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POLICY BRIEF

US Antitrust Laws: A Primer

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US antitrust laws, broadly speaking, aim to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies. These laws proscribe certain mergers and business practices in general terms, leaving courts to decide in specific terms which mergers and practices are illegal on the basis of the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horses and buggies to the present digital age. Yet for many years, US antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure that businesses have strong incentives to operate efficiently, keep prices down, and keep quality up. Though imperfect in application (like all legal institutions), the modern consumer-welfare approach to antitrust law has served the American public well.

Before turning to antitrust enforcement practicalities, the evolution of American antitrust enforcement, and very recent controversies that have called into question the appropriateness of contemporary antitrust policy, I begin with a brief review of the key federal antitrust laws.

THE BASIC LAWS AND HOW THEY ARE ENFORCED

There are three principal federal antitrust statutes: the Sherman Antitrust Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Antitrust Act of 1914. In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs.[1]

The Sherman Act

The first federal antitrust law, the Sherman Antitrust Act of 1890,[2] was in large part a response to concerns about the harmful effects on the economy and society of large new concentrations of economic wealth—in trusts (such as Standard Oil) and in industry-dominating companies (such as US Steel and certain railroads), which played a key role in the rapid growth of the American economy in the late 19th century. These big business interests were portrayed as engaging in monopolistic conduct that harmed small businesses and ordinary citizens and as posing a threat to American democracy. The Supreme Court in 1958 referred to the Sherman Act as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[3]

Section 1 of the Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and section 2 bars any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."

In 1911, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are "unreasonable."[4] For instance, a mere agreement between two individuals to form a partnership restrains trade in a certain sense. Forming a partnership is not necessarily unreasonable (though it may be unreasonable if, say, doing so is a cover for a cartel arrangement). However, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are per se violations of section 1 of the Sherman Act; in other words, no defense or justification is allowed for such acts. That said, most contractual restraints are not per se illegal. They are evaluated under the section 1 "rule of reason," which (unlike the per se rule) considers on a case-specific basis whether the restraint in question harms competition, and, if it does, whether the facts indicate that the restraint yields procompetitive benefits that outweigh the anticompetitive harm.

Section 2 of the Sherman Act has long been construed by the courts as not condemning monopolies themselves, but as barring only "exclusionary" conduct (specific business behavior not involving competition on the merits that creates, enhances, or protects monopoly power). Thus, for example, in the famous 2001 case *United States v. Microsoft*,[5] the US Court of Appeals for the DC Circuit did not condemn Microsoft for obtaining monopoly power in PC operating systems, but rather for engaging in a variety of "bad" practices that precluded potential competitors from legitimately challenging its monopoly. The most frequently quoted standard for what constitutes a section 2 violation is found in the 1966 case *United States v. Grinnell,* in which the Supreme Court defined illegal monopolization as having two required elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[6]

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the US Department of Justice (DOJ) through its Antitrust Division. Criminal prosecutions are typically limited to intentional and clear per se violations, such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for corporations and up to $1 million for individuals, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million. The DOJ seeks criminal penalties only when prosecuting "hard core" per se violations. It does not bring criminal charges in section 1 rule of reason and section 2 monopolization cases. Nevertheless, it may seek civil penalties in non–per se cases. It may also seek structural changes in a company (although it rarely does so), such as a corporate "breakup" of a monopolist, where other forms of potential relief are deemed inadequate. (The longtime telecommunications monopolist AT&T agreed to be broken up into multiple companies in the 1982 settlement of a DOJ monopolization prosecution.)

Although the Sherman Act is a powerful weapon today, its initial enforcement was seen as insufficient by many critics, who called for more focused antitrust legislation. Indeed, the need for new, more specialized antitrust enforcement was highlighted in the 1912 presidential campaign. Two new laws, the Federal Trade Commission Act and the Clayton Act, were passed in the wake of the 1912 election.

The Federal Trade Commission Act

The Federal Trade Commission Act of 1914 bans "unfair methods of competition" and "unfair or deceptive acts or practices,"[7] and it creates an expert administrative agency, the Federal Trade Commission (FTC), to oversee its provisions. The Supreme Court has said that all violations of the Sherman Act also violate the Federal Trade Commission Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the Federal Trade Commission Act against the same kinds of activities that violate the Sherman Act. The Federal Trade Commission Act also covers other practices that harm competition but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the Federal Trade Commission Act.

