



## INTRODUCTION

# TIME FOR A NEW SHERMAN ACT? THE DEBATE ON ANTITRUST REFORM IN HISTORICAL PERSPECTIVE

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## I. INTRODUCTION

Not long after the Sherman Antitrust Act (“Sherman Act” or “Act”) became law, lawyers, scholars, and politicians began

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to debate its proper interpretation and whether the Act was sufficient to address the pressing problem of industry-dominating trusts. Though terse in its text, the Sherman Act has proven adaptable to more than a century of development in economic and political life as well as in legal and economic scholarship. Indeed, the Sherman Act, along with the Federal Trade Commission Act of 1914 (“FTC Act”) and the Clayton Antitrust Act (“Clayton Act”), remain the “core federal antitrust laws still in effect today.”<sup>1</sup>

While the core statutes have remained largely the same, antitrust law has undergone sea changes since the late nineteenth and early twentieth centuries. Although the core statutes were amended during the New Deal and post-World War II era,<sup>2</sup> the most recent and significant antitrust reform emanated from the academy and was effected by enforcement agencies and courts. That reform, however, was facilitated by a political and economic environment (i.e., “stagflation” and the energy crisis) that led many to question the benefits of regulation. Antitrust law was part of the regulatory structure that became the subject of significant political reform.

Beginning in the late 1970s, in an effort to narrow the scope of the antitrust laws, enforcement agencies and courts adopted the consumer welfare standard. The consumer welfare standard “sharpens the focus of antitrust scrutiny to anticompetitive practices that are harmful to consumers, rather than competitors, so that the antitrust laws are not misapplied to advance social goals unrelated to consumer welfare and efficiency.”<sup>3</sup> Today, however, the standard itself, or at least the courts’ and enforcement agencies’

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<sup>1</sup> *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/C7WN-CTWM>] (last visited Mar. 23, 2022) [hereinafter *The Antitrust Laws*].

<sup>2</sup> The core statutes have gone through various amendments throughout the years. For example, the Clayton Act was amended in 1936 by the Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936.) and again in 1950 by the Celler-Kefauver Anti-Merger Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950). See *infra* notes 50–52 and accompanying text.

<sup>3</sup> Makan Delrahim, *The “New Madison” Approach to Antitrust and Intellectual Property Law*, 1 J.L. & INNOVATION 1, 6–7 (2019).

interpretation of that standard, is being questioned in light of the rising prominence of “Big Tech” in American life.

Commentators as well as legislators from both parties have asked whether the present antitrust legal regime is adequate to address modern challenges. Republicans have criticized Big Tech’s ability to influence politics through its control of social media, news delivery, book distribution, and other forms of political communication.<sup>4</sup> Some politicians are concerned with the power of Big Tech to exclude smaller competitors and its proclivity for acquiring nascent competitors.<sup>5</sup> Others find its political and social influence untoward. Though the complaints of each party differ, politicians from both parties have acknowledged that current conditions in the U.S. economy present challenges that contemporary antitrust laws may not be able to meet.

Despite more than forty years of judicial interpretation of the consumer welfare standard, ambiguities remain as to its meaning and application. Legal and economic scholars have debated the extent to which the standard can account for qualitative aspects of competition and what proxies should be used to consider factors such as innovation that are not readily subject to measurement.<sup>6</sup> Responding to criticism that

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<sup>4</sup> See Letter from Kevin McCarthy, House Republican Leader, to House Republicans, Framework To Stop the Bias and Check Big Tech (June 27, 2021), <https://www.republicanleader.gov/framework-to-stop-the-bias-and-check-big-tech/> [<https://perma.cc/9R4J-7KKY>] (discussing “conservative censorship and bias” across internet platforms such as Twitter and Google); see also Martin Pengelly, *Josh Hawley Finds New Publisher After Simon & Schuster Cancels Book*, GUARDIAN (Jan. 18, 2021, 11:02 AM), <https://www.theguardian.com/us-news/2021/jan/18/josh-hawley-book-publisher-simon-schuster> (on file with the Columbia Business Law Review) (quoting Senator Josh Hawley criticizing Simon & Schuster for dropping as a publisher for his book, JOSH HAWLEY, *THE TYRANNY OF BIG TECH* (2022)).

<sup>5</sup> See Press Release, Office of Sen. Amy Klobuchar, Klobuchar, Cotton Introduce Bipartisan Legislation to Protect Competition and Consumer Choice Online (Nov. 5, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=6DD6F99C-C71B-4299-B96D-9A744263297D> [<https://perma.cc/FFZ8-5XDT>].

<sup>6</sup> See A. Douglas Melamed & Nicholas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV.

the consumer welfare standard's focus on economics leads to lax enforcement of antitrust law, one article argues that "economic analysis does not inherently bias enforcement in a more or less interventionist direction" and that "economics can . . . be used to imagine all sorts of anticompetitive strategies, private market failures, and remedies for them."<sup>7</sup> Among some lawyers and economists, the primary debate is thus over how the consumer welfare standard should be interpreted and applied.

Other scholars, however, have questioned whether the consumer welfare standard, under any application, is adequate to meet the demands of the twenty-first century economy and whether a new (or a rehabilitated old) approach to antitrust is needed. For them, a new paradigm is needed. In a number of cases, reform proposals do not state whether they are clarifying the consumer welfare standard or replacing it with other standards.<sup>8</sup>

A new school of thought, often referred to as the "New Brandeis Movement," takes as its starting point the contention that "the United States has a monopoly problem."<sup>9</sup> The movement argues that the consumer welfare standard's "fixation on efficiency . . . has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent

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INDUS. ORG. 741, 750–54 (2019) (describing how the consumer welfare standard considers innovation through economic modelling and case law). For a more thorough review of this debate, see William H. Rooney & Timothy G. Fleming, *Assessing Qualitative Justifications Under Taft's Rule of Reason*, 2019 COLUM. BUS. L. REV. 797 [hereinafter Rooney & Fleming, *Qualitative Justifications*].

<sup>7</sup> Melamed & Petit, *supra* note 6, at 756–57.

<sup>8</sup> See Leah Nysten, *House Democrats About To Uncork 5-Pronged Assault on Tech*, POLITICO (June 10, 2021, 10:52 AM), <https://www.politico.com/news/2021/06/09/house-democrats-announce-tech-bills-492703> [<https://perma.cc/D2JU-ZA6X>] (quoting former FTC chair William Kovacic's comments that Democrats' reform proposals represent "a broader concept of competition policy that borrows some antitrust concepts").

<sup>9</sup> Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

entrepreneurs[.]”<sup>10</sup> The movement speculates, moreover, that excessive concentration in the private sphere effectuates concentration in the political sphere, whereby an economy unfettered by law and policy threatens democracy itself.<sup>11</sup>

In response, defenders of the consumer welfare standard argue that it “offers a tractable test that is broad enough to contemplate a variety of evidence related to consumer welfare but also sufficiently objective and clear to cabin discretion and honor the principle of the rule of law.”<sup>12</sup> They further argue that the New Brandeis anti-monopoly approach would undermine that principle in favor of “political expediency.”<sup>13</sup>

The debate has moved beyond the realm of academia into the halls of Congress, as multiple recent bills, supported by members of both major American political parties, propose major and minor reforms to antitrust law. At the time of this writing, the most recent such effort was proposed by Senators Amy Klobuchar (D) and Chuck Grassley (R).<sup>14</sup> They introduced a bill aimed at technology companies, prohibiting “dominant platforms from favoring their own products or services, a practice known as self-preferencing,” and from “discriminating among business users in a way that materially harms competition.”<sup>15</sup>

Both Senators Klobuchar and Grassley have introduced broader antitrust law reforms as well,<sup>16</sup> while other

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<sup>10</sup> *Id.* at 132.

<sup>11</sup> *Id.* at 131.

<sup>12</sup> Elyse Dorsey et al., *Consumer Welfare & The Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 867 (2020).

<sup>13</sup> *Id.*

<sup>14</sup> Competition and Antitrust Law Enforcement Act of 2021, S. 225, 117th Cong. (2021).

<sup>15</sup> John D. McKinnon, *Effort To Bar Tech Companies from ‘Self-Preferencing’ Gains Traction*, WALL ST. J. (Oct. 15, 2021, 12:17 PM), <https://www.wsj.com/articles/effort-to-bar-tech-companies-from-self-preferencing-gains-traction-11634202000> (on file with the Columbia Business Law Review).

<sup>16</sup> Press Release, Office of Sen. Chuck Grassley, Lee, Grassley Introduce TEAM Act To Reform Antitrust Law (June 14, 2021), <https://www.grassley.senate.gov/news/news-releases/lee-grassley->

legislators have proposed even more radical changes.<sup>17</sup> While not all of those proposals abandon the consumer welfare standard—indeed, Senator Grassley’s proposal would codify that standard<sup>18</sup>—they share a common suspicion that concentration within a market is itself inadvisable or even dangerous. Whether the reform efforts are a necessary safeguard for democracy, as adherents to the New Brandeis Movement claim, or an ill-conceived effort unsupported by data and driven by political calculation, as critics assert, remains to be determined.

