UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

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Antitrust Policy for the Conservative[1]

May 1, 2025

Among the most needful projects for contemporary conservatives is a critical reexamination of our view and treatment of power—both economic and political. Despite our unanimity about the threat unchecked political power poses to individual liberty and self-governance, there has been a willful blindness to how the acquisition and maintenance of economic power manifests in equally problematic ways. When economic relationships are shaped not by free exchange, but by coercion and exclusion, the distinction between private and public power erodes.

Conservatives must reaffirm that concentrated economic power is just as dangerous as concentrated political power, and that rightly ordered political power is a necessary and appropriate tool for restraining excessive economic power and preserving liberty. This approach requires moving beyond the modern tendency to conflate free markets with the unsupervised exercise of private power.

This observation is especially relevant to current debates in the United States over antitrust law and competition policy and calls for a reconsideration of what the conservative approach to antitrust should look like. The antitrust laws reflect the fundamental American values of free enterprise and economic competition. A free market, properly understood, is a system of economic order that is rooted in fair dealing and voluntary exchange. The antitrust laws are the primary mechanism for ensuring economic power does not calcify into anarchistic private tyranny. Free markets are not self-perpetuating—they require law enforcement to protect and maintain them.

For these reasons, conservatives should reject a laissez-faire or libertarian approach to antitrust law that inverts first principles, rejects the responsibilities of governance, and reflexively turns a blind eye to efforts to accumulate private power at any cost. We must recognize that antitrust law's endorsement of free and open markets is a legal and moral choice—not just an economic choice—that is rooted in our national commitment to human flourishing and the rule of law.

By reaffirming these first principles and demanding an enforcement approach that is historically grounded, conservatives have an unprecedented opportunity to provide clarity and certainty around what antitrust law is and how the law should be enforced. This effort means reinvigorating how we understand and apply concepts such as competition, consumer welfare,

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[1] Mark R. Meador is a Commissioner on the Federal Trade Commission. He is especially grateful to Daniel Graulich, Daniel Francis, and Kara Frederick for their feedback while drafting this paper. The views contained herein are his alone, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. An abridged version of this paper was presented as a speech at an event hosted by The Conservative Partnership Institute and American Compass on May 1, 2025.

economics, efficiency, and innovation. Conservatives should also acknowledge the political importance of antitrust, as well as the limits of antitrust as a political tool. This paper makes the case for such a reinvigorated approach, and provides the broad outlines for a framework to move American antitrust policy in a more effective and authentically conservative direction.

While the debate over the meaning of conservatism is well worn, this thesis requires a definition. By conservatism I mean the political, religious, and cultural project in the West of pursuing the just ordering of society that best facilitates human flourishing. This was first called "conservative" because it began as an effort of defense against 18th century radicals who sought to tear down what had been built over generations—to conserve the good in society and law and protect it from the solvent forces of "enlightened" radicalism.[2] It prioritized tradition and custom over newness for newness' sake, and beauty and virtue over cold, calculated efficiency. That effort has largely failed, and today the project might better be described as a restoration, but the animating values are the same. Among those values is a deep aversion to concentrated power and its potential for the corruption of justice and encouragement of vice.

I. Conservatism & Power

Big is bad. When referring to the size of the government or political power, this statement is not only uncontroversial among conservatives, it is axiomatic. It is the predominant force behind our support for the Constitution's ingenious system of checks and balances, federalism, and the overall preference for small government. Yet, for some reason, when concern about bigness is applied to private businesses or economic power, it suddenly becomes taboo. This is irrational and must change.

It is not that bigness offers no benefits at all—economies of scale are real. But size and the power that often accompanies it do in fact warrant greater scrutiny and concern, particularly of the mechanisms by which that power is acquired and entrenched.[3] To insist that just because a business is economically powerful does not mean it will behave badly is akin to expressing surprise that a gambler would place a risky bet after you gave him unlimited chips. Or that a government with unrestrained power won't *necessarily* infringe upon the rights of its citizens. Technicalities more often obscure the truth than lead us to it.

A concern with bigness and the abuses of concentrated power is behind many of the maxims and principles that have reliably guided Western political thought and American constitutional theory for centuries. Perhaps first among these is Lord Acton's famous dictum that, "Power tends to corrupt, and absolute power corrupts absolutely."[4] The very concept of federalism itself, possibly the single strongest thread uniting the various ideological factions of the American right, is premised upon the recognition that the threat to liberty increases as the concentration of power

[2] *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

[3] One might object that there is a difference between bigness that results from the free choices of economic actors in a free market and that of an oppressive government that limits choice, but the difference is only in the genesis not the resulting risk of the accumulated power. It is the exercise of power, not its origin, that can threaten liberty.

[4] John Acton, *Letter to Bishop Mandell Creighton* (April 5, 1887) published in HISTORICAL ESSAYS AND STUDIES, edited by J. N. Figgis and R. V. Laurence (Macmillan 1907).

grows, and that human flourishing is best encouraged when power is devolved to the lowest practicable level.

As James Madison stated in Federalist 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[5] Two centuries later, the Supreme Court would observe that, "The framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."[6] One might even say the Constitution was the first structural remedy.

Our founders also understood that the concerns about political power apply no less to unchecked economic power. In a letter to Thomas Jefferson in 1788, James Madison described monopolies as "justly classed among the greatest nuisances in Government."[7] While admitting a need for grants of monopoly in the realm of copyrights and patents, Madison insisted that, "Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions."[8]

Similarly, Jefferson recognized the readiness of corporations to leverage government to expropriate privileges for themselves at the expense of individual rights, stating, "I hope we shall crush … in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."[9]

In the same year as America's founding, Adam Smith described monopolies as,

> an overgrown standing army . . . they have become formidable to the government, and upon many occasions intimidate the legislature. The member of parliament who supports every proposal for strengthening this monopoly, is sure to acquire not only the reputation of understanding trade, but great popularity and influence with an order of men whose numbers and wealth render them of great importance. If he opposes them, on the contrary, and still more if he has authority enough to be able to thwart them, neither the most acknowledged probity, nor the highest rank, nor the greatest public services, can protect him from the most infamous abuse and detraction, from personal insults, nor sometimes from real danger, arising from insolent outrage of furious and disappointed monopolists.[10]

While monopolies in the 18th century were almost exclusively creations of the state, a grant bestowed by the legislature, Madison's and Smith's objections were not merely that the

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[5] THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961) (hereinafter THE FEDERALIST).
[6] *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).
[7] James Madison, *Letter to Thomas Jefferson* (Oct. 17, 1788). https://founders.archives.gov/documents/Jefferson/01-14-02-0018.
[8] *Id.*
[9] Thomas Jefferson, *Letter to George Logan* (1816).
[10] ADAM SMITH, THE WEALTH OF NATIONS 438 (New York: Modern Library, 1937) (1776).

government would do such a thing, as opposed to the conduct of private actors. Their objections were to the concentration of power inherent in monopoly itself—a concentration of economic power that, like the concentration of political power so assiduously combatted in the Constitution, risked subjecting the many to the will of the few.

Republican Senator John Sherman picked up this thread a century later. Speaking on the Senate floor in support of the landmark antitrust bill that would come to bear his name, he said,

> If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[11]

President Theodore Roosevelt echoed this sentiment in his 1901 State of the Union address in remarks that are eerily applicable to our own time over a century later:

> There is a widespread conviction in the minds of the American people that the great corporations known as trusts are in certain of their features and tendencies hurtful to the general welfare. This springs from no spirit of envy or uncharitableness, nor lack of pride in the great industrial achievements that have placed this country at the head of the nations struggling for commercial supremacy. … It is no limitation upon property rights or freedom of contract to require that when men receive from Government the privilege of doing business under corporate form, which frees them from individual responsibility, and enables them to call into their enterprises the capital of the public, they shall do so upon absolutely truthful representations as to the value of the property in which the capital is to be invested. Corporations engaged in interstate commerce should be regulated if they are found to exercise a license working to the public injury. It should be as much the aim of those who seek for social betterment to rid the business world of crimes of cunning as to rid the entire body politic of crimes of violence. Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with these institutions.[12]

By 1908, this sentiment and support for antitrust enforcement was firmly embedded into the Republican platform. William Howard Taft, in his remarks while accepting the Republican presidential nomination that year, described "accumulating evidence of the violation of the [Sherman Act] by a number of corporations" as one of several events that "quickened the

[11] 21 CONG. REC. 2457 (daily ed. Mar. 21, 1890) (statement of Sen. Sherman)).

[12] Theodore Roosevelt, *Annual Message of the President Transmitted to Congress*, December 3, 1901 https://history.state.gov/historicaldocuments/frus1901/message-of-the-president.

conscience of the people, and brought on a moral awakening among them that boded well for the future of the country."[13]

That view remained part of the DNA of the Republican Party, even after the passage of the Clayton and Federal Trade Commission Acts. Calvin Coolidge summed up his view of the antitrust laws this way:

> [The Sherman Act] is little more than a codification of the common law, which resulted from centuries of bitter commercial experience. Its object is mainly to prevent those conspiracies in restraint of trade, commonly called monopolies, which always have in them an element injurious to the public welfare. Otherwise no legal monopoly exists.
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> If monopolies were permitted, a few men in key positions would soon control our economic and probably our political destinies. Open opportunity would be gone. About the only remedy would be a revolution. The alternative would be a rigorous and blighting government control.[14]

And yet, despite this intellectual heritage, the common refrain from many on the right has been that economic and political power are fundamentally different. The usual objections are that corporate power does not pose a threat to liberty because businesses lack the state's monopoly on force, economic transactions are purely voluntary, and corporations have no power to determine political liberties or rights.

The 21st century has proven each of these objections hollow. That a corporation cannot compel anything at the point of a gun is cold comfort when it can cut you off from commerce, speech, and even your bank account. Human flourishing can be crushed by much less than a standing army. Likewise, economic transactions with a monopolist—or dominant competitors acting in concert—are anything but voluntary; by definition there is no meaningful alternative, and the terms imposed can be coercive. And while all of this does not technically alter the rights and liberties secured or recognized by the Constitution, when the state allows others to infringe upon what it itself has acknowledged as sacred it renders the promise hollow.[15]

Senator Mike Lee, the lead Republican on the Senate Antitrust Subcommittee, put it more concisely in a 2021 address to the Federalist Society:

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[13] William Howard Taft, Address Accepting the Republican Presidential Nomination (July 28, 1908), available at https://www.presidency.ucsb.edu/documents/address-accepting-the-republican-presidential-nomination-0.

