enforcers should have in weighing multiple goals in their analysis. As an overall political-economic community, we often are best served by competition. But individual enterprises have a strong self-interest in undermining competition law when they can exploit markets. Indeed extractive firms, like monopolies and oligopolies, typically lead to extractive governmental policies, where a few profit at the expense of the many. This is why we need more robust rules to ensure that collective values are achieved in the face of private interest.

Here, we see the shortcomings of the Supreme Court’s prevailing rule-of-reason legal standard to evaluate most antitrust claims. One generally cannot have, consistent with the rule of law, a fact-specific weighing standard, like the rule of reason, and multiple economic, political, and social policy objectives. Having the agencies and courts blend goals in every antitrust case is a recipe for disaster. It is questionable whether antitrust enforcers and courts can operationalize multiple goals in a systematic fashion in the vacuous rule of reason, regardless of whether they apply a consumer welfare or an effective competition standard. Moreover, allowing them to blend goals provides greater freedom to make errors and be politically captured.

Consequently, in addition to an effective competition standard that recognizes antitrust’s economic, social, and political aims, the *second* significant component we advocate is shifting from the Supreme Court’s unwieldy rule of reason to clearer legal presumptions. Congress can shift the Court from its “case-by-case” rule-of-reason analysis, which focuses on the “particular facts disclosed by the record,”<sup>182</sup> to simpler antitrust presumptions and rules “clear enough for lawyers to explain them to clients.”<sup>183</sup> The proposed legislation would shift, whenever feasible, from directly regulating market participants’ behavior ex post to legal presumptions that seek to promote a competitive structure ex ante and preserving freedom therein.

This would significantly streamline, rather than complicate, the enforcement of the antitrust laws. The current rule-of-reason review “is data-intensive and, consequently, expensive for litigants; also, it consumes large amounts of court time and other resources.”<sup>184</sup> It is little wonder why so few plaintiffs can afford to bring such cases to trial.

Ideally, Congress would enact the effective competition standard alongside legal presumptions that are simple enough for antitrust counsel to explain to their clients, for agencies to enforce, and for courts to apply.

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<sup>182</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467 (1992) (quoting *Maple Flooring Mfrs. Ass’n. v. United States*, 268 U.S. 563, 579 (1925)).

<sup>183</sup> *Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 555 U.S. 438, 453 (2009) (quoting *Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990)).

<sup>184</sup> *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1146 (9th Cir. 2011) (Reinhardt, Circuit Judge, dissenting in part and concurring in part).



Lastly, one might inquire why not the fifth option, where Congress is silent (or endorses) the consumer welfare standard but adopts the legal presumptions in Part V.c. No doubt, there is some judicial, scholarly, and popular support for the consumer welfare standard. But the reality is that the consumer welfare standard, even if scholars, courts, and agencies could agree on what it means, has neither promoted competition nor consumers' well-being. Moreover, it shifts the attention downstream, contributing to the neglect of upstream effects on labor and sellers.

An effective competition standard would expand the theories of harm available to antitrust plaintiffs, and as such, would reduce the potency of the defendants' strategy of using economic theory to dispatch with claimed price increases or output reductions to consumers. So, while the policy objectives for antitrust enforcement would indeed expand with the effective competition standard (relative to what it has been propounded under the consumer welfare standard), conversely, the proposed standard coupled with the legal presumptions would significantly reduce the administrative burden of individual enforcement actions—ultimately returning antitrust to its proper role as law enforcement rather than highly stylized theoretical speculation.

## **Specific Legislative Changes to Displace the Rule of Reason with Better Legal Presumptions and Rules to Effectuate the Effective Competition Standard**

Others concerned about the shortcomings of antitrust enforcement will likely offer changes to promote competition. The gamut can include reining in implied immunities to the competition law, statutory reform specifically for the digital economy, including measures to promote privacy competition, restructuring the antitrust agencies, and lowering the procedural hurdles for antitrust plaintiffs.