The Clayton Act

The Clayton Act of 1914 addresses specific practices that the Sherman Act does not clearly prohibit,[8] such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Both the FTC and the DOJ are authorized to enforce the Clayton Act. Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936,[9] the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance.[10] The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman Act or the Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

PRACTICALITIES OF ANTITRUST ENFORCEMENT

How does dual antitrust enforcement by the FTC and the DOJ Antitrust Division work? In some respects, the two agencies' authorities overlap, but in practice the two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets. For example, the FTC devotes most of its resources to segments of the economy where consumer spending is high: healthcare, pharmaceuticals, professional services, food, energy, and certain high-tech industries such as computer technology and internet services. Before opening an investigation, the agencies consult with one another to avoid duplicating efforts. In this policy brief, "agency" refers to either the FTC or the DOJ, whichever is conducting the antitrust investigation.

Premerger notification filings, information obtained from consumers or businesses, congressional inquiries, or articles on consumer or economic subjects may trigger an agency investigation. Generally, these investigations are not open to the public, to protect both the investigation and the individuals and companies involved. If the agency believes that a person or company has violated the law or that a proposed merger may violate the law, the agency may attempt to obtain voluntary compliance by entering into a consent order with the company. A company that signs a consent order need not admit that it violated the law, but it must agree to stop the disputed practices outlined in an accompanying complaint or take certain steps to resolve the anticompetitive aspects of its proposed merger.

If a consent agreement cannot be reached, the options available going forward depend on which agency is conducting the investigation. For the DOJ there is only one option: sue in federal court to seek an injunction to stop the harmful conduct or (in the case of hard-core per se illegal activity) to obtain a criminal conviction. Today, under the terms of a leniency program for informants (parties who privately inform the DOJ of their involvement in an antitrust crime), the DOJ is notified of many hard-core cartel offenses, such as price fixing or bid rigging. In such instances, cartel members, rather than face trial, often agree to criminal penalties through a court-administered settlement with the DOJ.

The FTC, unlike the DOJ, has two options: it may pursue injunctive relief in the federal courts, but it may also file an administrative complaint. An FTC administrative complaint initiates a formal proceeding that is much like a federal court trial but that takes place before an administrative law judge. Evidence is submitted, testimony is heard, and witnesses are examined and cross-examined. If a law violation is found, a cease-and-desist order may be issued. An initial decision by an administrative law judge may be appealed to the FTC. Final decisions issued by the FTC may be appealed to the US Court of Appeals and, ultimately, to the Supreme Court. If the FTC's position is upheld, then the FTC, in certain circumstances, may seek consumer redress in court. If a company violates an FTC order, the FTC may also seek civil penalties or an injunction.

In some circumstances, the FTC can go directly to federal court to obtain an injunction, civil penalties, or consumer redress. For effective merger enforcement, the FTC may seek a preliminary injunction to block a proposed merger pending a full examination of the proposed transaction in an administrative proceeding. The preliminary injunction preserves the market's competitive status quo.

The FTC also may refer evidence of criminal antitrust violations to the DOJ. Only the DOJ can obtain criminal sanctions. The DOJ also has sole antitrust jurisdiction in certain industries, such as the airline, banking, railroad, and telecommunications industries. Some mergers also require the approval of other regulatory agencies using a "public interest" standard. The FTC or DOJ often works with these regulatory agencies to provide support for their competitive analysis.

State Enforcement

State attorneys general can play an important role in antitrust enforcement on matters of particular concern to local businesses or consumers. They may bring federal antitrust suits on behalf of individuals residing within their states (*parens patriae* suits) or on behalf of the state as a purchaser. In merger investigations, a state attorney general may cooperate with federal authorities.

State attorneys general also may bring an action to enforce their state's own antitrust laws. The Supreme Court has held that state antitrust laws are not preempted by federal law. Indeed, state laws may go beyond federal law in what they prohibit (though a state may not punish conduct that takes place entirely outside its boundaries).