[14] Calvin Coolidge Says: Dispatches Written by Former-President Coolidge and Syndicated to Newspapers in 1930-1931 (Calvin Coolidge Memorial Foundation) (November 13, 1930), available at https://coolidgefoundation.org/resources/calvin-coolidge-says-november-13-1930.

[15] Joseph Schumpeter even tied this view of power to Marxism: "Many socialist writers besides Marx have displayed that uncritical confidence in the explanatory value of the element of force and of the control over the physical means with which to exert force. Ferdinand Lassalle, for instance, has little beyond cannons and bayonets to offer by way of explanation of governmental authority. It is a source of wonder to me that so many people should be blind to the weakness of such a sociology and to the fact that it would obviously be much truer to say that power leads to control over cannons (and men willing to use them) than that control over cannons generates power." JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 17 n. 10 (Harper Perennial 2008) (1942).

> It should be intuitive for the conservative that freedom from state tyranny has little worth if the state abandons you to the whims of monopolists. We must reject the cold and shallow conception of liberty that would congratulate a man for throwing off the shackles of big government only to be encumbered with those of big business.[16]

At root here is a critical distinction between conservatism and libertarianism, something many on the right have forgotten.[17] In the mid-20th century, conservatives and libertarians largely set aside their differences to combat a common enemy—the growing trend of expansive state power, most especially communism—in a movement referred to as fusionism.[18] This alliance was politically very successful, but unfortunately the fusion also led to confusion as many began to equate the two worldviews.

Today, the differences between conservatism and libertarianism are mostly thought to reside in social policy. The temptation for conservatives to acquiesce to libertarian economic policy, and to eschew the government's necessary role in preserving free markets, has been especially strong in antitrust law. We have forgotten that conservatives have historically viewed economic policy differently from libertarians as well. Judge Robert Bork, who called libertarians "quasi- or semi-conservatives," was unequivocal on this point:

> Free market economists are particularly vulnerable to the libertarian virus. They know that free economic exchanges usually benefit both parties to them. But they mistake that general rule for a universal rule. Benefits do not invariably result from free market exchanges. When it comes to pornography or addictive drugs, libertarians all too often confuse the idea that markets should be free with the idea that everything should be available on the market. The first of those ideas rests on the efficacy of the free market in satisfying wants. The second ignores the question of which wants it is moral to satisfy. That is a question of an entirely different nature. I have heard economists say that, as economists, they do not deal with questions of morality. Quite right. But nobody is just an economist. Economists are also fathers and mothers, husbands or wives, voters and citizens, members of communities. In these latter roles, they cannot avoid questions of morality.[19]

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[16] Senator Mike Lee, closing address at Federalist Society conference on "The Antitrust Paradox: Where We've Been and Where We're Going" (Sept. 15, 2021), available at https://fedsoc.org/conferences/the-antitrust-paradox-where-we-ve-been-and-where-we-re-going.

[17] *See, e.g.*, Paul Miller, *Reclaiming Conservatism from Libertarians*, THE IMAGINATIVE CONSERVATIVE (Sept. 16, 2014), https://theimaginativeconservative.org/2014/09/reclaiming-conservatism-libertarians.html; Frank Filocomo, *Society: A Community of Souls*, THE UNIVERSITY BOOKMAN (Nov. 27, 2022), https://kirkcenter.org/essays/society-a-community-of-souls/.

[18] *See, e.g.*, FRANK MEYER, IN DEFENSE OF FREEDOM (1962).

[19] ROBERT BORK, SLOUCHING TOWARDS GOMORRAH 151 (1996).

Some conservative leaders are beginning to recover an appreciation for this perspective, especially faced with a world in which the market capitalization of the largest corporations rivals the GDP of many peer nations.[20]

President Trump has called for strong antitrust enforcement where there is "too much concentration of power in the hands of too few."[21] He has lamented that, "Big Tech has run wild for years, stifling competition in our most innovative sector and, as we all know, using its market power to crack down on the rights of so many Americans, as well as those of Little Tech!"[22] In 2016, President Trump directly challenged "powerful special interests" that he said had "rigged our political and economic system for their exclusive benefit," declaring that he had "joined the political arena so that the powerful can no longer beat up on people that cannot defend themselves."[23] In remarks announcing an executive order on censorship, he promised, "As President, I'll not allow the American people to be bullied by these giant corporations."[24]

At a 2024 conference on antitrust policy, then-Senator J.D. Vance paraphrased the views of the drafters of the Sherman Act as saying, "We threw off the chains of monarchy in the early republic, and we didn't mean to replace them with the chains of private monopoly."[25] He continued,

> There was a recognition that concentrated private power could be just as dangerous as concentrated public power. That insight is so important to recover on the right. And if I can beat up on my fellow Republicans a little bit, there is often this idea that something is not tyrannical so long as a private entity does it. There's kind of this famous meme of sort of two guys. They're on their knees. And, you know, one guy has a gun pointed to his head and the other guy looks at him and says, you know, aren't you glad this was done through the free market? And the person holding the gun is Google. There is this weird idea that something can't be tyrannical if it comes through the operation of a free market. And my response to that would be, number one, the free market is not nearly as free as people suppose that it is. It's all influenced by various regulations. It's all influenced by […] privileges that were granted, liability protections that were granted. These things matter. And they frankly make the market a lot less free than people assume that it was.

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[20] *See, e.g.*, Omri Wallach, *The World's Tech Giants, Compared to the Size of Economies*, VISUAL CAPITALIST (July 7, 2021), https://www.visualcapitalist.com/the-tech-giants-worth-compared-economies-countries/.

[21] Emily Stephenson, *Trump vows to weaken U.S. media 'power structure' if elected*, REUTERS (Oct. 22, 2016, 1:25 PM), https://www.reuters.com/article/usa-election/trump-vows-to-weaken-u-s-media-power-structure-if-elected-idUSL1N1CS08H/

[22] Donald J. Trump (@realDonaldTrump), Truth Social (Dec. 4, 2024, 12:21 PM), https://truthsocial.com/@realDonaldTrump/posts/113595703893773894.

[23] Donald J. Trump, Address Accepting the Republican Presidential Nomination (Jul. 21, 2016), available at https://www.cnn.com/2016/07/22/politics/donald-trump-rnc-speech-text/index.html.

[24] Donald J. Trump, Remarks Announcing an Executive Order on Preventing Online Censorship (May 28, 2020), available at https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-announcing-executive-order-preventing-online-censorship/.

[25] Sen. J.D. Vance, *Keynote Address at RemedyFest 2024* (Feb. 27, 2024), available at https://www.youtube.com/watch?v=DuykIQ15Lag.

> And even if it was a perfectly free market, I want people to live good lives in our country.[26]

Conservatives must once again reject libertarianism's narrow conception of human freedom as the mere absence of government, while putting their heads in the sand when asked about how companies acquire, entrench, and maintain their economic power. We must instead acknowledge that tyranny can come from monopolies other than force, that freedom and free markets are not self-sustaining, and that our elected leaders swore an oath to defend their constituents from enemies foreign *and* domestic, whether armed with battalions or bankers.

Edmund Burke, the father of modern conservatism, wrote that,

> Government is a contrivance of human wisdom to provide for human wants. Men have a right that these wants should be provided for by this wisdom. Among these wants is to be reckoned the want, out of civil society, of a sufficient restraint upon their passions. Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should frequently be thwarted, their will controlled, and their passions brought into subjection.[27]

Alexander Hamilton made the same observation in Federalist 15: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint."[28]

This applies no less to the passions of capital than to those of the flesh. To that end, while the conservative remains distrustful of expansive government power, he does not embrace libertarianism's rejection of nearly any role for government to play. A chief duty of the state is to protect freedom; were the state the only threat to freedom, its existence at all would be pointless. This is in fact often the position of many libertarians, but that is because they underestimate or dismiss the dangers to freedom that come from private actors.[29]

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[26] *Id.* Florida Governor Ron DeSantis has echoed this perspective. When asked about possible tension between a belief in free markets and government action against predatory conduct by a large corporation, he responded to The American Conservative by asking, "What is a free market? Does an absence of government necessarily mean free market? I would say, sometimes, absence of government could just devolve into corporatism, and I think too many people on the right have basically been corporatists over the years." Bradley Devlin, *The Ratcatcher*, THE AMERICAN CONSERVATIVE (May 15, 2023) available at https://www.theamericanconservative.com/the-ratcatcher/. DeSantis had previously written of this dynamic that, "old-guard corporate Republicanism isn't up to the task at hand … policies that benefit corporate America don't necessarily serve the interests of America's people and economy." Ron DeSantis, *Why I Stood Up to Disney*, THE WALL STREET JOURNAL (Feb. 28, 2023), available at https://www.wsj.com/articles/why-i-stood-up-to-disney-florida-woke-corporatism-seaworld-universal-esg-parents-choice-education-defa2506.

[27] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 64 (Prometheus Books 1987) (1790).

[28] THE FEDERALIST NO. 15, at 106 (Alexander Hamilton).

[29] *See, e.g.*, Robert A. Levy, *The Case Against Antitrust*, CATO AT LIBERTY (Mar. 28, 2024, 11:10 AM), https://www.cato.org/blog/case-against-antitrust. This is in no small part due to libertarian anthropology, which borrows from the liberal antitheism and a belief in the perfectibility of man and adds to these a pathological preoccupation with personal autonomy incompatible with nearly any form of human community. Philosopher

Free societies and free markets alike are built upon order: the rule of law and the laws of fair competition. Both require protectors. To protect our political liberties, the American people separated and limited the powers of their rulers. To protect our economic liberties, our rules must separate and limit the power of economic actors. When either guarantor fails, both liberties suffer. The American psyche perceives *a priori* both that political malfeasance leads to economic servitude, and economic concentration to political corruption.

