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THE HORIZONS OF ANTITRUST

THE 2016 LEWIS BERNSTEIN MEMORIAL LECTURE

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Two economic issues that appeared front and center during the 2016 United States presidential election campaign were jobs and inequality. Among the solutions being offered was heightened antitrust enforcement. Some argued simply for more enforcement, while others argued that the standard for applying the antitrust laws itself needed to be changed.

The goals of antitrust law have been debated for as long as these laws have been on the books, but now, with competition laws in effect in over a hundred countries, that debate has gone global and has assumed renewed urgency.¹

Not only are there wildly different opinions within the United States, but the goals pursued by other nations vary widely, creating significant asymmetries that can advantage one trading partner over another.

Until about forty years ago, there was considerable support in the United States for an expansive view of antitrust goals, one that included such objectives as the dispersion of economic and political power. Since that time, most of these goals have been eliminated from antitrust analysis in the United States, leaving only the goal of fostering low prices, high quality, and high output at low cost. This goal is commonly termed “consumer welfare” or “total welfare,” since advocates of this standard usually have defined it to encompass the combined economic welfare of consumers and producers, regardless of how that

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¹ “Competition law,” rather than “antitrust law,” is the term used almost everywhere outside the United States.

welfare is distributed between them.² By either name, the goal is greater efficiency, resulting in lower costs and prices for more and better products or services.³

But there are other goals that are priorities in the world's economies, including not only full employment and altered income distribution, and not only the dispersion of economic and political power, but also national security, the preservation of domestic control over critical resources, the survival of small businesses, integration of disparate economic systems, preservation of minority cultures, preservation of a diversity of viewpoints, preservation of the environment, and others.

American antitrust jurisprudence once appeared inclined to embrace a host of these objectives. In one of its first antitrust opinions, the United States Supreme Court expressed particular concern about anticompetitive practices "driving out of business the small dealers and worthy men whose lives have been spent" in commerce.⁴

In 1977, United States Federal Trade Commission Chairman Michael Pertschuk went further and said that "no responsive competition policy can neglect the social and environmental

² See Fei Deng & Gregory K. Leonard, *Allocative and Productive Efficiency*, in 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 449, 450 (Wayne Dale Collins et al. eds., 2008); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1993). The United States Supreme Court has cited consumer welfare as the goal of antitrust more than once, but it has been noted that in none of these opinions has the Court indicated definitively what it understood consumer welfare to mean. See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 721 (2007). Judge Bork's own conception of consumer welfare has been explained as encompassing both consumer welfare and producer welfare. Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 646 n.83 (1999); see also Renata Hesse, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the 2016 Global Antitrust Enforcement Symposium: And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement (Sept. 20, 2016) ("[A]lthough we believe competition maximizes consumer welfare, the ultimate standard by which we judge practices is their effect on competition, not on consumer welfare" because sometimes there can be "a loss of important competition even if it is difficult to measure its exact consumer impact.").

³ See BORK, *supra* note 2, at 91 (Allocative efficiency and productive efficiency "make up the overall efficiency that determines the level of our society's wealth, or consumer welfare.").

⁴ United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

harms . . . : resource depletion, energy waste, environmental contamination, worker alienation, [and] the psychological and social consequences of marketing-stimulated demands.”⁵

In 1979, Professor—and later FTC Chairman—Robert Pitofsky published an influential article, *The Political Content of Antitrust*,⁶ in which he wrote: “It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.” By “political values,” he meant:

[F]irst, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third . . . concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.

In reaction to these views, other law and economics scholars—many from the ascendant “Chicago School”—cautioned that inclusion of any goals other than consumer welfare would lead to chaos.⁷ That view came to prevail in the United States, to the point that even under the Obama Administration, leaders of the U.S. antitrust enforcement agencies expressed strongly the opinion that the goals of antitrust law should be confined to consumer welfare. In 2014, Federal Trade Commission Chairwoman Edith Ramirez warned an international audience that although other goals may be worthy in themselves, integrating them into competition analysis “can lead to poor outcomes.”⁸ She pointed out that “competition agencies are

⁵ Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, 2015 A.B.A. SEC. ANTITRUST L. 3 n.11 (quoting Michael Pertschuk, Chairman, Fed. Trade Comm’n, New Directions for the FTC, Remarks Before the Eleventh New England Antitrust Conference (Nov. 18, 1977), reprinted in 308 Trade Reg. Rep. (CCH) (Supp. 1977)).

⁶ Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

⁷ Lawrence A. Sullivan, Book Review, 75 COLUM. L. REV. 1214, 1214–15 (1975) (reviewing MILTON HANDLER, HARLAN M. BLAKE, ROBERT PITOFSKY & HARVEY J. GOLDSCHMID, *TRADE REGULATION, CASES AND MATERIALS* (1974)).

⁸ Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Keynote Address at the Antitrust in Asia Conference: Core Competition Agency Principles: Lessons Learned at the FTC (May 22, 2014).

designed to be experts in competition law and are generally ill equipped to undertake an analysis of non-competition public interest factors,” and that if governments choose to advance other objectives, “that is best done by agencies with the relevant expertise.”⁹ The head of the United States’ Justice Department’s Antitrust Division, Bill Baer, similarly remarked that enforcement decisions should be “based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed.”¹⁰ This view was pointedly reflected in language that the United States proposed for inclusion in the now-shelved Trans-Pacific Partnership agreement: “Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare”¹¹

But the other goals did not disappear in the United States. Instead, they either have become the responsibility of other arms of government or have become the object of legislative attention. National security is the mission of the Committee on Foreign Investment in the United States (“CFIUS”); jobs are the province of the Department of Commerce and the U.S. Trade Representative; small business is the responsibility of the Small Business Administration; the environment is the realm of the Environmental Protection Agency; diversity of viewpoints is an objective of the Federal Communications Commission; and so forth. Dispersion of economic and political power has become

⁹ *Id.*

¹⁰ Bill Baer, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *International Antitrust Enforcement: Progress Made; Work To Be Done* 4 (Sept. 12, 2014) (“We must continue to seek broad international consensus on the principle that enforcement decisions be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed. We must ensure that enforcement decisions are not used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations.”).

¹¹ Trans-Pacific Partnership art. 16.1, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf> (not yet in effect). President Trump withdrew the United States as a signatory to the Trans-Pacific Partnership and from the negotiating process. Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017).

largely a political issue, attracting growing attention within Congress, academia, and the nation's think tanks, not to mention political campaigns.¹²

It should be noted that the triumph of the consumer welfare standard in America has not meant that other goals are never advanced by antitrust enforcement in the United States. Such goals as health and safety, job creation, and national security all have been advanced by antitrust enforcement in certain instances, but only as a byproduct, when those goals coincided with promoting consumer welfare.¹³

¹² See, e.g., Binyamin Applebaum, *Yellen Warns Global Strife Could Brake U.S. Growth*, N.Y. TIMES, Feb. 11, 2016; Mohamed A. El-Erian, *Opinion, The Fed Can't Save the Economy This Time*, N.Y. TIMES, Jan. 22, 2016.