To place the contemporary debate in historical context, we trace the trajectory of the Sherman Act and its diverging interpretations from the Act’s inception to date. Part II discusses the state of antitrust law during the early years of the twentieth-century, which featured the judicial development of the rule of reason. We also address the Progressive Era amendments to the antitrust laws, which reflected that era’s increased confidence in the efficacy of governmental and regulatory intervention as reflected in the amendments to the Clayton and FTC Acts. Part III focuses on the state of antitrust law during the middle years of the twentieth century, sometimes characterized as operating according to a “big is bad” principle.

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introduce-team-act-to-reform-antitrust-law [https://perma.cc/PVF3-6N5H] [hereinafter Grassley TEAM Act Press Release]; Press Release, Office of Sen. Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill To Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement> [https://perma.cc/H8EZ-4MMN] [hereinafter Klobuchar Press Release].

<sup>17</sup> Nylén, *supra* note 8; Press Release, Office of Sen. Josh Hawley, Senator Hawley Introduces the ‘Trust-Busting for the Twenty-First Century Act’: A Plan To Bust Up Anti-Competitive Big Businesses (Apr. 12, 2021), <https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big> [https://perma.cc/D7UE-URL2] [hereinafter Hawley Press Release].

<sup>18</sup> Grassley TEAM Act Press Release, *supra* note 16; *see* TEAM Act, S. 2029, 117th Cong. § 28(b) (2021).

Part IV turns to the modern era and discusses the last great revolution in antitrust thought: the arrival of the consumer welfare standard, which directs courts and practitioners to view antitrust law through the prism of how a given practice affects the consumer. This standard often, though not exclusively, focuses on a practice's impact on prices and output. Part V discusses what may be the next revolution in antitrust thought, which some characterize as "the New Brandeis Movement." It largely addresses the impact of increased concentration on economic as well as social and political issues. Finally, Part VI discusses the various legislative proposals, from both Democrats and Republicans, to reform antitrust law, either through modest alterations or thorough overhauls.

## II. EARLY CRITICISMS OF THE SHERMAN ACT AND THE DEVELOPMENT OF THE RULE OF REASON.

Some early criticism of the Sherman Act questioned whether, to the extent that the Act could be enforced at all, it was so broad that it risked doing more harm than good by prohibiting restraints of trade that could be socially desirable. Charles G. Dawes, then the former Comptroller of the Currency and future Vice President of the United States,<sup>19</sup> wrote in August 1906 that, "in [the Act's] present form, during the sixteen years that have elapsed since its passage, it has proved a failure."<sup>20</sup>

While Dawes referred to the Sherman Act generally, his argument focused on section 1 of the Act, which provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be

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<sup>19</sup> Charles G. Dawes *Biographical*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/1925/dawes/biographical/> [<https://perma.cc/JVN2-YQX2>] (last visited Mar. 23, 2022).

<sup>20</sup> Charles G. Dawes, *The Sherman Anti-Trust Law: Why It Has Failed and Why It Should Be Amended*, 183 N. AM. REV. 189, 189 (1906).

illegal.”<sup>21</sup> Dawes interpreted the provision to “make criminal . . . all agreements in restraint of trade”<sup>22</sup> and claimed that “there are certain agreements in restraint of trade which keep alive competition, and that are aimed at keeping it alive.”<sup>23</sup> Dawes argued for the existence of contracts in restraint of trade that “[p]ublic policy” should encourage, such as a contract that “has for its object the maintenance of high standards in manufactured products” or “the abolition of deception in sales.”<sup>24</sup>

Dawes contended that, by failing to define which agreements constitute restraints of trade, the Sherman Act was too ambiguous to accomplish its purpose. He stated that the Act “discourages the formation of good trade agreements and encourages the formation of evil ones,” since “scrupulous men” were likely to avoid any agreements that might fall afoul of the law while “to unscrupulous men the risk of prosecution is less, since to include under any law good and bad acts as equally criminal inevitably discourages its enforcement.”<sup>25</sup>

Dawes concluded his criticism with the hope that Congress would amend the Sherman Act so that “the law [would be] made more practical and enforceable by the clearer definition of what shall constitute illegality in trade agreements, and by the exemption from its provisions of such agreements in restraint of trade as are not injurious to the public.”<sup>26</sup> Indeed, some clarification on which agreements in restraint of trade are illegal under the Sherman Act would come five years after Dawes’ criticism, though not from Congress, as Dawes had suggested, but from the Supreme Court.

In 1911, the Supreme Court issued watershed rulings in *Standard Oil*<sup>27</sup> and *American Tobacco*.<sup>28</sup> In a portion of *Standard Oil* specifically addressing section 2 of the Sherman

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<sup>21</sup> 15 U.S.C. § 1 (2018); see Dawes, *supra* note 20, at 189.

<sup>22</sup> Dawes, *supra* note 20, at 190.

<sup>23</sup> *Id.* at 189.

<sup>24</sup> *Id.* at 190.

<sup>25</sup> *Id.* at 190–91.

<sup>26</sup> *Id.* at 194.

<sup>27</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>28</sup> *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).



Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize,<sup>29</sup> the Court held that the “the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act[.]”<sup>30</sup> *American Tobacco* held that “restraints of trade” in section 1 of the Sherman Act had the same meaning as in the common law, and applied only to agreements that harmed the public interests “by unduly restricting competition or unduly obstructing the due course of trade[.]”<sup>31</sup> The term also applied to restraints that “either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade[.]”<sup>32</sup>

President William Howard Taft, a former federal judge (and future Chief Justice) with his own substantial contribution to antitrust law jurisprudence,<sup>33</sup> and after whom this Lecture is named, placed such importance in the dual opinions that he began his annual written address to Congress on the State of the Union<sup>34</sup> with a discussion of the

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<sup>29</sup> 15 U.S.C. § 2 (2018).

<sup>30</sup> *Standard Oil*, 221 U.S. at 62.

<sup>31</sup> *Am. Tobacco Co.*, 221 U.S. at 179.

<sup>32</sup> *Id.* For a fulsome description of *Standard Oil* and *American Tobacco*, as well as their place in antitrust law jurisprudence and the development of the “rule of reason,” see William H. Rooney, Timothy G. Fleming & Michelle A. Polizzano, *Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule*, 2021 COLUM. BUS. L. REV. 1.

<sup>33</sup> For more on Taft’s place in antitrust law history (and context as to why the lecture series from which this and the succeeding articles derive bears his name), see William H. Rooney & Timothy G. Fleming, *Introduction: William Howard Taft, the Origin of the Rule of Reason, and the Actavis Challenge*, 2018 COLUM. BUS. L. REV. 1, 1.

<sup>34</sup> It would be Taft’s immediate successor, Woodrow Wilson, who would restart the long-dormant tradition of delivering the State of the Union in a live address before Congress. *State of the Union Address*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/SOTU/State-of-the-Union/> [<https://perma.cc/XA59-PL85>] (last visited Mar. 23, 2022).

decisions.<sup>35</sup> Perhaps considering what critics like Dawes had said of the Sherman Act, he claimed that the “epoch-making” decisions “serve to advise the business world authoritatively of the scope and operation” of the Sherman Act.<sup>36</sup> He further claimed that the decisions did not “depart in any substantial way from the previous decisions of the [C]ourt in construing and applying this important statute,” but acknowledged that they “clarify those decisions by further defining the already admitted exceptions to the literal construction of the act.”<sup>37</sup>

Taft used his address to respond to critics who argued that the Sherman Act was “obstructive of business progress[,] to be an attempt to restore old-fashioned methods of destructive competition between small units, and to make impossible those useful combinations of capital and the reduction of the cost of production that are essential to continued prosperity and normal growth[.]”<sup>38</sup> Taft asserted that, in the *Standard Oil* and *American Tobacco* decisions, the Supreme Court “makes clear that there is nothing in the statute which condemns combinations of capital or mere bigness of plant organized to secure economy in production and a reduction of its cost.”<sup>39</sup> Rather, “[i]t is only when the purpose or necessary effect of the organization and maintenance of the combination or the aggregation of immense size are the stifling of competition, actual and potential, and the enhancing of prices and establishing a monopoly, that the statute is violated.”<sup>40</sup> According to Taft, “[m]ere size is no sin against the law.”<sup>41</sup>

Taft also addressed Dawes’ concern that the statute “is not sufficiently definite in its description of that which is

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<sup>35</sup> William Howard Taft, President of the United States, Third Annual Message to Congress (Dec. 5, 1911), <http://www.presidency.ucsb.edu/ws/index.php?pid=29552> [perma.cc/ZK4K-EHB6] [hereinafter Taft Address].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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

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forbidden, to enable business men to avoid its violation.”<sup>42</sup> In response, the President argued that, “when men attempt to amass such stupendous capital as will enable them to suppress competition, control prices and establish a monopoly, they know the purpose of their acts.”<sup>43</sup> Despite his otherwise full-throated defense of the Sherman Act, Taft acknowledged that he did not see any “objection,” and indeed saw “decided advantages . . . in the enactment of a law which shall describe and denounce methods of competition which are unfair and are badges of the unlawful purpose denounced in the anti-trust law.”<sup>44</sup>

Specifically, Taft referenced “[t]he attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business, or the making of exclusive contracts with customers under which they are required to give up association with other manufacturers[.]”<sup>45</sup> He also mentioned “numerous kindred methods for stifling competition and effecting monopoly” as acts that “should be described with sufficient accuracy in a criminal statute” to allow the government both to prosecute these acts as single misdemeanors “instead of an entire conspiracy” and also identify “more in detail to the business community what must be avoided.”<sup>46</sup> Taft therefore saw no need to repeal or amend the Sherman Act, but he was not opposed to efforts to supplement it.

