MEMORANDUM 2024-33

Expert Report: Consumer Welfare Standard

Earlier in the course of the Commission's antitrust study,[1] the staff recruited experts to assist the Commission by preparing reports on specific antitrust-related topics. The scope of all the expert working groups' work is described in Memorandum 2023-16. The expert reports are posted on the Commission's study page for Antitrust Law. Each report will be attached to a staff memorandum and circulated in advance of the Commission meeting at which the report will be discussed. The meeting schedule can be found here.

Attached to this memorandum is the expert report from Group 4: Consumer Welfare Standard. Group 4 is composed of the following members:

Professor Jorge Contreras, University of Utah College of Law
Professor Warren Grimes, Southwestern Law School
Professor Douglas Melamed, Stanford Law
Heather Nyong'o, Cleary Gottlieb
Professor Barak Orbach, James E. Rogers College of Law, University of Arizona

Professors Melamed and Grimes will present the group's report at the Commission's August 15, 2024, meeting.

The staff is extremely grateful for the invaluable assistance that the Group 4 experts have provided. Their expert report will establish a critical foundation for the Commission's deliberations.

Respectfully submitted,

Sharon Reilly
Executive Director

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[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

January 26, 2024

A Report of the Consumer Welfare Committee: What Constitutes Antitrust Harm?

PREFACE

This report seeks to clarify a confusing and controversial antitrust theme: what types of harm does antitrust law intend to prevent? The answer to this question guides the distinction between permissible and impermissible conduct under the US federal antitrust laws. In the literature, references to the "goals" or "purpose" of antitrust law typically refer to this topic.

For simplicity, unless otherwise stated, all legal terms in this report refer to the US federal antitrust law and the US federal judiciary.

I. COURTS HAVE FAILED TO ADOPT A CLEAR LEGAL STANDARD

The protection of market competition is the ultimate goal of antitrust law.[1] Accordingly, the key substantive question that antitrust inquiries must address is whether particular actions of market actors have harmed or will likely harm competition.

A line of old judicial opinions, most of which were issued from the mid-1940s to the late 1960s, state that Congress passed the antitrust statutes "to promote competition through the protection of viable, small, locally owned business" although "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[2] This vision is colloquially known as the "Brandeisian" approach, with a nod to Louis Brandeis who championed it in the early 1910s.

By the 1960s, scholarship had moved beyond the Brandeisian approach. Harvard Professor Donald Turner, while serving as head of the Antitrust Division, had placed emphasis on rigor and economic analysis. Writing in the late 1950s, Turner and economist Carl Kaysen identified a number of goals of antitrust enforcement, but suggested protection of the competitive process as the most salient.[3]

In the late 1970s, the Supreme Court rejected the Brandeisian approach, holding that proof of unlawful harm to competition requires the showing of "demonstrable economic effect rather

[1] *See, e.g.*, *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (noting that the legislative history of the antitrust statutes "illuminates congressional concern with the protection of competition, not competitors."); *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); *Northern Securities Co. v. United States*, 193 U.S. 197, 331 (1904) (noting that, by enacting the Sherman Act, Congress "prescribed the rule of free competition."). *See generally* Barak Orbach, *How Antitrust Lost Its Goal*, 82 FORDHAM L. REV. 2253 (2013).

[2] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). *See also FTC v. Procter & Gamble Co*., 386 U.S. 568, 580 (1967) (stating that "[p]ossible economies cannot be used as a defense to illegality [under the antitrust laws]."); *United States v. Von's Grocery Co.*, 384 U.S. 270, 274-76 (1966) (stating that the antitrust laws intend to "preserve competition among a large number of sellers."); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (noting that the "purposes" of the antitrust statutes "was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.").