II. Conservatism & the Aims of Antitrust

For this reason, antitrust law exists to protect the people from the dangers of concentrated economic power, chiefly through two aims: diluting economic power and protecting competition. The enduring philosophical debate within antitrust law is over which of these aims should take priority, and by extension over what "competition" really means.

A. Competing Visions of Antitrust

American antitrust policy over the last century has largely been a battle between two competing visions. On one side are progressives, who argue that diluting economic power is the primary aim of antitrust, and thus advocate for strong structural presumptions and bright line rules, largely viewing any attempts at nuance in the analysis to be an excuse for concentration.[30] This view was championed by Justice William Douglas, who lamented the "problem of bigness," and that "size can become a menace," which was the dominant approach in the mid-twentieth century; contemporary proponents seek its revival.[31] Under this approach, the idea of competition is inextricably tied to market structure, meaning the number and size of competitors. The fewer and larger the competitors, the less competition the thinking goes. Thus, the Sherman and Clayton Acts' mandates to protect competition are viewed as legislative directives to prevent concentration above all else.

Matthew Crawford noted the parallel between the power of big business and that of the bureaucratic state: "All of the arguments that conservatives make about the administrative state apply as well to this new thing, call it algorithmic governance, that operates through artificial intelligence developed in the private sector. It too is a form of power that is not required to give an account of itself, and is therefore insulated from democratic pressures." *Protecting Competition and Innovation in Home Technologies: Hearing Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Matthew Crawford, Research Fellow, Institute for Advanced Studies in Culture).

[30] A "structural presumption" is an assessment of presumed anticompetitive effect derived from observations of a market's structure. For example, assuming that a merger that results in a combined firm with a market share in excess of 30% will "substantially lessen competition." *See U.S. v. Phila. Nat. Bank*, 374 U.S. 321 (1963).

[31] *United States v. Columbia Steel Co.*, 334 U.S. 495, 535 (1948) (Douglas, dissenting); Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737 ("[T]he undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens. . . . Antitrust law and competition policy should promote not welfare but competitive markets. By refocusing attention back on process and structure, this approach would be faithful to the legislative history of major antitrust laws. It would also promote actual competition—unlike the present framework, which is overseeing concentrations of power that risk precluding real competition.").

Although today's Neo-Brandeisians claim Justice Louis Brandeis as their intellectual forebearer, they mischaracterize his views as endorsing structuralism and advocating for using antitrust as an open-ended tool to "decentralize" the economy. Brandeis, who was "content to be described as a Jeffersonian,"[32] was deeply concerned not only with concentrated economic power, but also with the centralizing tendencies of big government. In multiple opinions, Brandeis emphasized the value of dispersing governmental powers through tripartite government[33] and federalism,[34] and further cautioned courts against "erect[ing] our prejudices into legal principles" when exercising judicial powers.[35] Nor did Brandeis believe that the antitrust laws allow enforcers or courts to pursue policy goals untethered from clear statutory limits. He instead took a legal approach that accounted for economic context in order to evaluate the methods and intent behind corporate behavior, as opposed to focusing on market structure for its own sake.[36] He also clearly stated in his writing and judicial opinions that size alone *does not* establish an antitrust violation.[37]

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[32] Jefferey Rosen, LOUIS D. BRANDEIS: AMERICAN PROPHET (Yale Univ. Press 2016), at 8-9.

[33] *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

[34] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, dissenting) ("[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.").

[35] *Id.*

[36] William MacLeod, *Neo-Brandeisians' Antitrust Stance Strays From Namesake*, LAW360 (Feb. 14, 2022), available at https://www.law360.com/articles/1463745/neo-brandeisians-antitrust-stance-strays-from-namesake (last accessed March 26, 2025) ("As a justice, he did not share his modern acolytes' disdain for the rule of reason, nor their skepticism of economics, nor their aversion to complicated cases"); Thomas B. Nachbar, *Heroes and Villains of Antitrust*, 18 ANTITRUST SOURCE 1–12 (Jun. 2019) ("Brandeis, portrayed as an advocate for an economy of small (probably local-sourced) businesses, had a much broader vision of power politics in industrial relations, one more focused on balance than size. He was happy with huge concentrations of power so long as they were equally balanced between employer and labor.") available at https://www.law.virginia.edu/scholarship/publication/thomas-b-nachbar/642681 (last accessed March 26, 2025).

[37] Louis Brandeis, BUSINESS – A PROFESSION at 198 (Boston Small, Maynard & Company Publishers, 1914) ("Neither the Sherman law nor any of the proposed perfecting amendments . . . contain any prohibition of mere size. Under them a business may grow as large as it will or can - without any restriction or without any presumption arising against it. It is only when a monopoly is attempted, or when a business, instead of being allowed to grow large, is made large by combining competing businesses in restraint of trade, that the Sherman law and the proposed perfecting amendments can have any application."); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 356 (1933) (joining the majority opinion, which held "[t]he true test is not the size of the combined companies, but the competitive strength of the companies that are not acquired."); *see also Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis dissenting) (stating that although Congress possessed the "power . . . to prohibit corporations of a size deemed excessive," "the Sherman Anti-Trust Act *did not* forbit large aggregations") (emphasis added). Indeed, his use of the term "a Curse of Bigness," when read in context of the chapter where he used the term, confirms his position that, although size standing alone does not demonstrate a violation, "bigness" tends to undermine claims of "business efficiency" when (1) achieved by combination, as opposed to through internal growth, or (2) used to obtain or maintain a monopoly position. *See* Louis Brandeis, OTHER PEOPLE'S MONEY (Frederick A. Stokes Company Publishers, New York, 1913) at 163-164 ("The 'great' security issues in which bankers have cooperated were, with relatively few exceptions, made either for the purpose of effecting combinations or as a consequence of such combinations. Furthermore, the combinations which made necessary these large security issues or underwritings were, in most cases, either contrary to existing statute law, or contrary to laws recommended by the Interstate Commerce Commission, or contrary to the laws of business efficiency. So both the financial concentration and the combinations which they have served were, in the main, against the public interest. Size, we are told, is not a crime. But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is but. And it is size attained by

It is therefore ironic that judicial thinkers on the left and right have misinterpreted, if not caricatured, Brandeis to further what are diametrically opposed political agendas—Justice Douglas by reducing Brandeis's jurisprudence to support a vision of structuralism that entails greater government intervention,[38] and Bork by attributing to Brandeis a vision of political balancing to make him a convenient foil.[39] The Neo-Brandeisians, in turn, have adopted both stories as correct without resolving the apparent contradictions, nor apparently investigating their accuracy.

Modern progressives' support for a structuralist view that entrusts courts with unrestricted discretion to "decentralize" industries is better captured in the jurisprudence of Justice Douglas.[40] Their approach views antitrust law not just as an economic project, but also–if not more so–as a political project. For example, Douglas in his *Standard Oil* dissent lamented "the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy."[41]

He went even further in his *Columbia Steel* dissent, in which he recast antitrust enforcement as a project for putting the power of industry into the hands of the government:

> Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands, so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men, but respectable and social-minded, is irrelevant. That is the philosophy and the command of

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combination, instead of natural growth, which has contributed so largely to our financial concentration."); *see also* BUSINESS A PROFESSION at 199-200 ("it may safely be asserted in America there is no line of business in which all or most concerns or plants must be concentrated in order to attain the size of greatest efficiency. For, while a business may be too small to be efficient, efficiency does not grow indefinitely with increasing size. There is in every line of business a unit of greatest efficiency. What the size of that unit is cannot be determined in advance by a general rule . . . And in no American industry is monopoly an essential condition of the greatest efficiency.").

[38] *Columbia Steel*, *supra* note 31, at 535 (Douglas, dissenting).

[39] ANTITRUST PARADOX, 41-47.

[40] *Columbia* Steel, *supra* note 31, at 536 (Douglas, dissenting) ("In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign, or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands, so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men, but respectable and social-minded, is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.").

[41] *Standard Oil Co. v. United States*, 337 U.S. 293, 318-19 (1949) (Douglas, J., dissenting).

> the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.[42]

In endorsing the view that the antitrust laws should entrust more power and discretion into the hands of government officials, former Democratic Chairman of the Federal Trade Commission Robert Pitofsky, despite acknowledging "that conflicts between political and economic goals do arise," explicitly called on courts applying the antitrust laws to take political values into account. This included, "[s]uch considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by the few."[43]

Modern progressives advocate for far more than a simple preference for bright-line rules that favor deconcentration. Rather, their vision of antitrust law is closer to the "public interest" standard that many regulatory agencies employ in various industries—except that, in place of experts removable by a democratically elected President, it would give to unelected lifetime-appointed judges oversight of the entire economy.

At the other end of the spectrum, the leading approach to antitrust policy on the right has come from the Chicago School, which prioritizes economic efficiency, usually assessed by price and output, above all other values and as the definition of competition itself. Its most famous proponent is Judge Bork, but its origins go back to his mentor, Aaron Director, a Russian-born economist at the University of Chicago central to the birth of the law and economics movement. Director's ideas with respect to antitrust gained traction through Bork's law review articles and 1978 work, *The Antitrust Paradox*, the first among these being the consumer welfare standard.[44]

Bork's central contention in *The Antitrust Paradox* was that the overarching purpose of antitrust law, and the definition of competition itself, is maximizing consumer welfare. Bork argued that the legislative history simply did not support the view that that the antitrust laws were meant to serve any other purpose, and that the application of the antitrust laws in the mid-twentieth century had actually done more harm than good for American consumers because it had prevented mergers and conduct that would have lowered prices or increased output by increasing the economic efficiency of market participants.

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[42] *Columbia Steel*, *supra* note 31, at 535-536 (Douglas, dissenting). Brandeis expressed similar, if not as drastic, sentiments in his dissent in *Ligget Co. v. Lee*. 288 U.S. 517, 564-564 (1933) (Brandeis, J., dissenting) ("Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations. . . . They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state . . . The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilised life' is committing it to the rule of a plutocracy.").

[43] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1050, 1064 (1979); *Id.* at 1075.

