



DEPARTMENT OF JUSTICE

Ensuring The Legacy of the Consumer Welfare Standard

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Consumer Welfare Paradigm and Legislative Proposals”

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Thank you all for having me here, in particular to Dean Reuter and the other leaders of The Federalist Society for organizing another fantastic National Lawyers Convention.

The subject of this panel, “The Future of Antitrust,” could not be more timely. Antitrust law, in many ways, again appears to be at a crossroads. It has worked its way into public consciousness and debate unlike any time since the *Microsoft* case in the late 1990s. The debate over antitrust law may be even louder today than it was then, as we now have presidential hopefuls campaigning on how they will change or enforce antitrust law.

At the Department of Justice Antitrust Division, we have not shied away from this debate. Indeed, it is imperative that the Executive Branch speak clearly on behalf of the United States regarding questions of antitrust policy, especially when the debate involves foreign antitrust enforcers analyzing the same conduct.

Over the past two years as Assistant Attorney General, I repeatedly hear the same question at conferences and events across the United States and overseas. It is the following: “Is the consumer welfare standard capable of handling new threats to competition, especially in the context of digital markets?”

I have given the same answer each time: Yes, I believe the consumer welfare standard is flexible and adaptable enough for the 21st Century and new business models such as digital platforms. It is incumbent on enforcers and courts to stay up to date with the latest economic thinking and understanding of new markets. That is critical to ensuring that the consumer welfare standard keeps pace with new technologies.

This understanding of the consumer welfare standard—flexible and adaptable—is exactly how Judge Robert Bork and other titans of the Chicago school antitrust revolution intended it. Judge Bork wrote the following in a new epilogue to *The Antitrust Paradox*, fifteen years after it

was originally published, “Though the goal of the antitrust statutes as they now stand should be constant, the economic rules that implement that goal should not. It has been understood from the beginning that the rules will and should alter as economic understanding progresses.”¹

Consistent with this understanding, for over forty years, the consumer welfare standard has served as a neutral principle for the administration of the antitrust laws. It focuses enforcers and courts on harm to competition and requires them to evaluate competitive effects. The consumer welfare standard is agnostic to considerations other than the actual competitive process.

Drawing the line in this manner is crucial. Otherwise, enforcers or courts would be placed in the powerful and awkward position of deciding whether a pro-consumer practice nevertheless violates antitrust law because it offends a non-competition value, like free speech.

Justice Robert H. Jackson—another antitrust visionary—understood this concern well, and emphasized the need for neutral principles of antitrust enforcement forty years before Robert Bork helped supply them. In a 1937 speech entitled *Should the Antitrust Laws Be Revised?*, then-Assistant Attorney General Jackson argued: “What is needed is the establishment of a consistent national policy of monopoly control, intelligible to those expected to comply with it and those expected to enforce it.”² Jackson warned that “the only probable alternative” to a consistent national policy favoring competition is “government control” of industry.³

What does the future hold for the consumer welfare standard? That is up to us.

No policy—no matter how sound—is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to manipulate them in ways never previously seen. I won’t mention specific examples, but we

¹ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 430 (1993 ed., orig. 1978).

² Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937), available at <https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised/>.

³ *Id.* at 577.

have seen this playbook when federal courts “interpret”—or more accurately, rewrite—the law in head-scratching ways, and when agencies issue new regulations that strain the statutory text.

Some reformers now seek to bring this playbook to the domain of antitrust law, which if read broadly could wield tremendous power over the economy. Unbridled, this power could do significant damage to the economic impulses that drive innovation, gains in efficiency, and other procompetitive outcomes for consumers. Antitrust law may be particularly vulnerable to hasty change given its “common law” status and evolution in light of advancements in economic thinking. We will see in our lifetimes whether the pendulum will swing back and unravel the progress the field has made.

What can practitioners, academics, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as “Hipster Antitrust,” because advocates for abandoning the consumer welfare standard invoke a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one’s opponents only goes so far. Winning an economic debate goes further, but not far enough: the modern antitrust reform movement is less concerned about economic soundness than it is about results.

That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don’t act swiftly and certainly, then we risk looking impotent next to those who would punish monopolists just for being big. That approach, of course, is an axe where a scalpel is needed. If we don’t use our scalpel, we shouldn’t be surprised to see the reformers sharpening their axes.

Second, and more importantly, I believe that the consumer welfare standard will survive the winds of change if we prove that *it works*. Antitrust law must live up to its promise of protecting competition and consumers. That requires enforcers to think creatively and act vigorously.

In particular, enforcers must answer critics of the consumer welfare standard who wrongly assert that it is concerned only with price effects. That has never been the case. For decades, courts interpreting the Sherman and Clayton Acts have recognized harms to competition in the form of lower output, decreased innovation, and reductions in quality and consumer choice.

Indeed, the harm asserted by the government in the *Microsoft* case took the form of reduced innovation and consumer choice. The D.C. Circuit recently affirmed this innovation-centric approach in its *AT&T/Time Warner* opinion. Despite the district court's factual findings in that case, the circuit court's opinion was favorable to future enforcement actions in several respects. Among others, the court recognized that harm to competition extends "beyond higher prices for consumers, including decreased product quality and reduced innovation."⁴ The court's legal analysis will help us when we bring our next case alleging non-price effects as competitive harm.

To be sure, price effects are easiest to quantify and may be an effective way to appeal to a skeptical judge or jury. They are not, however, the exhaustive means of proving an antitrust violation. Instead, we should focus our energy on understanding the broader set of effects that may result from anticompetitive behavior or transactions.

Ultimately, I believe that antitrust law and the consumer welfare standard will survive the winds of proposed reform, in much the same way Judge Bork envisioned it. It is up to us, however,

⁴ *United States v. AT&T Inc.*, 916 F.3d 1029, 1045 (D.C. Cir. 2019).

to keep the foundation steady through vigorous action to protect competition and the American consumer.

Thank you again, and I look forward to our discussion.