Given this reality, we offer several nonexhaustive suggestions to effectuate the effective competition standard into practice.

First, Congress is already considering amending Section 7 of the Clayton Act to establish a simple, cost-effective decision rule “to promote competition and prevent harmful consolidation by restoring the original intent of the Clayton Act to address the full range of anticompetitive harms.”<sup>185</sup> Toward that end, the amendments should require the parties to acquisitions that either (1) significantly increase concentration levels or (2) are undertaken by firms that already possess significant market power to bear the burden of establishing, supported by specific facts, that the acquisition will not materially lessen competition, create a monopoly or monopsony, or help maintain their market power.<sup>186</sup>

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<sup>185</sup> See 1812: Consolidation Prevention and Competition Promotion Act of 2017, <https://www.govtrack.us/congress/bills/115/s1812/text>.

<sup>186</sup> Our proposal does not define the baseline of when acquisitions “significantly increase concentration levels.” One reason is that the threshold/criteria will likely differ when evaluating upstream effects versus downstream, since monopsonies are *not* the mirror image for monopolies. Another reason is that the appropriate threshold will likely be lower than the 2010 Merger Guidelines HHI thresholds. Kwoka's data, based on examining post-merger reviews, suggest that lowering the HHI threshold from the current levels in the 2010 Merger Guidelines and creating a separate threshold based on the number of significant

To correct the Supreme Court’s recent, faulty reasoning in *Amex*,<sup>187</sup> significant market power can be established with direct evidence or circumstantial evidence, including high market share (over 30 percent for downstream sellers and 20 percent for upstream buyers) in any market with significant entry barriers.<sup>188</sup> Other “direct” indicia of market power (i.e., not necessarily requiring that antitrust markets be defined) include:

- Supra-competitive prices;
- Restricted output;
- Depressing quality, including privacy protections, innovation, or variety below competitive levels;
- Exclusion of competitors or entrants;
- Unilateral price- or wage-setting power;
- Ability to price discriminate;
- Ability to impose disadvantageous, non-price contractual terms on a counterparty, or to unilaterally revise contractual terms in one’s own favor; and
- Supra-competitive profits and/or payouts to shareholders significantly in excess of a firm’s cost of capital, lasting for a sustained period beyond the “start-up” phase of a new venture, and in excess of the risk.

Section 7 of the Clayton Act should also prohibit vertical mergers that may foster the firm’s ability and incentives to distort competition.

The amendment would also require the court to determine the likely effects of an acquisition to lessen competition:

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remaining competitors. Thus, one could justify restoring the HHI threshold to earlier levels (or no higher than 2000) and the number of significant remaining competitors at no lower than five. But as Kwoka recognized his data set involves industries for which there was a post-merger review. Given that economic studies have recently explored the degree to which companies exercise market power, another HHI threshold or threshold of remaining competitors may be warranted.

<sup>187</sup> In *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018), the government plaintiffs argued that they need not define the relevant market because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. The Court disagreed. It distinguished the cases that the plaintiffs cited as involving horizontal restraints. As the Court opined, “Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the [c]ourt first defines the relevant market.” But it is axiomatic that market power can be proven with direct or circumstantial evidence. So it makes little sense to require plaintiffs with direct evidence of market power to also prove market power with circumstantial evidence. Imagine a prosecutor with direct evidence of a serial killer’s crimes, being required to offer circumstantial evidence.

<sup>188</sup> In *United States v. Philadelphia National Bank*, the Court held that a merger resulting in a single firm controlling 30 percent of a market trending toward concentration in which four firms controlled 70 percent of the sales was presumptively illegal. 374 U.S. at 364 (“Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30 [percent] presents that threat”). Subsequent cases applied that presumption to where the merging parties’ combine share was below 30 percent. See *United States v. Aluminum Co. of America*, 377 U.S. 271, 275 (1964) (aggregate market share 29.1 percent; acquired firm’s market share 1.3 percent; four-firm concentration ratio 76 percent); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (finding a presumption of anticompetitive effects where the combined firm would have a market share of 28.4 percent).





