The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, The Consumer Welfare Standard in Antitrust Law, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University[1]

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This comment is submitted in response to The Federal Trade Commission's invitation to participate in its Hearings on Competition and Consumer Protection in the 21st Century. We appreciate the opportunity to comment and commend the FTC for inviting discussion on these important topics. In this comment, we discuss the Consumer Welfare Standard in Antitrust Law.[2]

Introduction

The consumer welfare standard is the guiding principle of modern antitrust analysis.[3] It demands that substantive and procedural antitrust rules be fashioned to

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[2] *See The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt? Before the Subcomm. on Antitrust, Competition and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. (2017) [hereinafter *Harbor in a Sea of Doubt*] (statement of Joshua D. Wright); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 2013 FORDHAM L. REV. 2405 (2013);
[3] *See Harbor in a Sea of Doubt* (statement of Joshua D. Wright).

benefit consumers, adopting economic learning and accounting for error costs.[4] This does not mean that the antitrust agencies or private plaintiffs must prove actual harms that outweigh actual benefits in every case. Rather, they use economic theory and judicial experience to create presumptions and procedural rules to truncate analysis where appropriate to minimize error costs and administrative costs.[5] These presumptions favor plaintiffs when the type of conduct at issue is likely to harm consumers; when the type of conduct at issue is likely to have a beneficial or neutral effect on consumers, the presumptions favor defendants.[6] In cases of conduct that is known to "always or almost always" harm consumers, there is no need to prove harm, and efficiency justifications are precluded by the rule of per se illegality.[7] This approach facilitates the prosecution of truly harmful conduct, while reducing costs associated with false positives.[8]

The consumer welfare standard has been widely lauded for bringing "coherence and credibility" to antitrust law, providing a framework for consistent, economically-sound decision making, and giving consumers the benefit of lower prices, increased

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[4] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984)
[5] *See* Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards* (Georgetown Law Faculty Publ'ns and Other Works, 2017).
[6] *See id.*
[7] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979).
[8] *See* Easterbrook, *supra* note 3.

output, higher product quality, and more innovation.[9] By focusing on a single objective measure, the consumer welfare standard disciplines modern antitrust law. Antitrust enforcers and courts under a consumer welfare standard are forced to support their actions with sound economic evidence.[10] This helps to deter arbitrary or politically motivated enforcement actions that would chill aggressive, but beneficial, competitive conduct.[11] Most important, the standard helps consumers, which is to say, all Americans.

Antitrust was not always based upon such a clear vision.[12] Prior to the economic revolution in antitrust law, which took hold in the late 1970s, courts applied the Sherman and Clayton Acts incoherently and anticompetitively, condemning low prices and protecting less efficient, but politically-favored firms from competition.[13]

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[9] *See, e.g.*, *Harbor in a Sea of Doubt*, *supra* note 1; (statement of Joshua D. Wright); *Id.* (statement of Carl Shapiro); *Id.* (statement of Diana Moss); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

[10] *See Harbor in a Sea of Doubt*, *supra* note 1 (statement of Joshua Wright).

[11] *See* Elyse Dorsey, Jan Rybnicek, & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, 1 CPI Antitrust Chron., Apr. 2018, at 1, https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Dorsey-Rybnicek-Wright.pdf.

[12] *See generally*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43 (2000).

[13] *See* Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967) (condemning rivals' attempts to compete with Utah Pie by lowering prices); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men"); *see also* Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217–18 (2010) (discussing the assortment of vague and anti-competitive social and political goals that the Court had read into the Sherman Act).

Abandoning the consumer welfare standard inevitably would harm consumers, lower output, diminish quality, and decrease innovation. The question for proponents of alternative standards is what offsetting benefits, if any, American consumers would receive in exchange for a shift to a standard that unequivocally makes them poorer. We believe the answer is either zero or close to it, and certainly not sufficient to justify the harm done to consumers by abandoning the consumer welfare standard.