Private Parties

Private parties can also bring suits to enforce antitrust laws. In fact, most antitrust suits are brought by businesses and individuals seeking treble damages for violations of the Sherman or Clayton Acts.[11] Private parties can also seek court orders preventing anticompetitive conduct (injunctive relief) or bring suits under state antitrust laws. Individuals and businesses cannot sue under the Federal Trade Commission Act.

Private parties also can sue businesses for injunctions or damages under many state antitrust statutes (such as California's Cartwright Act) and under state "Little-FTC Acts."[12] These state statutes, though they are loosely based on the federal antitrust statutes, often contain more-expansive prohibitions or theories of liability. Thus, private lawsuits brought under these state statutes may threaten businesses with liability for conduct that would not violate federal antitrust law.

Issues of International Jurisdiction

US and foreign competition authorities often cooperate in investigating cross-border conduct that has an impact on US consumers. In addition, as more US companies and consumers do business overseas, federal antitrust work often involves cooperating with international authorities around the world to promote sound competition policy approaches. There are now more than 130 foreign competition agencies. The FTC and DOJ have sought to promote sound, economics-based antitrust principles through regular consultations with major foreign agencies and through cooperative work under the International Competition Network.[13] (The International Competition Network is a virtual network of most of the world's competition agencies that promotes antitrust best principles through consultations, training, and the promulgation of substantive and procedural best practices.)

Exceptions to Antitrust Law

There are some areas of American commercial activity that are beyond the reach of antitrust laws.[14] For example, antitrust law provides immunities for federally specified activities (for example, certain aspects of the business of insurance, certain agricultural cooperative and marketing order activity, and certain agreements by ocean shipping conferences); exempts certain federal government monopolies (the US Postal Service in particular); applies only to certain highly regulated federal activity; exempts activities that are authorized by a clearly articulated state regulatory policy and are subject to active state supervision (the "state action" doctrine); and provides immunity from antitrust liability for the process of petitioning the government, including petitioning the government to take action that undermines competition (the "petitioning doctrine"). These antitrust exceptions have been subjected to substantial scholarly criticism over the years, and their boundaries occasionally have been narrowed through judicial interpretations. Nevertheless, they remain a not-insubstantial constraint on the broad application of procompetitive antitrust principles in the American economy.

FEDERAL ANTITRUST ENFORCEMENT POLICY: A BRIEF HISTORY

Federal antitrust enforcement policy has undergone various twists and turns over time.[15]

The Sherman Act was first successfully applied against labor unions (most labor organizing was exempted by statute from antitrust law decades later) as well as against various industrial cartels and a railway merger. The first widely heralded monopolization victories involved the breakup of Standard Oil and the American Tobacco Company in 1911.[16] Nevertheless, Progressive Era concerns that the Sherman Act was insufficiently effective in constraining bad business conduct led (1) to the Clayton Act, which specifically targets anticompetitive mergers and condemns particular sorts of agreements, and (2) to the Federal Trade Commission Act, which empowers a board of government experts to study business practices and curtail unfair competitive abuses.

The period from the end of World War I through the late 1930s was relatively uneventful, characterized by moderate merger enforcement and some attention to joint ventures, trade associations, and resale price maintenance (when a manufacturer dictates to a dealer the retail sale price for its product). The federal agencies eschewed aggressive enforcement and largely turned a blind eye to collusion among competitors, reflecting a fear that aggressive competition would drive many firms out of business and exacerbate the Great Depression. By the late 1930s, enforcement against price fixing picked up, as did actions against discounting by big businesses that threatened the viability of less efficient small competitors. The antidiscounting lawsuits, brought under the Robinson-Patman Act, harmed consumers and retarded efficient new business models. They later were totally discredited by economists, and they fortunately no longer play a meaningful role in American federal antitrust enforcement.

After a World War II hiatus, postwar antitrust policy increasingly addressed the problem of oligopoly—i.e., the concern that major industries (such as steel, aluminum, auto manufacturing, and oil refining) were dominated by a few large companies that did not compete aggressively and were able to maintain their favored positions over time. Structural antitrust economics focused on this perceived problem and posited that high market concentration inevitably leads to anticompetitive conduct and poor economic performance. Proposals to break up big firms through legislation or lawsuits were seriously considered from the 1950s through the 1970s, but these efforts did not succeed.