Supplemental legislation came under President Woodrow Wilson, during the Progressive Era, a time of increased faith in the ability of government, through regulatory oversight, to benefit economic performance and society more generally. While the Sherman Act “was somewhat successful in eliminating trusts and holding companies as vehicles for cooperation among companies, the Supreme Court did not extend its reach to mergers unless it could be shown that their

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.*

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

very purpose was to restrain trade.”<sup>47</sup> In response to concerns about the effectiveness of the Sherman Act, came the Clayton Act, which does not reply to the concerns that Taft mentioned in his 1911 address, but does identify the “specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies).”<sup>48</sup>

Section 7 of the Clayton Act specifically “prohibits mergers and acquisitions where the effect ‘may be substantially to lessen competition, or to tend to create a monopoly.’”<sup>49</sup>

The antitrust laws have since been amended to fill perceived gaps in coverage. The Clayton Act was amended in 1936 through the Robinson-Patman Act<sup>50</sup> to “[ban] certain discriminatory prices, services, and allowances in dealings between merchants,”<sup>51</sup> and again through the “Celler-Kefauver amendments in 1950,” which made the “Clayton Act applicable to asset acquisitions and to acquisitions involving firms other than direct competitors.”<sup>52</sup> The FTC Act<sup>53</sup> created the Federal Trade Commission (FTC) and also banned “unfair methods of competition” as well as “deceptive acts or practices.”<sup>54</sup> Changes in the interpretations of the core

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<sup>47</sup> Debra A. Valentine, Former Gen. Couns., Fed. Trade Comm’n, Prepared Remarks Before INDECOPI Conference, *The Evolution of U.S. Merger Law* (Aug. 13, 1996), <https://www.ftc.gov/public-statements/1996/08/evolution-us-merger-law> [<https://perma.cc/YY3F-QVTQ>] [hereinafter Valentine Remarks].

<sup>48</sup> *The Antitrust Laws*, *supra* note 1.

<sup>49</sup> *Id.* (quoting Clayton Act of 1914, 15 U.S.C. § 18).

<sup>50</sup> Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936).

<sup>51</sup> *The Antitrust Laws*, *supra* note 1.

<sup>52</sup> Valentine Remarks, *supra* note 47; *see* Celler-Kefauver Anti-Merger Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

<sup>53</sup> FTC Act, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

<sup>54</sup> *The Antitrust Laws*, *supra* note 1; *see* 15 U.S.C. § 45(a)(1) (2018) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

antitrust statutes, however, have significantly exceeded changes in their text.

### III. THE PRE-CONSUMER WELFARE ERA: IS MERE SIZE A VIOLATION?

Taft's insistence that "there is nothing in the statute which condemns combinations of capital or mere bigness of plant"<sup>55</sup> would soon be eclipsed by a view that size itself was suspicious. Future Supreme Court Justice Louis Brandeis, whose name has been taken by the new reform movement, perhaps best epitomized this view. To Brandeis, the trusts of his day were the "consequence of manipulated human action, not natural evolution[.]" and he rejected the idea that any natural monopolies existed in the United States.<sup>56</sup> Like the current movement, Brandeis expressed concerns about the impact of monopolies on civic life. In the debate over the Clayton Act, for example, he testified before Congress, saying, "You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree of industrial liberty accompanies it."<sup>57</sup>

Brandeis saw "domination of the market by a few, large entities" as "a form of economic despotism exercised by managers who wield absolute authority."<sup>58</sup> He posited the hypothetical example of "a corporation that has made it its cardinal principle of action that its employees must be absolutely subject to its will."<sup>59</sup> Brandeis wrote in apocalyptic terms, saying, "Can this contradiction—our grand political

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<sup>55</sup> Taft Address, *supra* note 35.

<sup>56</sup> Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 *TOURO L. REV.* 277, 282–83 (2017).

<sup>57</sup> *Hearings on S.Res. 98 Before the S. Comm. on Interstate Commerce*, 62d Cong. 1155 (1912) (statement of Louis D. Brandeis, Esq., Attorney at Law, of Boston, Mass.) [hereinafter *Hearings on S.Res. 98*].

<sup>58</sup> Thomas B. Nachbar, *The Antitrust Constitution*, 99 *IOWA L. REV.* 57, 66 (2013).

<sup>59</sup> *Id.* (quoting LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 38, 39 (Osmond K. Fraenkel ed. 1934)).

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liberty and this industrial slavery—long coexist? Either political liberty will be extinguished or industrial liberty must be restored.”<sup>60</sup>

Brandeis also tried to frame his argument in economic terms, insisting that while “a business unit may be too small to be efficient,” it was “equally true that a unit may be too large to be efficient.”<sup>61</sup> According to Brandeis, the reason that “increasing the size of a business may tend to inefficiency is perfectly obvious when one stops to consider.”<sup>62</sup> He reasoned that “success or failure of an enterprise depends usually upon one man; upon the quality of one man’s judgment, and, above all things, his capacity to see what is needed and his capacity to direct others.”<sup>63</sup> For Brandeis, then, a monopoly could lose its efficiency due to the poor decisions of its head.

Brandeis’ focus on the ability of a business to rise and fall with one individual revealed his concerns about the “social inefficiency’ of bigness” that centered on the “separation of ownership and control.”<sup>64</sup> Brandeis believed that the concentration of economic power affected stakeholders beyond merely consumers and included individuals who were “negotiating pay with an employer . . . or wrangling the terms of business with a trading partner.”<sup>65</sup> These reservations extended beyond the welfare of the consumer to encompass labor relations and industrial liberty more broadly.

#### A. The *Alcoa* Decision.

The Brandeis view received a federal court’s imprimatur in the 1945 decision of *United States v. Aluminum Co. of America (Alcoa)*, a Second Circuit Court of Appeals decision authored by the influential Judge Learned Hand.<sup>66</sup> The case concerned

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<sup>60</sup> *Id.*

<sup>61</sup> *Hearings on S.Res. 98, supra* note 57, at 1147.

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

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

<sup>64</sup> Elzinga & Webber, *supra* note 56, at 320.

<sup>65</sup> Khan, *supra* note 9.

<sup>66</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

whether the Aluminum Company of America (Alcoa)<sup>67</sup> was liable for monopolizing interstate commerce “particularly in the manufacture and sale of ‘virgin’ aluminum ingot[.]”<sup>68</sup> The court also considered whether Alcoa had entered into a conspiracy with another party, Aluminum Limited, in restraint of the virgin aluminum ingot trade.<sup>69</sup> With regard to the question of whether Alcoa constituted a monopoly, the Second Circuit found that its “control over the ingot market must be reckoned at over ninety per cent; that being the proportion which its production bears to imported ‘virgin’ ingot.”<sup>70</sup>

The court considered Alcoa’s argument that it could not use its strong position to raise prices, given the presence of ingot importers, and the court “assume[d] . . . that, had ‘Alcoa’ raised its prices, more ingot would have been imported.”<sup>71</sup> Indeed, the court found it “entirely consistent with the evidence” that the threat of increased foreign competition prevented Alcoa “from exploiting its advantage as sole domestic producer.”<sup>72</sup> In fact, the court found it “hard to resist the conclusion that potential imports did put a ‘ceiling’ upon those prices.”<sup>73</sup>

The price-constraint defense proved ineffective, however, for two reasons. First, the court found that “[h]aving proved that ‘Alcoa’ had a monopoly of the domestic ingot market, the plaintiff had gone far enough; if it was an excuse, that ‘Alcoa’ had not abused its power, it lay upon ‘Alcoa’ to prove that it had not.”<sup>74</sup> More importantly, Hand wrote, it was ultimately “irrelevant” whether Alcoa had abused its power, since “it is no excuse for ‘monopolizing’ a market that the monopoly has

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<sup>67</sup> *Id.* at 421.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 425.

<sup>71</sup> *Id.* at 426.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 427.

not been used to extract from the consumer more than a ‘fair’ profit.”<sup>75</sup>

Just as Brandeis did with his “one man” theory, the *Alcoa* court made an effort to justify its apparent blanket prohibition on monopolies in economic terms, arguing that “[m]any people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.”<sup>76</sup> Moreover, the *Alcoa* court oddly asserted that the fact that a producer did not make more than a “‘fair’ profit” was “no evidence that a ‘fair’ profit could not have been made at lower prices,”<sup>77</sup> although the court did not pause to define a “fair profit.”