¹³ For example, current U.S. antitrust law is sufficiently pragmatic to recognize that in some instances, non-economic goals must be served in order to permit competition to exist at all. In the *Professional Engineers* case, the Supreme Court acknowledged that in certain instances—although not in that case—goals such as safeguarding public health and safety require exceptions from normal antitrust rules to assure that products can successfully be brought to market and compete. *Nat'l Soc'y of Profl Eng'rs v. United States*, 435 U.S. 679, 686–87, 692 (1978). In the *Broadcast Music* case, the Court recognized that exceptions sometimes must be made to permit the creation of products or services that would not otherwise exist. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 18–19 (1979). This was not a departure but rather an acknowledgement that consumer welfare cannot be maximized if products cannot otherwise be created or continue to be sold. See also *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985); Business Review Letter 06-3 from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Steven John Fellman, Counsel for Linen Systems for Healthcare, LLC (Aug. 8, 2006) (approving of proposed joint venture of regional textile maintenance companies to market textile rental and laundry services to specialized health care client); Business Review Letter 00-5 from Joel I. Klein, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Garret G. Rasmussen, Counsel for Containers America, LLC (Mar. 8, 2000) (approving of proposed creation and operation of joint selling and purchasing vehicle for five regional manufacturers of steel drums). See generally FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000). Likewise, antitrust enforcement aimed at promoting consumer welfare sometimes results in a larger number of productive jobs and prevention of concentration of economic power. For instance, blocking a merger that would have resulted in too much concentration is likely to save efficient jobs that otherwise would have been eliminated, while preventing further consolidation of economic power. Eliminating practices that foreclose the entry of new competitors into a market is likely to foster the growth of small business and the creation of jobs, while dissipating incumbents' power over the market. Advancing consumer welfare can even advance national security. Recently, the Defense Department threatened to ask Congress for special legislation to elevate national security concerns over consumer welfare concerns in order to prevent the Justice Department from approving too many mergers of defense contractors, but the Justice Department assured the Defense Department that a proper assessment of consumer welfare would result in the desired outcome.

To be sure, these incidental effects are meaningful, but not everyone in America has been in agreement that this goes far enough to protect the American public or that consumer welfare should be treated as the only recognized goal of antitrust law.

The 2016 Democratic Party Platform, for example, declared support for what it termed the “historic purpose” of the antitrust laws, “to protect competition and prevent excessively consolidated economic and political power.”¹⁴ The prevention of excessively consolidated political power may have been an objective of American antitrust law once, but it had not been a professed goal of U.S. enforcers for years.¹⁵

Even broader goals have been proposed in Congress. Legislation has been introduced to inject a “net benefit” test, similar to one that already applies in Canada, into reviews of mergers, acquisitions, and other investments resulting in control by foreign interests.¹⁶ Under this legislation, titled the “Foreign Investment and Economic Security Act,” the mission of CFIUS would be expanded to include not only reviewing covered transactions to determine the effect on “national security,” but also to determine whether the transaction is of “net benefit” to the United States. This review would include weighing negative effects against positive effects based on a variety of factors, including employment, resource processing, utilization of parts made in America, effect on productivity, technology transfers, innovation in the United States, competition within the United States, competition between the United States and other countries, compatibility with U.S. industrial policy, compatibility with U.S. cultural policy, whether a foreign person participating

In a joint statement, the Federal Trade Commission and Justice Department explained that if a transaction has the potential to adversely affect national security by lessening competition, the antitrust agencies “will not hesitate to take appropriate enforcement action.” FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, JOINT STATEMENT ON PRESERVING COMPETITION IN THE DEFENSE INDUSTRY (Apr. 12, 2016).

¹⁴ *2016 Democratic Platform*, DEMOCRATIC NAT’L COMM. 11, http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf (last visited Apr. 3, 2017).

¹⁵ *Id.* And, of course, if changes in the goals of antitrust law are to be made without amending the statutes, on the theory that broader goals already are part of the original intent behind the antitrust laws, the agencies will not achieve much unless the judiciary agrees with their interpretation of those laws. It may be true that historically the courts recognized antitrust goals beyond consumer welfare, but more recent precedents have hardly embraced this position.

¹⁶ H.R. 5665, 114th Cong. § 3 (2016).

in the transaction is controlled by a foreign government, and whether that person adheres to U.S. principles of corporate governance and law.¹⁷

On September 15, 2016, sixteen members of the United States Congress—both Democrat and Republican—sent a letter to the head of the Government Accountability Office (“GAO”) requesting a report from that office on whether the mandate of CFIUS should be broadened to add a form of net benefit test and whether the definition of national security should be broadened to address concerns about control of “the media and ‘soft power’ institutions.”¹⁸ On September 30, 2016, the GAO responded that it would initiate a review in 2017.¹⁹

Other observers have championed the inclusion of still other goals in antitrust enforcement. On June 29, 2016, Senator Elizabeth Warren delivered a speech that attracted considerable coverage in which she stated that concentrated markets can harm small businesses and result in both “concentrated political power” and the decline of the middle class.²⁰ The “original purpose” of the antitrust laws, she said, “was to fight concentrated economic and political power.”²¹ She cited reports published at about the same time as her speech by the Center for American Progress and the Roosevelt Institute, the latter of which advocated a “public interest standard for enforcement actions.”²²

The Center for American Progress’s report, *Reviving Antitrust*, concluded that market power “distorts the distribution of income and the allocation of resources, reduces incentives for innovation, and underwrites . . . manipulation of political and

¹⁷ *Id.*

¹⁸ Letter from Rep. Robert Pittenger et al., House of Representatives, to Hon. Gene L. Dodaro, Comptroller Gen., U.S. Gov’t Accountability Office (Sept. 15, 2016).

¹⁹ Letter from Katherine Siggerud, Managing Dir. of Cong. Relations, U.S. Gov’t Accountability Office, to Rep. Robert Pittenger, House of Representatives (Sept. 30, 2016).

²⁰ Senator Elizabeth Warren, Keynote Remarks at New America’s Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016).

²¹ *Id.* (emphasis omitted).

²² *Id.* (quoting ROOSEVELT INST., *UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER* 20 (Nell Abernathy, Mike Konczal & Kathryn Milani eds., 2016)).

regulatory systems.”²³ Among the solutions it proposed was the appointment of a deputy director for competition policy within the National Economic Council (“NEC”), with responsibility to keep the President and the Director of the NEC informed of economic trends and to “push policies beyond antitrust enforcement to ensure strong competition.”²⁴

The Roosevelt Institute report advocated revising the antitrust statutes in general and the government’s merger guidelines in particular “to promote a ‘public interest’ or ‘citizen interest’ standard.”²⁵ A new statute could “requir[e] agencies to consider not just narrow price effects but also issues such as market openness, competition, and innovation,” as well as a company’s power over workers, and “the stability of global supply chains and the financial system.”²⁶

An article published in August 2016, under the auspices of the American Antitrust Institute similarly blamed increased economic concentration for rising inequality, the decline of small business, the decline in job creation, and “a corrosive effect on democracy.”²⁷ The remedy it proposed was to “[r]einstate the broader set of aims that once guided antitrust, balancing efficiency goals with other objectives, including a commitment to open markets in which small businesses have a fair opportunity to compete.”²⁸

At the same time, and apart from advocating changes to the goals of antitrust, lawmakers, including both Democrats and Republicans, began calling for stronger antitrust enforcement as a means of revitalizing the economy. At a notable Senate hearing in March 2016, Senators from both sides of the aisle questioned the leaders of the FTC and the Justice Department as to whether they were doing enough to enforce the antitrust laws.²⁹ These lawmakers did not propose that antitrust enforcers

²³ MARC JARSULIC ET AL., CTR. FOR AM. PROGRESS, REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY 22 (2016).

²⁴ *Id.* at 20.

²⁵ ROOSEVELT INST., UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER 20 (Nell Abernathy, Mike Konczal & Kathryn Milani eds., 2016).

²⁶ *Id.* at 21, 23.

²⁷ Stacy Mitchell, *The View from the Shop—Antitrust and the Decline of America’s Independent Businesses*, 61 ANTITRUST BULL. 498, 511 (2016).

