KHAN'S ANTITRUST PARADOX

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INTRODUCTION

Antitrust law, at its core, is a common law field. Significant legislation has been enacted and developed globally, but in the United States, the federal legislation is extraordinarily vague. Perhaps unsurprisingly, the common law accompanied by economic science has filled the gap where the statutory grants were unclear.

After a period of structuralism in the 1960s and 1970s, the Chicago School of Thought took hold and is now accepted in the antitrust jurisprudence. However, the Biden administration, led by Federal Trade Commission Chair Lina Khan and Department of Justice Antitrust Division Assistant Attorney General Jonathan Kanter, think the Chicago School has failed in critical aspects, particularly in Big Tech and that a return to structuralism is necessary. While courts have not yet accepted the propositions set forward by the Biden administration, the administration continues to push forward. In this comment, I argue that where the Consumer Welfare Standard fails, the Total Welfare Standard does not. Further, I argue that where the structuralist approach advocated for by the Biden administration fails, the Total Welfare Standard does not. Therefore, the Biden administration and the antitrust community should consider a Total Welfare regime for antitrust law and policy.

In Section I, I provide a detailed background on the evolution of antitrust law in the U.S. leading up to and through the passage of the Sherman Act. I continue to outline how the Consumer Welfare Standard became dominant and what the Biden administration is advocating for. I look at the economic learnings that have developed in line with antitrust law and policy. Specifically, I focus on why price effects are the relevant metric and how non-price metrics can, and are, accounted for in price effects and the merits of structuralism.

In Section II, I introduce the Total Welfare Standard and then compare it to the Consumer Welfare Standard and the structural approach. In Section III, I apply the Total Welfare Standard to the issues commonly raised about Big Tech and conclude that the Total Welfare Standard can adequately address the issues better than the Consumer Welfare Standard or a structural approach. Finally, in Section IV, I address the common counterarguments that have been presented or are likely to be presented against a Total Welfare Standard. Specifically, I address administrative costs and the supposed statutory purpose of the antitrust laws.

I. THE CHICAGOAN AND NEO-BRANDEISIAN REVOLUTIONS

In the later 1800s, firms began to organize themselves in what are today known as trusts. These trusts aggregated power in industries and resulted in significant control of markets by few market participants. The Sherman Act was passed in 1890 as a response to concerns about this concentration of economic power, which was perceived as a threat to competition and innovation.[1] The Sherman Act prohibited certain types of anticompetitive conduct, such as price fixing and monopolization, and empowered the federal government to take legal action against companies that violate its provisions. The purpose of the Sherman Act was to promote competition and protect consumers from anticompetitive practices that could lead to higher prices, and reduced choice and quality in the marketplace.

But the Sherman Act failed to sufficiently curb anticompetitive behavior. The Clayton Act was passed in 1914,[2] just three years after the Standard Oil decision by the Supreme Court. In 1911, the government sued Standard Oil for a handful of monopolizing practices under Section 2 of the Sherman Act.[3] Standard Oil decreased prices when competition or the threat of competition was present and subsidized below-cost prices in competitive market with excess profits in less competitive markets.[4] The Court found such practices in violation of the Sherman Act and ordered the break-up of the trust.[5]

The Clayton Act bolstered the Sherman Act's weaknesses. Specifically, the Act included sections to limit predatory pricing, price discrimination, and potentially anticompetitive mergers and acquisitions.[6] Such interest in limiting price discrimination was further emphasized in the Robinson-Patman Act in 1936,[7] however, the Robinson-Patman Act has not seen the same level of enforcement as the Sherman and Clayton Acts to date.[8]

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[1] 15 U.S.C. §§ 1—7 (2012).

[2] *Id.* §§ 12—27 (2012); 29 U.S.C. § 52—53 (2012).

[3] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[4] *See* IDA M. TARBELL, A HISTORY OF THE STANDARD OIL COMPANY 6–7 (1904).

[5] *Standard Oil*, 221 U.S. at 81–82.

[6] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 723 (2017) (noting "The House Report stated that Section 2 of the Clayton Act was expressly designed to prohibit large corporations from slashing prices below the cost of production "with the intent to destroy and make unprofitable the business of their competitors" and with the aim of "acquiring a monopoly in the particular locality or section in which the discriminating price is made."); s*ee also* Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 MINN. L. REV. 311, 363 (2009).

[7] 15 U.S.C. §§ 13–13b, 21a (2012).

[8] Although this may be changing soon. Newly appointed FTC Commissioner Bedoya has emphasized interest in bringing agency action under the RPA. *See* Leah Nylen, *FTC's Bedoya Presses for Return to Fairness Over Efficiency*, BLOOMBERG L. (Sept. 22, 2022), https://news.bloomberglaw.com/antitrust/ftcs-bedoya-presses-for-return-to-fairness-over-efficiency.

But whether banning price discrimination is beneficial or not is well-debated.[9] From the perspective of the consumer, bans on price discrimination by producers is almost always beneficial for consumers. Most consumers will be guaranteed consumer welfare, in this sense, defined as the difference between the consumers' willingness to pay and the price they actually pay. For example, say two fliers demand a flight from Washington to California. One is willing to pay $500 for the ticket and the other is only willing to pay $300. If the airline is not able to charge based on their willingness to pay, they will charge one flat rate, say $300, meaning that at least one of the consumers will capture some consumer surplus. Producers aren't necessarily harmed by such a ban, as producer welfare does not decrease, here producer welfare is defined as the difference between the producers' willingness to sell and the price they actually sell at.