However, leaving evidence of price aside, the court found that Congress, in passing the antitrust statutes, “did not condone ‘good trusts’ and condemn ‘bad’ ones; it forbad[e] all.”<sup>78</sup> In language that echoes that of Brandeis, the court found that, in passing the antitrust statutes, Congress “was not necessarily actuated by economic motives alone.”<sup>79</sup> The court found instead that “[i]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.”<sup>80</sup>

The court later explained that, beyond “economic reasons which forbid monopoly[,] . . . there are others, based on the belief that great industrial combinations are inherently undesirable, regardless of their economic results.”<sup>81</sup> Citing to the legislative history of the Sherman Act, Judge Hand found that one of the purposes of its passage “was a desire to put an

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 428.



end to great aggregations of capital because of the helplessness of the individual before them.”<sup>82</sup> The opinion continued, “Throughout the history of [certain statutes regulating businesses] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.”<sup>83</sup>

The court concluded by answering the question of whether Alcoa possessed a monopoly by saying that “Alcoa’ meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to ‘monopolize’ that market, however innocently it otherwise proceeded.”<sup>84</sup> That finding was sufficient to hold Alcoa liable for a section 2 offense in the ingot market.<sup>85</sup>

## B. The *Brown Shoe* Decision and Its Progeny

Perhaps the zenith of the “big is bad” theory in antitrust law occurred in applying the Clayton Act merger statute in *Brown Shoe Co. v. United States*.<sup>86</sup> That case concerned the proposed merger of two shoe manufacturers and retailers.<sup>87</sup> The Court first considered the vertical aspects of the merger, recognizing three product markets—“men’s, women’s, and children’s shoes,” and a national geographic market.<sup>88</sup> The Court found that “no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure,” and that “it is apparent both from past behavior of Brown and from the testimony of Brown’s President, that Brown would use its ownership of Kinney to force Brown shoes into Kinney stores.”<sup>89</sup> The Court therefore held that “in

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

<sup>83</sup> *Id.* at 429.

<sup>84</sup> *Id.* at 432.

<sup>85</sup> *Id.*

<sup>86</sup> 370 U.S. 294 (1962).

<sup>87</sup> *Id.* at 297.

<sup>88</sup> *Id.* at 326, 328.

<sup>89</sup> *Id.* at 331–32 (footnote omitted).

operation this vertical arrangement would be quite analogous to one involving a tying clause.”<sup>90</sup> It further found that “the shoe industry is being subjected to . . . a cumulative series of vertical mergers which, if left unchecked, will be likely ‘substantially to lessen competition.’”<sup>91</sup>

At the horizontal level, the Court found that the “same lines of commerce,” consisting of men’s, women’s, and children’s shoes, constituted the relevant product markets.<sup>92</sup> For a geographic market, at the retail level, the Court found that “the District Court properly defined the relevant geographic markets in which to analyze this merger as those cities with a population exceeding 10,000 and their environs[.]”<sup>93</sup>

Examining the probable effects of market foreclosure, while the government introduced evidence that the combined share of the two companies would range from 33% to 57% in the seven cities where their combined share was largest, the Court found cause for concern in shares as low as 5%.<sup>94</sup> The Court claimed that, “[i]f a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown’s competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved.”<sup>95</sup>

The Court’s concern appeared to be that smaller shoe retailers in the affected cities would not be able to compete. The Court found that “[t]he retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers.”<sup>96</sup>

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<sup>90</sup> *Id.* at 332 (footnote omitted).

<sup>91</sup> *Id.* at 334.

<sup>92</sup> *Id.* at 336.

<sup>93</sup> *Id.* at 339.

<sup>94</sup> *Id.* at 343–44.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 344.

In enjoining the proposed merger, the Court acknowledged that “some of the results of large integrated or chain operations are beneficial to consumers,” and it repeated the maxim that “[i]t is competition, not competitors, which the [Sherman] Act protects.”<sup>97</sup> However, in the very next sentence, the Court wrote that it could not “fail to recognize Congress’[s] desire to promote competition *through the protection of viable, small, locally owned business.*”<sup>98</sup> For the *Brown Shoe* Court, therefore, protecting competition and protecting competitors were one and the same. The Court continued by saying that “Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets[,]” but “[i]t resolved these competing considerations in favor of decentralization.”<sup>99</sup> The Court, in finding that it had to “give effect” to what it saw as Congress’s decision, chose to find benefits to consumers insufficient to justify a merger.<sup>100</sup>

In the penultimate paragraph of the *Brown Shoe* decision, despite previously focusing on local geographic markets, the Court discussed a national shoe retail market, which it found was tending toward concentration. The Court identified “the history of tendency toward concentration in the [shoe retail] industry” as a factor to consider when determining the merger’s effects.<sup>101</sup> Although the merger would only place around 7.2% of the country’s “shoe stores’ as defined by the Census Bureau, and 2.3% of the Nation’s total retail shoe outlets” under Brown Shoe’s control, the Court found that it could not “avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipency.”<sup>102</sup> The Court affirmed the district court’s conclusion that the “merger may tend to lessen competition substantially in the retail sale of men’s, women’s, and

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 344–45.

<sup>102</sup> *Id.* at 345–46.

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children's shoes," in most of the cities where the two retailers sold their products.<sup>103</sup>

The Court's skepticism of concentration continued to sharpen when, only four years later, it held in *United States v. Von's Grocery Co. (Von's Grocery)* that the merger of two Los Angeles retail grocery companies violated the Clayton Act.<sup>104</sup> The combined sales of both companies in 1960 comprised only 7.5% of total retail groceries sold in the Los Angeles market per year.<sup>105</sup> However, citing the fact that the number of owners operating single stores in the market decreased significantly while the number of chains with two or more grocery stores increased, the Court found that the resulting share was sufficient to find the merger anticompetitive.<sup>106</sup> Because "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed," a *trend* in the Los Angeles retail grocery market toward increasing concentration was itself enough for the Court to find an antitrust violation.<sup>107</sup>

#### IV. THE ARRIVAL OF THE CONSUMER WELFARE STANDARD

The merger decisions discussed above were part of an increasingly broad and deep regulatory structure that had been imposed on the economy, which included price controls by the federal government. At the same time, the economy suffered from "stagflation," a combination of slow economic growth, high unemployment, and inflation.<sup>108</sup> The roots of stagflation began in the late 1960s with the end of the post-

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<sup>103</sup> *Id.* at 346.

<sup>104</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966).

<sup>105</sup> *Id.* at 272.

<sup>106</sup> *Id.* at 273.

<sup>107</sup> *Id.* at 277.

<sup>108</sup> Jean Folger, *What Is Stagflation? The Economic Phenomenon That Stifled Growth Through the 1970s*, BUS. INSIDER (Nov. 2, 2021, 5:12 PM), <https://www.businessinsider.com/stagflation> [https://perma.cc/W5E2-7FDR].

World War II economic boom.<sup>109</sup> At the same time, “greater international competition, a drop in manufacturing jobs, and a massively expensive war in Vietnam” also contributed to rising unemployment and rising inflation.<sup>110</sup> Interventionist economic policies designed to combat those ills, including a ninety-day freeze on prices and wages, only compounded the problem, as did the effects of the 1973 oil embargo.<sup>111</sup>

Among the reactions to this economic and political malaise was an academic school of thought that denounced regulation as inefficient and the cause of more economic woes than it relieved. That academic view was focused generally on law and economics and gained particular traction in antitrust policy through what is commonly known as the Chicago School.<sup>112</sup>

The mid-1970s featured a string of antitrust cases that evaluated alleged violations in terms of economic effects. In *United States v. General Dynamics Corp. (General Dynamics)*, the government challenged a merger of two coal producers under the Clayton Act.<sup>113</sup> The government sought to make its case:

principally through statistics showing that within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company and thereby contribute to the trend toward concentration.<sup>114</sup>

The Supreme Court, however, found this evidence unpersuasive in light of proof that the acquired producer’s

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* 127–131 (rev. and updated 2002). *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 *UNIV. PA. L. REV.* 925 (1979).

<sup>113</sup> *United States v. General Dynamics Corp.*, 415 U.S. 486, 494 (1974).

<sup>114</sup> *Id.*

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“current and future power to compete for subsequent long-term contracts was severely limited by its scarce uncommitted resources.”<sup>115</sup> The Court therefore looked beyond increased market concentration to the actual effect on competition.