²⁸ *Id.* at 515.

²⁹ *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the H. Comm. on the Judiciary*, 114th Cong. (2016).

necessarily should adopt new goals, but that more vigorous enforcement itself would advance goals beyond consumer welfare, including the creation of jobs, reduction of the United States' trade imbalances, stemming the outflow of capital from the United States, and combating wealth inequality.³⁰ Antitrust enforcement also became an issue in the 2016 Presidential campaign, with Hillary Clinton calling for stronger enforcement and Donald Trump raising the prospect of blocking certain transactions.³¹

This has sparked a debate over just how much antitrust enforcement is needed. Exactly how much antitrust enforcement would it take to advance these objectives significantly? Every known price-fixing conspiracy is already being prosecuted. Should the enforcers hire more investigators to search out conspiracies? If so, how many? Every merger of significant size is already being reported in advance. Should smaller mergers be made reportable? Should the enforcers lower the bar for bringing a challenge? If so, by how much? Should enforcers bring more cases challenging single-firm conduct that may be foreclosing competitors? Which ones? Should the definition of "monopoly power" be changed to reach unilateral conduct by companies with smaller market shares? Should enforcers try to reinstitute per se rules against potentially exclusionary practices such as tying? Per se rules create certainty and foster compliance but

³⁰ *Id.*

³¹ An October 3, 2016, speech by Hillary Clinton in Toledo, Ohio included the following statement: "As president, I will appoint tough, independent authorities to strengthen anti-trust enforcement and really scrutinize mergers and acquisitions, so the big don't keep getting bigger and bigger." Daniel White, *Read Hillary Clinton's Remarks From a Rally in Toledo, Ohio*, TIME (Oct. 3, 2016), <http://time.com/4517335/hillary-clinton-transcript-toledo-ohio>. Also in October 2016, Donald Trump criticized AT&T's proposed acquisition of Time Warner as an example of a "power structure" rigged against the public. See Malathi Nayak et al., *Time Warner Shares Fall on Worries Trump May Block AT&T Deal; Bankers See M&A Pause*, BUS. STANDARD (Nov. 9, 2016), http://www.business-standard.com/article/reuters/time-warner-shares-fall-on-worries-trump-may-block-at-t-deal-bankers-see-m-a-pause-116110901722_1.html. In May 2016, Mr. Trump told Sean Hannity of Fox News that Amazon's Jeff Bezos has "got a huge antitrust problem because he's controlling so much, Amazon is controlling so much of what they are doing." See *Trump Says Washington Post Owner Bezos Has 'Huge Antitrust Problem'*, FOX NEWS (May 13, 2016), <http://www.foxnews.com/politics/2016/05/13/trump-says-washington-post-owner-bezos-has-huge-antitrust-problem.html>.

sometimes at the risk of being overkill. With a few exceptions, the proposals for greater enforcement have not been specific,³² but the sentiment is unmistakable.

This rash of dialogue represented a fascinating turn of events, given that the goals of antitrust law have not captured the public's attention in years. Yet, even as the significance of this debate has grown, it remains only half the story. It is equally important to recognize that the debate over the goals of antitrust law is not taking place in a geographic vacuum.

The United States may have elevated consumer welfare to become the singular goal of competition law, but not every jurisdiction sees it this way. Some foreign jurisdictions explicitly integrate goals beyond consumer welfare into their competition laws.³³ Some nations include the goal of "national interest," which encompasses not only the control of national defense assets but also the control of strategically important enterprises, such as financial institutions, utilities, agriculture and food processors.³⁴ Some include the goal of job creation and preservation, sometimes requiring pledges of job security as a prerequisite to approval of transactions.³⁵ Some include the goal of promoting minority ownership opportunities or cultural preservation.³⁶

And some include the goal of combating government subsidies that provide an advantage to certain companies over others. In the European Union, such subsidization is called "state aid," and as companies like Apple have learned, combating state aid is an integral goal of the European Competition Commission.³⁷ If a country provides subsidies in the form of tax

³² See ROOSEVELT INST., *supra* note 25, at 20. The Roosevelt Institute, for one, advocates favoring presumptions and per se rules over the rule of reason and calls upon the agencies to bring more cases challenging unilateral conduct.

³³ See Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497, 2510, 2513 (2013).

³⁴ *Report of the Task Force on Foreign Investment Review 2015* A.B.A. SEC. ANTITRUST L. 63.

³⁵ *Id.* at 1, 48.

³⁶ *Id.* at 1.

³⁷ See European Commission Press Release, IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth Up to €13 Billion (Aug. 30, 2016); Brett Molina, *Apple Appeals EU's \$14B Ruling on Irish Taxes*, USA TODAY (Dec. 19, 2016 10:09 AM), <http://www.usatoday.com/story/tech/news/2016/12/19/apple-ireland-appeal-eus-14-billion-tax-ruling/95606010/>. The Commission's decision was appealed at the end of 2016.

breaks or direct aid to a company operating within its borders, disadvantaging competitors elsewhere in the European Union, this is considered a competition issue, not just a tax issue. In contrast, the United States does not even have a term for state aid, and incentives to lure companies from one state to another have become commonplace.

What has emerged in the world today is a patchwork of competition laws, all with the goal of consumer welfare, but many with other goals as well. A catalogue of these laws and these objectives can fill a book,³⁸ but a few examples will illustrate the variety that exists.

A core objective of the European Union's competition law, first adopted in 1957, is the promotion of integration of the economies of the various EU member states.³⁹ Combating artificial barriers and state aid that would give a competitor from one member state an advantage over competitors from other member states was and is integral to this goal.

The competition regimes of numerous countries include a range of goals.⁴⁰ In South Africa, for example, the competition law requires consideration of a multitude of factors, including not only consumer welfare, but such national interest concerns as employment prospects and the impact on less developed regions of the country.⁴¹ This is markedly different from the pure consumer welfare standard being applied by antitrust agencies in the United States. In addition, not every jurisdiction assigns responsibility for pursuing economic goals in the same way as the United States.

Some, like China and South Africa, entrust their competition authorities with responsibility for pursuing multiple goals and balancing each against the others.⁴² South Africa has issued

³⁸ See A.B.A. SEC. ANTITRUST L., *supra* note 34, at ii; Organisation for Economic Co-operation and Development ("OECD"), *Public Interest Considerations in Merger Control*, at 4, DAF/COMP/WP3(2016)3 (June 30, 2016); INTERNATIONAL COMPETITION NETWORK: UNILATERAL CONDUCT WORKING GRP., REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 2 (2007).

³⁹ See Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–02, Oct. 26, 2012, 2012 O.J. (C 326).

⁴⁰ See INTERNATIONAL COMPETITION NETWORK: UNILATERAL CONDUCT WORKING GRP., *supra* note 38, Annex A; OECD, *supra* note 38, at 7.

⁴¹ See Competition Act 89 of 1998, GN 1392 of GG 19412 (30 Oct. 1998).

⁴² See OECD, *supra* note 38, at 7, 9; *see also* Notice of the General Office of the State Council on Launching the Security Review System for Mergers and

extensive guidelines explaining how such an analysis should be performed in reviewing mergers.⁴³ This includes an assessment as to whether a merger should be rejected on “public interest” grounds, considering its impact on employment, small business, disadvantaged populations, and the competitiveness of South African industries.