The debate gets interesting in the context of the Consumer Welfare Standard. The Consumer Welfare Standard seeks to protect consumer welfare. Therefore, it seems intuitive under the Consumer Welfare Standard that price discrimination should be banned. But price discrimination doesn't decrease welfare overall. It merely shifts the welfare captured between producers and consumers. If price discrimination is legal–and assuming the producers can predict or know what consumers' willingness to pay is–producers are able to decrease the margin between the consumers' willingness to pay and price actually paid. In other words, the amount consumer welfare decreases by is the same amount producer welfare increases by–a shift in welfare from consumers to producers.

Whether or not such a shift is harmful in itself is subject to extensive debate.[10] But there is much more to the price discrimination story. There are often scenarios where price discrimination is necessary for a firm to profitably survive.[11] Further, there are scenarios where price discrimination results in both an increase in producer welfare *and* consumer welfare.[12]

Over time, antitrust doctrine has changed significantly. In the 1960s through the late 1970s, the Harvard School of thought prevailed. The Harvard School emphasized a structuralist approach, a presumptive analysis interested in the number of firms in a market and their relative sizes.[13] Such an approach presumed that as a firm controls more of a market, the firm can act

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9 *See* James Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005); William J. Baumöl & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 ANTITRUST L.J. 661 (2003).

10 *See generally* Juan M. Elegido, *The Ethics of Price Discrimination*, 21 BUS. ETHICS Q. 634 (2011).

11 *Id.* at 638; Baumöl & Swanson, *supra* note 9.

12 Elegido, *supra* note 10, at 639–40.

13 *See* Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 348–49 (2007).

more anticompetitively.[14] Such a proposition was supported by early antitrust cases like *Standard Oil Co. v. United States*, where Standard Oil both controlled a more than significant share of the rail industry and also acted anticompetitively.[15]

While certainly in some scenarios such a presumption would correctly prevent anticompetitive conduct, for most situations such a presumption was unwarranted.[16] For example, in *United States v. Aluminum Co. of Am.*, the Second Circuit concluded that the Aluminum Company of America's concentration of market share was in violation of Section 2 of the Sherman Act despite the extensive cost savings consumers would experience through efficiencies gained from such increased market concentration.[17]

Structural presumptions have perhaps left their strongest market in *United States v. Philadelphia National Bank*. In *Philadelphia National Bank*, the 1963 court established a Clayton Section 7 presumption that if a proposed merger would result in a market share in excess of thirty percent, the merger was presumptively unlawful.[18] Such a presumption has been widely regarded as harmful to a healthy economy and doesn't comport with current economic understandings.[19] Despite all this, *Philadelphia National Bank* has not been overturned and is still good law, although the *PNB* presumption has been invoked significantly less over the years.[20]

Such a tradeoff would be resolved (to some extent) by the change in antitrust law towards the Consumer Welfare Standard advocated for by the Chicago School.

A. *The Chicago School's Consumer Welfare Standard*

Over the years, perhaps spurred by antitrust's presumptive enforcement, economic research and antitrust law and policy changed towards an effects-based approach. The Chicago school, pioneered by legends like Robert Bork, Frank Easterbrook, and Richard Posner, changed antitrust towards a more comprehensive framework. Instead of presuming that certain practices were

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[14] One of the most common critiques to the structural presumption approach is that they mistake causation for correlation. While there may be some relationship between a firm's market share and its anticompetitive behavior, the story is certainly more complex. For example, assuming that just because a firm controls greater ninety percent of a market doesn't mean it obtained that market share through anticompetitive means. It could be the case that that firm has a significantly superior product to its competition and thus captured the market share through competition.

[15] *See generally Standard Oil*, 221 U.S. 1.

[16] *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

[17] *Id.*

[18] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[19] *See* Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank*: *Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).

[20] *See generally Phila. Nat'l Bank*, 374 U.S. 321.

anticompetitive and therefore illegal, the school emphasized actual evidence tying the practice to anticompetitiveness. For example, many of the per se illegal practices covered under Section 1 of the Sherman Act like price fixing and market allocation were in one case or another shifted towards a more comprehensive rule of reason analysis.

Price fixing, for instance, which was traditionally considered to be anticompetitive in almost any instance, was subjected to a full rule of reason analysis in *Broadcast Music, Inc. v. CBS, Inc.*[21] In the 1979 case, Broadcast Music sold blanket licenses to CBS for set prices of many aggregated individual musical compositions, and CBS argued that such practice was per se illegal price fixing.[22] The Court held that the practice was not per se illegal because the alternative to the practice was not feasible.[23] Individual music composers could not reasonably license out their music to each person interested in listening to it.[24] Broadcast Music reduced the transactions costs of buying and selling music compositions for millions of producers (think musical artists) and consumers (think music listeners) such that a market could not exist but for such "price fixing."[25]

The shift away from presumptions of illegality also signaled a larger change in antitrust law. The burden-shifting regime began to dominate the jurisprudence. The government (or third-party Plaintiff) had to surpass an initial burden that a practice was anticompetitive. If that burden was met, then the burden shifted to the Defendants to show either that the practice was not anticompetitive (disproving the Plaintiffs evidence) or show that efficiencies derived from the merger would outweigh any anticompetitive harm.[26]

As the field of economics continued to develop, more and more evidence indicated that the market share and concentration in an industry was not a guarantee of anticompetitive behavior. In fact, significant market shares often signaled that a firm was the best in that industry. So long as a firm legitimately competed to obtain such significant market shares, they ought be rewarded with the supracompetitive profits derived through their legitimate acquisition of that power.