The *General Dynamics* Court distinguished past cases, such as *Von's Grocery*, on the grounds that, unlike coal, those cases involved markets where “statistics involving annual sales naturally indicate the power of each company to compete in the future.”<sup>116</sup> *General Dynamics*' shift from a pure focus on whether a merger would increase concentration, however, would presage a wider turn in antitrust law away from per se rules into a more searching economic analysis. In 1977, in *Continental T.V., Inc. v. GTE Sylvania Inc. (Sylvania)*, the Supreme Court narrowed the scope of the per se antitrust rule, under which certain arrangements are deemed anticompetitive wherever they exist, “to conduct that is manifestly anticompetitive.”<sup>117</sup>

Cases like *General Dynamics* and *Sylvania* received theoretical ballast from the Chicago School, which read those cases in the context of the overall stagnant economy. Then-Professor Robert Bork, who studied in the Chicago School, synthesized and applied its analytical methodology to a host of antitrust precedents in his watershed 1978 book, *The Antitrust Paradox: A Policy at War with Itself*.<sup>118</sup> The book's thesis is that “[t]he only legitimate goal of American antitrust law is the maximization of consumer welfare.”<sup>119</sup> Acknowledging that antitrust law had recognized other goals in the preceding decades, Bork attacked Judge Hand's assertion in *Alcoa* that “large market size is to be broken down regardless of cost to consumers because of the helplessness of the individual before the large firm” as quintessentially contrary to consumer interests.<sup>120</sup>

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<sup>115</sup> *Id.* at 503 (footnote omitted).

<sup>116</sup> *Id.* at 501.

<sup>117</sup> *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).

<sup>118</sup> ROBERT BORK, *THE ANTITRUST PARADOX* (1978).

<sup>119</sup> *Id.* at 51.

<sup>120</sup> *Id.* at 52.

Bork asked: Who exactly is this helpless individual? According to Bork, the hypothetical individual was not a consumer, “since [the nameless individual’s] interests are said to outweigh economic results.”<sup>121</sup> Bork claimed “[i]t was essential to Hand’s argument that he tell us who this individual is, at what point in firm size he begins to become helpless, and in what way he is helpless.”<sup>122</sup> However, Bork noted that “on these points Hand said nothing, perhaps because there really is nothing to say.”<sup>123</sup>

In place of the Brandeisian theories, Bork put forth what he coined the “consumer welfare standard” for antitrust practice. He claimed that “[t]he language of the antitrust statutes, their legislative histories, the major structural features of antitrust law, and considerations of the scope, nature, consistency, and ease of administration of the law all indicate that the law should be guided solely by the criterion of consumer welfare.”<sup>124</sup> He noted, with regard to the Sherman Act, that “[b]oth in the bills introduced and in the debates, there are a number of explicit statements that the purpose of the legislation was the protection of consumers.”<sup>125</sup>

Specifically with regard to Senator John Sherman, the principal author of the Sherman Act, Bork noted that “[m]any of Sherman’s arguments before the Senate showed exclusive concern for consumer welfare, and he even demonstrated that he understood the inseparability of higher prices and what the modern economist would call restriction of output.”<sup>126</sup> He also argued that the “rules of law foreseen in the debates—against cartel agreements, monopolistic mergers, and predatory business tactics—support the thesis.”<sup>127</sup> He further pointed to the “concern, repeatedly stressed, that the law should not interfere with business efficiency,” a concern that was “so strong . . . that it led Congress to agree that even complete

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 57.

<sup>125</sup> *Id.* at 61.

<sup>126</sup> *Id.* at 62.

<sup>127</sup> *Id.*

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monopoly should be lawful if it was gained and maintained only by superior efficiency.”<sup>128</sup>

Bork also made normative arguments for the consumer welfare standard. For example, “the ultimate goal of consumer welfare provides a common denominator by which gains in destruction of monopoly power can be estimated against losses in efficiency, and economic theory provides the means of assessing the probable sizes of the gains and losses.”<sup>129</sup> According to Bork, there was no such common means of evaluating gains and losses “when the trade-off is one between values, such as the decision of how much consumer welfare is to be sacrificed for what amount of additional wealth for small dealers and worthy men, or for what degree of industrial fragmentation, or for what number of additional sources of news.”<sup>130</sup>

Bork gave five policy reasons for the consumer welfare standard. First, he argued that it provides “fair warning” to those whose actions would implicate antitrust law, arguing:

No businessman can know what the law is if the ‘law’ depends upon the sympathies and prejudices of any one of the hundreds of federal judges before whom he may find himself arraigned at some uncertain date in the future. He can know what the law is when the goal of the law is consumer welfare, because the major distinctions of such a system run along the same lines in which the businessman thinks, making lawful his attempts to be more efficient and making unlawful his attempts to remove rivalry through such improper means as cartelization, monopolistic merger, and deliberate predation. A consumer welfare goal, moreover, lends itself to relatively few and simple rules of substantive law, so that predictability is further enhanced.<sup>131</sup>

Second, Bork argued that the “present antitrust laws do not contain any legislative determination that consumer

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 79.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 81.



welfare is to be sacrificed in any case to any other value, and they most certainly do not contain a decision of the degree of sacrifice or the circumstances under which it is to occur.”<sup>132</sup> Given the different roles of courts and Congress in the federal system, “it is utterly improper for courts to take on the task of adjusting the rewards to be allocated to consumers and those to be allocated to other groups.”<sup>133</sup>

Third, and relatedly, Bork contended that “[c]ourts that refuse to make basic policy choices for the legislature thereby force the legislature to decide questions they had previously been content to leave unanswered.”<sup>134</sup> By doing so, courts “help focus the issues to be addressed and make the legislative process more responsible.”<sup>135</sup>

Fourth, Bork argued that “[t]he policy of consumer welfare provides courts with the principles of basic price theory as their criteria for decision.”<sup>136</sup>

Finally, he posited that the consumer welfare standard avoided “arbitrary or anticonsumer rules” better than its alternatives.<sup>137</sup> Bork argued that “courts which admit into the adjudicative process goals in conflict with consumer welfare will engage in balancing, in case-by-case compromises between the values,” and were “much more likely to arrive at rigid rules which will either be arbitrary or completely anticonsumer.”<sup>138</sup>

Bork, along with others, began debates that “forced legal scholars to consider the first principles that guided antitrust and to answer why competition is valuable.”<sup>139</sup> According to antitrust scholars Elyse Dorsey, Geoffrey A. Mann, Jan M. Rybnicek, Kristian Stout, and Joshua D. Wright, “[t]he answer that emerged was that competition leads to lower prices, expanded output, better quality, and more

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<sup>132</sup> *Id.* at 82.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 83.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 84.

<sup>137</sup> *Id.* at 86.

<sup>138</sup> *Id.*

<sup>139</sup> *See, e.g.,* Dorsey et al., *supra* note 12, at 875.

innovation—that is to say, it procures outcomes that benefit consumers.”<sup>140</sup> The second contribution of reformers like Bork “was to introduce the importance of economic theory, empirical evidence, and the error-cost framework in guiding antitrust enforcement decisions.”<sup>141</sup>

The consumer welfare standard ultimately gained judicial acceptance. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,<sup>142</sup> the D.C. Circuit acknowledged the sea change in antitrust law. In an opinion written by Bork, then a judge on the circuit court, the D.C. Circuit found that, to the extent previous Supreme Court decisions “stand for the proposition that all horizontal restraints are illegal per se,” the older line of decisions had been “effectively overruled” by decisions issued between 1979 and 1985.<sup>143</sup>

In the merger context, *United States v. Baker Hughes Inc.* demonstrated acceptance of the consumer welfare standard.<sup>144</sup> There, the D.C. Circuit, in an opinion written by future Justice Clarence Thomas and joined by future Justice Ruth Bader Ginsburg, considered the proposed merger of two drilling rigs.<sup>145</sup> The court explained the standard used to evaluate mergers: “By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.”<sup>146</sup> However, the defendant subsequently has the opportunity to rebut this presumption, which, if they are successful in doing so, shifts the burden back to the government to “produc[e] additional evidence of anticompetitive effect.”<sup>147</sup>

In *Baker Hughes*, the D.C. Circuit found that the merging parties had produced sufficient evidence that the merger

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<sup>140</sup> *Id.* at 876.

<sup>141</sup> *Id.*

<sup>142</sup> 792 F.2d 210 (D.C. Cir. 1986).

<sup>143</sup> *Id.* at 226.

<sup>144</sup> *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

<sup>145</sup> *Id.* at 982.

<sup>146</sup> *Id.* (footnote omitted).

<sup>147</sup> *Id.* at 983.

would not harm competition. First, the court credited evidence that “[h]igh concentration has long been the norm in” the relevant market, and concentration was not “surprising where, as here, a product is esoteric and its market small.”<sup>148</sup> Moreover, the court considered the sophistication of the merging parties’ customers, finding that the “products are hardly trinkets sold to small consumers who may possess imperfect information and limited bargaining power.”<sup>149</sup> Rather, “buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order.”<sup>150</sup> “This sophistication,” the district court held and the D.C. Circuit affirmed as supported by the record, “was likely to promote competition even in a highly concentrated market.”<sup>151</sup>

By focusing on the reasons for concentration and whether purchasers would be able to counter the effects of concentration, the D.C. Circuit in *Baker Hughes* showed that antitrust merger analysis had moved beyond “big is bad.” Courts now determined whether, in a given instance, increased concentration would lead to increased harm to consumers. Such thought was, and remains, the dominant standard applied by courts in antitrust cases. However, that standard is now subject to intense debate in legal, economic, and political circles.

