WITHER THE CONSUMER WELFARE STANDARD?

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INTRODUCTION

President Biden issued Executive Order 14036[1] to widespread media acclaim[2] in July of last year. The order sweeps broadly and suggests the administration will make antitrust a major priority.[3] In particular, the President's Executive Order highlights greater enforcement of antitrust laws against technology platforms, in labor markets, in transportation markets such as air travel, and in health care.[4] What the order does not say is what previous administrations were missing in their enforcement agendas that overlooked competition problems in such varied industries.

The President's choice of advisers and leadership for the antitrust agencies fills in much of that gap.[5] President Biden selected leaders who have consistently taken aim at the economic foundations of modern antitrust and sought to replace those foundations with political goals in order to accomplish through antitrust law what they

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* Senior Judge, United States Court of Appeals for the District of Columbia Circuit. These remarks were delivered to the Capitol Hill Chapter of the Federalist Society, on March 2, 2022.

1. Promoting Competition in the American Economy, Exec. Order 14036, 86 Fed. Reg. 36987 (July 9, 2021).

2. *See, e.g.*, David Leonhardt, *Biden's New Push*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/07/09/briefing/us-economy-biden-competition-order.html [https://perma.cc/4LJW-7U5J] (parroting misleading economic trend data).

3. *See id.*

4. *See id.*; *see also* Executive Order 14036, *supra* note 1.

5. *See* Editorial, *An Antitrust Bait and Switch*, WALL ST. J. (June 16, 2021, 6:39 PM), https://www.wsj.com/articles/an-antitrust-bait-and-switch-11623883196 [https://perma.cc/3HCZ-B77P] (discussing the appointment of FTC Chair Lina Kahn as a bellwether of Biden's antitrust agenda).

have thus far not been able to accomplish through legislation.[6] Whether their efforts will prove successful at reshaping antitrust law remains to be seen.[7]

In my limited time here today, I want to take up an issue that was being discussed when I came to the Antitrust Division in 1983—indeed, even when I had started teaching antitrust law in the late 1970s.[8] After a long hiatus, it is being discussed again.[9] I am referring to the idea that antitrust enforcement should have as its goal something other than, or in addition to, consumer welfare—meaning efficient markets that deliver lower prices and better products to consumers.

I. THE RISE OF THE CONSUMER WELFARE STANDARD

Getting consumer welfare accepted as the sole purpose of the antitrust laws was a hard-won victory for economic rationality and for the rule of law.[10] Before then, courts viewed antitrust as serving various, conflicting societal goals.[11] The intellectual foundation for the consumer-welfare approach was laid in the 1960s by some of the people whose work everyone here knows—or should know—economists Aaron Director and Harold Demsetz, and law professors Richard Posner, Robert Bork, William Baxter, and Phil

6. *See* Holman W. Jenkins, Jr., *Let a Biden Reappraisal Include Antitrust*, WALL ST. J. (Aug. 27, 2021, 6:08 PM), https://www.wsj.com/articles/biden-antitrust-lina-khan-tim-wu-jonathan-kanter-google-microsoft-amazon-facebook-brandeis-11630094525 [https://perma.cc/78US-D7WH]; *see also, e.g.*, Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017); *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, A BETTER DEAL, [https://perma.cc/J8CL-XJQL] (last visited Sept. 12, 2022).

7. *See* Joshua D. Wright, *Lina Kahn Is Icarus at the FTC*, WALL ST. J. (July 13, 2021, 1:25 PM), https://www.wsj.com/articles/lina-khan-ftc-monopoly-big-tech-11626108008 [https://perma.cc/H3YZ-5DT3] (describing the strong possibility that courts will reject Kahn's antitrust agenda).

8. *See* Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 302–303, 360 (2019).

9. *See, e.g.*, *An Antitrust Bait and Switch*, *supra* note 5.

10. *See* Wright et al., *supra* note 8, at 293 – 94, 298–313.

11. *Id.* at 300.

Areeda.[12] It was in 1979, after only about a dozen years of intensive academic work on this subject, when the Supreme Court adopted the consumer welfare standard, saying simply, "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[13] The Court has adhered to that insight ever since, even though it meant overruling about half a dozen of its own precedents over the years.[14] These included all the precedents that made vertical restraints per se unlawful.[15] One after another, territorial restraints, maximum price restraints, and eventually minimum resale price restraints were all re-examined and made subject to the rule of reason, requiring a case-by-case assessment of the potential anticompetitive effects of the relevant business conduct.[16]

All of this was done through economic analysis.[17] Per se condemnations were seen often to be contrary to the welfare of consumers

12. *See, e.g.*, Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267 (1966); PHILLIP E. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES (1st ed. 1967).

13. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 12 at 66); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) ("The discussions of [the treble damages provision of the Sherman Act] on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers.").

14. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977) (abandoning per se rule against territorial restraints); Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771–74 (1984) (abandoning the "intra-enterprise conspiracy" doctrine); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 219–27 (1993) (raising the required showing for predatory pricing); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (lifting per se rule against maximum resale price maintenance); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006) (eliminating the presumption that a patent confers market power); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) (lifting per se rule against minimum resale price maintenance).

15. *GTE Sylvania*, 433 U.S. at 57 – 59; *Cooperweld*, 467 U.S. at 771 – 74; *State Oil*, 522 U.S. at 22; *PSKS*, 551 U.S. at 907.

16. *GTE Sylvania*, 433 U.S. at 57 – 59; *State Oil*, 522 U.S. at 22; *PSKS*, 551 U.S. at 907.

17. *See* Wright et al., *supra* note 8 at 306–07.

and to prevent efficient arrangements in the chain of distribution.[18] Likewise, the application of economics and the consumer welfare standard altered the Supreme Court's understanding and application of Section 2 of the Sherman Act with respect to monopolization and attempted monopolization, particularly when considering intellectual property rights.[19]

When Bill Baxter came to the Division in 1981, he discarded the so-called "Nine No-Nos," the Division's list of nine practices previously thought to be anticompetitive in the licensing of intellectual property rights.[20] It was a good deal later before we saw the Supreme Court making the basic point that the possession of an intellectual property right does not ordinarily entail a monopoly or even meaningful market power.[21] I have a lawful monopoly over my backyard, but that does not give me any market power. It is rare, indeed, that the possession of a lawfully acquired patent provides market power that should be viewed with concern, instead of being viewed as a reward for investment in innovation.[22]

II. ANTITRUST AND CORPORATE POLITICAL INFLUENCE

All of that came into question and was starting to be debated, as I said, before I came to the Division in 1983.[23] The debate had been

18. *See GTE Sylvania*, 433 U.S. at 54–56.

19. *See Indep. Ink*, 547 U.S. at 33–46; *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–611 (1985) (recognizing a monopolist may have an antitrust duty to deal with competitors in narrowly limited circumstances); Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (further narrowing *Aspen Skiing* and clarifying it is the outer bound of Section 2 liability); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 449–51 (2009) (further narrowing *Aspen Skiing* and all but eliminating "price squeeze" claims).

20. *See* Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515 (1981).

21. *Indep. Ink*, 547 U.S. at 44–45.

22. *See* Daniel F. Spulber, *How Patents Provide the Foundation of the Market for Inventions*, 11 J. COMP. L. & ECON. 271, 273–75 (2015) (explaining how patents operate to increase innovation).

23. *See* Wright et al., *supra* note 8 at 302–03

originated by FTC Chairman Robert Pitofsky.[24] He was concerned with the political influence that a large firm might acquire by virtue of its size, and could use to advantage itself or to disadvantage its rivals via the political branches of government.[25]

Corporate political influence, which is usually used for "rent-seeking,"[26] is a legitimate cause for concern. The result is too often a crony capitalism that distorts resource allocation, unjustly rewards some and harms others, and is antithetical to the market competition that benefits consumers and the economy.[27]

The Brandeisians may overstate the issue, however, as they often confuse lobbying dollars spent with political capital acquired.[28] Although the quantity of lobbying effort is an input in the congressional budget process, simply totaling the number of dollars spent without considering offsetting expenditures from opposing lobbying groups overstates the role lobbying plays in directing congressional priorities. In some cases, lobbying may be a zero-sum game, with each group's expenditures merely offsetting those of an opposing group.[29]

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24. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051 (1979).

25. *See id.* at 1052 – 55.

26. "People are said to seek rents when they try to obtain benefits for themselves through the political arena. They typically do so by getting a subsidy for a good they produce or for being in a particular class of people, by getting a tariff on a good they produce, or by getting a special regulation that hampers their competitors." David R. Henderson, *Rent Seeking*, ECONLIB, https://www.econlib.org/library/Enc/RentSeeking.html [https://perma.cc/NTM3-UEGJ] (last visited Sept. 12, 2022).