[3] Carl Kaysen & Donald F. Turner, *Antitrust Policy: An Economic and Legal Analysis* 44-45 (1959).

than . . . formalistic line drawing."[4] For example, in a case that established the antitrust injury doctrine, the Supreme Court reversed a lower court's decision that protected small businesses from entry of a "deep pocket" giant.[5] In a 1979 decision, citing an academic work of Robert Bork, the Supreme Court declared that Congress designed the Sherman Act as a "consumer welfare prescription."[6]

Bork relied on an incorrect analysis of the legislative history of the Sherman Act to argue that Congress designed the statute as a "consumer welfare prescription" to promote allocative efficiency. It is, however, far from clear that the Supreme Court has ever intended to embrace the Borkian meaning of the phrase "consumer welfare." The literal meaning of the phrase implies that harm to competition means impact on consumers, such as negative effects on price, output, quality, and innovation.[7] This consumer-centered approach may not always align with notions of allocative efficiency, which provide that welfare tradeoffs might justify harm to consumers.[8] This can happen in the unusual situation in which efficiencies attained through integration increase the seller surplus by more than they decrease the consumer surplus.

Neither the Supreme Court nor lower courts have defined the label "consumer welfare" or clarified what harm to the consumer welfare entails.[9] As a result, the standard has become one of the most contentious antitrust themes in the literature. Even attempts to characterize the concept or the controversy surrounding it tend to draw criticism and spark disagreements.[10]

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[4] *Continental T. V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 59 (1977).

[5] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 483 (1977). The antitrust injury doctrine stipulates that a private antitrust plaintiff must show that the alleged antitrust violation resulted in harm to competition, not to competitors.

[6] *Reiter v. Sonotone Corp*. 442 U.S. 330, 343 (1979) (stating that Congress designed the Sherman Act as a "consumer welfare prescription").

[7] *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877, 902 (2007) (characterizing "increased expense [to consumers] of the inferior practices" as harm to "competition and consumer welfare."); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 324 (2007) (referring to price and output effects); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209-10, 224 (1993) (referring to price effects); *NCAA v. Board of Regents*, 468 U.S. 85, 104, 107 (1984) (emphasizing price and output effects); *MetroNet Services Corp. v. Qwest Corp*., 383 F.3d 1124, 1134 (9th Cir. 2004) (noting that the elimination of double markup can enhance consumer welfare).

[8] The term "allocative efficiency" refers an allocation of resources that maximizes the total social welfare, so that no reallocation of resources can make someone better off without making someone else worse off.

[9] *See* Barak Orbach, *The Antitrust Consumer Welfare Paradox,* 7 J. COMPETITION L. & ECON. 133 (2011).

[10] *See, e.g.*, Darren Bush & Mark Glick, *The "Conspiracy" of Consumer Welfare Theory*, PROMARKET, Aug. 12, 2022; Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, PROMARKET, May 24, 2022; Eleanor Fox, *"Consumer Welfare" and the Real Battle for the Soul of Antitrust*, PROMARKET, Apr. 19, 2023; Andrew I. Gavil, *Locating Competitive Process Claims in the Consumer Welfare Debate*, PROMARKET, Apr. 11, 2023; Herbert Hovenkamp, *The Corruption of Consumer Welfare*, PROMARKET, Aug. 22, 2022; Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, PROMARKET, Apr. 10, 2023; William E. Kovacic, *Show Your Work: Meaningful Disclosure and Antitrust Enforcement Goals*, PROMARKET, Apr. 18, 2023; Steven Salop, *The Reasonable Competitive Conduct Standard for Antitrust*, PROMARKET, Apr. 6, 2023; Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard"*, PROMARKET, Feb. 16, 2022; Tim Wu, *The Consumer Welfare Standard is Too Tainted*, PROMARKET, Apr. 19, 2023.

The 2007 report of the Antitrust Modernization Commission illustrates the ambiguity of the standard. The Commission stated that "Antitrust law prohibits anticompetitive conduct that harms consumer welfare" and explained the ambiguity of the term in a lengthy footnote:[11]

> Debate continues about the precise definition of "consumer welfare." . . . The Supreme Court has not ruled specifically on this issue. . . .
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> Judge Robert Bork argued that Congress's goal in passing the Sherman Act was to optimize efficiency, regardless of whether producers or consumers capture the gains. . . . This will achieve consumer welfare, proponents maintain, because *all* consumers in the economy benefit when fewer resources are needed to make a product and those freed-up resources can be put to a higher and better use. . . . In certain limited cases—for example, if a merger to monopoly would significantly lower costs and lead to a more efficient allocation of resources, but would also raise consumer prices—Judge Bork's approach would permit the transaction to be consummated, despite an increase in consumer prices, because the merger would create efficiency gains that outweighed deadweight losses.
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> Others, however, argue that Congress's main goal was to prevent price increases to consumers—that is, wealth transfers from consumers to producers. Proponents of this approach distinguish between the consumers of products in a relevant market (consumers) and the shareholders of the firms in that market (producers). . . . They maintain that antitrust law should not allow wealth transfers from consumers to producers, even if gains in overall efficiency must be sacrificed.