[44] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (Free Press, 2nd ed. 1993) (1978) (hereinafter ANTITRUST PARADOX).

More importantly—and, as discussed below, more persuasively—Bork also argued that consumer welfare was the only constitutionally appropriate goal for antitrust law. By "plac[ing] intensely political and legislative decisions in Congress instead of the courts," the consumer welfare standard allows judges to apply the antitrust laws in a manner consistent with the separation of powers mandated by the Constitution.[45] Bork explained that,

> Courts are the wrong institution for these unstructured interpersonal comparisons both because political choices of this nature should, in a society with our presuppositions about democracy, be made by elected and representative institutions, and because the courts do not have the facilities for fact-finding on a broad scale that are available to the legislature. The admission by a court of goals in conflict with consumer welfare into the adjudicative process, therefore, involves a serious usurpation of the legislative function by the judicial arm.[46]

Simply put, the Constitution does not permit judges effectively to legislate from the bench by allocating—*redistributing*—economic benefits among competing constituencies in the pursuit of some political goal. Such power is reserved for Congress alone.

B. Robert Bork: Brilliant Lawyer, Failed Historian

The approaches of Bork and the modern progressives have this in common: each identifies something deeply true and important in antitrust law, but is ultimately hobbled by a fatal flaw.

Bork's observation that the insertion of explicit political values into the antitrust analysis performed by courts is unconstitutional is unassailable. It rests on a foundational legal principle for American conservatives, that the role of the judge is to say what the law is, not what it should be. Bork, in reference to political concerns in antitrust analysis requiring judges to weigh competing social values, put it this way:

> The problem may be stated as one of determining which types of trade-off decisions belong in legislatures and which in courts. […] In constitutional law the trade-off choice is given to courts, but in areas where the legislature is not forbidden to make the choice, we think of such value trade-offs as the very essence of politics. We then typically reserve the choice for legislative determination and require the terms of the treaty…to be written down […]. The problem of a trade-off between consumer and producer welfare illustrates the point, but the analysis is the same no matter what value is weighed against consumer welfare. […] Striking the balance is essentially a legislative task.[47]

For Bork, consumer welfare serves as a neutral principle, or "common denominator," by which judges may assess whether a particular merger or course of conduct harms competition. Conservative legal academic George Priest has summarized Bork's argument in *The Antitrust Paradox* as comprising five parts:

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[45] *Id.* at 81.
[46] *Id.* at 83.
[47] *Id.* at 79-80.

> First, judges should apply only neutral principles and not engage in political judgments among competing interest groups, which is the province of Congress. [...] Second, … the promotion of consumer welfare is a neutral principle. Third, the promotion of consumer welfare was the original principle adopted by Congress in 1890 with the Sherman Act. Fourth, the promotion of consumer welfare is the basis for the per se prohibition of price fixing [...]. Finally, the Court's then-current prohibitions of various vertical restraints are inconsistent with the promotion of consumer welfare [...].[48]

However, Priest is highly critical of Bork's scholarship on at least two of these points. He is blunt about Bork's connection between the development of the per se rule against price-fixing and the role of consumer welfare under the rule of reason, describing it as "entirely ahistorical."[49]

On Bork's accounting of the legislative history surrounding the antitrust laws, Priest notes that the claim that "the promotion of consumer welfare was the original intent of Congress … remains highly controversial. Few in the Chicago school accepted this interpretation."[50] At a recent Federalist Society event, Prof. Todd Zywicki observed, "Bork may have been a brilliant lawyer and a great man, but I think the subsequent research has suggested he wasn't a perfectly accurate historian in terms of the legislative history about consumer welfare."[51] Antitrust scholar Herbert Hovenkamp is even more blunt, writing that "not a single statement in the legislative history comes close to stating the conclusions that Bork drew."[52]

Bork's error lies in his obsession with economic efficiency. He notes there are two kinds of efficiency:

> Allocative efficiency … refers to the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their output most. Productive efficiency refers to the effective use of resources by particular firms.[53]

The former seeks the most profitable investment of capital; the latter seeks to use invested capital as efficiently as possible by lowering costs and maximizing output. For Bork,

> These two types of efficiency make up the overall efficiency that determines the level of our society's wealth, or consumer welfare. The whole task of antitrust can be summed up

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[48] George Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S12 (2014).

[49] *Id.* at S10.

[50] *Id.* at S11; *Id.* at n. 62 ("I have engaged in some historical work on this subject and am not yet convinced by Bork's argument.").

[51] *Competition Policy, Corporate Concentration & Freedom of Thought: Approaching the Merger Guidelines* (July 20, 2023), *available at* https://www.youtube.com/watch?v=yI3AHo_moKM.

[52] Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 22 (1989); *see also* William J. Novak, *American Antimonopoly and the Rise of Regulated Industries Law*, in ANTIMONOPOLY AND AMERICAN DEMOCRACY 168, n. 84 and accompanying text (Daniel A. Crane & William J. Novak eds., 2024).

[53] ANTITRUST PARADOX 91 n. *.

> as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.[54]

The problem for Bork is that the legislative and historical records yield almost no evidence that the drafters or supporters of the Sherman Act were concerned with the efficient allocation of resources across the national economy, let alone that they would have wanted or expected judges to declare by judicial fiat what practices maximize total economic welfare. Prof. Robert Lande points out that the very concept of "allocative efficiency" was barely in its incipiency in 1890, and it is nearly impossible that most economists—let alone any legislator—at the time even knew what it was.[55]

This point is clear from any review of the historical record. The public of the late 19th century was largely concerned with the overall power of the trusts of their time and the trusts' ability to unfairly leverage their economic power. William Letwin has described the dynamic well:

> Trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators… they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone. The kind of remedy that the public desired was clear enough: it wanted a law to destroy the power of the trusts.[56]

Lande likewise argues that Congress, in responding to this sentiment, was particularly concerned about the ability of trusts to extract higher prices from consumers, and therefore intended the Sherman Act to "prevent[] 'unfair' transfers of wealth from consumers to firms with market power."[57] He states that while Bork was "correct to conclude that Congress was concerned with 'consumer welfare', he incorrectly restricts the definition of this key term to economic efficiency."[58] Rather than the overall allocation of resources, the drafters of the Sherman Act were primarily concerned with the financial effects on *consumers*:

> For example, Senator Sherman termed the higher prices "extortion," and "extorted wealth." Others referred to the overcharges as "robbery," and a complaint was made that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people." Another congressman complained that the beef trust "robs the farmer on the one hand and the consumer on the other." Another declared that the trusts were "impoverishing the people" through "robbery." Another declared that monopolistic pricing was "a transaction the only purpose of which is to extort from the community . . . wealth which ought . . . to be generally diffused over the whole community." Another complained: "They aggregate to themselves great, enormous wealth by extortion . . . ."[59]

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[54] *Id.* at 91.

[55] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 86-89 (1982).

[56] WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 70 (1981).

[57] Lande, *supra* note 55, at 68.

[58] *Id.* at 87.

[59] John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L.REV. 191, 202 (2008).

And that only concerns the Sherman Act, upon which Bork based the bulk of his historical argument. In his section on the legislative history of the antitrust laws, Bork devotes only a single paragraph to most of the subsequent antitrust laws passed by Congress.[60] The Clayton Act (1914), the Federal Trade Commission Act (1914), and the Celler-Kefauver Act (1950) (the last of which he refuses even to name) receive only passing references, accompanied by unsupported assertions that these statutes have the same goals as those he imputed to the Sherman Act.[61]

It's not hard to see why. Every substantive antitrust law passed after the Sherman Act was written to *strengthen* antitrust enforcement, whereas Bork lamented the fact, deriding concepts like incipiency that he disagreed with on policy grounds and declared were of "no value."[62] The Clayton and Federal Trade Commission Acts were passed in response to court decisions narrowly applying the Sherman Act, in particular the Supreme Court's adoption of the rule of reason in *Standard Oil*.[63] Many in Congress were upset by what they viewed as the Court watering down the Sherman Act's strict prohibition on restraints of trade to apply only to those restraints the Court deemed unreasonable. A congressional committee was formed to consider the need for new antitrust legislation. The committee's report pulled no punches, "declar[ing] that 'whenever the rule [of reason] is invoked the court does not administer the law, but makes the law," and that it is "'inconceivable that in a country governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve.'"[64]

In debate over the Clayton Act, Republican Senator Albert Cummins was unequivocal as to why he supported updating the antitrust laws:

> Why, of course a man may exercise autocratic and absolute power wisely. He may render the people over whom he rules the greatest possible service. His government may be a better government than a government of the people. He may enact better laws, and he may enforce them more efficiently and justly than we may make and enforce in a democracy or in a republic. We have discovered, however, that power of that kind is likely to be abused and that in the great majority of instances it is safer to trust the people themselves rather than a single ruler. Therefore we adhere to democracy and adhere to the republic. Just so in this respect. Here and there there may be a case in which the monarchy of business is vastly better, but, taking it as a whole, the republic, the democracy, is as sound in business as it is in politics.[65]

Here we see not a defense of allocative efficiency, but rather a firm insistence that the disaggregation of economic power is far more important to the country than efficiency in business. Moreover, Cummins' remarks directly echo those of Sen. Sherman 24 years earlier

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[60] ANTITRUST PARADOX 63.
[61] *Id.* Bork gives a slightly longer treatment of the Robinson-Patman Act (1936), but reaches the same conclusion.
[62] *Id.* at 130-131.
[63] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).
[64] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 231-232 (1980) (quoting S. Rep. No. 1326, 63d Cong., 3d Sess., at xii).
[65] 51 CONG. REC. 14,536 (1914).

when he compared monopoly power to monarchical tyranny, "inconsistent with our form of government."[66]

The same themes arose in the debates over the Celler-Kefauver Act, decades later. Pitofsky observed that,

> A striking feature of the legislative history of amended section 7 was the widely-shared perception of danger to the political well-being of the country and its citizens stemming from the merger movement. … Virtually all proponents of the bill who spoke asserted that the merger trend must be blocked because concentrated economic power would lead to increased government control, because freedom would corrode and totalitarianism prosper, and because absentee ownership by large corporations would diminish local initiative and civic responsibility.[67]

This view is also supported by Prof. David Millon, who undertook a comprehensive review of the philosophical underpinnings and legislative history behind the antitrust laws and concluded, "Congress in 1890 was concerned about power, not efficiency. The legislators confronted the concentration crisis from the perspective of an ideological tradition that equated excessive economic power with political corruption as well as oppression of competitors and consumers."[68]

Looking at the historical record, productive efficiency is acknowledged but was far from the main driver; allocative efficiency does not enter the discussion at all.[69] In a sense, it is true that

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[66] Sherman, *supra* note 11.