27. *See, e.g.*, Hettinga v. United States, 677 F.3d 471, 481–82 (D.C. Cir. 2012) (Brown, J., concurring) (noting that at the request of dairy producers two senators pushed legislation to block a more competitive entrepreneur).

28. Reed Showalter, *Democracy for Sale: Examining the Effects of Concentration on Lobbying in the United States*, AMERICAN ECONOMIC LIBERTIES PROJECT at 29–31 (August 2021), http://www.economicliberties.us/wp-content/uploads/2021/08/Working-Paper-Series-on-Corporate-Power_10_Final.pdf [https://perma.cc/VC3N-WDME].

29. Karam Kang, *Lobbying Can Have a Small Effect on Policy Enactment but Very Valuable Returns*, LSE: BLOG ADMIN (September 14, 2015), https://blogs.lse.ac.uk/usappblog/2015/09/14/lobbying-can-have-a-small-effect-on-policy-enactment-but-very-valuable-returns/ [https://perma.cc/GRA9-4V7T].

In any event, it does not necessarily follow that antitrust enforcement is an appropriate preventative measure for corporate political influence. If not the only, certainly the primary tool with which an antitrust agency can inhibit corporate political influence by large firms is merger control, that is, by blocking mergers not because they are thought to be anticompetitive but solely in order to prevent the merged firm from obtaining a size that is thought to be conducive to political influence.

There are a number of problems with using merger control to that end. First, and most obviously, it precludes realizing whatever efficiencies are motivating the merger, to the detriment of consumers.[30] Second, size is a rather poor proxy for political influence. Many small firms and, particularly, associations of small firms, have substantial political clout, often besting large firms on the other side of an issue. Consider insurance agents versus insurance companies;[31] automobile dealers versus automobile manufacturers;[32] and gasoline retailers versus petroleum companies.[33] These "small dealers and worthy men," as Justice Peckham called them in 1897,[34] prevail consistently, both in the state and the federal legislatures.

30. *See* Wright et al., *supra* note 8 at 343–45 (reviewing the empirical evidence and concluding that "the consistency of results across these literature surveys is clear: vertical integration, in general, benefits consumers").

31. *See generally Industry Profile: Insurance*, OPEN SECRETS https://www.opensecrets.org/federal-lobbying/industries/summary?id=F09 [https://perma.cc/PXA9-RULA] (last visited Oct. 25, 2022) (over $150 million spent on lobbying between the two groups each year).

32. *See generally* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573 (2016) (showing automobile dealers political lobbying power).

33. *See generally* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (involving legislation favoring independent retailers against vertically integrated petroleum companies).

34. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

Finally, some firms attain size—and perhaps also political influence—simply because they are successful in satisfying consumers.[35] A merger control program aimed at preventing firms from becoming large would leave those firms unaffected. It would essentially be an arbitrary and haphazard application of the antitrust laws.

Even the more "targeted" reform efforts in the proposed American Innovation and Choice Online Act, which would apply only to firms that had an estimated market valuation in excess of $550 billion over the previous year,[36] would have arbitrary results. For example, Meta would have qualified as a "covered platform"—and therefore been subject to special rules about which firms it could refuse to deal with—in 2020 and 2021, but not after its stock price declined in 2022.[37] With this regime in place, it is not hard to imagine a firm saving bad news to release whenever the specter of antitrust enforcement appears.

The same problems attend a fixed limit on firm size; indeed, that would be so arbitrary that it has not been proposed by any thoughtful proponent of curbing corporate political influence.[38] This is not to deny it was proposed by Senator Edward Kennedy in 1979 and endorsed by Zephyr Teachout as recently as 2014.[39]

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35. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 407 (2004) ("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.").

36. S. 2992, 117th Cong. (as reported by S. Comm. On the Judiciary, March 2, 2022).

37. Sofia Pitt, *Meta Shares Plunge 24% to the Lowest Price Since* 2016, CNBC (Oct. 27, 2022 8:19 AM), https://www.cnbc.com/2022/10/27/meta-stock-falls-23percent-on-earnings-miss-analyst-downgrades.html [https://perma.cc/ZGW8-QBGH].