Part I of this Comment addresses the Public Interest standard being proposed in some quarters to replace the consumer welfare standard. We show that approach would harm consumers by importing multiple incommensurate and often conflicting standards into antitrust law. Part II addresses the Consumer Choice standard favored by Lande and Averitt. We show that approach would harm consumers by focusing upon nonprice dimensions of competition without weighing the unavoidable tradeoffs that would entail. Part III addresses specific proposals for a standard specific to online platforms. We show these proposals would harm innovation and burden successful firms, while discouraging new firms from entering the market.

I. Public Interest Standard

Recently, there have been calls from some to scrap the consumer welfare standard, and instead use antitrust law to attack some or all of a variety of perceived social problems, such as concentration of political or economic power, challenges to small business from competition, low wages, and economic inequality.[14] This multiple-goals approach, which some proponents term a "public interest standard," would necessarily harm consumers.[15]

Antitrust agencies are not well-suited to conduct the complex weighing of various considerations embedded in a public interest standard.[16] The various goals will inevitably come into conflict. For example, imagine a collusive agreement between small businesses that depressed wages, but helped the conspirators compete with larger firms that benefit from economies of scale. Would wages be sacrificed to protect small business, or the reverse? Or take the example of Walmart, which has grown large and economically powerful by offering low prices on a wide range of necessities.[17] Would Walmart be broken up, and its scale economies lost, despite the employment it provides

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[14] *See, e.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); *see also*, Herbert J. Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?* 1 (Univ. of Penn. Law Sch. Inst. for Law and Econ., Research Paper No. 18-7, Feb. 2018), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2966&context=faculty_scholarship (noting that these proposals often do not mention low consumer prices among their goals).

[15] *See* K. Sabeel Rahman & Lina Khan, *Restoring Competition in the U.S. Economy*, *in* UNTAMED: HOW TO CHECK CORPORATE FINANCIAL AND MONOPOLY POWER 18–25 (2016); *Harbor in a Sea of Doubt*, supra note 1 (statement of Barry Lynn); Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

[16] *See* David Balto & Matthew Lane, *'Hipster Antitrust' Movement Is All Action, No Plan*, THE HILL (Mar. 13, 2018), http://thehill.com/opinion/judiciary/378788-hipster-antitrust-movement-is-all-action-no-plan.

[17] *See* Jason Furman, Wal-Mart: A Progressive Success Story (Nov. 28, 2005), https://www.mackinac.org/archives/2006/walmart.pdf; Charles Kenny, *Give Sam Walton the Nobel Prize*, FOREIGN POLICY (Apr. 29, 2013, 3:00 AM), https://foreignpolicy.com/2013/04/29/give-sam-walton-the-nobel-prize.

and the savings it brings to lower-income consumers?[18] Agencies and courts would have to make complex tradeoffs in cases presenting such conflicts, which could involve not two but several vectors. The results necessarily would be arbitrary and unpredictable. Moreover, if the decision in a case deviates from the decision indicated by the consumer welfare standard, i.e., unless the change in standards has no effect, then consumers will pay the price.

Sometimes recognizing the difficulty of the tradeoffs that their new standard would require,[19] proponents of a public interest standard have suggested the problem could be avoided by the adoption of simplistic presumptions of illegality for a wide range of conduct, including exclusive dealing arrangements, below-cost pricing, refusals to deal, and mergers creating a firm with greater than a twenty percent market share.[20] These presumptions would have the effect of chilling, and condemning, what is

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[18] *Cf.* Barry Lynn, *The Case for Breaking Up Walmart*, FOREIGN POLICY (Apr. 29, 2013, 3:00 AM), https://foreignpolicy.com/2013/04/29/the-case-for-breaking-up-walmart; *but see* Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. APPLIED ECONOMETRICS 1157 (2007) (finding that entry by Walmart reduced average household expenditures on food by over 20%, with larger gains for low-income households).

[19] *See, e.g.*, Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 279 (2017) ("[I]t is not possible to balance the cost savings from a merger against the costs of the enhanced long-term economic and political power of the larger corporation."). Despite her awareness of this difficulty, Khan seems to call for agencies and courts to consider multiple incommensurable goals in individual cases. *See* Khan, *supra* note 7 at 791 ("Within a broader framework . . . the potential harms [cognizable in predatory pricing cases would] include lower income and wages for employees, lower rates of new business creation, lower rates of local ownership, and outsized political and economic control in the hands of a few.").