From the late 1940s through the 1960s, judicial decisions extended per se rules beyond collusion to new forms of conduct such as tying (i.e., the act of one firm tying the sale of one product to the purchase of another product) and nonprice vertical restraints (i.e., manufacturer limitations on the terms of marketing a product by downstream distributors). A 1950 amendment that tightened the Clayton Act's limitation on mergers led to increased and predominantly successful government lawsuits against mergers along horizontal, vertical, and conglomerate dimensions (that is, among direct competitors, among firms at different levels of distribution, and among firms in different industries). A focus on the perceived evils of increased concentration led to the nearly automatic judicial condemnation of horizontal mergers among competitors, even in industries where there were huge numbers of firms with small market shares. This led Supreme Court Justice Potter Stewart to state that the sole consistency in these merger cases was that "the Government always wins."[17]

In the 1970s and 1980s, however, published research by scholars associated with the Chicago school of law and economics (e.g., Robert Bork,[18] Yale Brozen,[19] Harold Demsetz,[20] and Richard

Posner,[21] among others) condemned antitrust enforcement policy as unsound, arguing that it had led to the unjustified condemnation by courts of many efficient business practices and innocuous mergers. Chicago school thinking on antitrust policy was encapsulated in highly influential books by professors Robert Bork and Richard Posner. They advocated promoting consumer welfare as the appropriate touchstone for antitrust enforcement, and rejected antitrust condemnation based on "bigness" and industry structure. During the 1980s, the Ronald Reagan administration appointed DOJ and FTC leadership that implemented Chicago school analysis in enforcement, and it appointed Chicago school scholars (such as Richard Posner and University of Chicago professor Frank Easterbrook) to the judiciary. Also, new Harvard school antitrust analysis joined with Chicago school thinking in arguing that antitrust courts should be mindful of administrative costs and error costs in the enforcement system when devising antitrust principles for application.[22]

Starting in the late 1970s and continuing since then, the Supreme Court, taking note of Chicago school scholarship, began to stress consumer welfare enhancement as the single antitrust policy goal,[23] ignoring earlier case law pronouncements that had emphasized the evils of big business and the importance of protecting smaller enterprises. Landmark judicial decisions began to eliminate per se prohibitions unrelated to hardcore cartel conduct, to grant monopolists greater freedom of action to engage in aggressive competition, and to enunciate standards that maintain incentives for business conduct that actually benefits consumers.

Although the courts have never specifically defined the consumer-welfare standard, leading commentators see it as focused on behavior that tends toward maximizing output (taking into account quantity, quality, and innovation) in a way that is consistent with sustainable competition.[24] Modern antitrust law condemns business behavior that is not "competition on the merits" (aggressive behavior that harms rivals without plausibly benefiting consumers or improving a firm's efficiency) as illegal "exclusionary conduct" that undermines consumer welfare.[25] Antitrust law does not, however, require firms to show that their practices will guarantee the greatest amount of consumer welfare. Rather, antitrust law today generally allows businesses substantial leeway to shape their commercial agreements as they see fit to obtain profits, as long as they avoid per se illegal behavior and other exclusionary conduct.

In the 1980s and thereafter, federal antitrust agencies performed economic analysis and referred to harm to consumer welfare when deciding whether to enforce antitrust policy. Aided by large numbers of career PhD economists, the agencies also promulgated economics-based enforcement guidelines in such areas as mergers, agreements among competitors, and intellectual property licensing. Under a premerger notification regime, agency merger analysis in particular became more sophisticated in exploring the case-specific potential economic welfare implications of merger proposals and began to place far less emphasis on mere market structure. In evaluating potential enforcement cases and guidance principles, the agencies also considered applying so-called post-Chicago economic analysis. Post-Chicago economics deployed mathematical game theory, among other tools, to assess lack of competition (sometimes having to do with raising rivals' costs) as a potential explanation for conduct that was generally deemed efficient by Chicago analysts.