39. *See* Zephyr Teachout, *Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform* (Fordham Law Legal Studies Research Paper No. 2384182, 2014), papers.ssrn.com/sol3/papers.cfm?abstract_id=2384182 [https://perma.cc/D2EG-XPPQ] (suggesting Senator Ted Kennedy's 1979 proposal to limit mergers of companies with assets over $2 billion is the type of solution needed to prevent market concentration).

III. ALTERNATIVE GOALS FOR ANTITRUST

More recently, other voices have championed different goals for antitrust. All are arguably worthy goals, but ask yourself whether they are best, or even reasonably, achieved by reforming antitrust law or enforcement policy. They include the preservation of jobs that would be rendered redundant if a merger were approved; countering income inequality; preserving small, locally owned businesses, as Brandeis suggested;[40] protecting the privacy of consumers' personal data;[41] and safeguarding the environment.[42]

Here are some specifics. For example, Lina Khan, now the Chair of the Federal Trade Commission, and Sandeep Vaheesan, of the Open Markets Institute: "[A]ntitrust laws must be reoriented away from the current efficiency focus toward a broader understanding that aims to protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power."[43]

Also, professors Jonathan Baker and Steven Salop[44]: "[A]ntitrust law and regulatory agencies could address inequality more broadly by treating the reduction of inequality as an explicit antitrust goal."

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40. *Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined*, 66 YALE L. J. 69, 69 (1956).

41. *See* Michael Scarborough, David Garcia, & Kevin Costello, *Privacy Now Looms Large In Antitrust Enforcement*, LAW360 (Sept. 17, 2021), https://www.sheppardmullin.com/media/publication/1951_Privacy%20Now%20Looms%20Large%20In%20Antitrust%20Enforcement.pdf [https://perma.cc/KG6Q-3ZNB] (discussing evolving view of privacy as an element of market structure, rather than product quality).

42. Nicole Kar et al., *92 percent of businesses call for changes to competition rules to boost climate change collaboration*, LINKLATERS (Apr. 30, 2020), linklaters.com/en/about-us/news-and-deals/news/2020/april/92-percent-of-businesses-call-for-changes-to-competition-rules-to-boost-climate-change-collaboration [https://perma.cc/5TL3-FYCA] (discussing growing consensus among business leaders that economic goals should give way to sustainability in competition law).

43. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 237 (2017).

44. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. 1, 24 (2015).

And in testimony before the Senate in 2017, Barry Lynn, also from the Open Markets Institute, argued that the consumer welfare standard "warps" antitrust law by preventing its use for "specific policy outcomes—such as reducing inequality or raising the earnings of workers or fighting concentrated political power."[45]

More ambitious still is Professor Maurice Stucke,[46] who notes:

If antitrust's ultimate goal is to promote well-being, we must then address what constitutes 'well-being.' . . . Promoting well-being entails promoting (1) material well-being (income and wealth, housing, and jobs and earnings) and (2) quality of life (health status, work and life balance, education and skills, social connections, civic engagement and governance, environmental quality, personal security, and subjective well-being).[47]

But, he continues, "the greater issue is fairness, namely how well the resources are distributed."[48]

"To maximize well-being," Professor Stucke goes on, "any competition policy must balance the promotion of material well-being with quality-of-life factors, such as freedom and self-determination, while not deterring the exercise of compassion and interpersonal relationships."[49]

As you could not help but realize from this litany, none of the suggestions for broadening the goal of antitrust from consumer welfare to incorporate additional objectives seems in the least bit practical.

Let's take inequality. What could an antitrust agency do about inequality, whether inequality of wealth or of income? I have not found a single proponent of the idea who has laid out what the antitrust agencies could do to reduce inequality. I suppose they could

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45. *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Senate Comm. On the Judiciary*, 115th Cong. 13 (2017) (testimony of Barry Lynn, Executive Director, Open Markets Institute).

46. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 599-600 (2011).

47. *Id.*

48. *Id.* at 601.

49. *Id.* at 602.

try to inhibit business success, or to hinder transactions that would make an entrepreneur rich, but those efforts are too absurd to attribute to serious scholars such as Jonathan Baker and Steven Salop.[50] Indeed, they seem to think using antitrust to reduce income inequality is more a theoretical than a practical idea,[51] at least as of now, for they conclude that "[t]he range of competition policy options set out here can be a useful starting point for a policy debate."[52]

Use antitrust to raise the earnings of workers, says Barry Lynn.[53] How? By making a raise for employees a condition for approving a transaction?