Although some judicial opinions refer to allocative efficiency, the consumer-centered approach has governed seller power applications of antitrust law.[12] More precisely, courts sometimes link the concepts to emphasize that high prices alone "are not the epitome of anticompetitive harm."[13] Rather, something more than high prices is needed to demonstrate harm to competition.[14] We are unaware of any judicial opinion in which a court concluded that efficiency is a legitimate justification for harm to consumers. Several decisions of lower courts accommodate the idea that, in merger cases, proof of post-merger efficiencies can serve as a means to rebut a prima facie case that a merger will lead to restricted output or increased prices,[15] while other lower

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[11] Antitrust Modernization Commission, *Report and Recommendations* 26, n. 22 (2007).
[12] *See, e.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co*., 51 F.3d 1421, 1433 (9th Cir. 1995) ("an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.").
[13] *Jacobs v. Tempur-Pedic Int'l., Inc*., 626 F.3d 1327, 1339 (11th Cir. 2010).
[14] *See, e.g., Tempur-Pedic Int'l*, 626 F.3d at 1339; *Ross v. Bank of America, N.A.(USA)*, 524 F.3d 217, 224 (2d Cir. 2008); *Paladin Associates, Inc. v. Montana Power Co*., 328 F.3d 1145, 1156 (9th Cir. 2003); *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994) ("In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for [restraints of trade]."); *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1110 (7th Cir. 1983) ("we should focus our examination on economic efficiency and consumer benefit.").
[15] *See, e.g., ProMedica Health System, Inc. v. F.T.C.*, 749 F.3d 559, 571-72 (6th Cir. 2014); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.D.C. 2001) ("[T]he trend among lower courts is to recognize the [efficiency] defense.").

courts' decisions rejected the so-called efficiency defense.[16] However, it is difficult to find a case in which a court approved a merger recognizing that the alleged efficiencies would harm consumers.[17]

As noted, the antitrust laws do not condemn the power of companies to set high prices. As interpreted by the Supreme Court, "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[18] For this reason, the acquisition and maintenance of monopoly power through "a superior product, business acumen, or historic accident" do not violate the antitrust ban on monopolization.[19]

The consumer-centered approach does not imply that constraints on competition in upstream markets are beyond the reach of antitrust. The Supreme Court has recognized that the antitrust laws prohibit anticompetitive conduct that harms suppliers and is thus not focused solely on harm to consumers.[20] One might therefore describe current law as focused on the welfare of trading partners, both customers and suppliers. The latter includes workers, who supply labor services to employers.

A. **California Antitrust Law**

California's antitrust laws diverge from federal antitrust law in scope, statutory text, and legislative intent. However, the California Supreme Court's underlying views about the purpose of California's antitrust laws raise similar issues to those that federal applications raise.

California's antitrust laws are primarily codified in the Cartwright Act,[21] the Unfair Practices Act ("UPA"),[22] and the Unfair Competition Law ("UCL").[23] The Cartwright Act was modeled after multiple other state laws and was not based upon the Sherman Act.[24]

The California Supreme Court has offered interpretations of the major purposes of the state antitrust laws, some of which are ambiguous. Overall, the California Supreme Court has declined to follow some decisions of the U.S. Supreme Court, including *Leegin Creative Leather*

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[16] *See, e.g.*, *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015) ("[T]he Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations.")

[17] *See, e.g., FTC v. University Health, Inc*., 938 F.2d 1206, 1223 (11th Cir. 1991) ("[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.").

[18] *Pacific Bell Telephone Co. v. Linkline Communications, Inc*., 555 U.S. 438, 448 (2009).