- Not only on prices, but other parameters of competition, including quality, choice, innovation, and privacy; and
- Upstream on labor, suppliers, and other market participants as well as downstream on customers or other individuals whom the acquisition may harm.<sup>189</sup>

Second, Congress would either amend Section 2 of the Clayton Act or add a new provision to prohibit price discrimination where it generally harms consumers overall.<sup>190</sup> Such would be case with behavioral discrimination where firms use the data accumulated on individuals to get them to purchase things they otherwise wouldn't buy at the highest price they are willing to pay.<sup>191</sup> Alternatively, Congress can consider safeguards to make it harder for firms to collect data on users and effectively identify their reservation price.

Third, Congress should either amend Section 1 of the Sherman Act or add a new provision that:

- States that the federal antitrust laws protect both inter- and intra-brand competition;
- Presumes price and non-price vertical restraints to be illegal, including in the labor market, with narrow exceptions when (1) the seller and buyer both lack market power, or (2) the restraint is shown to be reasonably necessary to foster entry into a new market or to curb free-riding;<sup>192</sup> and

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<sup>189</sup> Arguably, the agencies should already do this under the Clayton Act and their merger guidelines. See Horizontal Merger Guidelines § 1 (noting how enhanced “market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation”) and § 12 (noting how the agencies consider whether a merger is likely to enhance market power on the buying side of the market). One problem is that the agencies often consider the merger’s impact downstream on price. As a result, scholars recommend that any competitive analysis of mergers include upstream effects. Carstensen, *supra* note 81. This includes identifying the various labor markets affected by the mergers and assessing the effect of the merger on concentration in these labor markets. See, e.g., Krueger & Posner, *supra* note 167, at 12. This includes calculating the pre-merger and post-merger HHI levels of these labor markets, and recognizing “a presumption against a merger if the post merger absolute level of concentration and/or the increase indicate too high a risk of wage suppression.” *Id.*

<sup>190</sup> See, e.g., John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, 60 ANTITRUST BULLETIN 358 (2015).

<sup>191</sup> See ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016).

<sup>192</sup> As the dissent in *Leegin* noted, the Court identified two benefits of resale price maintenance:

“First, such agreements can facilitate new entry. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so—if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. The result might be increased competition at the producer level, i.e., greater inter-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call ‘free riding.’ Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a ‘free ride’ on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under

- Prohibits attempts to engage in unlawful conduct (such as invitations to collude).<sup>193</sup>

Fourth, Congress should either amend Section 2 of the Sherman Act or add a new provision that would establish a *prima facie* violation when a dominant firm engages in:

- Otherwise unlawful conduct (such as deception) that reasonably appears capable of making a significant contribution to its attaining or maintaining monopoly or monopsony power;<sup>194</sup>
- Pricing below marginal (or, if that cannot be shown, average variable) cost for a sustained period of time, without the need of the plaintiff to show that defendant has a dangerous probability of recouping its “investment” in below-cost prices;<sup>195</sup> or
- Cheap exclusion (conduct that “costs or risks little to the firm engaging in it, both in absolute terms and when compared to the gains (or potential for gains) it brings, and which is therefore attractive for an aspiring monopolist” and “does not raise any cognizable efficiency claims”<sup>196</sup>).

Congress should also clarify when a dominant firm has a duty to deal with others, namely where:

- The firm controls a product, service, resource, or facility that is necessary for carrying on a particular business;
- The refusal is likely to significantly exclude competition;
- The refusal prevents the emergence of a new product for which there is potential consumer demand, or the refusal prevents improving current products in a relevant market; and
- The defendant cannot objectively justify, with particular facts, its refusal.<sup>197</sup>

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these circumstances, dealers might prove unwilling to invest in the provision of necessary services.”

*Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 913 (2007) (Breyer, J., dissenting) (internal citations omitted). Thus, unlike the per se illegal standard, the proposed standard would permit vertical restraints where it is unlikely to undermine intra-brand competition. See also John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 ANTITRUST BULLETIN 423 (2010) (proposing as an alternative to rule of reason a presumption of illegality combined with safe harbors).

<sup>193</sup> The FTC can address invitations to collude under Section 5 of the FTC Act. The primary mechanism for the DOJ to prosecute such attempts would be as an attempt to monopolize claim under Section 2 of the Sherman Act, which is harder to prove. As a result, the DOJ brings fewer invitations to collude cases. For one notable example, see *United States v. Am. Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

<sup>194</sup> For elaboration and applications, see Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?*, 63 SMUL REV. 1069 (2010).

<sup>195</sup> This standard would foster greater convergence internationally. See, e.g., Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359 (holding that it is presumptively illegal if a dominant firm prices below average variable cost to eliminate a competitor, and that if the dominant firm prices between total cost and average variable cost, this could be abusive if evidence of anticompetitive intent).

<sup>196</sup> Susan A. Creighton, Director, Bureau of Competition, Speech Before: Charles River Associates 9th Annual Conference Current Topics in Antitrust Economics and Competition Policy (February 8, 2005), 2005 WL 1023093, at \*1; see also Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker, & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

<sup>197</sup> As the FTC notes, “[o]ne of the most unsettled areas of antitrust law has to do with the duty of a monopolist to deal with its competitors.” Federal Trade Commission, *Refusal to Deal* (last accessed September 9, 2018), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal>. This has become an especially important issue in the digital economy. See, e.g., U.S. Senator Mark R. Warner, Draft White Paper: Potential Policy Proposals for Regulation of Social Media and Technology Firms at 21-23 (undated),



These changes will help address today's market power problem. As we previously noted, while antitrust is a necessary tool to promote competition, it is not sufficient. In today's data-driven markets, for example, policymakers must consider other laws, like consumer protection and privacy, to promote competition. Thus, Congress must consider additional policy tools to curb data-opolies' abuses (and leveraging their power into other markets). As the European Data Protection Supervisor (EDPS) recently noted:

“Increased market concentration in digital markets has the potential to threaten the level of data protection and freedom enjoyed by consumers of digital services. The data protection and privacy interests of individuals are relevant to any assessment of potential abuse of dominance as well as mergers of companies, which may accumulate or which have accumulated significant informational power.

Independent data protection authorities can help with the assessment of such an impact on the consumer or society more generally in terms of privacy, freedom of expression and choice. This assessment, as well as the identification of conditions or remedies for mitigating negative impacts on privacy and other freedoms, may be separate to and independent from, or integrated into, the analysis carried out by competition authorities during their assessment under competition law.”<sup>198</sup>

As the EDPS correctly observes, a coordinated approach is needed. Thus, other sector-specific policy tools may have a comparative advantage in promoting an effective competitive structure. Accordingly, the competition agencies must coordinate with the other agencies to consider mechanisms to promote competition.

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<https://graphics.axios.com/pdf/PlatformPolicyPaper.pdf> (discussing need for interoperability and FRAND terms for essential facilities). Our proposal would promote greater internal convergence on when a dominant firm has a duty to deal. Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN).

<sup>198</sup> Statement of the EDPB on the data protection impacts of economic concentration (Aug. 27, 2018), [https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-statement-economic-concentration-27082018\\_en](https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-statement-economic-concentration-27082018_en).



# ANTICIPATED OBJECTIONS TO THE EFFECTIVE COMPETITION STANDARD

Given the departure from the status quo that the effective competition standard would represent, we think it worthwhile to respond to several likely objections.