[20] Khan & Vaheesan, *supra* note 13, at 281–82.

often, indeed more often than not, procompetitive behavior.[21] The effect would be no less disastrous than asking courts and agencies to make complex tradeoffs.

The remainder of this Part will consider in turn each of the proposed new goals of antitrust law. Although each one may be an independently desirable policy goal, none has a proper role in deciding antitrust cases.

A. **Dispersing Political Power**

Dispersion of political power is a goal commonly advanced by proponents of a "public interest standard."[22] The influence of large businesses on the political process may be a proper concern for campaign finance reform, but attempts to solve the problem by changing antitrust law are misconceived.[23] As Diana Moss of the American Antitrust Institute has put it, "populist claims appear to place demands and burdens on the antitrust laws to serve and perform in ways that go above and beyond their design and historical functions. . . . [A]ntitrust is not designed to be the first line of defense against the accretion and use of political might."

If antitrust law constrains the commercial conduct of large companies that grew large not by anticompetitive means but by better satisfying consumers, on the ground that they are too politically powerful, then consumers will necessarily suffer higher

[21] *Cf.* James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005) (finding that vertical restraints are generally procompetitive).
[22] *See, e.g.*, Stucke, *supra* note 7, at 624; Khan, *supra* note 7, at 791; Joseph E. Stiglitz, *Towards a Broader View of Competition Policy* 3–4 (Roosevelt Institute Working Paper, 2017).
[23] *See Harbor in a Sea of Doubt*, *supra* note 1 (statement of Diana Moss); Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. (forthcoming 2018) (manuscript at 28–29).

prices, diminished output, lower quality, and reduced innovation. That alone should counsel against diverting antitrust from its primary purpose.

Ironically, adopting political influence as a concern of antitrust law invites abuse by politicians and rent-seeking by politically powerful companies.[24] No longer would economics and objective criteria govern results. Rather, courts and agencies would be encouraged to consider the politics of businesses under investigation. Released from the constraints imposed by economic theory, antitrust could be used as a weapon "by those in power to hurt companies supportive of those not in power."[25] For example, politicians could pressure the antitrust agencies to break up large companies that donate to their opponents' campaigns because, under a public interest standard, the assumed political clout of large companies would be a matter of antitrust concern. The lack of economic grounding would also help firms seeking to hamper a more efficient rival; they need argue only that the more efficient firm was too politically powerful. Such arbitrary grounds for law enforcement are avoided by keeping antitrust focused on consumer welfare rather than political power.

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[24] *See* Dorsey et al., *supra* note 10, at 3–4.
[25] Balto & Lane, *supra* note 15.

B. **Protecting Small Businesses**

Advocates of a "public interest standard" want antitrust law in effect to return to the days when it protected competitors at the expense of competition.[26] This way of thinking was rejected by the Supreme Court decades ago in favor of an approach that protects "competition not competitors"[27]—and for good reason. Absent clear congressional direction—which is hard to imagine—courts have no place propping up inefficient businesses at the expense of consumers.

Consumers benefit immensely when companies grow large by offering lower prices and better products so they can take advantage of economies of scale and, in some industries, network effects. Any time a firm successfully innovates, it hurts its rivals. But the rivals' loss is the consumers' gain. If courts use antitrust to pick winners and losers, they will only slow down the evolution of markets toward ever greater efficiency.[28] When disruptive new business models emerge, some incumbent firms will

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[26] *See* Khan & Vaheesan, *supra* note 13, at 236–37; Barry C. Lynn, *An Interview: Free Markets Killed Capitalism*, OPEN MARKETS INSTITUTE (June 29, 2017), https://openmarketsinstitute.org/articles/an-interview-barry-lynn-salon ("Back when Bork wrote [*The Antitrust Paradox* in 1978], there were tens of thousands of families who ran grocery stores in America and hardware stores and garages and general merchandise stores, and that was because the law protected them from concentrated capital. . . . Wal-mart has sucked Main Street right inside their walls.").