By the mid-1990s, a general bipartisan consensus on federal antitrust enforcement had emerged,[26] which placed consumer welfare at the forefront but was willing to consider new theories of economic harm and test those theories using the facts of specific investigations. Although Democratic administrations may have sounded slightly more aggressive when discussing merger and nonmerger enforcement (and may have paid a bit more attention to novel theories of competitive harm), guidance documents and pronouncements from agencies both in the United States and around the world regarding antitrust policy based on consumer welfare reflected a large degree of political consensus over time. This consensus was led by economic experts, who all shared essentially the same premises when evaluating conduct (although they occasionally diverged when applying those premises to particular cases), and it by and large remained in place until the end of the Obama administration.

Beginning around 2016, however, more interventionist arguments began to emerge that persist today. Many who make these arguments call themselves neo-Brandeisian (a label chosen in honor of the early 20th-century Supreme Court justice Louis Brandeis). They claim, echoing Brandeis's attacks on the "curse of bigness," that American economic concentration has risen and that competition has diminished in recent decades.[27] They blame ineffective antitrust enforcement and criticize reliance on consumer-welfare principles, calling instead for enforcement that takes into account firm size, fairness, labor rights, and the protection of smaller enterprises. Neo-Brandeisians suggest that new, far more aggressive antitrust remedies are required, including breakups of enterprises, harsher penalties for violators, far-reaching public regulation, and even direct government control of certain businesses. Neo-Brandeisians have supported new legislative proposals that would radically toughen antitrust law, and they have focused especially on breaking up or regulating huge digital platforms such as Amazon, Facebook, and Google.

Building on the neo-Brandeisian narrative, proposals for antitrust policy change have come quickly and furiously in 2020 and early 2021. By late 2020, new studies by the House Subcommittee on Antitrust, Commercial, and Administrative Law and the Washington Center for Equitable Growth had garnered special attention.[28] These studies endorse digital platform regulation; new FTC antitrust rulemaking; legislative changes to toughen antitrust enforcement; and elimination of the consumer-welfare standard in favor of a multifactor assessment that weighs market openness, economic fairness, democracy, and the interests of workers, entrepreneurs, independent businesses, and consumers. In February 2021, Senator Amy Klobuchar, chair of the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, introduced the Competition and Antitrust Enforcement Reform Act,[29] which would substantially increase federal antitrust enforcement resources, greatly toughen the legal standards applied in assessing mergers, shift the burden to merging parties to prove that their merger will not violate the law, lower the bar for a finding of monopolization violation, significantly raise potential antitrust penalties, and establish a new FTC division to conduct market studies and merger retrospectives. Whether these and other proposals would actually usher in huge changes in American antitrust law and abandonment of the longstanding consumer-welfare-based antitrust policy consensus is, as of early 2021, still unclear.

ARE CALLS FOR ABANDONMENT OF THE ANTITRUST POLICY CONSENSUS WELL-FOUNDED?

The neo-Brandeisian assault on consumer-welfare-based antitrust policy is unfounded as a matter of facts and economic logic. It also is at odds with the rule of law. These considerations call into question the neo-Brandeisian case for far-reaching antitrust reform.

First, the underlying assumptions of rising concentration and declining competition on which the neo-Brandeisian critique is largely based (and which are reflected in the introductory legislative findings of the Competition and Antitrust Enforcement Reform Act) are flawed. Chapter 6 of the *2020 Economic Report of the President*,[30] dealing with competition policy, summarizes research debunking those assumptions. To begin with, it shows that studies complaining that competition is in decline are fatally flawed. Studies such as one in 2016 by the Council of Economic Advisers rely on overbroad market definitions that say nothing about competition in specific markets, let alone across the entire economy.[31] Indeed, in 2018, professor Carl Shapiro, chief DOJ antitrust economist in the Obama administration, admitted that a key summary chart in the 2016 study "is not informative regarding overall trends in concentration in well-defined relevant markets that are used by antitrust economists to assess market power, much less trends in concentration in the U.S. economy."[32] Furthermore, as the 2020 report points out, other literature claiming that competition is in decline rests on a problematic assumption that increases in concentration (even assuming such increases exist) beget softer competition. Problems with this assumption have been understood since at least the 1970s. The most fundamental problem is that there are alternative explanations (such as exploitation of scale economies) for why a market might demonstrate both high concentration and high markups—explanations that are still consistent with procompetitive behavior by firms. (In a related vein, research by other prominent economists has exposed flaws in studies that purport to show a weakening of merger enforcement standards in recent years.[33]) Finally, the 2020 report notes that the real solution to perceived economic problems may be less government, not more: "As historic regulatory reform across American industries has shown, cutting government-imposed barriers to innovation leads to increased competition, strong economic growth, and a revitalized private sector."[34]