Perhaps the people hawking these generalities have so different a conception of antitrust that they also conceive of a different type of enforcement agency, one empowered to order wages raised, quite apart from any transaction contemplated by the Sherman Act. One that breaks up large companies not because of any anticompetitive conduct, but because they have too much political influence or have centralized their management instead of treating smaller units as autonomous in the Brandeisian interest of localism.

According to Professor Stucke, it seems, "deterring the exercise of compassion and interpersonal relationships" would also be an antitrust offense—or perhaps just a factor to be considered against a firm in the dock for some other conduct.[54] Even if one were inclined to adopt such an approach, how could enforcers identify activity that increases compassion and strengthens interpersonal relationships? How would enforcers measure compassion? Such a scheme risks reducing human complexity to a cynical token in a bid to punish companies that do not share the enforcers' economic ideology.

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50. Baker & Salop, *supra* note 44, at 27.

51. Not surprisingly, because Baker and Salop are serious scholars, their statement quoted above is followed by recognition of the several "issues" and "challenges" that would be presented by making the reduction of inequality an antitrust goal. *Id.*

52. *Id.*

53. Lynn, *supra* note 45.

54. Stucke, *supra* note 46, at 602.

What kind of decision making would be required if all—or any—of these proposals were adopted as criteria to be applied in addition to or in lieu of consumer welfare? At the very least, they would require antitrust enforcers (if they should still be called that) to impose losses on consumers for gains in, let us say, employment; or for some contribution to income equality; or to prevent the loss of local ownership of a company that wants nothing more than to sell itself to a national firm. These are all incommensurable values. To let the government decide how much consumers pay in the form of higher prices, poorer quality, or foregone innovation in order to reduce inequality or the like is to invite economic totalitarianism. Worse still, the bureaucrats reordering the economy would lack a nonarbitrary way to make these tradeoffs, notwithstanding any pretense to the contrary. Sound familiar? It would be socialism writ small, pure and simple.

Arbitrary decision making is systemically costly even beyond the loss of welfare it entails. Arbitrary decision making invites political manipulation. A call from a congressman cannot turn an anticompetitive transaction into a boon for consumers any more than can a call from the Chinese Communist Party to the courts of China. If the agency's analysis is readily manipulable by throwing in some effect on wages or localism or what-have-you, then any outcome can be jiggered. Even if no call ever comes, there is little reason for the public to think the agency's decisions are, in fact, made on some objective or at least defensible basis. Indeed, insofar as the decisions are explained in an agency release or in a brief in court, the agency will be hard-pressed to dispel the implication that it has acted in an arbitrary way; one doesn't have to be a judge to recognize doubletalk. Further still, the pall of political influence will hang over every boardroom and will chill much productive activity. Even if antitrust enforcers could remain as pure as triple-distilled water, the prospect of additional, highly complex regulation creates a barrier to entry, which is inherently anticompetitive and harmful to consumers.

Antitrust law does not efficiently serve its deterrent function when companies cannot determine with some confidence when their actions will incur potential liability.[55] If a company's counsel cannot reliably predict when an acquisition or strategy might run afoul of antitrust law, firms will be left with only two options.[56] First, a rationally risk-averse firm—which is to say most firms—could shy away from any possible liability to avoid incurring the economic and reputational cost of a government lawsuit.[57] Alternatively, a risk-preferring firm could attempt to profit from the indeterminacy of a multi-factor competition law by acquiring market, or even monopoly, power and counting on political influence to protect it from the antitrust agencies. In the first case, chilling productive activity that does not result in harm to competitors is a deadweight loss because the activity would have yielded both consumer and producer gains. In the alternative case, allowing conduct that results in the accumulation of market power and higher prices also results in a deadweight loss. But add to this the inevitable uncertainty about how courts across the country would review decisions made under a multifactor standard, and the potential for error seems striking.[58]

I suggest that, at bottom, the assault on the consumer welfare standard is an assault on the antitrust enterprise and on the societal

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55. *See* Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 362-63 (2011) (discussing the decision-making framework for determining welfare consequences of deterrence success or failure in the context of antitrust).