## **Objection #1: The consumer welfare standard offers administrability, while the effective competition standard introduces multiple objectives into the law that will make it impossible to enforce.**

One criticism is that by loading up the “to-do” list for antitrust, and given the multiple goals of the effective competition standard, it will be more difficult to administer and more subjective than the existing consumer welfare standard. If it has been difficult to define consumer welfare and get consistent jurisprudence looking at how restraints affect consumers, the effective welfare standard would be even more unwieldy. Courts would have to balance interests of individuals, purchasers, consumers, and producers, which may conflict. Courts could also differ in how to promote individual autonomy and well-being or disperse private power.

The conventional wisdom during the recent antitrust policy cycle has been that the Supreme Court ran amok with per se liability rules between the 1940s and early 1970s. But during that period, the Court did seek administrable rules in furtherance of the Sherman Act’s principles. To give content to the Sherman Act, said the Court, “it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed.”<sup>199</sup> One could argue that the Court adopted the wrong mechanism to further those principles or that its per se rules hindered, rather than furthered, such principles.

By contrast, today’s Supreme Court is no longer anchored by the Sherman Act’s principles. The Court now holds that its antitrust doctrines “evolve with new circumstances and new wisdom.”<sup>200</sup> Currently, the principles of stare decisis are less significant for the Sherman Act than other federal criminal or civil statutes.<sup>201</sup> The current Court articulates a new objective of the antitrust laws (based on its conception

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<sup>199</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940).

<sup>200</sup> *Leegin*, 551 U.S. at 900 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988)).

<sup>201</sup> For over 90 years, the Court viewed resale price maintenance as per se illegal. The Court’s aim in *Leegin* was not to reconcile its abrupt departure with stare decisis principles, but to show why these principles did not burden the Court. One of the few businesses submitting an amicus brief in *Leegin* noted the importance of stare decisis given the essential part of the regulatory background against which many discount retailers financed, structured, and operated their businesses. Brief for Burlington Coat Factory Warehouse Corp. as Amicus Curiae Supporting Respondent at 5-7, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 621854, at \*2-8. Although the dissent observed, “whole sectors of

of “modern” economic theory) and a rule to promote that new objective. For example, in *Leegin*, the Court justified a reduction in intrabrand competition by opining that the antitrust laws’ primary purpose is to protect interbrand competition. But this policy statement never came from the Sherman Act or its legislative history. It came from a footnote in *Sylvania*.

Thus, the status quo in antitrust is far from ideal. There has not been a significant monopolization prosecution in 20 years, following the complex “structured rule-of-reason” procedure applied by the D.C. Circuit in *Microsoft*. Just in the last year, the Supreme Court introduced a new pleading standard into the rule-of-reason jurisprudence for “two-sided transaction platforms” in *Ohio v. American Express*, requiring plaintiffs to prove competitive effects on both sides of that platform.<sup>202</sup> In that case, even an increase in merchant fees was insufficient to prove that competition was harmed. The Court ruled that any antitrust plaintiff must now prove that the restraint reduced output on the other side of the platform or increased overall costs above competitive levels.<sup>203</sup>

In ruling for the defense in the AT&T-Time Warner merger, the district court required the government to prove that vertical integration would increase prices for consumers more than assumed efficiencies would reduce them—effectively locking vertical merger enforcement into economic assumptions that inherently favor defendants (that vertical mergers enhance efficiency and that consumers benefit “automatically” thereby) and prohibiting theories of harm that cannot be reduced to consumer price effects.<sup>204</sup> Not only was the district court’s rationale inconsistent with the trial testimony, it was inconsistent with economic reality. As the DOJ noted on appeal, “[d]espite having repeatedly pledged during the trial to deliver more choice, lower cost to American consumers, AT&T promptly increased the

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the economy have come to rely upon the per se rule,” the majority never responded to Burlington’s or Justice Breyer’s arguments. *Leegin*, 551 U.S. at 925 (Breyer, J., dissenting).