[19] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

[20] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc*., 549 U.S. 312, 325 (2007).

[21] Bus. & Prof. Code § 16600 *et seq*.

[22] Bus. & Prof. Code § 17000 *et seq*.

[23] Bus. & Prof. Code § 17200 *et seq.*

[24] "Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." *In re Cipro Cases I & II*, 61 Cal. 4th 116, 142 (2015) quoting *Aryeh v. Canon Business Solutions, Inc*., 55 Cal.4th 1185, 1195 (2013).

Products, Inc. v. PSKS, Inc.,[25] that announced a rule of reason approach to resale price maintenance.[26]

i. Cartwright Act

While the Cartwright Act contains specific prohibitions, overall it is directed at agreements or contracts that restrain trade. The California courts have followed Section 1 Sherman Act jurisprudence in adopting a rule of reason approach.[27] The Cartwright Act contains no provision comparable to Section 2 of the Sherman Act but does contain a provision dealing with exclusive dealing and tying, tracking the wording of Section 3 of the Clayton Act.[28]

The California Supreme Court has described the Cartwright Act's principal goal as the preservation of consumer welfare.[29] In a 2015 case, the California Supreme Court, in acknowledging the consumer welfare goal, described the goal of the Cartwright Act as providing for "the unrestrained interaction of competitive forces . . . will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[30] In *Knevelbaard Dairies*, discussing California law, the Ninth Circuit held that the Cartwright Act recognizes a broader range of antitrust injuries compared to federal law.[31]

ii. UPA and UCL

The issue of California court interpretations is complicated by the existence of the UPA and the UCL, which deal with antitrust issues but also more broadly with unfair conduct that often would be beyond the reach of the Cartwright Act or Sherman Act (but perhaps within the domain of Section 5 of the FTC Act).

Applying the UPA, the California Supreme Court has distanced itself from some Supreme Court decisions on the subject of vertical restraints. In *ABC International Traders*, the California Supreme Court rejected arguments flowing from the U.S. Supreme Court's decision in *Continental TV v. GTE Sylvania*[32] that the Sherman Act's primary purpose was to protect

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[25] 551 U.S. 877 (2008).
[26] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007)).
[27] *People v. Building Maintenance Etc. Assn*., 41 Cal. 2d 719, 727 (1953).
[28] Bus. & Prof. Code § 16727
[29] *Cianci v. Superior Court*, 40 Cal. 3d 903, 918 (1985); *Marin County Bd. Of Realtors, Inc. v. Paisson*, 16 Cal. 3d 920, 935 (1976).
[30] *In re Cipro Cases I & II*, 61 Cal. 4th 116, 136 (2015) (*quoting Marin County Bd. Of Realtors, Inc. v. Paisson*, 16 Cal. 3d 920, 935 (1976)).
[31] In *Knevelbaard Dairies*, the Ninth Circuit Court of Appeals discussed that the California legislature added a clause to the Cartwright Act which permits actions to be brought by those who are injured indirectly. The Court of Appeals noted that the California legislature added this provision after the U.S. Supreme Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, (1977). *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 991 (9th Cir. 2000). *See also William Morris Endeavor Entm't, LLC v. Writers Guild of Am., W., Inc*., 2020 U.S. Dist. LEXIS 90681, at *19 n.3 (C.D. Cal. Apr. 27, 2020) ("Because 'the more restrictive definition of "antitrust injury" under federal law does not apply to the Cartwright Act,' . . . Counterclaimants' Cartwright Act claims do not suffer from the same standing deficit as their Sherman Act price-fixing claim.") (internal quotations omitted).
[32] *Cont'l T. V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 37, 97 S. Ct. 2549, 2551, 53 L. Ed. 2d 568 (1977).

interbrand competition, not intrabrand competition. The California Supreme Court held that "history teaches that a primary concern in the enactment of the UPA was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores."[33] The California Supreme Court discussed that interpretations of the Sherman Act had no relevance to Section 17045 of the UPA because that section "requires proof of injury to, and a tendency to destroy, 'competition,' not 'interbrand competition.'"[34]