Second, quite apart from the flawed premises that inform the neo-Brandeisian critique, specific neo-Brandeisian reforms appear highly problematic on economic grounds.[35] Breakups of dominant firms or near prohibitions on dominant firm acquisitions would sacrifice major economies of scale and potential efficiencies of integration, harming consumers without offering any proof that the new market structures in reshaped industries would yield consumer or producer benefits. Furthermore, a requirement that merging parties prove a negative (that the merger will not harm competition) would limit the ability of entrepreneurs and market makers to act on information about misused or underutilized assets through the merger process. This limitation would reduce economic efficiency. After-the-fact studies indicating that a large percentage of mergers do not add wealth and do not otherwise succeed as much as projected miss this point entirely. They ignore what the world would be like if mergers were much more difficult to enter into: a world where there would be lower efficiency and dynamic economic growth because there would be less incentive to seek out market-improving opportunities.

Third, one aspect of the neo-Brandeisian approach to antitrust policy is at odds with fundamental notions of fair notice of wrongdoing and equal treatment under neutral principles, notions that are central to the rule of law. In particular, the neo-Brandeisian call for considering a multiplicity of new factors such as fairness, labor, and the environment when enforcing policy is troublesome. There is no neutral principle for assigning weights to such divergent interests, and (even if weights could be assigned) there are no economic tools for accurately measuring how a transaction under review would affect those interests. It follows that abandoning antitrust law's consumer-welfare standard in favor of an ill-defined multifactor approach would spawn confusion in the private sector and promote arbitrariness in enforcement decisions, undermining the transparency that is a key aspect of the rule of law.[36] Whereas concerns other than consumer welfare may of course be validly considered in setting public policy, they are best dealt with under other statutory schemes, not under antitrust law.

Fourth, and finally, neo-Brandeisian antitrust proposals are not a solution to widely expressed concerns that big companies in general, and large digital platforms in particular, are undermining free speech by censoring content of which they disapprove. Antitrust law is designed to prevent businesses from creating impediments to market competition that reduce economic welfare; it is not well-suited to policing companies' determinations regarding speech.[37] To the extent that policymakers wish to address speech censorship on large platforms, they should consider other regulatory institutions that would be better suited to the task (such as communications law), while keeping in mind First Amendment limitations on the ability of government to control private speech.

The serious deficiencies inherent in neo-Brandeisian antitrust proposals do not mean that the current antitrust laws could not be improved. Indeed, the merits of particular carefully targeted changes to the antitrust laws certainly deserve consideration. For instance, providing the federal enforcement agencies with the resources they need to do their job more effectively and thus reduce their enforcement error rate might prove beneficial. And scaling back antitrust exemptions and immunities could enhance the efficiency and competitive vitality of affected markets. But efforts to totally reshape antitrust policy into a quasiregulatory system that arbitrarily blocks and disincentivizes (1) welfare-enhancing mergers and (2) an array of actions by dominant firms are highly troubling. Such interventionist proposals ignore the lack of evidence of serious competitive problems in the American economy and appear arbitrary compared to the existing consumer-welfare-centric antitrust enforcement regime. To use a metaphor, Congress and public officials should avoid a drastic new antitrust cure for an anticompetitive disease that can be handled effectively with existing antitrust medications.