<sup>202</sup> The Court noted that some markets involving two-sided platforms, like newspapers, “should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor.” *Am. Express*, 138 S. Ct. at 2286. Thus, the lower courts and antitrust plaintiffs are left to figure out whether the Court’s holding is limited to credit card transaction networks, or other two-sided platforms that might be deemed a “two-sided transaction platform.”

<sup>203</sup> *Id.* at 2287 (“To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex’s antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.”).

<sup>204</sup> The district court cited the government’s economic expert that AT&T’s customers would reap \$352 million annually from the merger’s efficiencies. Thus, “to understand whether the proposed merger will harm consumers, Professor Shapiro explained, it is necessary to ‘balance’ whether the Government’s asserted harms outweigh the merger’s conceded consumer benefits.” *AT&T*, 310 F. Supp. 3d at 198. One problem, as the United States raised on appeal, is that the government’s expert conceded no such thing:

“Instead, Professor Shapiro testified that the merger would result in \$352 million of annual savings in licensing fees for Turner content to AT&T. . . . His estimate of how those cost savings would impact consumers was far lower and was an output of the very raising-rivals’-costs and pass-through analysis that the district court rejected. . . . The court made no findings on the savings to consumers against which proven harm would have to be balanced.”

Proof Brief of Appellant United States (Public Copy—Sealed Material Deleted) at 64, filed in *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir. filed Aug. 6, 2018), <https://www.justice.gov/atr/case-document/file/1085516/download>.



price of its DirecTV Now product shortly after the trial concluded.”<sup>205</sup>

The erosion of antitrust over the last four decades—and the concomitant onset of the economy’s market power crisis—is centrally premised on restricting the conduct that “counts” as reducing competition. This requires plaintiffs to plead narrow theories of harm, and it invites defendants to invoke economic theories as grounds for overturning findings of fact, giving rise to the unworkable multi-stage procedure that turns district courts into the simulacrum of an academic seminar. That is not an appropriate procedure for enforcing laws against economically harmful conduct, as enacted by a democratically accountable legislative branch and interpreted by experts in the executive branch.

Under the Supreme Court’s flawed economic theories, antitrust standards will continue to stray further from rule-of-law principles. Each new nugget of economic “wisdom” can affect criminal liability under the Sherman Act.

Consequently, the effective competition standard and concomitant legal presumptions will bring antitrust closer to rule-of-law ideals. The legal presumptions in focusing on preserving competition are more straightforward. Some may disagree with the standards and presumptions, but at least they are transparent and easier to explain than today’s amorphous consumer welfare/rule-of-reason approach.

## **Objection #2: Replacing the consumer welfare standard with the effective competition standard would remove “economics” from antitrust.**

Evolving (and disputed) economic theory cannot provide the requisite guidance for civil and criminal illegality. As one study of the antitrust laws puts it, “[l]egal requirements are prescribed by legislatures and courts, not by economic science.”<sup>206</sup> Legal standards that are premised on a court’s assessment of the latest prevailing economic thinking simply afford too much discretion to the judiciary, which is especially clear in the current era in which the latest economic thinking has in fact progressed significantly beyond the false assumptions courts have baked into their rulings. Congress never intended to give the courts unfettered discretion to interpret the Sherman Act for the advancement of a particular judge’s ideologies.

While antitrust cases will no longer devolve to the protracted, costly expert debates, economics can still help inform Congress and the agencies. The consumer welfare standard is not based on “economics,” but rather on one particular model of how the economy works, premised on a set of interlocking assumptions (amounting to the claim that the economy operates competitively “naturally”) that are applied to a single market in static equilibrium. Empirical economics has shown how these assumptions

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<sup>205</sup> *Id.* at 60 n.5 (internal citation and quotation omitted).

<sup>206</sup> STANLEY N. BARNES ET AL., THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955); see also *Leegin*, 551 U.S. at 914–15 (“antitrust law cannot, and should not, precisely replicate economists’ (sometimes conflicting) views”) (Breyer, J., dissenting).



at times are incorrect. Replacing the consumer welfare standard with an effective competition standard driven by modern empirical scholarship would, in fact, replace an uneconomic body of antitrust jurisprudence with one premised on contemporary scholarship in the tradition of the ongoing “empirical revolution” in academic economics.