The UCL has been similarly evaluated and contrasted with the Sherman Act. In *Epic Games*, the Ninth Circuit affirmed a decision by the district court rejecting the Sherman Act claims but holding that the restrictions were "unfair" under the UCL. The Ninth Circuit discussed that the UCL's prong prohibiting "unfair" business practices is "intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive."[35] The district court applied two tests to evaluate "unfair" practices. First, the district court evaluated "whether the defendant's conduct 'threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'"[36] Next, the district court evaluated whether there was unfairness felt by consumers by "'weigh[ing] the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'"[37]

Although California law does differ from federal antitrust law in some respects, the challenge of identifying a cohesive antitrust standard that is comprehensive without overreaching is the same whether it involves federal or state antitrust law. In Part III, we offer a centrist approach to applying both federal and state antitrust statutes. Our recommendations have relevance to the California UPA and UCL only to the extent that the statutes serve as a vehicle for antitrust enforcement.

II. CURRENT ANTITRUST JURISPRUDENCE REFLECTS A CONVICTION THAT ANTITRUST ENFORCEMENT MAY CHILL COMPETITION

While the Supreme Court has not clarified the meaning of the consumer welfare standard, it has developed two sets of legal presumptions that guide lower courts and narrow the substantive scope of antitrust law.

1. **The false-positives framework.** The current antitrust jurisprudence of the Supreme Court rests on the premise that over-aggressive antitrust enforcement can chill competition, because "antitrust courts are likely to make unusually serious mistakes" while the benefits of antitrust enforcement are less clear.[38] This notion has led to the idea that antitrust courts should be more concerned about the risk of false positives (the risk of

[33] *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp*., 14 Cal. 4th 1247, 1261 (1997).
[34] *Id. at* 1267.
[35] *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1000 (9th Cir. 2023), cert. denied, No. 23-337, 2024 WL 156473 (U.S. Jan. 16, 2024), and cert. denied, No. 23-344, 2024 WL 156474 (U.S. Jan. 16, 2024) (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co*., 20 Cal. 4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)).
[36] *Id*., *quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co*., 20 Cal. 4th 163, 186-87 (1999).
[37] *Id*., *quoting Progressive W. Ins. Co. v. Super. Ct*., 135 Cal. App. 4th 263, 285 (2005).
[38] *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007). *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 404 (2004).

condemning conduct that increases welfare) than the risk of false negatives (the risk of permitting anticompetitive conduct). Judge Frank Easterbrook famously inspired this premise in a 1984 article writing that "judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."[39]

2. **Vertical arrangements and unilateral conduct are unlikely to harm competition.**[40] The Supreme Court has identified "collusion" – namely, agreements among rivals not to compete – as the "supreme evil of antitrust."[41] However, it has said that vertical arrangements and unilateral conduct are unlikely to harm competition.

There is a broad consensus among scholars that these presumptions have eroded the capacity of the antitrust enterprise to protect competition.

III. CURRENT POLICY PRESCRIPTIONS

Some formulations have used the term "competitive process" to describe the set of market attributes that the antitrust law is intended to protect.[42] This venerable standard, with roots in Europe as well as the U.S., has gained renewed attention in recent years.[43] Supporters of this standard argue that it more accurately reflects the primary goal of antitrust: to protect competition. It eliminates concerns that consumers should be favored in an antitrust analysis against the welfare interests of other market participants. Workers, growers, suppliers, fabricators, distributors, and retailers, among others, are equally protected by antitrust laws. It also comfortably encompasses other key competitive values such as protecting choice and quality as well as innovation and entry. Competition favors efficiency, low consumer prices, and fair worker wages, but it does not guarantee the consumer the lowest possible price, nor does it

[39] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984).

[40] Horizontal arrangements are agreements among, or the integration of, rivals. Vertical arrangements are agreements among, or the integration of, market participants on adjacent levels along the supply chain. Unilateral conduct refers to actions of a market participant arising from independent business decisions.

[41] *Trinko*, 540 U.S. at 408.