CONCLUSION

US antitrust laws have evolved through over a century of enforcement and judicial oversight, and their application has been informed increasingly by sound economics applied to case-specific facts. Today, antitrust enforcers and courts have generally accepted the promotion of consumer welfare as the antitrust policy lodestar, and an antitrust policy consensus around that standard has developed. Very recently, however, certain critics have claimed that antitrust policy has been ineffective in coping with big business depredations and a worsening competitive climate. These neo-Brandeisians have called for a radical toughening of antitrust laws that would dramatically reduce the proportion of proposed mergers allowed to proceed, impose major restrictions on transactions entered into by dominant companies, and begin to take into account other factors in addition to consumer welfare in evaluating possible antitrust prosecutions. Neo-Brandeisian proposals are based on faulty premises regarding the state of competition in the American economy. Moreover, those proposals, if adopted, would tend to harm rather than benefit the economy and would interject new uncertainty into antitrust enforcement. Although a few marginal adjustments to antitrust law may prove beneficial, retention of the consensus consumer-welfare approach appears much preferable, as a matter of law and economics, to radically changing the antitrust laws.

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NOTES

1. The discussion of the basic antitrust laws, how those laws are enforced, and practicalities of antitrust enforcement draws substantially from "Guide to Antitrust Laws," Federal Trade Commission, accessed February 16, 2021, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws.

2. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–38.

3. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

4. Standard Oil Co. v. United States, 221 U.S. 1, 64 (1911).

5. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

6. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

7. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58.

8. Clayton Act of 1914, 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53.

9. 15 U.S.C. § 13.

10. 15 U.S.C. § 18a.

11. A "statute authorizing treble damages directs the judge to multiply by three the amount of monetary damages awarded by the jury in those cases and to give judgment to the plaintiff in that tripled amount. The Clayton Act . . . , for example, directs that treble damages be awarded for violations of antitrust laws." *The Free Dictionary*, s.v. "Treble Damages," accessed March 12, 2021, https://legal-dictionary.thefreedictionary.com/Treble+Damages.

12. Cal. Bus. & Prof. Code §§ 16720–16728 (West 1944). For a description of individual Little-FTC Acts, see Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Boston: National Consumer Law Center, February 2009). For a critical commentary on the allegedly overly expansive coverage of the Little-FTC Acts, see Henry N. Butler and Joshua D. Wright, "Are State Consumer Protection Acts Really Little-FTC Acts?," *Florida Law Review* 63, no. 1 (2011): 163–92.

13. "About" (webpage), International Competition Network, accessed February 16, 2021, https://www.internationalcompetitionnetwork.org/about/.

14. For a more detailed discussion of exceptions to antitrust law, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 6th ed. (St. Paul, MN: West Academic, 2020), 869–960.

15. This discussion of the history of federal antitrust enforcement draws substantially upon Hovenkamp, *Federal Antitrust Policy*, 69–102.

16. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

17. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, P., dissenting).

18. Robert H. Bork, *The Antitrust Paradox*, 1st ed. (New York: Basic Books, 1978).

19. Yale Brozen, *Concentration, Mergers, and Public Policy* (New York: Macmillan, 1982).

20. Harold Demsetz, "Industry Structure, Market Rivalry, and Public Policy," *Journal of Law and Economics* 16, no. 1 (1973): 1–9.

21. Richard A. Posner, *Antitrust Law: An Economic Perspective*, 1st ed. (Chicago: University of Chicago Press, 1976).

22. William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix," *Columbia Business Law Review* 2007, no. 1 (2007): 1; Einer Elhauge, "Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?," *Competition Policy International* 3, no. 2 (2007): 59.

23. In 1979, the Supreme Court stated that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Bork, *Antitrust Paradox*, 66).

24. Hovenkamp, *Federal Antitrust Policy*, 102.

25. In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985), the Supreme Court stated that exclusionary conduct must impair rivals and either "not further competition on the merits or do so in an unnecessarily restrictive way" (quoting Phillip Areeda and Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (New York: Aspen Law & Business, 1978), 3).

26. Christopher S. Yoo, "The Post-Chicago Antitrust Revolution: A Retrospective," *University of Pennsylvania Law Review* 168, no. 7 (2020): 2145–69.

27. Yoo, "Post-Chicago Antitrust Revolution," 2166–68. Yoo cites leading neo-Brandeisian authors. See also Louis D. Brandeis, "A Curse of Bigness," *Harper's Weekly*, January 10, 1914, 18; Barak Orbach and Grace E. Campbell Rebling, "The Antitrust Curse of Bigness," *Southern California Law Review* 85, no. 3 (2012): 605–56.

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