For example, the voluminous evidence that has already been assembled regarding the extent of monopsony power in the labor market is no less “economic” than any other modern empirical investigation of policy-relevant structural parameters of interest for policy.

The effective competition standard marshals the economic evidence, while simplifying the courts’ and agencies’ assessment of whether agents anywhere in the supply chain were harmed. To take one example, it would typically require economic analysis to determine whether a firm possesses monopsony power for the purposes of analyzing its exclusionary conduct under Section 2 of the Sherman Act.<sup>207</sup> But once the court determines that the firm is a monopsony, the court, using the legal presumptions, could more readily assess whether the conduct is presumptively illegal.

### **Objection #3: Replacing the consumer welfare standard with an effective competition standard will harm consumers.**

We noted how enforcers and courts have manipulated the phrase “consumer welfare” to undermine key antitrust principles and harm most of us. But one concern is that courts and agencies, under the guise of preserving competition, can harm us even more. One can think of how state and federal agencies might have applied an “effective competition” standard to substantially favor incumbent monopolists or preserve oligopolies. So how would our standard prevent or limit this?

Again, Congress, in fully delineating structural presumptions and burdens of presentation and proof, will lessen the need for the courts to basically dictate the outcome based on their interpretation of economics.

Alternatively, what if our standard does more harm than good? An aim of our standard is “the dispersion and deconcentration of private power wherever in the economy it is to be found.” Most firms have some market power (if market power means the ability to price above marginal cost). So would every firm have to fear from antitrust under the effective competition standard, thereby blunting entry and innovation?

The effective competition standard prevents powerful firms from bullying or ganging up on others. That is what antitrust is meant to prevent.<sup>208</sup> But that does not mean every firm with some degree of market

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<sup>207</sup> For an example of how to do this, see José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, NBER Working Papers, no. 24395 (2018).

<sup>208</sup> Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543, 543 (2012) (“Properly applied, antitrust law focuses simply, and entirely, on combating two of the most innate proclivities in human nature—bullying and ganging up—



power is liable. Firms with some market power in unconcentrated industries could still merge. They could engage in vertical restraints. And the effective competition standard does not endorse “no fault” liability for monopolies and monopsonies.<sup>209</sup>

Experience shows that an economy characterized by concentrated market power does not serve its residents, whatever the claims defendants’ experts present at trial. The effective competition standard would serve us far better because it expands the conduct that can incur antitrust liability precisely in order to confront significant market power wherever in the economy it can be found. We are, after all, not only consumers but also laborers and producers.

With only one monopolization case by the DOJ in the past 18 years at the same time that the economy suffers from a growing market power crisis, enforcement is nonexistent. We expect significantly more enforcement under the new standard, which should open the door to a new realm of entrants and smaller competitors to discipline the entrenched monopolies. It should also promote labor mobility and earnings.

#### **Objection #4: The effective competition standard would introduce politics into previously technocratic antitrust.**

Despite claims of being descriptive in nature, any economics-based competition policy ultimately is normative. Subjective value judgments underlie “objective” economic standards, and the objectives vary.

Antitrust always had political goals and implications, since it centrally concerns the distribution of wealth and power in the economy and in society. What has varied over time is whose interests it has defended and whose have been ignored. In the contemporary consumer welfare era, as we have seen, many powerful businesses have extracted wealth—not necessarily by innovating or through efficiencies, but by market power. They have conjured up a range of theoretical pro-competitive justifications that legalize business models to extract wealth out of the economy and deliver it into the hands of the very few (less than 1 percent of the population).

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when such conduct harms competition.”).

<sup>209</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945):

“Since the [a]ct makes ‘monopolizing’ a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances. A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.”