The supracompetitive profits are a driving factor of innovation, competition, and entry into markets. Firms have a strong incentive to enter markets where more than normal profits are being made. Such entry, invariably results in increased competition, resulting in a regression to the mean where such supracompetitive profits vanish over time.

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21 441 U.S. 1 (1979).

22 *Id.* at 6.

23 *Id.* at 7, 24.

24 *Id.* at 20.

25 *Id.* at 20–21.

26 Such burden-shifting regime is still in play today. Depending on what a case is brought under, there may be an additional third burden on the Plaintiffs to show that the procompetitive justifications purported by the Defendants were the least burdensome way of achieving such efficiencies. *See* NCAA v. Alston, 594 U.S. 69, 106 (2021).

The Consumer Welfare Standard as advocated for by the Chicago School has essentially controlled antitrust law and policy since the early 1980s up until recently. While there have been continued debates amongst the Harvard and Chicago School, the economic evidence supporting the Chicago School has lent it the most support.[27] Further, the Chicago approach almost always results in more in-depth analysis considered by the courts– Decreasing the likelihood of Type I and II errors.

B. *"Hipster" Antitrust*

Up until the Biden administration, antitrust law and policy has accepted the principles established by the Chicago School. The economic foundations have proven useful and accurate in antitrust and merger analysis. Merger retrospectives indicated that antitrust enforcement was not significantly under- nor over-deterring competitive conduct.[28] However, the Biden administration, and its principal antitrust actors, see things differently.[29] Lina Khan, Chair of the FTC and Jonathon Kanter, Assistant Attorney General for the Antitrust Division of the DOJ, have extensive literature criticizing the approach adopted in current antitrust jurisprudence, especially in the context of Big Tech.[30]

Chair Khan wrote the somewhat legendary Yale Law Journal Note "Amazon's Antitrust Paradox" outlining how Amazon strategically escaped antitrust enforcement through different weak spots in the current antitrust regime.[31] For example, Amazon escaped predatory pricing enforcement under the current antitrust regime.[32] Under the current jurisprudence, a predatory pricing case is established when (1) a firm charges for each unit of output below the cost of production of that unit; and (2) there is dangerous likelihood

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27 For a complete defense of the Consumer Welfare Standard, see The *Consumer Welfare Standard* in *Antitrust*: Outdated or a *Harbor* in a *Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition and Consumer Rights* of *the Subcomm. on the Judiciary*, 115th Cong. (2017) (statement of Honorable Joshua Wright, Exec. Dir. of the Glob. Antitrust Inst., George Mason Univ. Antonin Scalia Law School).

28 *See* Orley Ashenfelter et al., *Retrospective Analysis of Hospital Mergers*, 18 INT'L J. ECON. BUS. 5 (2011).

29 For an attack on "Hipster Antitrust," 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 (2018).

30 While there is no one definition of Big Tech, Big Tech almost always includes the following firms: Alphabet (Google), Amazon, Apple, Meta (Facebook), and sometimes Microsoft. These firms dominate their respective industries, often experience network effects, and are often accused of being anti-competitive in one way or another.

31 Khan, *supra* note 6, at 755–56.

32 *Id.* at 753 ("The fact that Amazon has been willing to forego profits for growth undercuts a central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth.226 In this way, Amazon's strategy has enabled it to use predatory pricing tactics without triggering the scrutiny of predatory pricing laws.").

that the firm would be able to recoup those losses in the future at supracompetitive levels.[33]

The Chicago School, notably Bork, argued that pricing below cost is irrational and rarely occurs.[34] Further, such below cost pricing comes with no guarantee that their competition would actually be induced to leave the market nor re-enter after the predator raises prices to recoup their losses. Such guaranteed upfront losses with only potential recapture prevents most firms from pricing predatorily.

As Chair Khan highlighted in her note, Amazon consistently priced predatorily and yet evaded prosecution through practices that did not clearly violate the test as set out in *Brooke Group*. For instance, Amazon changes prices more than 2.5 million times each day which makes determining whether they are charging below cost for a specific product difficult.[35] Further, it is possible that Amazon cross-subsidized between products. For example, Amazon may have "loss-led" to get purchasers to buy that product *and* others that were not sold at below cost.