[27] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[28] Take the example of the taxi industry. Recently, traditional taxi companies have attempted to use antitrust suits to slow the move of taxi markets towards the innovative ride-sharing model pioneered by Uber. *See* Eleanor Tyler, *Uber Wins Another Set of Taxi Antitrust Attacks*, BLOOMBERG LAW: BIG LAW BUSINESS (June 20, 2018), https://biglawbusiness.com/uber-wins-another-set-of-taxi-antitrust-attacks. Courts have correctly recognized that Uber's innovations, while bad for traditional taxi companies, are good for consumers. *See id.* Under a public interest standard, courts might be compelled to weigh the harm to taxi companies from competition against the benefits to consumers from lower prices and greater convenience.

be harmed, but society as a whole reaps the gains of innovation. In fact, innovation is the primary driver of long run economic growth.[29] For this reason, it would be unwise to make protection of competitors (small or otherwise) part of the standard for deciding antitrust cases.

C. **Boosting Wages**

Advocates of a public interest standard have criticized the consumer welfare standard as incapable of protecting wages and employment.[30] They have suggested instead a framework that treats effects on wages as a cognizable harm in antitrust decision making.[31] Their criticisms are exaggerated and their proposed reform is unwise.

First, the consumer welfare standard is already used to address monopsony and anticompetitive labor practices when they harm competition in a labor market.[32] Antitrust enforcers have attacked no-poaching and wage-fixing agreements between firms, as well as unreasonable non-competition agreements with employees.[33] They

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[29] *See* Enrique Martinez-Garcia, *Technological Progress Is Key to Improving World Living Standards*, ECON. LETTER (Fed. Reserve Bank of Dall., Dallas, Tex.), June 2013, https://www.dallasfed.org/research/eclett/2013/el1304.cfm.

[30] *See, e.g.*, Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, ROOSEVELT INSTITUTE (Dec. 11, 2017), http://rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory.

[31] *See* Khan, *supra* note 13, at 791.

[32] *See* Hovenkamp, *supra* note 13, at 48–56; *Harbor in a Sea of Doubt*, *supra* note 1 (statement of Diana Moss).

[33] *See* Competitive Impact Statement, United States v. Knorr-Bremse AG, No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018), https://www.justice.gov/atr/case-document/file/1048891/download (enjoining no-poaching agreement between railroad equipment suppliers); Press Release, Wash. Office of Att'y Gen., AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide, https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-

also have rejected an efficiency defense in a hospital merger where the anticipated cost and price reductions would have been realized by the exercise of monopsony power against health care professionals.[34] Indeed, the agencies' Horizontal Merger Guidelines feature a section detailing the antitrust agencies' approach to analyzing monopsony power under the consumer welfare standard.[35] The assertion that a new antitrust framework is required to handle issues of monopsony power in labor markets is simply without support.

That said, antitrust law should not be used to resist technological and structural changes by firms that increase efficiency by reducing their need for labor. Antitrust enforcers should attack only anticompetitive conduct that depresses wages. As Professor Hovenkamp has pointed out, "condemning a merger because it reduces costs

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restrictions-low-wage-workers (ending fast food companies' practice of preventing employees from moving between different franchises of same restaurant chain); Press Release, Fed. Trade Comm'n, FTC Approves Final Order Restoring Competition for Adult Cardiology Services in Reno, Nevada, https://www.ftc.gov/news-events/press-releases/2012/12/ftc-approves-final-order-restoring-competition-adult-cardiology (requiring cardiology practices to suspend "non-compete" clauses in employment contracts as condition of merger); Todd v. Exxon, 275 F.3d 191 (2d Cir. 2001) (holding employees' allegation that information exchanges between oil companies suppressed wages was sufficient to support a Sherman Act § 1 claim); Hovenkamp, *supra* note 13, at 51 n.252 (collecting cases condemning wage suppression agreements harming nurses, tech workers, and basketball coaches, and others); *Harbor in a Sea of Doubt*, *supra* note 1, at 6–7 (statement of Diana Moss) (collecting complaints where antitrust agencies have alleged harm to workers); *see also* U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidance for Human Resources Professionals (2016), https://www.justice.gov/ atr/file/903511/download ("An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. . . . Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.").