Some jurisdictions, like Canada and Australia, assign different agencies or officials the tasks of assessing different economic goals. For example, in Canada, the Competition Commission is responsible for protecting competition while the Minister of Industry and the Minister of Canadian Heritage are responsible for assuring that investments in Canada are of “net benefit” to the nation and will not harm its national heritage.⁴⁴ In Australia, the Competition and Consumer Commission is responsible for protecting competition while the Treasurer, with the advice of a Foreign Investment Review Board, is responsible for assuring that investments in Australia are not contrary to the “national interest,” taking into account a range of goals, which include, but are not limited to, protecting competition.⁴⁵

Typically, any one of these agencies or officials is authorized to prohibit a practice or a transaction, regardless of how the others rule, so that if any agency or official disapproves, the practice or transaction is disallowed. For example, in Australia, the Competition Commission approved the acquisition of Australia’s largest grain producer, GrainCorp, by a U.S.-based company, Archer-Daniels-Midland (“ADM”), in 2013, but

Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Gen. Office of the St. Council, Feb. 3, 2011, effective Mar. 5, 2011) (China); Provisions of the Ministry of Commerce for the Implementation of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Commerce, Aug. 25, 2011, effective Sept. 1, 2011) Sept. 8, 2011 (China).

⁴³ *E.g.*, Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act 89 of 1998, GN 309 of GG 40039 (31 May 2016).

⁴⁴ See Investment Canada Act, R.S.C. 1985, c 28.

⁴⁵ *About the ACCC*, AUSTRALIAN COMPETITION & CONSUMER COMM’N, <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc> (last visited Apr. 4, 2017); *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 67 (Austl.).

Australia's Treasurer subsequently prohibited the deal on the recommendation of the nation's Foreign Investment Review Board.⁴⁶

In some jurisdictions, a minister or equivalent official may reject a decision made by the competition commission and either disapprove something the commission has approved or approve something that the commission has disapproved. In Germany, the Competition Commission (the Bundeskartellamt) decided to block the acquisition of grocery chain Kaiser's Tengelmann by another grocery chain, Edeka, but the Minister of the Economy overruled the Commission and allowed the acquisition to proceed on the condition that Edeka protect the jobs of Kaiser Tengelmann's 16,000 employees for at least five years.⁴⁷ In Spain, the competition authority decided to block the merger of gas and electricity companies Gas Natural and Endesa, but the Council of Ministers overruled the authority and cleared the deal, with conditions.⁴⁸

Sometimes, different arms of government endeavor to coordinate the timing of their deliberations in order to avoid the awkwardness of conflicting decisions of this kind.⁴⁹

How did we get to such a wide variety of approaches? In the United States, the first federal antitrust statute was adopted in 1890.⁵⁰ Although a handful of countries had competition laws prior to World War II, most were adopted later. Not all countries had the same economic priorities, and not all had the same type of legal system. This resulted in a variety of objectives. The United States, with its common law tradition, free market economy, and abundant resources, was not in the same position as every other country. In Europe, a different legislative model emerged and nations around the world tended to adopt laws

⁴⁶ See OECD, *supra* note 38, at 14.

⁴⁷ See *Regulators Overruled in Supermarket Takeover*, DEUTSCHE WELLE (Mar. 17, 2016), <http://www.dw.com/en/regulators-overruled-in-supermarket-takeover/a-19122420>.

⁴⁸ See OECD, *supra* note 38, at 15.

⁴⁹ For example, in 2011, the U.S. Department of Justice and Federal Communications Commission conducted investigations of the proposed acquisition by AT&T of T-Mobile USA during the same period of time.

⁵⁰ *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Apr. 4, 2017).

based on the U.S. model, the European model, or some combination of the two, with countless variations and innovations.

At first, each nation's laws had limited impact in other jurisdictions. Although there was a great deal of discussion within academic circles about "harmonization" of these laws, or even real "convergence," genuine differences remain. Occasional efforts to craft a universal competition code all have resulted in failure.⁵¹ There has been productive research conducted within the International Competition Network, an organization of competition agencies from around the world, together with study in other quarters, including the OECD and the World Bank Group, but most of this work so far has focused on cataloging the differences that exist among jurisdictions, rather than on reconciling them.⁵²

With economic globalization, however, it has become increasingly difficult to contain the impact of each nation's competition law within that nation's borders. Mergers and acquisitions of any consequence spill across multiple countries. Practices such as licensing restrictions or exclusivity agreements often apply to multiple jurisdictions. For agencies enforcing these laws and corporations trying to adopt global practices or close global transactions, the disharmony has become more than an academically interesting phenomenon and can be downright frustrating.

More than that, for governments confronting asymmetrical enforcement goals among nations, the disharmony has become a political problem. For how long can a country like the United States adhere to a pristine antitrust standard of consumer welfare when its trading partners are pursuing other goals like "national interest" in enforcing their own competition laws, especially when these goals that can exclude American-based companies from opportunities that their competitors based abroad would be permitted to take advantage of in the United States?

⁵¹ See Richard M. Steuer, *Antitrust Overhaul*, 80 ANTITRUST L.J. 681, 681 (2015).

⁵² *ICN Factsheet and Key Messages*, INT'L COMPETITION NETWORK (Apr. 2009), <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>.

Yet, that is where America finds itself today. American-based ADM was prevented from acquiring Australia's GrainCorp under Australia's "national interest" test and before that Coca-Cola was prevented from acquiring one of China's leading juice manufacturers under China's public interest test.⁵³ Around the same time, however, a Chinese company was permitted to acquire America's largest pork producer, Smithfield Foods, because, among other things, the United States had no "national interest" test.⁵⁴ That deal was closely scrutinized in Congress and elsewhere, but it did not violate the antitrust laws under the consumer welfare test or threaten national security, as that concept was being interpreted, and was allowed to close.⁵⁵ This is not to say that the Smithfield deal necessarily was contrary to America's national interest, but that although there was widespread public concern, there was no mechanism to subject the transaction to a national interest review.

So, what is the right direction for the future? The issues confronting the United States today are which goals to pursue, who should be responsible for pursuing these goals, and how, when these goals conflict, should they be prioritized and balanced. This sounds simple enough, until taking a closer look at the choices that would need to be made.

I. WHICH GOALS TO CHOOSE?

What should be the goals of antitrust law in the United States? Consumer welfare is a given. There is no disagreement that low prices, high quality, and high output at low cost should be a key goal.

Keeping a lid on the concentration of economic and political power is considerably more controversial. Often, the goal of safeguarding consumer welfare requires limiting concentration, as when a merger is disallowed or a monopoly is broken up to prevent supracompetitive prices. But if limiting concentration of

⁵³ See *Hard to Swallow: China Indicates the Real Targets of its Anti-Monopoly Law: Outsiders*, *ECONOMIST*, (Mar. 21, 2009), <http://www.economist.com/node/13331326>.

⁵⁴ Parija Kavilanz, *China's Expensive Love Affair with Pork*, *CNN: MONEY* (May 29, 2013), <http://money.cnn.com/2013/05/29/news/companies/smithfield-foods/index>.

⁵⁵ Shuanghui International Holdings Ltd. acquired Smithfield Foods in 2013 for \$4.7 billion. Dana Mattioli, et al., *China Makes Biggest U.S. Play*, *WALL ST. J.* (May 30, 2013, 7:42 AM), <https://www.wsj.com/articles/SB10001424127887324412604578512722044165756>.

power were recognized as a goal unto itself, would the amount of permissible concentration in markets be the same as it would be today? If four competitors are sufficient to assure competitive prices in a market, are four enough to assure the minimum level of concentration of economic and political power? How would that be measured?