Some of those challenges do not question the appropriateness of the consumer welfare standard, but do question whether it has been applied too narrowly.<sup>152</sup> For example, A. Douglas Melamed and Nicholas Petit argue that, “using the stylized supply and demand curves that are so common in antitrust analysis[,] the welfare improvements that result from technological innovation can be represented as rightward shifts in the demand (reflecting product

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<sup>148</sup> *Id.* at 986.

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

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *Melamed & Petit*, *supra* note 6, at 757 (claiming that criticisms of the consumer welfare standard “confuse specific applications of the . . . standard with inherent properties or implications of the standard”).

improvements) and supply (refle[c]ting productive efficiencies) curves.”<sup>153</sup> We have argued in this journal that “output” should be “recalibrated” in antitrust analysis “to include all dimensions and aspects of the legitimate activity to which the restraint is ancillary, even if the dimensions and aspects of the activity are intangible and not reducible to a quantifiable metric.”<sup>154</sup> However, as we will see, some antitrust thinkers have proposed, in lieu of any recalibration of the consumer welfare standard, a dismissal of the standard altogether.

## V. BACK TO THE FUTURE WITH THE NEW BRANDEIS MOVEMENT?

Just as stagflation and perceived overregulation concerned thinkers and policymakers in the 1970s, concerns regarding increased concentration have grown in recent years within both political parties. The concerns are manifold and include: the power of large firms, especially tech companies, compared to labor; the perceived abilities and tendencies of tech companies to purchase and absorb potential competitors; the role that platforms play in spreading misinformation and content allegedly harmful to children and teenagers; the capacity of such firms to influence the political process; and the ability of technology platforms to censor individuals or viewpoints with which they disagree.<sup>155</sup> Those concerns have led to a rethinking of the purpose of antitrust laws and how antitrust law can be used as a remedy.

The New Brandeis Movement, in the words of two of its proponents, views the thirty years prior to the rise of the consumer welfare standard as the “golden era of antitrust

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<sup>153</sup> *Id.* at 752.

<sup>154</sup> Rooney & Fleming, *Qualitative Justifications*, *supra* note 6, at 799.

<sup>155</sup> See MAJORITY STAFF OF H. SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 11–12 (Comm. Print 2020) (“[T]he online platforms’ dominance carries significant costs. It has diminished consumer choice, eroded innovation and entrepreneurship in the U.S. economy, weakened the vibrancy of the free and diverse press, and undermined Americans’ privacy.”).

action.”<sup>156</sup> At that time, scholars Maurice E. Stucke and Ariel Ezrachi argue, “competition was seen largely as an antidote to fascism, and antitrust as the enabler of that competition.”<sup>157</sup> They posit that antitrust policy was seen as key to protecting the “*competition ideal*,” which “was the belief, in line with democratic principles, in dispersing economic and political power from the hands of a few, to foster greater opportunities to compete, improve, and win.”<sup>158</sup> Stucke and Ezrachi were writing in 2017, when their thesis would likely have found little support among Republicans. That, as discussed below, has significantly changed.

In the Brandeis era, “robust antitrust policy was a central condition necessary for effective competition.”<sup>159</sup> By contrast, during the consumer welfare era, “some courts and enforcers sacrificed important political, social, and moral values to promote certain economic beliefs,” and “[t]he authorities accepted the increased risks from concentrated telecommunications, financial, and radio industries, among others, for the prospect of future efficiencies and innovation.”<sup>160</sup>

In their 2017 article, Stucke and Ezrachi present their case for a new antitrust paradigm. They claim that, “[n]ew business formation has steadily declined as a share of the economy since the late 1970s,” that “[c]ompetition is decreasing in many significant markets, as they become concentrated,” and that “[g]reater profits are falling in the hands of fewer firms.”<sup>161</sup> For associated harms, Stucke and Ezrachi argue that, “[s]ince the late 1970s, wealth inequality has grown, and worker mobility has declined,” while “[l]abor’s share of income in the nonfarm business sector” has

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<sup>156</sup> Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement?autocomplete=true> [<https://perma.cc/42JU-NZ7M>].

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

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

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declined.<sup>162</sup> Additionally, “[d]espite the higher returns to capital, businesses in markets with rising concentration and less competition are investing relatively less.”<sup>163</sup> According to them, “[l]iberals and conservatives are increasingly warning that consumers are not benefiting from the meager competition in many markets.”<sup>164</sup>

New Brandeis scholars especially focus on the need for the “competition ideal” in the “digital economy.”<sup>165</sup> As Stucke and Erzarchi argue:

Data-driven network effects and the rise of a few key gatekeepers have changed the competitive dynamics: entrants may find it hard, if not impossible, to effectively compete, or challenge the dominant super-platforms. Algorithmic collusion, behavioral discrimination, and abuses by dominant data-opolies can further reduce our well-being. The mythical ability of the markets to self-correct becomes doubtful as concentration levels increase, network effects shield the winners, and commercial strategies enable the entrenched to control and limit disruptive innovation.<sup>166</sup>

If the trend continues, they argue, “concentration will likely increase, our well-being will decrease further, and power and profits will continue to fall into fewer hands.”<sup>167</sup> Their solution is to “restor[e] [] the competition ideal.”<sup>168</sup>

Notably, at least one prominent scholar, now-FTC Chair Lina Khan, insists that the antimonopoly movement is not synonymous with the theory that “big is bad.”<sup>169</sup> Some might characterize Khan as part of the New Brandeis Movement,

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Khan, *supra* note 9, at 132. Notably, Khan situates a reframed approach to antitrust within a broader antimonopoly movement in which “[a]ntitrust law is just one tool.” *Id.* at 131.

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and others might contend that Khan simply has a more robust understanding of consumer welfare. In any event, Khan argues that “certain industries tend naturally towards monopoly,” especially “networks,” and “[i]n such cases, the answer is not to break these firms up, but to design a system of public regulation that prevents the executives who manage this monopoly from exploiting their power.”<sup>170</sup> Similarly, Stucke and Erzarchi contend:

To be clear, the anti-monopoly New Brandeis School does not suggest or promote unrestricted intervention or the jettisoning of economic analysis in antitrust enforcement. All agree that intervention should be measured to avoid chilling competition, innovation and investment. The question is one of degree. The hope is for an enforcement policy which is carefully designed, but not diluted.<sup>171</sup>

The overall thrust of the antimonopoly movement, per Khan’s writing, is to restructure antitrust law to the prior paradigm of “not . . . focusing on any specific outcome but . . . ensuring that markets [are] structured in ways that promote[] openness and competition.”<sup>172</sup> Khan, however, does not dispute that economic efficiency is a desirable goal of antitrust policy, but rather purports that a regulatory framework is needed in order to achieve that goal, among others.

Consumer welfare proponents have responded to the New Brandeis Movement with a vigorous defense of the current standard. Dorsey and her co-authors dispute that structure necessarily implies any given mode of performance. They argue that “there is in fact no rigorous economic support for claims that high concentration levels are a strong indicator of harm to competition or that they should trigger a presumption of such harm in antitrust analysis.”<sup>173</sup> They argue that “a superficial increase in concentration is just as consistent with an *increase* in competition as with a decrease; the contrary

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<sup>170</sup> *Id.* at 132.

<sup>171</sup> Stucke & Erzarchi, *supra* note 150.

<sup>172</sup> Khan, *supra* note 9, at 132.

<sup>173</sup> Dorsey et al., *supra* note 12, at 886–87.

claim—that there is a clear causal link between increased concentration and reduced competition—simply disregards the weight of economic evidence.”<sup>174</sup> As the authors note, “successful firms are often successful for *meritorious* reasons.”<sup>175</sup> “[A]ltering antitrust rules to respond to concentration,” they argue, “would punish the victorious firm for winning and successfully growing larger—which both economic learning and the courts tell us is a poor outcome.”<sup>176</sup>

Turning to the argument that increased concentration has led to higher prices and lower output, Dorsey and her co-authors find the evidence to be “mixed at best,” and “in no case do[es] the[ evidence] clearly identify systemic shortcomings in current antitrust enforcement efforts.”<sup>177</sup> Moreover, the consumer welfare proponents argue, the reforms proposed by the New Brandeis school threaten to “diminish consumer welfare,” as under the new standard, “prices and output might be one concern—but employment, democracy, the environment, and inequality might be competing concerns.”<sup>178</sup> Under the New Brandeis framework, “lower prices, higher output, and product improvements would not have the trump card in the analysis they do today.”<sup>179</sup> The authors suggest that, “even if prices and output have, in fact, trended in directions harmful to consumers, the better question to be asking is whether this is because enforcement under the consumer welfare standard is not at the optimal level.”<sup>180</sup>

Finally, with regard to the argument that increased antitrust enforcement would lead to decreased inequality, the authors find, “as of yet, no empirical support for the underlying proposition that increasing antitrust enforcement levels would slow, stop, or reverse” trends towards greater inequality.<sup>181</sup>

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<sup>174</sup> *Id.* at 888.