[67] Pitofsky, *supra* note 43 at 1064. *See also id.* at 1063 (quoting Sen. Kefauver: "It is no accident that we now have a big Government, big labor unions, and big business. The concentration of great economic power in a few corporations necessarily leads to the formation of large Nation-wide unions. The development of the two necessarily leads to big bureaus in the Government to deal with them. Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years. The control of American business is steadily being transferred, I am sorry to have to say, from local communities to a few large cities in which central managers decide the policies and the fate of the far-flung enterprises they control. Millions of people depend helplessly on their judgment. Through monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future."); *id.* at 1062 (quoting Rep. Celler, reading from a report of the former Secretary of War: "Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war.").

[68] David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1282 (1988).

[69] Lande, *supra* note 55, at 89-93; *id.* at 90-92 ("Senator Sherman appreciated the efficiencies of large corporations generally: 'Experience has shown that they are the most useful agencies of modern civilization. They have enabled individuals to unite to undertake enterprises only attempted in former times by powerful governments. The good results of corporate power are shown in the vast development of our railroads and the enormous increase of business and production of all kinds.' But congressional endorsement of trusts' efficient operations stopped when consumer prices rose, and the legislature withheld approval from combinations that, while yielding more efficient methods of competition, also produced higher consumer prices. The trusts were condemned despite their efficiency in large part because they kept the fruits of such efficiency. As Senator Sherman pointed out in qualification of his praise for efficiency, 'It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer.' Congressional condemnation of monopolistic extractions of wealth was so strong that it is even unlikely that Congress meant to provide an exception for a monopoly based solely upon superior efficiency.").

Congress's intent with the antitrust laws was to promote consumer welfare. It is just that Congress's vision of consumer welfare does not align with Judge Bork's.[70]

C. Progressives' Conservatism

When it comes to the purposes behind the antitrust laws, it turns out that progressives perceived something that Bork either missed or willfully ignored—which is ironic because those purposes are fundamentally *conservative* in nature. This is clear in so many of the passages from the founding fathers and conservative thinkers and leaders above, it is worth the risk of repetition to revisit them side-by-side with those of the drafters and supporters of the Sherman, Clayton, and Celler-Kefauver Acts.

Madison called monopolies "sacrifices of the many to the few"; a drafter of the Sherman Act said the "trusts were impoverishing the people through robbery."[71] Adam Smith wrote that monopolies had "become formidable to the government, and upon many occasions intimidate the legislature"; Justice Brandeis observed "that so-called private corporations are sometimes able to dominate the state."[72] Sen. Sherman implored that "[i]f we would not submit to an emperor we should not submit to an autocrat of trade"; Brandeis argued that some corporations "may be too large to be tolerated among the people who desire to be free."[73]

Former Attorney General Bill Barr has written of certain big tech companies that "their behavior poses a threat to individual liberty and democratic self-determination"; Sen. Kefauver said that "[t]hrough monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future."[74]

Just as "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty," contemporary progressives seek to strengthen structural presumptions in antitrust law to prevent the abuse of economic power.[75] Chicago school defenders argue that structural presumptions inhibit efficiency, but Sen. Cummins draws the appropriate analogy: the structural prohibitions of consolidated power in our government might also make it less efficient, but "power of that kind is likely to be abused" and "there may be a case in which the monarchy of business is vastly better, but, taking it as a whole, the republic, the democracy, is as sound in business as it is in politics."[76]

Presidents Roosevelt, Taft, Coolidge, and Trump, Vice President Vance, and Sen. Mike Lee have all affirmed that it is the duty of the government to protect the people from the predations of

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[70] Daniel J. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1206 n. 2 and accompanying text (2021).
[71] Madison, *supra* note 5; Lande, *supra* note 55 (internal quotations omitted).
[72] Smith, *supra* note 10; *Liggett*, *supra* note 37 at 564 (Brandeis dissenting).
[73] Sherman, *supra* note 11; Statement of Louis D. Brandeis, *Hearings Before the Senate Committee on Interstate Commerce Pursuant to S. Res. 98*, 62d Cong., 2d Sess., vol. I, at 1174 (1911).
[74] WILLIAM P. BARR, ONE DAMN THING AFTER ANOTHER 427 (2022); 96 CONG. REC. 6,452 (1950).
[75] *Bowsher*, *supra* note 6; Khan, *supra* note 21.
[76] Cummins, *supra* note 65.

private power.[77] Brandeis suggested that a failure to do so would lead America "to the rule of a plutocracy."[78]

To add to all of that, two of the most infamous passages in antitrust law also reflect deeply conservative values. Justice Rufus Peckham is regularly derided by antitrust scholars and practitioners alike for writing in *Trans-Missouri Freight* that, while large firms may be able to attain more efficient operations,

> Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.[79]

Likewise with Justice Earl Warren, who wrote in *Brown Shoe*:

> But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.[80]

Each of these statements flagrantly offends Chicago school economic orthodoxy (and Warren is simply wrong about Congress's desire to avoid higher prices for consumers).[81] But the underlying sentiments are conservative through and through: preference for and protection of the small and local through the decentralization of power is a first principle for the conservative. Edmund Burke, whom Assistant Attorney General Slater quoted at her recent swearing in, put it this way:

> To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind. The interest of that portion of social arrangement is a trust in the hands of all those who compose it; and as none but bad men would justify it in abuse, none but traitors would barter it away for their own personal advantage.[82]

For Burke, those who would sacrifice the good of their local community for the sake of some greater glory or economic gain are not only greedy, but treasonous. But it is Burke's most famous condemnation of the French revolutionaries' Enlightenment radicalism that is perhaps

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[77] *See supra* notes 12-16.
[78] *Ligget*, *supra* note 37 (Brandeis dissenting).
[79] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897).
[80] *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 344 (1962).
[81] *See supra* notes 55-59 and accompanying text.
[82] Burke, *supra* note 2 at 51.

best addressed to the obsessive impulse to frame all matters of law as figments of some great economic equation trying to maximize our utils: "[T]he age of chivalry is gone. That of sophisters, economists, and calculators, has succeeded."[83]

Here we have a tradition—on both the left and the right—of recognizing danger in concentrated economic power, refusing to excuse it by appeals to efficiency and economic gain, and calling on the federal government to restrain it. In our time, the idea that antitrust law is essential to preserving democracy predominantly is associated with the left and the progressive movement. While the conservative may justifiably roll his eyes at the grandiloquent rhetoric that often accompanies these claims, the fact is that such a concern has a long pedigree on the right as well.

Where Peckham, Douglas, Warren, Pitofsky, and our progressive contemporaries go wrong, however, is in their preferred manner of pursuing these admittedly good ends. Their extremism lies less in their diagnosis and more in their prescription. Concentrated economic power is, in fact, a threat to democracy—on that we agree. But the solution is not to put more power in the hands of unelected judges.[84] On that point, as we've seen, Bork wins handily. And so we are left with two competing goals: the prevention of concentrated economic power through enforcement of the antitrust laws, and the avoidance of consolidated federal power that would result from allowing judges to engage in political decision-making.

The tension between laudable aims and permissible means is not new for conservatives. It dates back to the earliest days of the republic, and Russell Kirk observed that modern conservatism retains this tension between two competing ideas.[85] On the one hand there is the belief "that certain ancient values of society … could be protected best by a strong common government."[86] On the other is the conviction that "consolidation, political or economic, would breach the wall of tradition and establish in America a unitary state, arbitrary, omnicompetent, manipulated for the benefit of a dominant majority, told by the head—and within that popular majority, for the benefit of the masters of the new industry."[87] This tension remains to our day, and gets to the need for the exercise of power by a "strong common government" precisely in order to prevent the economic consolidation that threatens to unravel our traditions and perpetuate a "unitary state."[88]

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[83] *Id.* at 80.

[84] One can already see at the fringes of the progressive movement how such an arrangement might go horribly wrong, as some call for antitrust to be used to advance "diversity, inclusion, and antiracism" or environmentalism. *See, e.g.*, FTC Commissioner Rebecca Slaughter, *Antitrust at a Precipice* (November 17, 2020) https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf; Marios Iacovides, *Why Aligning Antitrust Policy With Sustainability is a Moral Imperative* (March 22, 2022) https://www.promarket.org/2022/03/22/sustainability-antitrust-policy-anticompetitive-climate-change.

[85] RUSSELL KIRK, THE CONSERVATIVE MIND (7th Ed.), p. 153.

[86] *Id.*

[87] *Id.*

[88] Contemporary proponents of federalism tend to focus on its call to separate and devolve power, *infra*, but forget that it also entails the centralization of authority in a *federal* government. *See, e.g.*, THE FEDERALIST NO. 1 (Alexander Hamilton) ("[I]t will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found

How, then, is a conservative to resolve this tension, to achieve the political goals of antitrust without requiring judges to make political decisions?

III. A Conservative Approach to Antitrust Policy

Conservatives should advocate for interpreting and applying the antitrust laws in a way that preserves the priority of consumer welfare as the ultimate goal, but with an understanding of consumer welfare that actually focuses on consumers and an approach to legal and factual antitrust analyses that prioritizes avoiding false negatives over false positives. In this way, judges will remain more faithful to the actual text of the antitrust laws and avoid wading into political questions—all without frustrating the political goals of antitrust.

