Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy

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#ITIFantitrust

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The Consumer Welfare Standard

- Has guided antitrust policy for four decades.
- Does a merger or corporate action convey enough market power to raise prices, reduce quantity, or otherwise harm other market participants?
- Influenced by:
  - Academic literature
  - A belief that past practice had stifled competition and efficiency

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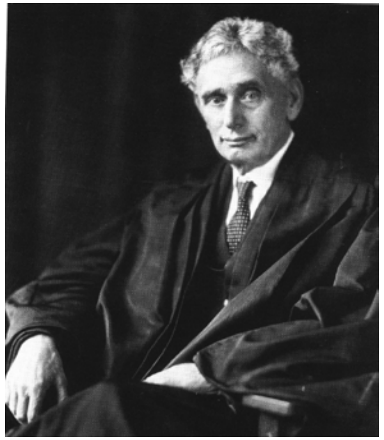
Brandeis Is Back: The Rise of the New Anti-Monopolists



- "Today, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector." (Senator Elizabeth Warren, D-MA)
- "The degree of consolidation in many industries today bears a striking resemblance to that of the late Gilded Age." (Barry Lynn and Phillip Longman)
- Increased concentration has "resulted in higher corporate profits, higher returns for shareholders, and higher pay for top corporate executives and Wall Street bankers—and lower pay and higher prices for most other Americans." (Robert Reich)
- Increased concentration is why "the vast majority of American workers have seen their hourly wages flatten or decline since 1979." (Lina Kahn)

Neo-Brandeisianism

- Focus on consumer welfare has harmed society.
  - Harms consumers
  - Cannot deal with non-price threats
  - Ignores harm to workers and small businesses
  - Threatens privacy
  - Threatens democracy
- Government should prevent the concentration of market power even if the result is higher prices or less choice.

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Price Harms

- Claim: Higher market concentration has led to less competition and higher prices.
- The focus on the market share of the top four companies hides the true level of competition.
- The national increase in concentration does not offer a good picture of the degree of local competition.
- Modest concentration does not necessarily imply harm to consumers.

Non-Price Harms

- Claim: The focus on consumer prices ignores a variety of non-price harms that can result from concentration, including declining quality and less choice.
- Focus on market power is for "simplicity of exposition."
- Other harms can be translated into prices.
- Antitrust agencies do look at threats to quality and other market aspects.

Innovation

- Claim: Market concentration reduces innovation.
- CWS incorporates innovation as a non-price effect.
- Agencies have opposed mergers that would reduce innovation.
- Large companies are often more productive and innovative than small ones.

Monopsony Power

- Claim: Current policy concentrates too much on consumers to the exclusion of other parties such as small businesses and workers.
- Consumer welfare standard looks at all uses of market power, including monopsony.
- Companies are not allowed to take anticompetitive actions against suppliers or workers.
- Agencies have pursued cases where companies sought to limit competition over workers.

Internet Platforms

- Claim: Internet platforms can achieve uncontested market power by amassing data to stifle competition.
- Traits that complicate traditional antitrust analysis:
  – Some services are often given for free
  – Pricing below marginal cost
- Antitrust principles still apply but regulators need to make a detailed study of all sides of the market before concluding that competition has been harmed.

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Privacy

- Claim: Dominant companies, especially Internet platforms, force consumers to disclose large amounts of personal data in order to use their services.
- Privacy rules give consumer protection regulators powers to enforce promises and prevent abuses. If Congress wants to enact additional protections it should strengthen these laws, not antitrust policy.

Political Power

- Claim: Large companies dominate politics.
- Companies face significant political opposition from competitors, labor unions, private donors, and organizations representing small business.
- Political power can be reduced by changing laws governing campaign finance, disclosure, and lobbying.

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Protecting Businesses From Competitors

- Claim: The consumer welfare standard lets large companies drive smaller companies out of business.
- Company growth is usually a sign of superior efficiency and better value.
- Government should not interfere with the competitive process to protect smaller, less efficient, companies from going out of business. Doing so would lower productivity.

Protecting Workers From Layoffs

- Claim: Consolidation reduces the number of potential employers and weakens workers' bargaining power.
- Evidence of this claim is weak. Large employers often pay higher compensation.
- Tax policy, worker training programs, and income supplements can help workers more directly.

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Neo-Brandeisianism Is Not Workable

- How would government make these trade offs?
- When should it stifle competition and lower prices in return for job security or protecting small business?
- What about international competition?
- Would government use this large increase in its discretionary powers responsibly?

The Consumer Welfare Standard

- Historical precedents going back 40 years providing clear guidance for courts, regulators, and companies.
- Flexible enough to deal with market changes.
- A focus on actual harm to individual markets.
- Enables creative destruction driving productivity and living standards.
- Promotes the interest of the majority of Americans.

Thank You!

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