<sup>175</sup> *Id.* at 894.

<sup>176</sup> *Id.* at 896.

<sup>177</sup> *Id.* at 901.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 902.

<sup>181</sup> *Id.* at 905.



One major criticism of the New Brandeis Movement is its potential to encourage a more politicized antitrust regime. Dorsey and her co-authors argue:

If enforcers can call upon a large list of political justifications for their enforcement decisions, they will be able to pursue cases that best fit within a political agenda—which will necessarily change over time as political administrations change—rather than being forced consistently to focus upon the limited practices that are most injurious to consumers. In proposing such a political regime, the populist antitrust model thus largely fails to offer a definable set of metrics to distinguish strong cases from weak ones. What would stand in its place is political discretion.<sup>182</sup>

The authors argue that “reintroducing a political dimension to antitrust law would reestablish a regime inherently prone to capture by rivals seeking to ride populist waves of protectionism to economic dominance.”<sup>183</sup> Moreover, “[i]f competition law is unconstrained on its own terms—that is, if it is unmoored from a set of subject-specific limitations imposed by courts and legislatures—it threatens to morph into a large, sprawling, economy-wide set of regulations resembling a national industrial policy.”<sup>184</sup> Finally, Dorsey and her co-authors note that, if non-economic-goals were cognizable antitrust rationales, players could push for exemptions from antitrust enforcement based on those same non-economic goals.<sup>185</sup> Reintroducing such non-economic goals into antitrust law could therefore undermine the purposes of enforcement and increase concentration.

## VI. PROPOSALS TO AMEND ANTITRUST LAW

While its ideas have not yet been enacted into antitrust law, the New Brandeis Movement’s influence can be seen in executive orders issued by the White House, in the initiatives

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<sup>182</sup> *Id.* at 909.

<sup>183</sup> *Id.* at 913.

<sup>184</sup> *Id.* at 914.

<sup>185</sup> *Id.*

of the FTC and Department of Justice (DOJ) and in several proposed bills put forward by both parties. The FTC, under the direction of Lina Khan, has expanded the scope of its investigations to include labor, investor, and other factors that are not expressly related to economic efficiency.<sup>186</sup> Both the DOJ and FTC have brought cases against Big Tech on matters that have not previously provoked concern.<sup>187</sup> The outcomes of those broader investigation and litigation initiatives remain uncertain, but, as of now, they will be determined under the consumer welfare standard.

In his first year in office, President Joseph R. Biden signaled an aggressive approach to antitrust enforcement, selecting Google foe Jonathan Kanter to serve as assistant attorney general for the DOJ's Antitrust Division.<sup>188</sup> In July 2021, President Biden issued an executive order extolling the benefits of “[r]obust competition.”<sup>189</sup> The order “calls for marshaling a ‘whole-of-government’ response and establishing the White House Competition Council to reorient American economic priorities to cultivate greater competition.”<sup>190</sup>

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<sup>186</sup> Memorandum from Lina M. Khan, Chair, Fed. Trade. Comm'n, to Comm'n Staff and Comm'rs, Vision and Priorities for the FTC (Sept. 22, 2021),

[https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf) [https://perma.cc/QKF9-LCG9].

<sup>187</sup> See, e.g., Press Release, Dep't of Justice, Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> [https://perma.cc/RJ4X-ACUD]; Press Release, Fed Trade Comm'n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme To Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), <https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush> [https://perma.cc/W73Z-NN6K].

<sup>188</sup> Martha C. White, *Momentum Is Building for Antitrust Reform: Here's What That Means for Big Tech*, TIME (Nov. 12, 2021, 11:55 PM), <https://time.com/6116953/antitrust-reform-big-tech-congress-biden/> (on file with the Columbia Business Law Review).

<sup>189</sup> Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

<sup>190</sup> White, *supra* note 188 (quoting 86 Fed. Reg. at 36,989).

In the legislative branch, multiple bills are at various stages of development. Many of the proposals are aimed particularly at technology-based companies seen as inordinately large, powerful, and influential in daily American life.

The most advanced bill is the American Innovation and Choice Online Act,<sup>191</sup> which on January 20, 2022, cleared the Senate Judiciary Committee in a 16-6 vote.<sup>192</sup> The bipartisan bill, championed by former presidential candidate and current Senator Amy Klobuchar (D) and Senator Charles Grassley (R), among others, targets technology companies by banning “dominant platforms from favoring their own products or services, a practice known as self-preferencing” and from “discriminating among business users in a way that materially harms competition.”<sup>193</sup> While the bill has now advanced out of committee, it faces opposition from companies that argue that the law would hamper their efforts to control spam or otherwise harmful apps and render their services, such as Gmail, more vulnerable to hackers.<sup>194</sup> Both Senators from California, the home of Silicon Valley, have expressed reservations about the bill.<sup>195</sup>

Members of both parties are considering other bills also aimed at large technology companies, although those bills have not advanced out of committee, to the extent they have been proposed at all. For example, House Democrats, based on reporting from June 2021, were considering several pieces

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<sup>191</sup> S. 2992, 117th Cong. (2021).

<sup>192</sup> Cat Zakrzewski & Gerrit De Vynck, *Senate Advances Antitrust Legislation, Despite Reservations from California Democrats*, WASH. POST (Jan. 20, 2022, 6:55 PM), <https://www.washingtonpost.com/technology/2022/01/20/senate-advances-antitrust-bill/> [<https://perma.cc/99NW-Y3KE>].

<sup>193</sup> John D. McKinnon, *Effort To Bar Tech Companies From ‘Self-Preferencing’ Gains Traction*, WALL ST. J. (Oct. 15, 2021, 12:17 PM), <https://www.wsj.com/articles/effort-to-bar-tech-companies-from-self-preferencing-gains-traction-11634202000> (on file with the Columbia Business Law Review); see American Innovation and Choice Online Act, S. 2992, 117th Cong. § 3(a) (2021).

<sup>194</sup> Zakrzewski & De Vynck, *supra* note 192.

<sup>195</sup> *Id.*

of legislation prohibiting “tech giants . . . from discriminating against rivals or buying potential competitors,” including one bill that “would let prosecutors . . . break up major tech companies by forcing the platforms to sell off lines of business if they represent a conflict of interest.”<sup>196</sup> From the Republican Party, legislators like Senators Marco Rubio and Roger Wicker have introduced bills<sup>197</sup> that aim to curtail Big Tech’s regulatory grasp over free speech.<sup>198</sup> The bills aim to limit tech companies’ ability to use “opaque algorithms and unaccountable teams of moderators to manipulate online discourse to their worldview.”<sup>199</sup>

While legislation aimed at big tech may have gained the most media attention, proposals to significantly alter the content of the core antitrust laws are also being advanced. While these proposals do not necessarily abandon or replace the consumer welfare standard, they evince a concern that the standard *as currently interpreted and applied* fails to fulfill the purpose of antitrust law. On February 4, 2021, Senator

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<sup>196</sup> Nylen, *supra* note 8; *see, e.g.*, Ending Platform Monopoly Act, H.R. 3825, 117th Cong. (2021); Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021); Merger Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021); Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849, 117th Cong. (2021).

<sup>197</sup> Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression (DISCOURSE) Act, S. 2228, 117th Cong. (2021); Promoting Rights and Online Speech Protections To Ensure Every Consumer Is Heard (PRO-SPEECH) Act, S. 2031, 117th Cong. (2021).

<sup>198</sup> Press Release, Office of Sen. Marco Rubio, Rubio Introduces Sec 230 Legislation to Crack Down on Big Tech Algorithms and Protect Free Speech (June 24, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/6/rubio-introduces-sec-230-legislation-to-crack-down-on-big-tech-algorithms-and-protect-free-speech> [https://perma.cc/Y4AU-FLJR] [hereinafter Rubio Press Release]; Press Release, U.S. Senate Committee on Commerce, Science, and Transportation, Wicker Introduces Bill to Prohibit Big Tech from Controlling Online Speech (June 10, 2021), <https://www.commerce.senate.gov/2021/6/wicker-introduces-bill-to-prohibit-big-tech-from-controlling-online-speech> [https://perma.cc/8LK9-F9X3].

<sup>199</sup> Rubio Press Release, *supra* note 198.