After reviewing at length how Judge Bork erred by claiming that Congress passed the antitrust laws solely to pursue consumer welfare (defined as allocative efficiency), and how the other congressional intentions that Bork ignored were actually quite conservative, one might ask why then should a conservative still consider consumer welfare as the standard for interpreting the antitrust laws. The answer is twofold. First, Bork's conception of consumer welfare is misleading; correctly defining it can rescue the project. Second, among all the purposes of the antitrust laws identified by their drafters and supporters, consumer welfare, properly understood, is best suited to serve as the neutral principle that judges may apply while remaining faithful to the Constitution's separation of powers.

A. Correctly Defining Consumer Welfare

Bork's definition of consumer welfare may be one of the greatest sleights of hand in modern legal scholarship. Kirkwood and Lande explain that,

> Under Bork's definition, "consumer welfare" is improved when economic efficiency is increased even if consumers in the relevant market are harmed. Technically, Bork can make this claim because the owners of monopolies and cartels are also consumers. Indeed, in the classic tradeoff situation, they are the "consumers" who principally benefit from a merger that raises price but increases efficiency. (Consumers in other markets may also benefit if the merger lowers costs, because that frees up resources for use in other markets, which will increase supply in those markets and may lower prices.) However, those who purchase from the merged firm—the consumers that Congress wanted to protect—are substantially worse off. They gain none of the efficiency benefits, absorb some of the allocative inefficiency losses, and have their surplus extracted by the firms with market power.[89]

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a much more certain road to the introduction of despotism than the latter, and that of those mean who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants."). Federalism embraces both the limitation and centralization of power and holds the two in tension.

[89] Kirkwood & Lande, *supra* note 49 at n. 29 (emphasis added).

Experts have "pointed out that Bork's terminology was confusing or misleading because economic efficiency, as commonly measured, consists of the sum of consumers' surplus and producers' surplus. The more accurate synonym for economic efficiency is *total welfare*."[90]

While the phrase, "consumer welfare," brings to mind the pursuit of what's best for your average citizen or shopper, Bork's tortured definition actually requires calculating and offsetting the benefits and harms to *all* market participants, not just those we colloquially think of as "consumers." The result is a version of the antitrust laws that can excuse almost any merger or monopolization, so long as the benefits received by some market participants exceed the costs imposed on others—often a wealth transfer from the most economically vulnerable consumers to big businesses and their shareholders.

This is absurd on its face, and conservatives should not hesitate to reject it as an insult to our intelligence. Instead, we should adopt consumer surplus, the net benefits to *real* consumers, as the definition of consumer welfare. Of course, not all markets have "consumers" in the same way. There are labor markets, business-to-business markets, and antitrust cases dealing with monopsony—buyer power. In these contexts, what we mean by "consumer" is that class of persons whose business is courted by the alleged monopolist, their trading partners. The conduct at issue in an antirust case should be evaluated through lens of how it affects *their* welfare.

B. Consumer Welfare as a Neutral Principle

Preventing monopolies and concentrated corporate power, protecting small businesses, and shielding democracy from the influence of big business are all valid *and conservative* goals—but they are not tasks that the Constitution permits us to place in the hands of judges to pursue in the abstract and at their own discretion. Doing so would require the court to weigh social, political, and economic equities among competing constituencies without any grounding principles or guidance. To give such power to the judicial branch would create the very consolidation of political power that the Framers sought to prevent.

While Bork correctly identifies the need for judges to have a neutral principle by which to interpret and apply the antitrust laws, his definition of consumer welfare fails the test by pitting producer welfare against consumer welfare. By calling on judges to weigh and compare the economic benefits to competing constituencies and to substitute legal reasoning with economic speculation, Bork's version of consumer welfare, ironically, comes dangerously close to the very kind of political decision-making he claims to oppose. Perhaps even worse, it implicitly requires deference to economists in how we decide legal questions.

The more accurate definition of consumer welfare as consumer or trading partner surplus offers the benefit of avoiding the need for political judgments or weighing benefits between two

[90] *Id.* at n. 30 and accompanying text (citing Jonathan B. Baker, *Competition Policy As a Political Bargain*, 73 ANTITRUST L.J. 483, 515 (2006) (emphasis added); Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 430–32 (2005); and John B. Kirkwood, *Consumers, Economics, and Antitrust*, in ANTITRUST LAW AND ECONOMICS 1, 47 n. 11 (John B. Kirkwood ed., 2004)).

competing constituencies, while actually better serving antitrust's political goals by putting consumers—*people*—before corporations.

Consumer welfare is also simply the best answer to the question, "What is competition for?"[91] The debate over what "competition" means too often ignores the teleological inquiry. In order to say what something is, we must be able to say what it is for, what is its *telos* or end. Competition is best assessed through the lens of consumer welfare because the entire of point of encouraging competition is to improve outcomes for consumers—citizens. Even if one is to say that improved outcomes for consumers necessarily includes freedom from oppressive economic powers and the political harms they may inflict, this still makes *consumer* welfare the ultimate end of competition. The question then is simply to what extent and in what ways the courts are empowered to pursue such ends.

C. Antitrust, Textualism, and the Common Law

While Bork, his progressive interlocutors, and subsequent academics have spilled much ink on the legislative history and congressional intent behind the antitrust laws, little attention has been paid to that part of the statute conservatives believe should take primacy in judicial decision-making: the text. This is true of scholars, the antitrust bar, and even the courts.

Prof. Daniel Crane has observed that, while courts are not ignorant of the plain meaning of the antitrust statutes, they simply "refuse to follow it."

> But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. …[T]his unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been

[91] Former Assistant Attorney General Jonathan Kanter is fond of quipping that "if you ask five antitrust lawyers what the consumer welfare standard means you will get six answers," and therefore it is no standard at all and not useful. (Jonathan Kanter, *Remarks at New York City Bar Association's Milton Handler Lecture* (May 18, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association). It's cute, but not particularly insightful. The same could be said of the First Amendment's free speech or free exercise clauses, and yet that is not an argument for dispensing with those. Really, it is true of nearly every constitutional provision, statutory law, and federal regulation. Litigating disagreements over the meaning of legal standards is half the practice of law. Clarity in the law is important, but if the absence of disagreement is necessary to set standards we will have no standards at all.

> consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.[92]

Crane says it is not simply a matter of textualism versus purposivism. Rather, courts have taken neither approach when it comes to antitrust law, and have instead "treated the antitrust laws as a virtually unbounded delegation of common-law powers."[93]

There is some basis to treat the Sherman Act as codifying a federal common law approach. Sen. Sherman himself claimed that the Act

> does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. … The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.[94]

Elsewhere, Crane notes that the Supreme Court has taken differing views on the role of the common law in antitrust analysis, with Justice Kennedy describing it as "irrelevant" and Justice Scalia admitting at least that it cannot be ignored.[95]

Conservatives should agree with Sherman, not because it was his intention at the time, but because his view is the most reasonable interpretation for a statute that applies an existing area of common law to the federal government with so few details provided in the text. The operative provisions of Section 1 and Section 2 of the Sherman Act are one sentence each, and hinge on the undefined terms "restraint of trade" and "monopolize."

As Sherman explained on the senate floor,

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.[96]

Even if one were to attempt a purely textualist approach to interpreting the Sherman Act, the search for the original public meanings of "restraint of trade" and "monopolize" would simply lead you back to the pre-Sherman Act common law tradition.

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[92] Crane, *supra* note 70 at 1207. *See also* The Federalist Society, *A Creature of Statute: American Antitrust Law* (Nov. 9, 2023), https://www.youtube.com/watch?v=Nz0ZhfvWJwI.
[93] Crane, *supra* note 70 at 1207.
[94] Sherman, *supra* note 11 at 2456.
[95] Daniel A. Crane, *Introduction*, in ANTIMONOPOLY AND AMERICAN DEMOCRACY, 3, n.40 and accompanying text (Daniel A. Crane & William J. Novak eds., 2024) (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988)). As usual, Scalia gets the better of Kennedy.
[96] Sherman, *supra* note 11 at 2460.

That said, antitrust law today is more than the Sherman Act. As previously noted, the subsequent antitrust statutes were all enacted in response to the Court's interpretation of the Sherman Act. Whereas the Sherman Act can be read as Congress declaring, "we shall have federal antitrust common law," the Clayton, Federal Trade Commission, Celler-Kefauver, and Robinson-Patman Acts are all far more specific and clearly written to strengthen antitrust enforcement in places where Congress believed the Court's interpretations had diverged from legislators' intentions.

Because of this, antitrust is neither purely common law nor purely statutory; it is a hybrid system of common law tradition and detailed statutory schemes. The Sherman Act establishes that there will be federal common law governing competition and restraints of trade, granting courts the authority to develop those concepts in the context of the cases and controversies brought before them. Congress then, however, *augments* the Court's rulings by passing additional antitrust statutes—ones which are more specific and detailed.

To respect Congress's legislative prerogative, the courts should have thereafter endeavored to interpret the Sherman Act in a way that is consistent with the more specific guidance provided by the later enacted laws—particularly the Clayton and Celler-Kefauver Acts.[97] What follows is an attempt to answer the question, "What would that look like?"