The effective competition standard, by contrast, instantiates antitrust's core goal of deconcentrating economic power in society. No doubt, the entrenched monopolies, invoking the consumer welfare standard (under which they have very little to fear) will seek to preserve the status quo.

Nonetheless, the concern remains that monopolies can subvert the effective competition standard to protect their power. No antitrust standard, by itself, can prevent this. Thus, clear rules and legal presumptions are also needed.

To illustrate, suppose you or I commit fraud. We would likely face criminal or civil liability. But suppose a monopoly deceives to attain or maintain its power. The agency and court under antitrust's consumer welfare/rule-of-reason analysis would consider multiple factors, some inconsistent with other legal policies, as well as the monopolist's pro-competitive justifications for its otherwise illegal behavior.<sup>210</sup> It is not surprising that courts, under the consumer welfare standard, downplay or excuse a dominant firm's fraud and deception to maintain its power.<sup>211</sup>

Another example is merger review. Today, the FTC and DOJ allow some seemingly problematic mergers in highly concentrated industries to sail through (even without an extensive review). Energizer Holdings Inc.'s purchase of Spectrum Brands Holdings Inc.'s battery unit shocked many, including Wall Street analysts, who expected at least a longer antitrust review.<sup>212</sup> So how did the FTC justify quickly ending its investigation in an industry with supra-competitive pricing?<sup>213</sup> That remains unclear.

Under the effective competition standard and legal presumptions, the FTC would have a harder time justifying further concentration in an already concentrated industry. It must tell Congress and the public how the merging parties satisfied their heavy burden of proving, with specific facts, how the acquisition would not materially lessen competition, create a monopoly or monopsony, or help maintain their market power.

Thus, in bringing antitrust closer to rule-of-law ideals, the standard and presumptions will require greater transparency and accountability by the agencies and courts and reduce the subjective influence of lobbyists. Of course, politics can still intrude. But it will be harder for the agencies and courts to justify their inaction or inconsistencies.

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<sup>210</sup> For examples, see Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. 1069 (2010).

<sup>211</sup> *Id.* (proving examples).

<sup>212</sup> Joshua Fineman and Hannah Levitt, *Energizer Deal's Antitrust Approval Shocks Investors*, BLOOMBERG (April 2, 2018), <https://www.bloomberg.com/news/articles/2018-04-02/energizer-deal-s-antitrust-approval-shocks-investor-m-a-logic>.

<sup>213</sup> Sharon Terlep & Nicole Friedman, *Demand for Batteries Is Shrinking, Yet Prices Keep on Going and Going and Going... Up*, WALL STREET JOURNAL (April 16, 2018), <https://www.wsj.com/articles/demand-for-batteries-is-shrinking-yet-prices-keep-on-going-and-goingup-1523871000>.



# Conclusion

Today, we have several incongruities in our economy and society. The current antitrust policies claim to promote the welfare of consumers; however this has not happened. Courts proclaim that “the antitrust law protects competition, not individual competitors”; but as a result of the courts’ and agencies’ largely non-interventionist policies, competition has diminished.

The available economic data all point to declining competition, increasing concentration, higher prices, and widening wealth and income inequality.

And insofar as antitrust does take a position on the distribution of economic surplus to consumers (versus producers), the narrow focus on price effects has carved out substantial space for business models that harm consumers—and society more broadly—in other ways, such as by harvesting their data for sale to third parties, discriminating in terms of quality, and segmenting and dividing the market. Between monopsony power, foreclosure, domination of the market by powerful distributors, and a multitude of other abuses the antitrust laws ought to rectify, the harms of the consumer welfare standard as it is interpreted and actually enforced—as opposed to how it was intended—indicate the need for a substantial overhaul.

Given the mounting evidence of the failures of the current antitrust regime, we need to promote competition. Toward that end, a new standard and new legal presumptions to promote effective competition are not only warranted—they are also necessary.