[42] *See e.g.*, Herbert J. Hovenkamp, *The Slogans and Goals of Antitrust Law*, PENN. CAREY L.: LEGAL SCHOLARSHIP REPOSITORY, 44 (2022) ("While consumer welfare may be the most commonly stated goal of the antitrust laws, 'protection of the competitive process' is very likely a close second."); Jorge L. Contreras, *Free Market State (Of Mind): Antitrust Federalism, John J. Flynn and the Utah Constitution's Free Market Clause,* 2023 UTAH L. REV. 279, 308-10 (2023) (tracing statutory proposals using competitive process standard); Warren Grimes, *A Post-Chicago Debate: Is Protecting the Competitive Process Antitrust's Overarching Goal?*, 35 ANTITRUST 72 (2021) (summarizing the history of competitive process considerations in antitrust law); A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L. J. 269, 271-72 (2020) ("Antitrust law is . . . about protecting the competitive process in order to promote economic welfare. This is commonly known as 'the consumer welfare standard.'"), Tim Wu, *The Curse Of Bigness: Antitrust In The New Gilded Age* 137 (2018) ("a return to 'protection of competition' [is] the recognized goal of American antitrust law"). John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893 (1990) (arguing that antitrust law should seek to address "unfair wealth transfers caused by a breakdown in the competitive process and the denial to every individual of equality of opportunity in access to and fairness in the operations of the market").

[43] *Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture*, U.S. Dep't. of Just., May 18, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-deliversremarks-new-york-city-bar-association [https://perma.cc/RK7A-ETYF] ("Antitrust law protects competition and the competitive process in service of both prosperity and freedom.").

guarantee the worker the highest possible wage. Competition, to paraphrase Adam Smith, results in the invisible hand of the marketplace determining welfare tradeoffs.

Some commentators do not support adoption of a "competitive process" standard because they think it is ambiguous and does not make clear when conduct simply disadvantages a rival and when its impact is of sufficient magnitude to harm competition as a whole. The concern about ambiguity could apply to any overarching antitrust standard captured in a short phrase ("an economic welfare standard" or a "trading partner welfare standard"). To address this concern we believe that, regardless of the label applied, the hallmark of injury to competition, and to the competitive process, is the creation, increase, or maintenance of the defendant's market power as a result of conduct that reduces the competitive constraint provided by rivals or potential rivals. Such conduct could take the form of an agreement among actual or potential competitors not to compete or conduct by one or more firms that reduces the ability of other firms to compete. When market power is implicated, the defendant gains increased ability to deviate from a competitive price or otherwise harm customers or suppliers, including workers. If the harm to rivals is not of that magnitude, it is not sufficient to harm competition as a whole or the competitive process.

Today, there is a widely shared view among antitrust scholars and practitioners that the skepticism reflected in some of the case law about antitrust enforcement and the excessive concern about the risk of false positives ought to be corrected. While some reform advocates favor a revival of the Brandeisian approach, a majority of antitrust scholars oppose the Brandeisian approach for several reasons, including that it would result in arbitrary and unpredictable antitrust decisions that would often reduce competition or economic welfare.

Most antitrust scholars believe that antitrust enforcement should be strengthened without abandoning the focus on economic welfare that is captured in the elusive notion of the consumer welfare standard. Some would use terminology like the "competitive process" or "trading partner welfare" to make clear that all participants in the economic process are entitled to the protection of the antitrust laws. This centrist approach would reject claims that harm to a competitor, by itself, is sufficient to vindicate an antitrust claim. The harm must be based on the creation, increase, or abuse of market power and must be guided by soundly reasoned precedent and economic analysis.

In the view of the committee, the label is less important than the substantive principle on which antitrust law is based. The principle is this: conduct that maintains, increases, or enhances market power to the detriment of trading partners, whether customers or suppliers, is unlawful, unless that conduct can be justified as reasonably necessary to provide welfare-enhancing benefits for those trading partners. Protecting trading partners in this way can increase economic output and thus employment, lower consumer prices, and increase amounts paid to workers and other suppliers; it also promotes innovation, entry, and opportunities for efficient small firms to survive and flourish. If the legislature were to embrace this principle, whether called a competitive process standard or a trading partner welfare standard, it could then focus on the important question of shaping an antitrust law that would effectively promote welfare and strike an optimal balance between avoiding the risk of false positives and the risk of false negatives.