IV. Antitrust Policy Reconsidered

In addition to making consumer welfare (defined as consumer surplus) the measure of competition, a conservative approach to antitrust law that seeks to follow congressional guidance will be more concerned with avoiding Type II errors than Type I errors.[98] While modern economics may insist that Type I errors are more costly than Type II errors, and therefore to be more carefully avoided, Congress's approach to the antitrust laws does not reflect that belief.[99] This is nowhere more explicit than in the Clayton Act's repeated use of the phrase "*may be* to substantially lessen competition, or to *tend* to create a monopoly." And, as Barr has observed, "It is much harder to use antitrust laws to undo entrenched and concentrated power than it is to stop ongoing and future anticompetitive conduct."[100]

There was some indication as early as the Sherman Act debates that many members of Congress at the time believed that efficiency should not excuse even a fairly-obtained monopoly, that size alone was in fact a danger.[101] By the time of the Clayton and Celler-Kefauver Acts, that conclusion was inescapable.[102] Conservatives should therefore advocate for legal and factual antitrust analyses that are less deferential to claimed efficiencies and defenses of mergers and anticompetitive conduct. Shifting our antitrust enforcement mindset from one concerned about overdeterrence to one more concerned about underdeterrence provides another neutral principle

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[97] The Federal Trade Commission Act is different because it grants authority to a different, newly created federal entity. The Robinson-Patman Act may also be considered, but it is arguably *sui generis* in its object and specificity.
[98] A Type I error is a false positive; in this case, stopping conduct or a merger that is actually procompetitive. A Type II error is false negative, allowing conduct or a merger that is actually anticompetitive.
[99] *See, e.g.*, Jerzy Neyman and E. S. Pearson, *The testing of statistical hypotheses in relation to probabilities a priori*, in MATHEMATICAL PROCEEDINGS OF THE CAMBRIDGE PHILOSOPHICAL SOCIETY (October 30, 1933); *see supra* II.B.
[100] Barr, *supra* note 74 at 442.
[101] *See supra* notes 65-70 and accompanying text.
[102] *See supra* II.B.

for courts and enforcers to apply the antitrust laws in a way that is faithful to the text and fulfills the political purposes of antitrust without entrusting to judges the act of political decision-making.[103]

The following are topics within antitrust that merit reconsideration as part of this proposed conservative approach. Here I intend only to highlight areas worthy of attention and suggest arguments to consider in that process. More detailed roadmaps to reform I leave to future works or other authors, as each will require extensive study and discussion.

A. The Role of Economics

Because antitrust law involves the oversight of markets and economic power, economic analysis will always play an essential role in its application. But its role must be that of servant, not master.[104] The right has too often fetishized economic analysis, as if economic experts in ivory towers can better manage the economy than economic experts in regulatory agencies. Conservatives must rehabilitate the understanding of the law as primarily an exercise in law and policy and morality, not in economics. Economics is a tool that can be used to achieve ends, but it cannot identify or defend what the ends should be.

Moreover, it is not a scientific tool; it is a tool of educated guesswork, one that depends upon various assumptions and caveats, all of which can and often is rendered moot by marketplace realities and "facts on the ground." Economics may inform the factual and legal analyses of an antitrust question, but it is not a system of thought that can be relied upon to dictate outcomes or set policies.[105]

While all are aware of Bork's outsized role in securing a greater emphasis on economics in antitrust, few recall his warnings as to the *limits* of economics in antitrust. As Sen. Mike Lee observed in his introduction to a reprinting of *The Antitrust Paradox*, they deserve more attention:

> Judge Bork was instrumental in advocating for the proper role of economic analysis in antitrust. His chapter, "The Method of Antitrust Analysis," strongly cautioned against pushing economic analysis beyond its competence, stating that "antitrust must avoid any

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[103] Pitofsky advocated for a similar approach. Pitofsky, *supra* note 43 at 1054 ("That concern about economic power and the desire that it be dispersed complements the general American governmental preference for a system of checks and balances and distribution of authority to prevent abusive actions by the state. The result is a 'tilt' in antitrust, usually evidenced by the design of rules limited the behavior of monopolists or candidates for monopoly power, and limited concentration by merger in ways that occasionally incur costs in terms of lost efficiencies."). Had he stopped there, we would be essentially in agreement. However, Pitofsky's model would see judges themselves determine how best to allow specific political values to influence and shape the "tilt" that is applied to antitrust analysis. In fact, though he attempts a defense of the administrability of such an approach, he never gives a moment's consideration to whether it is constitutional. Even were Pitofsky's administrability argument persuasive, this is a bridge too far for the conservative.

[104] *See, e.g.*, Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 882 (2022) ("The fragile quantifications of economic modeling make a wonderful servant but an indecisive master.").

[105] Making antitrust law subservient to "the economics" is no different than making your COVID-19 policy subservient to "the science." The pandemic gave us the painful reminder that rule by expert is arbitrary, capricious, and often erroneous.

> standards that require direct measurement and quantification of either restriction of output or efficiency. Such tasks are impossible." Instead, courts ought to "infer effect from purpose, even though we know that the effect will not always be what the firm intended. … Antitrust must content itself with the identification of attempts to restrict output and let all other decisions, right or wrong, be made by the millions of private decision centers that make up the American economy." Judge Bork also wrote that "The real objection to performance tests and efficiency defenses in antitrust law is that they are spurious. They cannot measure the factors relevant to consumer welfare, so that after the economic extravaganza was completed we should know no more than before it began."[106]

Bork also rejects the idea that a showing of efficiencies should be an affirmative defense in antitrust cases precisely because "the relevant ultimate facts for antitrust purposes cannot be perceived directly or quantified."[107] He is even stronger when he observes that, "[e]conomists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured."[108]

As Bork explains,

> The economist builds a pure model in order to clarify thought; such models are indispensable for policy analysis, but they are not prescriptions for policy. They leave out too much. A determined attempt to remake the American economy into a replica of the textbook model of competition would have roughly the same effect on national wealth as several dozen strategically placed nuclear explosions.[109]

For these reasons, Bork writes, "the judge, legislator, or lawyer cannot simply take the word of an economist in dealing with antitrust, for the economists will certainly disagree."[110] Sadly, this advice was not heeded, and antitrust law today has strayed into exactly the kind of "economic extravaganza" that Bork warned against. One of the first tasks for conservatives dedicated to reforming antitrust law must be to reverse this trend.

B. Efficiency

An obsessive preoccupation with efficiency is deeply unconservative. Soviet housing projects were "efficient." But the conservative pursues beauty, excellence, and virtue, not mere efficiency. Conservatives of course believe in conservation, and our care and affection for society calls us to a prudent stewardship of resources. Waste is bad. But a Scrooge-like accounting for every dime that might be saved is incompatible with a humane way of living—especially when we are misled as to whom will see the savings.

Conservatives should insist that antitrust analysis credit only efficiencies that: (1) are realized in the same market as the harms they offset; (2) can only reasonably be achieved through the

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[106] Mike Lee, *New Introduction*, THE ANTITRUST PARADOX xii (Bork Publishing 2021).
[107] ANTITRUST PARADOX 124.
[108] *Id.* at 127.
[109] *Id.* at 92.
[110] *Id.* at 118.

conduct or transaction at issue; (3) are nonspeculative (*i.e.*, measurable in some way and likely to be realized); and (4) will directly and predominantly accrue to consumers.[111] Sen. Sherman wisely observed that, "It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer."[112] If the end of competition is consumer welfare, harm to that welfare cannot be excused by benefits to others.

C. Innovation

Innovation—technological, economic, political—has been a boon to mankind in many cases, and the ability for firms to pursue innovation to maintain competitive markets must be protected. And yet, an undue preoccupation with innovation—such as innovation at any cost, or so-called "permissionless innovation"—is a progressive impulse, not a conservative one. For the conservative, innovation is a means to an end, a method for achieving excellence and pursuing human flourishing that exists within a larger legal and moral framework. "Move fast and break things" is antithetical to the conservative's considered preservation of custom and tradition and our commitment to the rule of law.[113] We do not celebrate the inexorable forward march of progress precisely because not all that is innovative is good—let alone legal.

In antitrust law, we seek to protect innovation that benefits consumers, whether through higher quality, lower prices, or some other cognizable form. A merger or course of conduct challenged under the antitrust laws is often defended on the grounds that it is necessary for such innovation. Sometimes this is true, but often the claim is self-serving. Conservatives should receive them with an appropriate skepticism.

Parties to a merger often argue that greater scale is necessary for innovation. These claims should be carefully examined, and precise detail as to the nature of the innovation sought should be required. For example, is the sought-after innovation something that can only or most effectively be attained through the elimination of competition (such as through a horizontal merger)? Analysis of these kinds of claims should balance the speculative gains of faster or greater innovation with the loss of competition. The latter is certain, the former less so. Some of the greatest, world-changing innovations of our time have come not from big businesses benefitting from scale, but from startups in the proverbial (or actual) garage.[114]

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[111] *See, e.g.*, Tougher Enforcement Against Monopolists Act, S. 2039, 117th Cong. (2021).

[112] Sherman, *supra* note 11 at 2460.

[113] *Mark Zuckerberg's Letter to Investors: 'The Hacker Way'*, WIRED (Feb. 1, 2012), https://www.wired.com/2012/02/zuck-letter/; *Contra* Kirk, *supra* note 64 at 45 ("Change is inevitable, [Burke] says, and is designed providentially for the larger conservation of society; properly guided, change is a process of renewal. But let change come as the consequence of a need generally felt, not inspired by fine-spun abstractions. Our part is to patch and polish the old order of things, trying to discern the difference between a profound, slow, natural alteration and some infatuation of the hour.").

[114] Each of the largest American technology companies is an example of this. See also Monika Schnitzer and Martin Watzinger, *How the AT&T Case Can Inform Big Tech Breakups*, PROMARKET (Feb. 20, 2023), https://www.promarket.org/2023/02/20/when-considering-breaking-up-big-tech-we-should-look-back-to-att/ (showing that the break-up of AT&T was followed by a 19% increase in patenting in the telecommunications sector).

Innovation defenses also often rest on a Schumpeterian view of "dynamic competition," which is the idea that the most important innovations are those that usher in transformative change that doesn't simply improve offerings within a market but displaces the market entirely with something new—what Schumpeter called "creative destruction."[115]

On the surface, there is something insightful here: competition is dynamic, and the benefits that come from transformative change as one market displaces another may outweigh whatever benefits might have been realized from competition—or harm from a lack of it—within the static legacy market. Upon reflection, it almost seems obvious that the most impactful innovation is of the paradigm-shifting sort, rather than marginal improvements within static markets.[116]

But does this hold up to scrutiny?

Schumpeter's theory of dynamic competition hinges on the existence in markets of endogenous innovation—innovation internal to the market from "individual entrepreneurs or firms' R&D departments."[117] There are two problems with extrapolating from this a reason to avoid antitrust scrutiny in static markets, however.

First is the incentives of incumbent firms in the market. A monopolist simply isn't going to invest in innovation that would challenge or cannibalize its existing market power.[118] History has shown, instead, that monopolists—especially when they're publicly traded and have fiduciary obligations to their shareholders—often innovate to entrench and protect their monopoly rather than disrupt it.