There are two principal means to combat concentration: prevent mergers and break up dominant companies. If containing the degree of economic and political power existing in a market were an independent goal of antitrust enforcement, enforcers and courts theoretically would be empowered, under the antitrust laws, to block a merger that is not expected to create the power to raise prices or reduce output, and is not expected to facilitate collusion to fix prices, limit output, or divide customers, but nevertheless is expected to lead to an undesirable level of political power. Would political power be measured within relevant markets, as with consumer welfare analysis, or would market definition be less relevant? If the nation's largest automaker wanted to merge with the nation's largest food producer and the nation's largest telecom provider, at what point would this result in too much power, regardless of whether there would be a likely impact on prices or output in any relevant market? What if all three were being acquired by some other country's sovereign wealth fund? Without a yardstick, the answers are likely to depend on which administration is in power at any time under a test of "I know it when I see it."⁵⁶ Some may find this acceptable and, of course, any interpretation of the antitrust laws would be subject to review in the courts, which would need to agree with that interpretation, but predictability would be diminished.

In reality, much of the concern that has been expressed over the concentration of power today stems from remorse over the approval of various large mergers in years past,⁵⁷ and there is only so much that antitrust enforcement can accomplish to undo those deals. Assuming that such remorse is warranted, the most

⁵⁶ *Cf.*, *Bon-Ton Stores, Inc. v. New York*, 881 F. Supp. 860, 869–70 & n.5 (W.D.N.Y. 1994) ("customers know a department store when they see it" (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring))).

⁵⁷ *See, e.g.*, Justin Elliott, *The American Way*, PROPUBLICA (Oct. 11, 2016), <https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust>.

meaningful answer is to make antitrust enforcement vigorous enough going forward to prevent this from happening again. Despite the recent criticism, antitrust enforcement actually has grown stronger over the past several years,⁵⁸ and this has resulted not only in stopping or trimming some major deals and practices, but also in averting other deals and practices in lawyers' offices before they ever progress beyond the talking stage.⁵⁹

As for undoing completed mergers and acquisitions that, in retrospect, seem ill-considered, these are harder to tackle. There is some precedent for challenging acquisitions that were completed years before and were never reviewed. Theoretically, it even would be possible for the enforcement agencies to challenge a deal that they did review and allowed to close long before.⁶⁰ Conduct and conditions change, and in compelling cases, an *ex post* challenge could succeed. Unless such challenges were numerous and largely successful, however, they would do little to change the face of the American economy.

As for attacking size itself, the National Commission for the Review of Antitrust Laws and Procedures issued a recommendation in 1979 for the adoption of a "no-fault monopolization" standard under which enforcers could obtain relief in monopolization cases without the need to prove willful acquisition or maintenance of monopoly power, which is the current standard.⁶¹ Instead, the new standard would have required a court, upon a showing of "persistent monopoly power," to formulate a plan to dissipate that power, on the assumption that "persistent monopoly power, in all but the most exceptional instance, can only result from culpable conduct."⁶² The proposal had its proponents but ultimately failed to win much support,

⁵⁸ See Loretta E. Lynch, Att'y Gen., U.S. Dep't of Justice, Keynote Luncheon Address at the 64th Annual American Bar Association Antitrust Law Spring Meeting (Apr. 6, 2016).

⁵⁹ *Id.*

⁶⁰ See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957) (explaining that the legality of an acquisition may be determined at "any time when the acquisition threatens to ripen into a prohibited effect").

⁶¹ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 156, 410 (1979).

⁶² NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *supra* note 61, at 156.

even from enforcers themselves.⁶³ Today, the prospect of authorizing suits to break up existing corporations for dominating too large a share of a relevant market, regardless of whether it can be proved that they engaged in willful acquisition or maintenance of their market power, seems no more realistic an option than it was in 1979. Moreover, even if a few mega-companies were broken up, this would affect only a handful of industries, and the overall effect might well be more symbolic than real.

To be realistic, if the political power of dominant companies is of serious concern to lawmakers today, the antitrust laws can provide only a partial solution. Antitrust enforcement can limit the power of corporations going forward, and the containment of political power is a foreseeable side effect of vigorous antitrust enforcement, but antitrust enforcers alone can do only so much to limit existing corporate power either by stepping up enforcement against future acts or by trying to break up past mergers and existing monopolies.

What about jobs? If creating and preserving jobs were a discrete goal of antitrust enforcement, enforcers and courts theoretically could block a merger or outlaw a practice that impedes the preservation of jobs, even if there were little prospect of an adverse impact on consumer welfare. This theoretically could happen in South Africa,⁶⁴ although under South Africa's new guidelines, it is possible for merging companies to justify a loss of jobs by showing that only by reducing employment can the companies reduce prices to consumers. But again, how would one measure the anticipated effect on employment? Relative to the total employment in the same market, or industry, or in the country as a whole? If a merger or practice is expected to have little adverse effect on consumer welfare but is expected to result in jobs being eliminated or shipped abroad, how can the impact on jobs be measured in a way that can be compared to the effect on prices and output?

⁶³ Milton Handler & Richard M. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 190 n.262 (1980).

⁶⁴ See Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act 89 of 1998, GN 309 of GG 40039, at 5.6 (31 May 2016).

To complicate matters further, we know that a reduction in factory jobs can have the ripple effect of eliminating jobs in support products and services, from restaurants and dry cleaners to residential housing and police departments. How should this be taken into account? On the other hand, the preservation of inefficient jobs can be a drag on the economy in the long term, not a benefit. Should this be taken into account and, if so, how can it be measured? Experience teaches that preservation of inefficient jobs rarely benefits an economy for very long.

What about small business? If the Jeffersonian tradition of preserving small farmers and small merchants is to be carried on, enforcers and courts theoretically could block mergers or outlaw practices that could be expected to impede the entry, growth, and survival of small businesses, regardless of the effect on consumer welfare. But how would “small business” be defined and how would one measure the impact of a transaction or practice on small businesses? Preventing the foreclosure of competition already is a goal of antitrust law, encompassed within the concept of consumer welfare. There is debate over whether enforcement against unilateral practices that foreclose smaller competitors has been effective enough,⁶⁵ but no debate over whether combating foreclosure of competition already is a goal of antitrust law. If protection of small business were made a discrete antitrust goal unto itself, could enforcers and courts prevent transactions and practices that would not result in higher prices or less output, but still would jeopardize the survival of some smaller competitors? How would such impact be measured and what weight should it be given? We have some precedent in the form of the Robinson-Patman Act—which was

⁶⁵ The treatment of unilateral conduct has been hotly debated within the United States. In 2016, the Roosevelt Institute recommended that America’s antitrust agencies “should litigate to test the boundaries of the law and to alert monopolist firms that certain conduct (i.e., tying/bundling practices, predatory pricing, exclusive dealing) will be closely scrutinized.” See ROOSEVELT INST., *supra* note 25, at 22. The 2016 report of the Center for American Progress included the observation that “there have been few challenges to unilateral actions to expand or preserve market power by those who have it,” and recommended that both the FTC and the Department of Justice try building on past precedents to bring a greater number of unilateral conduct cases. See JARSULIC ET AL., *supra* note 23, at 2, 17. Similarly, the article published under the auspices of the American Antitrust Institute in August 2016, urged that America “[d]o more to address market power . . . by taking more enforcement actions against companies that unilaterally harm competition.” See Mitchell, *supra* note 27, at 42.

enacted during the Great Depression to protect small businesses—but the Supreme Court recently instructed that in most cases even this act should be interpreted to require injury to competition itself, not just to small businesses.⁶⁶

What about other goals? If such goals as protection of the environment or the rights of indigenous peoples were among the goals of American antitrust law, antitrust enforcers and courts theoretically could block a deal that would not be expected to adversely affect consumer welfare but would threaten these other objectives. How could these variables be measured and weighed? Other countries do it, so it can be done, but it would add additional layers of complexity and uncertainty, and force antitrust enforcers to make judgments about entirely unfamiliar issues.