Regardless, the Neo-Brandeisians advocate for a return to a more structuralist approach. In Chair Khan's case, she advocated for structural presumptions for predatory pricing over the current test as established by *Brooke Group*.[36]

Other reasons for such a return to structure have been presented in the context of Big Tech as well. Specifically, structural presumptions when network effects and control over data are present which (supposedly) allow for more anticompetitive conduct.[37]

But moving from the nearly four decades of consumer welfare standard supported by the Chicago School to the structural approach seen in the 1960s is no easy leap. Many of the problems outlined by the Neo-Brandeisians have more than one solution. In the following sections I will address the Total Welfare Standard as a feasible alternative to both the Consumer Welfare Standard and the Structuralist approach advocated for by the Biden administration.

II. THE TOTAL WELFARE STANDARD COMPARED TO THE CONSUMER WELFARE STANDARD AND THE STRUCTURAL APPROACH

Whether a shift away from the Consumer Welfare Standard is warranted is a question in itself. Clearly the Biden administration sees problems with the current antitrust jurisprudence and is thus changing the field. But moving

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33 *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–25 (1993).

34 *See* Khan, *supra* note 6, at 727 n.82.

35 *See id.* at 763 n.271.

36 *See generally id.* at 729.

37 *See generally* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325 (2003).

away from the Consumer Welfare Standard has not been seen in decades. Below I outline the Total Welfare Standard, the Consumer Welfare Standard and the Structural approach that is where the Biden administration seems to be shifting antitrust law and policy.

A. *The Total Welfare Standard*

The Total Welfare Standard is a close cousin of the Consumer Welfare Standard. In fact, somewhat confusingly, in Judge Bork's Antitrust Paradox, Bork referred to the Total Welfare Standard as the Consumer Welfare Standard.[38] But there are important distinctions between the two welfare standards. Hopefully obvious from their names, one emphasizes aggregate welfare overall whereas the other focuses on just consumers.[39]

The Total Welfare Standard's principal goal is to maximize total welfare. This means that the distribution of welfare between consumers and producers is not necessarily relevant under such a regime. For instance, under the Total Welfare Standard, the goal is to have the largest pie. The size of the slice of the pie that goes to the consumers does not necessarily matter. Similarly, the size of the slice of the pie that goes to the producers also does not matter. This differs from the Consumer Welfare Standard where the goal is not to have the biggest pie, but to have the biggest slice of the pie for consumers.[40]

There is extensive debate over which regime is better and there are certainly costs and benefits of each. For example, under the Total Welfare Standard, on aggregate, the world is a better place–there is more pie. But just because there is more pie does not mean consumers are getting any. It is possible that producers have figured out how to perfectly price discriminate such that the consumers get an infinitesimally small slice of pie, and the producers get almost the entire pie. This is contrasted by the Consumer Welfare Standard where consumers are guaranteed their substantial slice of the pie at the cost of maximizing total welfare amongst consumers and producers.

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[38] *See* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19 (2014).

[39] Total welfare is defined as the aggregate of consumer welfare and producer welfare. *See* Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, Luncheon Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/ public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

[40] *See id.*

B. *The Total Welfare Standard compared to the Consumer Welfare Standard*

Under the Consumer Welfare Regime there are two conventional burden shifts in the regime. The first burden is placed on the Plaintiff to prove that the Defendant has acted anticompetitively. If the Plaintiff successfully shifts their burden, the Defendants then must either disprove the evidence the Plaintiffs provided supporting their anticompetitive conclusion or show that the efficiencies derived from the action outweighs any anticompetitive effects.

Unfortunately, this "efficiencies defense" has not fared well in the antitrust jurisprudence. Under the Consumer Welfare regime, efficiencies defenses are known to be losing cases.[41] In fact, an article examined twenty-five years of Section 7 Clayton Act cases in which efficiency defenses were raised and found that courts are not actually completing the rigorous comparison between procompetitive justifications (efficiencies) and anticompetitive harms.[42]

Some proponents of the Total Welfare Standard argue that the policy aspirations of the Consumer Welfare Standard can be better served by the Total Welfare Standard. For instance, such redistributional efforts can be achieved through other means after the pie has been maximized by the Total Welfare Standard rather than the smaller size seen under the Consumer Welfare Standard.[43]

C. *The Total Welfare Standard compared to the Structural Approach*

The Neo-Brandeisian Approach advocates for a return to the 1960s Structuralist rules that allow simple and quick enforcement by the agencies and courts without regard to economic evidence. But ultimately, it appears that the Neo-Brandeisian Approach is "fixing" the antitrust problems seen in Big Tech that the Consumer Welfare Standard could not address. "In order to capture . . . anticompetitive concerns, we should replace the [C]onsumer [W]elfare [Standard] with an approach oriented around preserving a competitive process and market structure."[44] For example, Amazon's seeming

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41 *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (This is the primary case that won on an efficiencies defense).

42 *See* Jamie Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1695, 1698 (2010) ("Although courts claim to be balancing merger generated efficiencies with other negative factors affecting market competition, they are not in fact doing so.").

43 *See* Kenneth Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL'Y INT'L 28 (2006).

44 *See* Khan, *supra* note 6, at 803.

evasion of predatory pricing cases was one of the central messages of Chair Khan's note.

Antitrust concerns often arise when barriers to entry are significant. This is extremely prevalent in Big Tech markets. For example, Meta, formerly Facebook, has purportedly invested over $36 billion dollars into building the metaverse.[45] If such an investment pays off and Meta controls the premier metaverse or virtual reality platform, it will be extraordinarily difficult for competition. Very few firms have access to the many-billion-dollar investment Meta has made and thus success may result in monopolistic power in the market.