Take, for example, the pharmaceutical industry, whose representatives often tout how much money drug companies spend on R&D. However, an April 2021 CBO report found that, while small companies devote a greater share of their R&D to developing and testing new drugs, larger drug companies devote a greater share of their R&D to things like "line extension" improvements for existing drugs.[119] This is consistent with the many complaints and enforcement actions we have seen in the industry over the last few decades, including pay-for-delay agreements, product hopping, and patent thickets—all of which appear to be aimed at protecting existing monopolies from competition, and all of which pharma often defends as necessary to "innovation."

In their chapter on "Innovation and Antitrust Enforcement" in *Dynamic Competition and Public Policy*, Daniel Rubinfeld and John Hoven note that, "There is a substantial body of evidence that

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[115] *See generally* DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION, AND ANTITRUST ISSUES (Jerry Ellig, ed., 2001). The observations that follow here were first delivered in a speech hosted by the Information Technology & Innovation Foundation. *See* Mark Meador, *Keynote Address at the GW Regulatory Studies Center and Information Technology and Innovation Foundation Conference: Dynamic Competition and Public Policy* (April 14, 2022), *available at* https://www.youtube.com/watch?v=zX9E5O-a_Zw&t=31705s.

[116] Think of smartphones replacing computers as compared to marginal improvements in desktop processor speed.

[117] *Supra* note 115 at 17.

[118] *Cf.* Kenneth Arrow, *Economic Welfare and the Allocation of Resources to Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS (NBER ed., 1962).

[119] Congressional Budget Office, Research and Development in the Pharmaceutical Industry (April 2021) https://www.cbo.gov/publication/57126.

leading incumbents prefer a different path of innovation than challengers," and quote Nancy Dorfman's observation that,

> Leading companies … generally use technology as a means of reinforcing their position without changing the fundamental rules of the game. … Because it may disrupt the nature of competition in a given industry, a new technology which modifies the key factors for success tends to be perceived as a strategic opportunity by marginal competitors, and as a threat by the leading competitors, even if they are the ones which developed the new technology.[120]

The second problem with reliance on endogenous innovation is that the potential for and nature of would-be paradigm-shifting innovation from marginal competitors is often directly influenced, if not controlled by, incumbent monopolists in the legacy market.

Even disruptive innovation to some extent relies upon legacy technologies and networks. Nothing new is created in a vacuum. Conduct that increases barriers to entry, increases switching costs, or limits interoperability only exacerbates this dynamic. Monopoly power in the legacy market can empower a firm to control the quantity and quality of innovation in emerging markets. The idea that we should tolerate greater market power within markets because it fosters greater innovation to disrupt that market gets things entirely backwards.[121]

Moreover, when incumbent firms *can't* constrain disruptive entrants there is still the possibility of acquisition to obviate the competitive threat. This is particularly the case in the tech industry, which has in no small part outsourced its R&D to Silicon Valley venture capitalists. While the potential for acquisition has led to an explosion in VC funding for start-ups, it has also created a dynamic in which truly disruptive innovation—which is always most likely to occur outside an incumbent firm—is now even less likely to realize its full potential.

Innovators that would fundamentally disrupt the marketplace are either acquired by an incumbent in order to blunt the risk—or to coopt the innovation to augment and protect an existing market position—or the innovator will never get funding in the first place because an incumbent firm controls the terms of entry.

It's now common knowledge in the tech space that the best way to get funding is to develop a feature or complement to the product of an existing firm—the tech version of pharma's "line

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[120] *Supra* note 115 at 75.

[121] *Cf.* Richard J. Gilbert & A. Douglas Melamed, *Innovation Under Section 2 of the Sherman Act*, 84 ANTITRUST L.J. 601, 607 (2021) ("First, although creative destruction might ultimately topple existing monopolies, that possibility does not justify anticompetitive conduct that would reduce the likelihood or delay the onset of innovation competition or dilute its effect. … Second, there is no evidence to support Schumpeterian propositions that large firms with market power generally accelerate the rate of innovation by attracting capital for R&D or enabling a more stable platform for investment in R&D. Innovations often come from small firms or new entrants, and today's capital markets provide ample opportunities for start-ups to attract financial support for promising ideas."); Herbert Hovenkamp, *Schumpeterian Competition and Antitrust*, 4 COMPETITION POL'Y INT'L 273, 277 (2008) ("[One can always argue that a firm will use monopoly profits to innovate more, and that the gains from the resulting innovation might possibly far exceed the losses from short-run consumer injuries. But this argument proves too much and justifies monopoly no matter how created or maintained.") (cited by Gilbert & Melamed, *id.* n. 26).

extensions." Far from the "perennial gale of creative destruction," this looks more like the "perennial lull" that Schumpeter warned against.

For all of these reasons, it would seem then that the fate of the endogenous innovation likely to bring about dynamic competition hangs, itself, on the state of static competition in legacy markets.

D. Direct Evidence

Many who know little about antitrust law believe that its inquiry centers on market share, and that a monopolist is a firm with a high market share. The reality is more nuanced. Monopoly power is defined as the ability to control prices or output.[122] This can be demonstrated through direct evidence.[123] Market share is an alternative by which courts *infer* monopoly power in the absence of direct evidence.[124] But this concept has been turned on its head, such that a market share short of one that justifies an inference of monopoly power is often taken to support the conclusion that there is an *absence* of monopoly power. This is a logical fallacy.

Antitrust analysis should reemphasize the centrality of direct effects to determine monopoly power, especially in markets where unique features (such as network effects and barriers to entry) can mean that market shares understate a firm's power over its rivals and customers.

E. Reexamining Case Law

Understanding consumer welfare to mean consumer surplus and applying the approaches outlined above may have resulted in different outcomes for many important Section 2 cases in recent decades. Conservatives should revisit and reconsider the holdings of these cases, and develop investigatory and litigation strategies for securing reversals of decisions found to be detrimental to competition rightly understood.

Antitrust law would also benefit from comprehensive merger retrospectives, particularly for mergers that the government attempted to block but failed, to see whether the court's analysis held up in the aftermath. Courts have long recognized that Section 7 of the Clayton Act is designed to stop harm to competition in its "incipiency."[125] This is obvious from the text of the statute, which prohibits mergers and acquisitions where "the effect of such acquisition *may be* substantially to lessen competition, or to *tend to* create a monopoly."[126] The plain meaning of Section 7 is clear that a merger should be blocked if there is reasonable likelihood that it will meaningfully reduce competition. A greater level of certainty should be required to excuse a

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[122] *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).
[123] *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (noting that "proof of actual detrimental effects, such as reduction of output, can obviate the need for an inquiry into market power") (quotations omitted); *see also* Daniel A. Crane, *Market Power without Market Definition*, 90 NOTRE DAME L. REV. 31 (2014).
[124] *See Movie 1 & 2 v. United Artists Commc'ns, Inc.*, 909 F.2d 1245, 1254 (9th Cir. 1990) (stating that "although market share does not alone determine monopoly power, market share is perhaps the most important factor to consider in determining the presence or absence of monopoly power").
[125] *United States v. Von's Grocery Co.*, 384 U.S. 270, 278 (1966).
[126] 15 U.S.C. § 18 (emphasis added).

merger that eliminates competition than to condemn it. Yet at times it has seemed that these burdens are reversed.

F. Legislative Reform

As an initial matter, legislators should recognize that the consumer welfare standard, being a limitation on the ability of judges to engage in political decision-making, is a restriction on courts, not congress. Within the limits of the Constitution, Congress is free to balance political equities in whatever way it deems best.

As for specific antitrust reforms, Congress should consider the following: (1) appropriating drastically more resources for antitrust enforcement;[127] (2) statutorily cabining the use of economic evidence along the lines outlined above;[128] (3) codifying the correct definition of consumer welfare as consumer or trading partner surplus; and (4) reenacting a modern version of the Expediting Act so that important antitrust cases can more quickly reach the Supreme Court for review, providing greater clarity and certainty for market participants and allowing the law to develop without delay as markets and technologies change.[129]

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These are only some of the possibilities for modernizing antitrust law for the 21st century. Further discussion and experience will undoubtedly lead to others, and it is my hope that a new generation of scholars, practitioners, and leaders will be inspired to take up the challenge.

V. Conclusion

The fundamental tension within the antitrust project is that the law is and must be oriented toward consumer welfare, but human beings are not *just* consumers. They are embodied souls seeking communion with their fellow man and their Creator. *Human* welfare cannot be accounted in dollars and cents or purely materialist renderings of the Good. For this reason, antitrust law is not and cannot be a panacea for all social or even all economic ills. But we can make it more just by ensuring that we do not allow a preoccupation with economic speculation to water down robust enforcement, preferring to err on the side of cautious deconcentration rather than hopeful deference to the interests of concentrated economic powers. Powers, I will note, that apart from their putative lines of business increasingly declare open war on the moral values that undergird the foundation of our constitutional republic.

Antitrust law is not a panacea, but it is incredibly important. It is the only comprehensive area of law that governs how we structure our economy and protects the free market, and it concerns the greatest loci of power in our country outside the federal government. Conservatives must reject

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[127] Funding for the agencies has lagged far behind the growth of the economy. *See, e.g.*, Michael Kades, *The Merger Filing Fee Modernization Act is a down payment on the future of antitrust enforcement*, WASHINGTON CENTER FOR EQUITABLE GROWTH (May 6, 2021), https://equitablegrowth.org/the-merger-filing-fee-modernization-act-is-a-down-payment-on-the-future-of-antitrust-enforcement/.

[128] *See supra* IV.B.

[129] 32 Stat. 823, 15 U.S.C. § 28, 1903-02-11.

the lies they have been told by libertarianism and once more embrace vigorous enforcement of the antitrust laws as essential to both economic and political liberty. Sen. Sherman gave a warning against ignoring this task, and it is as apt today as it was in 1890:

> Sir, now the people of the United States as well as of other countries are feeling the power and grasp of these combinations, and are demanding of every Legislature and of Congress a remedy for this evil, only grown into huge proportions in recent times. They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before.[130]

It is time for conservatives to answer the call.

[130] Sherman, *supra* note 11 at 2460.