What about “national interest?” If protecting national interest were a separate goal of antitrust enforcement, antitrust enforcers theoretically could block an acquisition that would unduly threaten a critical national interest, such as control over the nation’s food supply, financial markets, energy, transportation, or communications, regardless of the acquisition’s anticipated effect on consumer welfare. But how would an enforcer or other official assess a threat to national interest? Would it depend on the nationality of the acquirer? That is not always easy to establish.⁶⁷ Would it depend on whether the acquirer is a private business or individual, or a state-owned enterprise or sovereign wealth fund? How would one measure a threat to national interest? Would it somehow be weighed against consumer welfare, and where would the line be drawn? One answer is that if CFIUS already can measure national security concerns, it should be possible to measure national interest concerns. Another answer is that if other countries’ competition agencies can do it, including China’s and South Africa’s, U.S. officials theoretically should be able to do it too.

⁶⁶ See *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (“[W]e would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition.”).

⁶⁷ See, e.g., Michael Forsythe & Jonathan Ansfield, *A Chinese Mystery: Who Owns a Firm on a Global Shopping Spree?*, N.Y. TIMES: DEAL BOOK (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/business/dealbook/anbang-global-shopping-sprees-china-mystery-ownership.html>.

And what about state aid? If subsidization of U.S.-based companies is becoming an issue abroad, can the United States ignore subsidization of foreign-based competitors? How would this be incorporated into an antitrust analysis? And what about tax breaks offered by states, counties, and municipalities within the United States? Would limitations on domestic tax subsidies even be constitutional?

These are hard questions. There is a preference among many enforcers and scholars for measurable criteria for conducting antitrust analysis. Measurable variables, such as concentration ratios and price elasticity, are usually favored over such variables as changes in political power or national interest. Econometricians routinely participate in antitrust deliberations, but not political economists. Nevertheless, to exclude factors that are difficult to measure may concede too much in the interest of expediency and may place the United States at a disadvantage with respect to other jurisdictions. For example, if a merger poses a borderline threat to prices and output, but is almost certain to result in a substantial increase in the power to influence government decisions affecting the industry or a substantial loss of jobs, is this something that American antitrust enforcers should be required to ignore? If they must ignore it, who will review it? Congress cannot prevent a merger on its own, and today, unless the industry is subject to another regulatory authority or there is a national security issue, no authority will weigh in.

So, what is the answer? The antitrust laws already contain the kernels of many of the goals under discussion and, theoretically, many of these goals could be characterized as having an impact on consumer welfare in the long run to some extent. If political power becomes too concentrated, firms might have greater opportunity to engage in lobbying and regulatory capture and ultimately to raise prices to consumers above a competitive level. If jobs in America disappear, this not only may harm consumer welfare through higher prices commanded by foreign producers, but also may harm producer welfare by contracting demand.⁶⁸ If small businesses are foreclosed from competing, innovation might be stifled and consumers might be

⁶⁸ See Richard M. Steuer, *Jobs and Antitrust*, 23 ANTITRUST MAG. 98, 101 (2009).

denied better products at lower prices. These often are theoretical and speculative outcomes, to be sure, none of which likely would be sufficient in itself to enable an antitrust enforcer to win a case in court. Yet in those cases where the applicable standard is *threatened* harm to competition, which is the standard applicable to mergers and to practices that foreclose access to customers, rather than harm to competition that is already in progress, it might be appropriate to recognize these factors as “tie-breakers” in close cases.

It is important in this context to recognize that there are two broad categories of antitrust offenses under U.S. law—those that require proof of an immediate anticompetitive effect, including per se offenses where that effect may be presumed from the conduct, and those that instead require proof of a threat to lessen competition. Section 7 of the Clayton Act prohibits acquisitions the effect of which “may be substantially to lessen competition, or to tend to create a monopoly.”⁶⁹ Section 3 of the Clayton Act prohibits exclusive dealing and tying where the effect “may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”⁷⁰ In these latter instances, reference to a

⁶⁹ 15 U.S.C. § 18 (2012).

⁷⁰ 15 U.S.C. § 14 (2012). In recent years, as a result of a series of court decisions and commentary summarizing those decisions, the incipency doctrine has been marginalized to some degree, but it remains the law. For example, the antitrust treatise of the American Bar Association’s Section of Antitrust Law summarizes the court and Federal Trade Commission decisions as “effectively merging the mode of analysis” under Section 3 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the FTC Act into a rule of reason standard. 1 A.B.A. SEC. OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 214 (7th ed. 2012); see also U.S. DEP’T OF JUST. & FED. TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995) (citing *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1352 (9th Cir. 1987)) (“In evaluating transactions, the trend of recent authority is to use the same analysis employed in the evaluation of tying under Section 1 of the Sherman Act to assess a defendant’s liability under Section 3 of the Clayton Act.”). A proposed 2016 update of the Guidelines states that, “In evaluating transactions, courts use the same analysis employed in the evaluation of tying under Section 1 of the Sherman Act to assess a defendant’s liability under Section 3 of the Clayton Act.” U.S. DEP’T OF JUST. & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT’L ENFORCEMENT & OPERATIONS (proposed Nov. 1, 2016). As authority, the new draft cites a Seventh Circuit opinion where the court observed, “Though some old cases say otherwise, the standards for adjudicating tying under the two statutes are now recognized to be the same.” *Sheridan v. Marathon Petrol. Co.*, 530 F.3d 590, 592 (7th Cir. 2008). However, none of the cases that *Sheridan* cites actually stands for the proposition that the incipency doctrine no longer exists. Nor do any of the authorities relied on by those cases. See, e.g., 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN

“tie breaker” can inform the assessment of a threat to competition. A tie-breaker approach is not unprecedented, and already is reflected in the horizontal merger guidelines issued by the U.S. Department of Justice and United States Federal Trade Commission.⁷¹ These guidelines take a skeptical view of efficiency defenses raised to justify mergers and acquisitions, but recognize that in close cases, a legitimate efficiencies argument can make the difference.⁷² Of course, there the tie breaker is a justification, not a threatened harm, but it is a tie breaker nevertheless.

In close cases, the antitrust enforcers routinely hear an earful from legislators, interest groups, and the public about such factors as employment, concentration of power, and foreclosure of small businesses.⁷³ While the enforcers do their best to shut this

ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1719b (3d ed. 2011). Each case relies on an earlier case that draws upon both statutes but, upon analysis, not one of those precedents holds that the incipency doctrine has been repealed. Even if any of them did, no judicial opinion—even that of the Supreme Court—can abrogate a Constitutional act of Congress. The fact is that although the elements of proof of an offense under Section 3 of the Clayton Act and Section 1 of the Sherman Act (and Section 5 of the FTC Act) are largely the same—market power, conditioning, etc.—the *degree* to which a plaintiff must demonstrate that competition has been impeded is different. There is a material difference between needing to prove an unreasonable restraint of competition and needing to prove that the effect of a practice or transaction “may be” to substantially lessen competition or “tend to” create a monopoly. Indeed, *Areeda & Hovenkamp* explicitly acknowledge that, with regard to exclusive dealing, not all courts apply the same test under the Clayton Act and the Sherman Act, with “a probable majority of courts hold[ing] that the Clayton Act test is easier for a plaintiff to meet than the Sherman Act test.” *Id.* ¶ 1719b n.22. *See also id.* ¶ 1800c4 (“In tying arrangement cases a few courts have followed the rule suggested in *Times-Picayune* of applying a more aggressive test under the Clayton Act than under the Sherman Act, but most apply the same test under both statutes. Clearly this would be the most sensible approach to exclusive dealing as well. Nevertheless, the cases are divided, with a likely majority stating that the Clayton Act requires a smaller showing of anticompetitive effects.”) (citations omitted).