While the Neo-Brandeisians seek to prevent such acquisition of market power in the first place, as evidenced by the FTC challenge of the Meta acquisition of Within,[46] under a Total Welfare Standard approach, such conduct would be evaluated by comparing all the costs and all the benefits of Meta's action. The case is somewhat similar to *Verizon v. Trinko*, where the Supreme Court held that Verizon had no duty to share their infrastructure with their competition.[47]

In *Trinko,* Verizon was a major competitor in the telephone and internet service industries. Verizon had an extensive network of telephone lines that allowed them to provide service across the nation. However, Verizon refused to deal with competitors and contract with them so they could use Verizon's network.[48] The Supreme Court held that Verizon committed no antitrust violation and that they had no duty to deal with their competitors.[49] Further, Trinko argued that under the essential facilities doctrine–a principle that if one market participant controls an essential item to enter a market and refuses to deal with competition, the essential facility holder may be in violation of the Sherman Act–Verizon controlled an essential facility, the telephone lines, and thus violated the antitrust laws.[50] The Court held that the doctrine was inapplicable as Verizon was not considered a dominant firm in the market as there was significant competition.[51]

In the context of Meta and the developing metaverse, the Total Welfare Standard would suggest that all the costs and benefits should be considered. For example, there is currently little to no market on or in any metaverse. If, by allowing Meta to experiment, even at a significant price tag, a market

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45 *See* Jyoti Mann, *Meta Has Spent $36 Billion Building the Metaverse But Still Has Little to Show For It, While Tech Sensations Such As the iPhone, Xbox, And Amazon Echo Cost Way Less,* BUS. INSIDER (Oct. 29, 2022), https://www.businessinsider.com/meta-lost-30-billion-on-metaverse-rivals-spent-far-less-2022-10.

46 *See* Complaint, Meta Platforms, Inc., FTC Docket No. 3:22-cv-04325 (July 27, 2022).

47 *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004) (holding "we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.").

48 *Id.* at 403.

49 *Id.* at 411.

50 *Id.* at 410.

51 *Id.*

emerges, welfare is certainly gained by both the producers and consumers in that new market. Meta would likely have some monopoly power in the market that develops, perhaps through information, perhaps through fees, or otherwise. Under the Total Welfare Standard, the answer seems straightforward. Meta created something of value, and even though there will likely be some anticompetitive concerns in that market, there is still welfare created; therefore, allowing such a market to develop is warranted as the pie is growing.

This is contrasted by the Neo-Brandeisian/structuralist approach. In the Federal Trade Commission Meta/Within Complaint, there are clear concerns about potential anticompetitive concerns. If the Federal Trade Commission prevails, the result is delayed or halted development of the metaverse in the name of preventing potential anticompetitive behavior in that metaverse. It seems obvious that such a goal is at odds with the antitrust jurisprudence and has not been accepted by any court to date.

III. THE TOTAL WELFARE STANDARD AND BIG TECH

The Total Welfare Standard can succeed where the Consumer Welfare Standard and structural approach cannot, especially in Big Tech, where network effects, platform power, and deep pockets are practically a certainty.

Big Tech is unique in what the firms provide. Take Amazon for example. Amazon not only functions as a marketplace, but also competes in that marketplace and has an almost completely integrated supply chain. Amazon collects data on its platform which enables it to outcompete most of its sellers. For example, in the Amazon market for chairs, Amazon knows at what price point chairs sell at optimally, the optimal design for those chairs, and a slew of other variables that consumers care about when purchasing chairs. Further, Amazon has access to all of the data of its consumers and sellers, but those same consumers and sellers only have a small window into that complete dataset.

This means that if Amazon enters the chair market on their own platform, they are poised to make the optimal product for consumers that will outperform its competition. Further, Amazon can position their products above their competition without cost and use other methods to promote their product above their competition that their competition cannot outcompete. Finally, because of Amazon’s highly integrated supply chain, their cost of producing and delivering their own products will almost invariably be cheaper than their competitions. This means that their competition can likely not compete on price alone as Amazon has a lower marginal cost per unit.

This is similar to app stores like the Apple App Store or the Google App Store. Apple and Google have complete information about what apps are popular, why they are popular, what consumers demand, and how they can outperform their competition if they ever enter the market. For example, think about your iPhone before it had the flashlight integrated into the software. An app, that was either paid for or had ads, was required to use your

camera light as a flashlight. Apple realized the significant demand for such a product through the many sales of the apps and integrated a flashlight into the iPhone operating system. Another example would be the maps app, where initially the Apple Maps app did not have traffic data or reports about accidents or police, but after Apple realized the significant demand generated through competition like Waze, a maps app that allows users to update the map in real time for events like traffic, police, accidents, or otherwise, a similar feature was integrated into the Apple Maps app.

Big Tech has a monopoly on information and control over the platform for which sellers and consumers use their platform. Establishing such a platform is extraordinarily expensive and is unpredictable. The Total Welfare Standard would suggest that, while such expenses may be significant, and there may be potential anticompetitive harms, comparing the net harms with net benefits is what is relevant.