56. If the firms routinely cannot predict when conduct runs afoul of the Sherman Act, then there is also a risk that any new set of standards will run afoul of the constitutional prohibition against vagueness. *See* Matthew G. Sipe, *The Sherman Act and Avoiding Void-For-Vagueness*, 45 FLA. ST. UNIV. L. REV. 709, 734-35 (2018) (discussing the intersection of antitrust law, due process, and the void-for-vagueness doctrine).

57. *See* Kaplow, *supra* note 57, at 367–68 (discussing potential for false positives to chill productive activity in the context of price fixing cases).

58. *See* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1648-49 (2006) ("an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste" is one judges have expressed reluctance towards) (quoting Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring)).

commitment to a competitive economy that underlies it. If inequality, or wages, or political influence should be regulated, let the job be done respectively by the Internal Revenue Service, a wage control board, and those who enforce the codes of ethics that apply to the political branches.

IV. THE CASE OF EUROPE

This is not a plea to preserve the status quo for its own sake. It is a plea to preserve the rule of law, by having a transparent and objective criterion, the application of which can be evaluated *ex ante* by potentially affected parties and reviewed in a court of law. Only then can decisions be accepted by the public as legitimate.[59] There are, of course, going to be two sides in every case and expert economists arguing for each side. But that is a very different proceeding than one would see in a court if the agency has made its decision based upon distributive or environmental or any of the other criteria being proposed without a moment's thought about arbitrariness and transparency versus the rule of law. A variation on this threat to the rule of law may already be coming our way. As of now it is being talked about more in Europe than here. Indeed, the European Commission has made a proposal it calls the Green Deal "to transform the EU into a modern, resource-efficient and competitive economy,"[60] the central point of which is to reduce effects on the environment.

The Green Deal is very much what you would imagine, having to do primarily with energy and climate change—and the talk there is

59. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

60. Eur. Comm'n, *A European Green Deal* (2019), https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en [https://perma.cc/N28K-424D].

about making European competition policy hospitable to firms collaborating to accomplish the EU's environmental goals.[61] Commissioner Vestager has suggested the European Commission may allow mergers based upon a number of environmental benefits, saying "[m]any sustainability agreements . . . like some agreements on open standards for green products, for instance . . . can be legal, even though they do restrict competition, so long as the benefits they bring for consumers outweigh those restrictions."[62] Those benefits are, of course, environmental. The Commission may even adopt new block exemption regulations related to reducing carbon dioxide emissions or improving "sustainable working conditions."[63] Of course, cooler heads may prevail, such as Andreas Mundt, Germany's head of the Federal Cartel Office. He recently remarked: "we must take utmost care that the debate that we currently have on cooperation does not get bigger and catch the area of mergers" in the effort to incorporate sustainability into antitrust.[64]

This is going to be a rallying point for a great deal of agitation by firms seeking permission to collaborate. Perhaps some of them actually will be trying to do something to advance their governments' views on the environment without any significant diminution in

61. *See* Margrethe Vestager, *The Green Deal and Competition Policy* (Sept. 22, 2020), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en [https://perma.cc/XN6C-GHQN] (asking for input into whether the EU should "make it easier for companies to agree to produce greener products, without breaking the competition rules").

62. Margrethe Vestager, *Competition policy in support of the Green Deal* (Sept. 10, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en [https://perma.cc/8R7C-ACKL] (reviewing options for implementing Green Deal without eliminating antitrust scrutiny).

63. Benjamin Geisel, *The impact of the Green Deal on EU Competition law: How Sustainability Aspects are shaping the Rules and what it means for Businesses*, ALLEN & OVERY (Oct. 5, 2021), https://www.allenovery.com/en-gb/global/news-and-insights/publications/sustainability-belgium-the-impact-of-the-green-deal-on-eu-competition-law [https://perma.cc/KAS9-4LPY].

64. Tom Madge-Wyld, *Sustainability concerns must not steer merger challenges, Mundt says*, GLOBAL COMP. REV. (Feb. 23, 2022), https://tinyurl.com/2p8tfrv5 [https://perma.cc/9VPR-EKWX].

competition, but surely others will be seeking a way to get together and do things they would like to do for their bottom lines but are inhibited from doing now by the antitrust laws.[65] Rent seeking, that is, will be a growth industry on a scale not seen since Louis XVI dispensed favors at Versailles.