[34] *See* United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017); Hovenkamp, *supra* note 13, at 52–53.

[35] 41 U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines §12, Mergers of Competing Buyers (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

by using less labor intensive technologies . . . is no less perverse than denying a patent for the same reason."[36]

D. **Decreasing Inequality**

While few have called for antitrust law to adopt economic equality as an explicit goal, its proponents commonly argue that a public interest standard would help reduce inequality.[37] It is unlikely, however, that moving to a public interest standard would do any more to reduce inequality than would continued enforcement under the consumer welfare standard: Indeed, those in the lowest income brackets are likely to benefit the most from low prices because lower-income individuals spend a larger portion of their income on consumption. A public interest standard, which would lead to higher prices, would therefore likely hurt lower-income individuals the most.

II. **Consumer Choice Standard**

Lande and Averitt have proposed adopting a "consumer choice" standard due to perceived shortcomings in the ability of the consumer welfare standard to address nonprice competition.[38] Under their framework, any "activity that unreasonably

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[36] Hovenkamp, *supra* note 13, at 49.

[37] *See* Khan & Vaheesan, *supra* note 13, at 237 ("To be clear, our argument is not that antitrust should should embrace redistribution as an explicit goal."); *see also* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 24–26 (2015) (discussing challenges inherent in adopting redistribution as an explicit goal of antitrust).

[38] *See* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007); Robert H. Lande, *Consumer Choice As the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001); Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

restricts the totality of price and nonprice choices that would otherwise have been available" is an antitrust violation.[39] This critique ignores how the consumer welfare standard accounts for nonprice competition, and its adoption would harm consumers by diminishing nonprice competition, product variety, and innovation.[40]

The standard microeconomic model used in antitrust analysis incorporates nonprice dimensions of competition through consumers' revealed preferences and quality-adjusted prices.[41] Moreover, the current *Horizontal Merger Guidelines* already explicitly incorporate nonprice competition in the analysis: "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. Such non-price effects may coexist with price effects, or can arise in their absence."[42]

The number of choices available to consumers does not determine the strength of nonprice competition any more than it does the strength of price competition. the

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[39] Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 182 (2007).

[40] *See generally* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).

[41] *See, e.g.*, Andrew Stewart Wise & Kiran Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679 (2005) (using quality-adjusted prices to analyze consumer switching from cable television to satellite television); David J. Balan & George Deltas, *Better Product at Same Cost, Lower Sales and Lower Welfare*, 31 INT'L J. INDUS. ORG. 323 (2013) (finding that an increase in product quality does not cause an increase in sales or welfare); Daniel P. Kessler, Can Ranking Hospitals on the Basis of Patients' Travel Distances Improve Quality of Care? (Nat'l Bureau of Econ. Research, Working Paper No. 11419, 2005), http://www.nber.org/papers/w11419.pdf.

[42] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

consumer choice framework would treat all exclusive dealing arrangements, which may reduce the number of choices available to consumers, as suspect even though they are generally procompetitive.[43]

Unlike the consumer choice standard, the consumer welfare standard directly addresses the fundamental competitive forces. This enables enforcers using the consumer welfare standard to condemn the exclusive dealing arrangements that are anticompetitive while leaving the procompetitive arrangements untouched.

III. Special Treatment of Platforms

Concerns about perceived competitive problems with online platforms animate many of the contemporary complaints about the consumer welfare standard.

A. **Abuse of Dominance**

Two commentators have proposed importing the European concept of "abuse of dominance" in order to have a means of prosecuting online platforms for conduct outside of the scope of the Sherman Act.[44] Under this theory of liability, firms with large market shares can incur liability for refusing to grant rivals access to their facilities or to share their intellectual property with them.[45] Assuming the "dominant" firm came by its

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[43] *See generally* Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, *in* ANTITRUST LAW AND ECONOMICS 183 (Keith N. Hylton ed., 2010).