While it certainly is true that many of the current Big Tech firms hold a dominant market position as they currently stand, there is no guarantee that they maintain their position. This may be evidenced by their continued investment into innovation. For example, if Meta/Facebook had a monopoly over their market, it would be unlikely that they would invest tens of billions of dollars into development of a new product for consumers.

Further, extensive research has examined where welfare is captured by innovative products. Schumpeterian profits are defined as those profits that arise when firms are able to appropriate the returns from innovative activity.[52] One study estimated that innovators only capture 4% of the total social surplus from their innovations.[53] Such a conclusion suggests that even the most dominant firms that are innovating are largely contributing to Consumer Welfare, and to a lesser extent, Total Welfare.

One other advantage some Big Tech Firms have is their ability to cross-subsidize. Cross-subsidizing or cross-subsidization is the process of using one arm of a business to fund the development and proliferation of another arm of the same business. For example, Meta was extremely successful in the social media market. Using funds raised by Facebook, Meta can afford its expansion into the metaverse. Cross-subsidization is a very common business practice and antitrust concerns typically don't arise unless the cross-subsidization leads to anticompetitive behavior.

As discussed in Part I.B, the current test for predatory pricing is established by *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.*, where a firm must show below-cost pricing and a dangerous probability of recouping.[54] In the context of Big Tech firms, the large platforms are particularly advantaged in information and their ability to cross-subsidize. For example,

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52 William Nordhaus, *Schumpeterian Profits and the Alchemist Fallacy* 1 (Yale Working Papers on Economic Applications and Policy, Discussion Paper No. 6, 2005).

53 *See id.* at 16–17.

54 509 U.S. 209, 222 (1993).

hypothetically, Amazon could be earning significant profits in the book market and cross-subsidize their Kindle's such that their cost is significantly lower than any other competing ebook reader.[55] This may drive the competitors out of the market.

Chair Khan emphasized this point in her note suggesting that the Chicago School-backed test for predatory pricing was not realistic and that many of the practices seen by Big Tech firms would be considered predatory by any reasonable definition.[56] Under the Total Welfare Standard, Chair Khan's position would be supported. Instead of the current test requiring that predatory pricing cross a significant bar (dangerous probability of recoupment), courts would be inclined to examine all the evidence. The Total Welfare Standard would ensure that neither Type I nor Type II errors would occur in practices that are potentially predatory. For instance, perhaps a firm like Meta charges below cost for their virtual reality headset to draw customers into their metaverse. The first requirement of the *Brooke Group* test would be met as Meta is charging below-cost. But say Meta never planned on recouping those lost earnings through increasing the price of their virtual reality headset. Under the second requirement of the *Brooke Group* test, there is no intent nor dangerous probability of recoupment through increased prices, therefore the practice would not legally be considered predatory. However, let's say it's clear that Meta plans to recoup their investments not through the customers paying directly, but through ad services in the metaverse.

Under the Total Welfare Standard, the concerns that are missed by the *Brooke Group* test, established by the Chicago School, and that are highlighted by the Biden administration can be captured. A judge may look to all the evidence, see that Meta is predatorily pricing, albeit indirectly, and find that the practice is in violation of the Sherman Act. This is the primary benefit of the Total Welfare Standard.

But such concerns are not guaranteed. The reason predatory pricing cases are so rarely brought is because the probability of recoupment is extraordinarily unlikely. As soon as Amazon drives the price of their Kindles up to a sufficient point, their competition that previously left the market will re-enter.

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[55] For a more complete analysis of predatory pricing, Amazon, and ebooks, *see* Khan, *supra* note 6, at 774–83.

[56] *See* Khan, *supra* note 6, at 730 n.106 (arguing "[a]s some commentators have noted, the Court's reliance on scholarship advocating a retrenchment of enforcement against predatory pricing schemes did not reflect a dearth of opposing views.; *see, e.g.*, F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences, in How The Chicago School Overshot The Mark* 30, 33 (Robert Pitofsky ed., 2008) ("Already by the time of the Matsushita decision, there was a substantial scholarly literature documenting what should have passed for predation by any reasonable definition and showing the rationality of sharp price-cutting by a dominant firm to discourage new entrants.")).

IV. ADDRESSING COUNTERARGUMENTS

A. *The Total Welfare Standard is impracticable as courts do not have the knowledge or resources to complete requisite analyses*

In an ideal world, the courts would be able to analyze each potential merger or potentially anticompetitive practice with great scrutiny. The courts would completely consider the costs and benefits of the action itself as well as any implications it may have on other firms. Furthermore, the courts would accurately compare any anticompetitive effects with any procompetitive effects and determine, on aggregate, whether the practice is net beneficial.

For better or worse, we are not in that world. The courts are not only limited in their knowledge, but they are also limited in their resources. The antitrust regime debate fundamentally centers on this discussion. Because courts cannot always embark upon complete analyses,[57] shortcuts must be made that make the task of the judiciary possible. Such debate aligns closely with the rules versus standards debate seen throughout the legal field more generally. As has been discussed above, some of these shortcuts come in the form of rules, like presumptions of illegality. But over time rules generate exceptions.