The European Commission lapsed once more than 20 years ago when it approved an agreement among makers of household appliances (clothes washers, in particular) to allow them to collaborate to achieve a standard that would conserve water.[66] To my knowledge, it is the only time the Commission has done anything of this sort, but it is quite clear that similar proposals will now be coming its way.[67] Surely something similar can be expected on this side of the Atlantic, considering the parallel interest in slowing climate change.[68] Indeed, in the U.S. there is already an emerging literature on the pursuit of environmental goals as the predicate—or perhaps pretext—for firms seeking relief from the antitrust laws.[69] Expect similar pleas based upon so-called "social" goals, and we will have two-thirds of the ESG movement in play. Thus, the anti-

65. Alexander Raskovich et al., *Colluding to Go Green: Global Antitrust Institute Comments on the Austrian Federal Competition Authority's Draft Guidelines to Exempt "Sustainability Agreements"* (Geo. Mason U. L. & Econ. Research Paper Series No. 22-29, June 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143814 [https://perma.cc/HQ9R-TUMV].

66. Commission Decision of 24 January 1999 (Case IV.F.1/36.718–CECED), OJ [2000] L 187/47.

67. *See, e.g.*, Pierre Zelenko and Nicole Kar, *Sustainability goals: Is competition law cooperating?*, LEXOLOGY (Jan. 21, 2020), https://www.lexology.com/library/detail.aspx?g=7fc53217-3b30-4144-92ed-ee508a91efb2 [https://perma.cc/8Q3P-HM5U].

68. *See generally* H.R. Res. 109, 116th Cong. (2019) (outlining a "Green New Deal").

69. *See, e.g.*, Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 ECOLOGY L.Q. 219 (2020), https://www.ecologylawquarterly.org/currents/colluding-to-save-the-world-how-antitrust-laws-discourage-corporations-from-taking-action-on-climate-change/ [https://perma.cc/5UGS-R2F4]; *see also*, Sean O'Kane, *DOJ drops antitrust probe into automakers that want cleaner cars*, THE VERGE (Feb. 7 2020), https://www.theverge.com/2020/2/7/21128684/doj-antitrust-investigation-closed-trump-ford-vw [https://perma.cc/HV75-25FS].

trust enterprise as we know it now is under assault from two directions. On one side are people agitating for non-consumer welfare criteria as a general matter and, on the other side, are firms interested in collaborating on ESG in the hope of relaxing the competition laws, and hence the competition, that now constrains them.

Europe's Digital Markets Act (DMA) and the United Kingdom's related Digital Markets Unit (DMU) signal a similar shift towards valorizing social goals, such as privacy, that may prove difficult in practice to define, let alone protect.[70] More worrisome still, the DMA will allow the European Commission to micromanage the business practices of so-called "digital gatekeepers" through *ex ante* prohibitions.[71] Unlike existing competition rules in Europe, the DMA would not require the Commission to prove the prohibited conduct resulted in economic harm to anyone.[72] In effect, Europe is experimenting with discarding antitrust law as we know it; in its place will be central government regulation of platforms.[73]

CONCLUSION

Whether the United States will follow the trend in Europe, as one might reasonably fear,[74] of course, remains to be seen.

Even if we do not go that far, however, antitrust law is heading into an existential struggle. Will the agencies that enforce it become

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70. *See* Alden Abbott, *Consumer Welfare-Based Antitrust Enforcement is the Superior Means to Deal with Large Digital-Platform Competition Issues*, TRUTH ON THE MARKET (Nov. 2, 2021), https://truthonthemarket.com/2021/11/02/consumer-welfare-based-antitrust-enforcement-is-the-superior-means-to-dealing-with-large-digital-platform-competition-issues/ [https://perma.cc/WH7D-SHCD].

71. *See* Aurelien Portuese, *The Digital Markets Act: European Precautionary Antitrust*, INFO. TECH. & INNOVATION FOUND. (May 24, 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust [https://perma.cc/Y49R-8YKT].

72. *Id.*

73. *Id.*

74. *See* Arthur Sidney, *Senators Should Avoid Making the Digital Economy More European*, DISRUPTIVE COMP. PROJECT, (Jan. 17, 2022), https://www.project-disco.org/competition/011722-senators-should-avoid-making-the-digital-economy-more-european/ [https://perma.cc/8VYY-MX7R].

the vehicles for arbitrary, bureaucratic management of firms? Or vendors of indulgences to politically influential firms and their handmaidens elsewhere in government? Both? Or, dare we hope, neither?