[44] *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 283 (2017) ("The antitrust agencies and courts should look to European Union abuse of dominance law for a model to emulate. . . Dominant firms can engage in certain types of conduct only if they have credible business reasons for doing so."); *see also*

[45] *See* Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039 (Eur. Ct. Justice) (requiring a firm to license data to its competitors).

large market share lawfully, adopting the theory of abuse of dominance is nothing less perverse than creating liability for competitive success.

The antitrust laws were passed to protect the competitive process, not less efficient competitors.[46] The theory of abuse of dominance does precisely the opposite: It penalizes successful firms for being successful. By burdening successful firms with the duty to treat their rivals with kid gloves, the abuse of dominance theory stifles successful firms' incentives to innovate and to compete with their rivals.[47] That is precisely why the Supreme Court has refused to embrace the "essential facilities" doctrine, explaining:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[48]

It would take an act of the legislature – and a very foolish legislature it would be – to import "abuse of dominance" into American antitrust jurisprudence.

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[46] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[47] *See, e.g.*, Joined Cases C-241 & C-242/91 P, Radio Telefis Eireann v. Comm'n of the Eur. Cmtys., 1995 E.C.R. 1-743 (requiring a television station operator to provide a third-party publisher with its broadcast schedule for inclusion in a weekly television guide, a product which did not yet exist on the market when the case was filed).

[48] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

B. **Information as a Public Utility**

One student law review note has received attention for having claimed it is "unfair" and anticompetitive for Amazon to compete as a merchant in its online marketplace, as it can use other merchants' sales data to identify and copy successful products.[49] The author maintained Amazon should incur liability for or be prohibited from developing and selling its own products if they would compete with products that third parties sell on Amazon.[50]

Like the abuse of dominance theory, this theory creates liability for competition itself. After all, imitating a successful competitor is among the most common forms of competition. Restricting successful companies from entering new markets can only diminish competition, with its attendant advantages of lower prices, greater output, and increased consumer welfare.

Others have stated that Facebook, YouTube, and Twitter are "monopolies" and "essential facilities" for political discourse, and that by virtue of their dominant position, they should be required to "run in a politically neutral fashion."[51] They view the perceived censorship of conservative voices as a product of the social media platforms' "monopoly power," and a harm that is enhanced by the lack of alternative

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[49] Khan, *supra* note 13, at 780–83, 799.

[50] *Id.* at 781.

[51] *See* Jeremy Carl, *How to Break Silicon Valley's Anti-Free-Speech Monopoly*, NATIONAL REVIEW ONLINE (Aug. 15, 2017), http://www.nationalreview.com/article/450476/silicon-valleys-anti-conservative-bias-solution-treat-major-tech-companies-utilities; *see also* Selwyn Duke, *Antitrust Should Be Used to Break up Partisan Tech Giants Like Facebook, Google*, THE HILL (Dec. 27, 2016), http://thehill.com/blogs/pundits-blog/media/311886-antitrust-should-be-used-to-break-up-partisan-tech-giants-like.

forums.[52] They propose either breaking up the social media platforms,[53] or regulating them as public utilities.[54]

Putting aside the point that government regulation of a medium of expression is almost surely unconstitutional, calling multiple firms that compete with each other for online audiences a monopoly is a self-evidently false premise. Indeed, there are more competing online platforms than there are competing newspapers in any American city. To the extent that there is a problem with "censorship" by online platforms, there is no reason to treat it as an antitrust problem. Social media companies' efforts to moderate content posted on their platforms is not a restraint on competition.

CONCLUSION

The consumer welfare standard remains the only antitrust standard that protects competition and therefore benefits consumers. It is supported by a wealth of empirical evidence and decades of successful application. What the critics propose is a reversion to the empirically discredited approach to antitrust in which size, superior efficiency, or innovation could create liability. Abandoning the consumer welfare standard in favor of the arbitrary and unworkable standards proposed by its critics will not solve any actual competitive problem, but rather will harm competition and consumers.

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[52] *Id.*

[53] *See, e.g.*, Duke, *supra* note 52.

[54] *See, e.g.*, Carl, *supra* note 52.