For example, in the landmark *United States v. Microsoft*, the D.C. Circuit was asked to consider whether Microsoft's practice of tying its internet browser to its operating system was per se illegal, as had been the case with tying arrangements until that point.[58] The court carved out an exception that held tying arrangements involving software platforms should be considered under the rule of reason analysis–not per se illegal. From there, more exceptions have appeared for tying arrangements and the once strong rule of per se illegality has shifted towards a more standards-based approach.

The Biden administration continues to emphasize a return to structuralism. More per se rules prohibit certain mergers or actions.[59] Accounting less for efficiencies or even not accounting for efficiencies in certain situations. Whereas the Consumer Welfare Standard and to a larger extent the Total Welfare Standard emphasize a focus on in-depth analysis by the courts. The Total Welfare Standard specifically emphasizes evaluating everything.[60]

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57 In practice, even complete rule of reason analysis is not complete. The courts have never actually econometrically calculated the relative anticompetitive harms against the procompetitive benefits from a proposed merger or otherwise.

58 *See generally* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).

59 For example, the FTC recently proposed a rule to ban all non-compete clauses. This is noteworthy because the proposed rule has practically very few exemptions. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. 910).

60 The Total Welfare Standard is also commonly referred to as the Aggregate Economic Welfare Standard. *See* Wilson, *supra* note 39.

Practically speaking, United States antitrust law accepts that courts cannot evaluate everything. But as a fundamental principle, it seems logical that if the burden of considering additional evidence or information is less than the value derived from that consideration, the courts should consider such. For example, another rule that arose out of the *Philadelphia National Bank* decision was that not all efficiencies are treated equally.[61]

Revisiting this *Philadelphia National Bank* presumption would be a practical next step in approaching the total welfare standard that better achieves the goals of the Biden administration. Next to the thirty percent market share burden shifting *Philadelphia National Bank* presumption is the out-of-market efficiencies will not be considered for merger analysis *Philadelphia National Bank* presumption.[62] Professor John Yun outlines the debate over considering out-of-market efficiencies and argues that while administrative costs may increase, the costs will not be so burdensome that the costs outweigh the benefits.[63] For instance, out-of-market efficiencies related to a merger are likely closely related to the substantive reasons for that merger. Therefore, while additional documents, depositions, and other evidence will increase, it will not be as significant as collecting a completely new set of documents, et cetera.

Reconsidering such a presumption would allow for more accurate decisions to be made in merger analysis. Instead of considering all the anticompetitive costs and only some benefits of a proposed merger, evaluation of all the anticompetitive costs and *all* the procompetitive justifications would produce welfare maximizing results.

Further, in many cases, a Total Welfare Standard is practical with little change beyond the jurisprudence. For instance, naked price fixing without evidence of efficiencies and many vertical practices, including exclusive dealing or tying arrangements, may be better resolved by the Total Welfare Standard.[64]

However, some argue that the practical import of a change from the current Consumer Welfare Standard to the Total Welfare Standard would not result in significant changes as rarely do judicial decisions lie on the substantive differences.[65]

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61 *See* 374 U.S. 321.

62 *See id.* at 363–64, 370–71.

63 *See generally* John Yun, *Reevaluating Out of Market Efficiencies in Antitrust*, 54 ARIZ. ST. L.J. 1261 (2022).

64 *See* Wilson, *supra* note 39.

65 *See, e.g.*, Herbert Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust* 9 (U. Iowa Coll. of L. Legal Stud. Rsch. Paper Series Working Paper, 2011) (stating "[t]he volume and complexity of the academic debate on the general welfare vs. consumer welfare question creates an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy. Few if any decisions have turned on the difference."); Heyer, *supra* note 38, at S31 (stating "[t]his is undoubtedly true, and, at least in the United States, courts have not spent much time wrestling with distinctions between consumer and total welfare. This may, however, be partly because federal

B. *The statutory purpose of the Sherman and Clayton Acts were not passed to maximize welfare*

Extensive discussion arises about the statutory and legislative history associated with the Sherman, Clayton, Robinson-Patman, and Federal Trade Commission Acts. One might conclude that the legislation is extensive and therefore looking to the statutory history helps clarify the ambiguities in the statutes. Such a conclusion could not be more inaccurate. The Sherman and Clayton Acts are notorious for being extremely vague.[66]

Because the statutes are extraordinarily indirect in their guidance, the antitrust field is largely guided by common law. Look no further than the *Philadelphia National Bank* presumption or even the Consumer Welfare Standard itself. Nowhere in any antitrust statute is the Consumer Welfare Standard mentioned once.[67] Nonetheless, proponents of each school of thought fervently argue that the statutory and legislative history of each relevant statute clearly supports their propositions. While there are certainly merits to these claims in some instances, such discussion is largely unhelpful given how the antitrust law has developed.

One common argument against a Total Welfare Standard–and more often made against the Consumer Welfare Standard–is that there is no legislative support for such a regime. Pushing back on this argument, the same could be said about the structuralist approach proposed by the Biden administration. While there is historical evidence suggesting that the antitrust laws were meant to prevent anticompetitive conduct, there is limited support suggesting that the antitrust laws were meant to impose arbitrary rules on size of corporations without reference to competition.[68]

Further, US antitrust is a common law field.[69] While there is a statutory scheme, the actual law as applied has been developed through cases and controversies as well as through action brought by the Federal Trade Commission. Therefore, while it may be accurate that the Consumer Welfare Standard or Total Welfare Standard have no explicit backing in the Sherman or

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competition agencies and defendants know that courts are not receptive to defenses when it appears that end users will be harmed."); Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017) ("[E]fficiency claims . . . are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful. The decisions that credit claimed efficiencies as justification typically also find that the government failed to make out its prima facie case against the merger.").