⁷¹ U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 10 (2010).

⁷² *Id.* (“The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. . . . In the Agencies’ experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great.”).

⁷³ For example, when airline mergers were under review, labor unions and big-city mayors tried to persuade the Justice Department not to challenge under the antitrust laws with the promise to preserve jobs in those cities. When hospital mergers were under review, the hospitals urged the FTC and Justice Department

out, these groups would not keep commenting unless they thought they were being heard. Serious consideration needs to be given to acknowledging that in those instances where the legal standard is a “threatened” lessening of competition or “threatened” creation of monopoly power, evidence of such factors as threats to jobs and threats of excess political power legitimately may be considered in making antitrust decisions as to whether there is a demonstrable threat of long-term harm to consumer welfare. To characterize these factors as “non-economic” or “non-competition” factors, as some do,⁷⁴ is to ignore the long-term impact they can have on consumer welfare. Just because a factor is hard to measure or may take a longer time to impact competition is not reason enough to ignore it, if it bears on the purpose for having antitrust laws and the long-term health of competition.

This does not mean that antitrust decisions should turn on the impact on political power, jobs, or small businesses if not accompanied by immediate or threatened harm to consumer welfare. Making the containment of political power, the preservation of jobs, or the preservation of small businesses goals of antitrust enforcement in the absence of threatened harm to consumer welfare would do more harm than good. Blocking mergers and breaking up companies when there is no real threat to competition under the consumer welfare standard would risk impeding economic progress. Requiring the preservation of jobs as a discrete goal of antitrust, even if there is no threat to consumer welfare, would perpetuate unproductive jobs without creating productive jobs. Such employment requirements have been imposed in other countries for limited periods of time and they can afford workers time to consider their options, but blocking a deal simply in order to perpetuate jobs is a recipe for inefficiency. Likewise, making antitrust determinations solely for the purpose of preserving particular small competitors rather than preserving opportunities for competition itself—which of

not to challenge with promises to freeze prices. When university agreements on scholarships and athletics were under review, the universities urged the Justice Department not to bring a challenge in order to preserve academic traditions. In each instance, the enforcement agencies tried their best to exclude these other factors and to focus exclusively on the anticipated effect on consumer welfare.

⁷⁴ Diane R. Hazel, *Competition in Context: The Limitations of Using Competition Law as a Vehicle for Social Policy in the Developing World*, 37 *HOUS. J. INT'L L.* 275, 306, 308 (2015).

course includes competition from small businesses—would be counterproductive. Where there is no serious threat to consumer welfare, antitrust enforcement to contain political power, perpetuate jobs, or perpetuate small businesses is not an appropriate or particularly effective instrument. At the same time, where the applicable standard is proof of a threat to lessen competition, and there is evidence of an appreciable threat of higher prices or diminished output, the added existence of demonstrable threats of excessive power, loss of jobs, or elimination of small businesses may help to confirm the threat to consumer welfare and the advisability of taking enforcement action.

In contrast, national security and national interest concerns in the context of foreign investment review are in a category of their own. Regardless of the impact on consumer welfare, there is a geopolitical dimension to these concerns that is not adequately reflected in the consumer welfare standard. This is not to suggest that foreign investment in the United States should be discouraged or unreasonably limited, but in a world where most of America's principal trading partners have imposed national interest barriers in one form or another, it would hardly be reckless for the United States to adopt a formal national interest mechanism of its own. National interest tests already exist in Canada, Australia, China, Japan, Korea, and most of the countries in the European Union. New legislation could be enacted to invest America's antitrust authorities, or some other arm of government or an entirely new body, with responsibility for reviewing transactions on the basis of "national interest," including any or all of the goals described earlier.⁷⁵

Another alternative is simply to take a more expansive view, under existing legislation, of the meaning of "national security" and the scope of the authority of CFIUS to review mergers, acquisitions, and takeovers by foreign persons that threaten or

⁷⁵ Congress could conduct hearings and adopt measures announcing its intent to either reaffirm or modify the goals of the antitrust laws. Congress has debated bills of this kind before, and could again. The Foreign Investment and Economic Security bill described earlier offers one model, embracing nearly every possible goal and resting ultimate decision-making power with a select committee and the president, but many other approaches are possible, as well. Alternatively, the enforcement agencies could announce their interpretation of the existing antitrust laws, with the courts having the last word as to whether that interpretation properly represents the intent of the Congress that enacted each of those laws.

impair national security.⁷⁶ Already, CFIUS has interpreted national security to include investments not only in defense contractors but in the technology sector and strategic infrastructure. Other nations take a similarly expansive view.⁷⁷

Still another route is to empower sector regulators having discretion to approve or disapprove a transaction in a sector of the economy with authority to consider national security or national interest on their own. In the telecom industry, for example, the Federal Communications Commission (“FCC”) regularly has been provided advice by “Team Telecom,” an informal working group including staff-level representatives of the Department of Justice, Department of Homeland Security, and Department of Defense, which makes recommendations to the FCC concerning whether or not it should approve license applications that raise national security concerns.⁷⁸ There is no statutory authority for this body or this process, but the FCC has discretion to approve or disapprove license applications and presumably is entitled to take advice as it sees fit in carrying out that responsibility. Although such a process would not work in all sectors of the economy, it could be applied by any agency with comparable authority.

Of course, in a real sense this is a trade issue more than it is an antitrust issue. If the reason for adopting a “national interest” or “net benefits” test is that other countries are subjecting American-based companies to such tests, the ultimate

⁷⁶ The current authority is conferred pursuant to 50 U.S.C. § 4565(b)(1)(A)(i) (2012). *See also* Exec. Order No. 11858, 40 Fed. Reg. 20,263 (May 7, 1975), *amended by* 31 C.F.R. § 800.101 (2016).

⁷⁷ Reportedly, the White House also considered a proposal to expand the scope of national security review in the context of the telecom industry to include review of transactions not involving foreign persons at all but still having an impact on national security. The National Telecommunications and Information Administration (“NITA”), which is a division of the Department of Commerce that advises the White House regarding telecommunications policy issues, reportedly has proposed broadening the scope of reviews by Team Telecom, an interagency panel with representatives from the Departments of Homeland Security, Defense, Justice, State, and Treasury, together with representatives from the FBI and United States Trade Representative, to reach petitions that do not involve foreign ownership of U.S. carriers. *See* Jenna Ebersole, *FCC OKs Team Telecom Review Process Reform Proposal*, LAW360 (June 24, 2016, 3:27 PM), <https://www.law360.com/articles/810734/fcc-oks-team-telecom-review-process-reform-proposal>.

⁷⁸ *Proposed FCC Rules for Team Telecom Review of Applications with Foreign Ownership, Shorten Timeframes, Add Burdens*, WOMBLE CARLYLE (June 30, 2016), <http://www.wcsr.com/Insights/Alerts/2016/June/Proposed-FCC-Rules-for-Team-Telecom-Review-of-Applications-with-Foreign-Ownership>.

answer may lie in adopting an equivalent test and negotiating mutual exceptions. Potentially, America could adopt a national interest test that provides a different standard for transactions involving entities from countries with which America has negotiated agreements, allowing American-based entities to invest in those countries without unreasonable limitations.⁷⁹ Without a national interest test of its own, however, the United States presumably would find it harder to negotiate agreements of this kind.