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Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act,<sup>200</sup> which had the stated goal of “reinvigorat[ing] America’s antitrust laws and restor[ing] competition to American markets.”<sup>201</sup> In remarks announcing the bill, Senator Klobuchar expressed the view that contemporary antitrust policy is inadequate, saying:

Competition and effective antitrust enforcement are critical to protecting workers and consumers, spurring innovation, and promoting economic equity. While the United States once had some of the most effective antitrust laws in the world, our economy today faces a massive competition problem. We can no longer sweep this issue under the rug and hope our existing laws are adequate[.]<sup>202</sup>

As proposed, the bill would substantially overhaul merger enforcement. For example, it would “[a]mend[] the Clayton Act to forbid mergers that ‘create an appreciable risk of materially lessening competition’ rather than mergers that ‘substantially lessen competition,’ where ‘materially’ is defined as ‘more than a de minimis amount.’”<sup>203</sup>

The bill contains several provisions that appear to be aimed at limiting market concentration. For example, it would shift the legal burden of proof for certain mergers, such that the companies would need to prove their mergers do *not* create an appreciable risk of materially lessening competition or tending to create a monopoly or monopsony.<sup>204</sup> Included among those merger categories are: (1) “[m]ergers that significantly increase market concentration”; (2) “[a]cquisitions of competitors or nascent competitors by a dominant firm (defined as a 50% market share or possession of significant market power)”; and (3) “[m]ega-mergers valued at more than \$5 billion.”<sup>205</sup> For such mergers, the bill seems

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<sup>200</sup> Competition and Antitrust Law Enforcement Act of 2021, S. 225, 117th Cong. (2021).

<sup>201</sup> Klobuchar Press Release, *supra* note 16.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (quoting S. 225, 117th Cong. § 4 (2021)).

<sup>204</sup> Klobuchar Press Release, *supra* note 16; *see* S. 225, 117th Cong. § 4(b) (2021).

<sup>205</sup> Klobuchar Press Release, *supra* note 16.

to require the merging parties to prove a negative, the difficulty of which would vary directly with the number of markets affected by the proposed transaction.

In addition to the above provisions, the bill creates a new Clayton Act provision prohibiting “exclusionary conduct,” which is defined as “conduct that materially disadvantages competitors or limits their ability to compete,” if that conduct “presents an ‘appreciable risk of harming competition.’”<sup>206</sup> The government’s burden in proving liability under this new section would depend on how broadly courts interpret “appreciable risk.”

The proposed bill would also increase antitrust enforcement budgets, create a new FTC division to conduct market studies and retrospectives of past mergers, as well as other provisions to “seek civil fines for antitrust violations, study the effect of past mergers, strengthen whistleblower protections, and more.”<sup>207</sup>

From the Republican Party, Senators Grassley and Mike Lee introduced a bill that, while friendly to the consumer welfare standard, still contains some elements of suspicion regarding mergers that increase concentration.<sup>208</sup> While Senator Grassley’s proposed bill would codify the consumer welfare standard, it also creates a “[r]ebutable presumption that transactions resulting in unilateral effects or more than 33% market share (5% in the case of a state-owned entity) will substantially lessen competition.”<sup>209</sup> The bill would also ban “mergers that result in a market share greater than 66%, except when necessary to prevent serious harm to the national

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<sup>206</sup> *Id.*; S. 225, 117th Cong. § 9 (2021).

<sup>207</sup> Klobuchar Press Release, *supra* note 16.

<sup>208</sup> Tougher Enforcement Against Monopolists (TEAM) Act, S. 2039, 117th Cong. (2021).

<sup>209</sup> Press Release, Sen. Mike Lee, TEAM Act One Pager (June 14, 2021), <https://www.lee.senate.gov/services/files/f0dae6bf-c180-48c6-9f2a-0c4025785086> [<https://perma.cc/4BC2-ULMV>] [hereinafter Lee Press Release]; S. 2039, 117th Cong. § 202 (2021).

economy,” and it “[a]pplies to acquisition of potential competitors.”<sup>210</sup>

Outside the merger context, Senator Grassley’s bill also: (1) concentrates antitrust enforcement authority in the DOJ (eliminating the FTC’s role); (2) repeals precedents prohibiting indirect purchasers from suing for antitrust injury; (3) limits the ability of courts to infer antitrust immunity; (4) allows plaintiffs to recover prejudgment interest; (5) allows the DOJ to recover treble damages on behalf of consumers; (6) prohibits monopolists from discriminating in their downstream market; and (7) authorizes \$600 million in appropriations to the Antitrust Division.<sup>211</sup>

Moreover, Republican Josh Hawley introduced the Trust-Busting for the Twenty-First Century Act,<sup>212</sup> legislation explicitly aimed at “tak[ing] back control from big business and return[ing] it to the American people.”<sup>213</sup> This bill may be the most direct assault on the consumer welfare standard, as it would “[r]eplace the outdated numerically-focused standard for evaluating antitrust cases, which allows giant conglomerates to escape scrutiny by focusing on short-term considerations, with a standard emphasizing the protection of competition in the U.S.”<sup>214</sup> The bill would “[b]an all mergers and acquisitions by companies with market capitalization exceeding \$100 billion,” allow the FTC to designate “dominant digital firms” that would be prohibited from buying potential competitors, and provides that “‘vertical’ mergers are not exempt from antitrust scrutiny.”<sup>215</sup>

Senator Hawley’s rationale for the bill is Brandeisian, even if Brandeisian scholars may avoid some of his language, as he claims in support of the bill that “[a] small group of woke mega-corporations control the products Americans can buy,

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<sup>210</sup> Lee Press Release, *supra* note 209; S. 2039, 117th Cong. § 202 (2021).

<sup>211</sup> Lee Press Release, *supra* note 209.

<sup>212</sup> S. 1074, 117th Cong. (2021).

<sup>213</sup> Hawley Press Release, *supra* note 17.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

the information Americans can receive, and the speech Americans can engage in.”<sup>216</sup> Those corporations, according to Senator Hawley, have “gobbled up” the country’s “freedom and competition.”<sup>217</sup> The Senator claimed it was “time to bust . . . them up and restore competition.”<sup>218</sup>

Just as Chair Khan notes that “[a]ntitrust law is just one tool” in the larger “antimonopoly” movement,<sup>219</sup> antitrust is only one tool being used by Republicans expressing the concern that large technology companies are using their ability to influence public discourse and to censor conservative voices. For example, in June 2020 Senators Hawley and Marco Rubio introduced a bill<sup>220</sup> that “would prohibit Big Tech companies from receiving Section 230 immunity unless they update their terms of service to operate under a clear good faith standard and pay a \$5,000 fine if they violate those terms.”<sup>221</sup> The duty of good faith, as defined in the bill, “would contractually prohibit Big Tech from . . . [d]iscriminating when enforcing the terms of service they write” and from “[f]ailing to honor their promises.”<sup>222</sup>

While these bills have yet to be enacted, at least one state has tried to apply similar theories under existing law. Earlier this year, the Republican administration in Ohio filed suit against Google, seeking declaratory relief that Google is a public utility.<sup>223</sup> Ohio claims that, as a common carrier,

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Khan, *supra* note 9, at 131.

<sup>220</sup> Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020).

<sup>221</sup> Press Release, Sen. Marco Rubio, Rubio, Hawley Announce Bill Empowering Americans To Hold Big Tech Companies Accountable for Acting in Bad Faith (Jun. 17, 2020), <https://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-hawley-announce-bill-empowering-americans-to-hold-big-tech-companies-accountable-for-acting-in-bad-faith> [<https://perma.cc/Q2ZH-X6E7>].

<sup>222</sup> *Id.*

<sup>223</sup> Complaint for Declaratory Judgment and Injunctive Relief, State of Ohio v. Google LLC, No. 21 CV-H-06-0274 (Oh. C.P. Del. Cnty., June 8, 2021); *see* Press Release, Dave Yost, Ohio Att’y Gen., AG Yost Files



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Google has a duty to “offer sources or competitors rights equal to its own” which would prohibit Google from prioritizing its “own products, services and websites on search results pages.”<sup>224</sup>

## VII. CONCLUSION

The core antitrust statutes emerged in the late nineteenth century, when sprawling trusts such as Standard Oil amassed tremendous economic power, and during the early twentieth century’s Progressive Era, with its increased faith in the capacity of the government to improve economic and social life. The last revolution came in the 1970s and 1980s amidst an era of increased skepticism about the efficacy of regulation to stem the tide of stagnant growth and rising prices. Its objective, understandably, was to promote economic efficiency and benefits to consumers.

Momentum is gaining for another inflection point in antitrust development to counter the rise of Big Tech. Some commentators have expressed concerns reminiscent of the trust-busting era, as they assert that tech firms are acquiring potential competitors and exerting pressure on workers. Other concerns are more political, including the question of how tech companies use their size to influence the political process and distort debate.

Will increasing pressure from academics and lawmakers change the principle, championed by the Chicago School and applied by the courts for over almost fifty years, that economics, in the name of consumer welfare, will control the enforcement and application of antitrust law? The answer remains to be seen, but it will almost certainly come from Congress, not the courts, given the coherent and consistent body of law that has been developed under the consumer welfare standard.

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Landmark Lawsuit To Declare Google a Public Utility (June 8, 2021), <https://www.ohioattorneygeneral.gov/Media/News-Releases/June-2021/AG-Yost-Files-Landmark-Lawsuit-to-Declare-Google-a> [<https://perma.cc/6RZW-4CU5>] [hereinafter Yost Press Release].

<sup>224</sup> Yost Press Release, *supra* note 223.