66 *See generally* Matthew Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709 (2018).

67 *See, e.g.*, 15 U.S.C. §§ 1—7 (2012).

68 *See* Yun, *supra* note 63, at 1263 n.7 (quoting Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontent*s, 11 HARV. L. & POL'Y REV. 235, 277 (2017)) ("Many legal scholars have studied the major antitrust statutes and shown that Bork's argument about efficiency is not supported by the legislative history.").

69 *See* 15 U.S.C. § 1 (2012).

Clayton Acts' legislative history, there is no mandate for such as supported by the loose language in the antitrust laws.

Such a proposition is supported by the Supreme Court. In *Reiter v. Sonotone*, the Court, relying on Bork's Antitrust Paradox, held that "Congress designed the Sherman Act as a consumer welfare prescription.[70] This was reaffirmed by the 2010 Horizontal Merger Guidelines.[71] For example, in Section 1 of the Horizontal Merger Guidelines, the guidelines state, "[a] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or *otherwise harm customers* as a result of diminished competitive constraints or incentives."[72]

Further, the reliance on the common law has proven extremely beneficial to the development of antitrust law in line with economic understandings. Perhaps this is the largest problem with accepting a structuralist approach. Time and again, practices that were once deemed unambiguously anticompetitive are shown to have some competitive use. The Total Welfare Standard emphasizes that when a merger or practice is evaluated, the court should look to all of the facts of the case instead of jumping to some conclusion that may ultimately harm welfare and deter innovation and competition.

As a final comment on this topic, the Federal Trade Commission has proposed a rule to ban almost all noncompete clauses.[73] The Federal Trade Commission cites studies that suggest these clauses largely harm competition and the labor market, however the Federal Trade Commission fails to address the fundamental question: if these clauses are so detrimental, why have they not been banned to date and why do so many employers use them? I suspect that noncompete clauses are a tool used by employers to protect their investment into employees.[74] By banning all noncompete clauses, it is foreseeable that unemployment will increase, wages will decrease, and welfare will be harmed.[75] There are certainly instances where such noncompete clauses are

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70 442 U.S. 330, 343 (1979) (internal quotations omitted).

71 *See* Jan Rybnicek & Joshua Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – VOLUME II n.8 (Nicolas Charbit et al. eds., 2014) (highlighting "[w]hether efficiencies should be considered in merger evaluations was the topic of much debate in the second half of the last century. Section 7 of the Clayton Act makes unlawful transactions the effect of which "may be substantially to lessen competition." 15 U.S.C. § 18 (2012). The Clayton Act does not expressly provide for the federal courts and antitrust agencies to weigh efficiencies benefits against likely anticompetitive harms when determining whether a proposed transaction violates Section 7. Although consideration of efficiencies benefits was discussed briefly in the first several iterations of the Horizontal Merger Guidelines, it was not until 1997 that the Guidelines detailed how efficiencies should be incorporated into merger analysis in the United States.").

72 *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, § 1 (2010) (emphasis added).

73 *See* 88 Fed. Reg. 3,482.

74 *See generally* Brandon Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L. J. 1295 (2005).

75 For an in depth discussion, *see* Bruce Kobayashi, *Antitrust, Non-Competition, and No-Poach Agreements in Digital Industries*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL

unnecessarily stifling competition and restricting movement in the labor market. Under a Total Welfare Standard, those instances could be addressed independently. The times where the noncompete clauses are used to protect their investment into employees would likewise be considered independently and likely upheld as a legitimate business interest that maximizes welfare.

CONCLUSION

In summary, there are common goals in antitrust. The primary goal is to protect competition in the marketplace. While the Biden administration appears to be interested in a more structural approach to antitrust enforcement, a total welfare standard better comports with the antitrust jurisprudence to date and can accomplish many of the goals of the Biden administration. Maximizing the total welfare of society accounts for both the price and non-price effects of mergers or potentially anticompetitive behaviors on all time horizons. Further, it literally makes the world a better place relative to the consumer welfare standard and the structural approach. Finally, it is practicable to implement. While courts may need to invest more time and resources into deciding antitrust matters, such investment is necessary, especially in the time when many Big Tech firms appear to be dominant in their respective markets.

ECONOMY 707, 715 (2020) (noting "whether the observation of reductions in wages and employee mobility is sufficient to conclude that NCAs are anticompetitive, these results demonstrate that a change in welfare in an input market does not directly map onto a similar change in consumer welfare in the output market, and may be negatively correlated with both consumer and total welfare. Indeed, such a negative relationship will be common when NCAs are used by firms in a procompetitive way to lower costs and increase quality by reducing agency costs. The point is that the procompetitive use of NCAs can result in less mobility and lower wages relative to a setting in which use and/or enforcement of NCAs are prohibited.").