Plainly, there is more than one possible approach for addressing national interest. The only wrong answer would be not to confront the issue of asymmetrical barriers at all.

II. WHO SHOULD BE RESPONSIBLE FOR EACH GOAL?

If America's goals are modified, who should take responsibility for them? The current division of responsibility may work reasonably well in most instances, but it was not the product of some grand plan. Rather, it was the result of incremental agency growth over the years.

What should the division of responsibility be? The possibilities include the following: (1) assigning each of multiple authorities responsibility for making an assessment of compatibility with a narrow set of goals; (2) assigning the competition authority responsibility for balancing all or most the goals; or (3) assigning another arm of government responsibility for balancing all or most of the goals.

There are several models for these alternatives from which to choose. First, assign each agency one or more goals, which could result in more than one agency assessing competition issues, and provide each agency the authority to veto a transaction or practice. This is the model currently in effect in the United States and numerous other countries, which have competition agencies, national security agencies, and multiple specialized regulatory agencies, such as banking commissions,

⁷⁹ The September 15, 2016 letter from sixteen members of Congress to the GAO asked the GAO to report on whether the mandate of CFIUS should be broadened to "prohibit investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry." Letter from Rep. Robert Pittenger et al., House of Representatives, to Hon. Gene L. Dodaro, Comptroller Gen., U.S. Gov't Accountability Office (Sept. 15, 2016). This proposal derived from the 2012 Annual Report of the U.S.-China Economic and Security Review Commission.

communications commissions, energy commissions, and transportation commissions to exercise authority—sometimes exclusive authority—over transactions and practices involving entities within their areas of responsibility. Second, assign each agency one or more goals but enable some agencies to override the vetoes of others, as occurred in Germany and Spain. Third, assign the antitrust authorities responsibility for balancing multiple goals, as in South Africa and China.

Lastly, assign the antitrust authorities responsibility for applying the consumer welfare standard and assign another authority, such as an expanded CFIUS, a new foreign investment review board, or the Secretary of Commerce, responsibility for balancing multiple goals under a “net benefit” or “national interest” test, as in Canada and Australia, with each authority having the power to disapprove a transaction or practice.

In the United States, the dispersion of responsibility among multiple agencies has existed for some time, with each agency pursuing a somewhat different set of goals with some overlap. One can argue that the principle of “if it ain’t broke, don’t fix it” would counsel to leave well enough alone in this respect, especially in a country like the United States, which can afford the expense of operating multiple regulatory agencies. Although there are occasional conflicts between agencies, these are infrequent and tend to be worked out.

Could there be greater coordination between and among agencies? There already has been progress on this score, and more can be made, but if this is the course chosen improvements should be pursued. One possibility is to appoint an official to act as liaison among agencies with authority to review transactions or practices, to help assure that the agencies do not act at cross purposes even if they do not have liaisons of their own. In the same vein, on April 15, 2016, President Obama issued an executive order to all federal agencies directing them to identify specific actions they can take to detect anticompetitive behavior, to refer perceived antitrust offenses to the U.S. Justice Department and U.S. Federal Trade Commission when appropriate, and to identify actions they themselves can take within their own areas of responsibility to address undue burdens on competition.⁸⁰

⁸⁰ Exec. Order No. 13725, 81 Fed. Reg. 23,417 (Apr. 15, 2016).

As described earlier, some countries assign their competition agencies responsibility for assessing and weighing not only consumer welfare, but other goals as well. This can be daunting, but every town council and zoning board routinely faces the challenge of weighing competing goals, usually with far less analytical support.⁸¹ Nevertheless, the arguments against assigning competition agencies authority for applying other goals are that these agencies are ill equipped to perform non-economic analysis, and that such an approach would concentrate too much discretion within the competition authorities. If, for instance, the Federal Trade Commission were tasked with conducting a “net benefit” analysis, considering all the goals discussed earlier, it would require greater resources. It also would need the political strength to withstand the criticism it would inevitably attract year in and year out from disappointed parties and their supporters.

Some countries, such as Canada and Australia, have established authorities separate from competition authorities to oversee foreign investment, applying a wide variety of goals either apart from consumer welfare or, as in Australia, including consumer welfare.⁸² A model like that adopted in Australia would contemplate the creation of a foreign investment review board to advise a cabinet member or the president, who in turn would have authority to disapprove foreign investments, applying a “national interest” or “net benefit” test.

If such an arm of government were assigned responsibility in the United States for balancing all these goals in the context of foreign investment, who has the breadth of experience, depth of wisdom, and political respect to make such judgments? The National Economic Council, as has been suggested by the Center for American Progress?⁸³ Would its determination be subject to judicial review, and under what standard? What about expanding the responsibilities of CFIUS, as proposed under the Foreign Investment and Economic Security bill,⁸⁴ to apply a “net benefit” test to foreign acquisitions of control regardless of

⁸¹ ROOSEVELT INST., *supra* note 25, at 21 (stating that “regulators and enforcers are routinely tasked with balancing a variety of goals and priorities.”).

⁸² U.S. Dep’t of State, Bureau of Economic & Business Affairs, 2015 Investment Climate Statement – Australia (2015); U.S. Dep’t of State, Bureau of Economic & Business Affairs, 2015 Investment Climate Statement – Canada (2015).

⁸³ JARSULIC ET AL., *supra* note 23, at 20.

⁸⁴ See *supra* note 16.

whether those acquisitions pose a threat to national security? Under that proposal, the Committee's determination would be subject to review by the President, but otherwise would be non-reviewable.

What about creating a new body, modeled on Australia's Foreign Investment Review Board? How would it be composed and who would appoint its members? Would it be modeled on the Federal Trade Commission, with members from more than one political party serving fixed terms or would it be reconstituted by each administration, like the Council of Economic Advisors? Who would have the ultimate responsibility—the Treasury Secretary? The Commerce Secretary? The President? What would be the threshold for review? Would judicial review be possible and, if so, under what standard?

The simplest approach might be to expand the mission of CFIUS by defining “national security” to include economic security, or “national interest,” and to create a new advisory board, with adequate staffing, to provide the support that CFIUS would need to fulfill a broader mission with respect to acquisitions of foreign control that do not raise issues of national defense or homeland security. Depending upon the scope of this new authority, there might be calls to add provisions to allow judicial review in those instances where neither national defense nor homeland security is involved.⁸⁵

It would be easiest to leave well enough alone, of course, but if the American economy truly is being threatened by the current approach, a new assignment of responsibility should be considered. There are several viable alternatives, as just described, each of which has pros and cons. What is clear is that if the present structure in the United States no longer is working satisfactorily, a new structure needs to be considered.

III. HOW SHOULD GOALS BE BALANCED AND PRIORITIZED?

The last key issue, regardless of which goals are pursued and which arm of government takes responsibility for each one, is how to resolve conflicts among the goals. In the United States,

⁸⁵ For a discussion of the constitutionality of a statutory bar to judicial review, see *Ralls Corp. v. CFIUS*, 758 F.3d 296, 307–12 (D.C. Cir. 2014).

the answer to this question has emerged somewhat haphazardly, with little occasion for policymakers to ponder whether it is being done correctly.

Should one goal trump another? Should each goal be balanced against the others? If different agencies with different goals are involved, should each have a veto? If so, should there be priorities among the vetoes? What about overriding vetoes—should one arm of government have the right to override the veto of another arm?

America has made its choices piecemeal. Every agency, applying its own set of goals, potentially has a veto. But now that advocates from both political parties have been calling on antitrust enforcers to do more to advance the economy, one reasonably can ask whether there are ways to improve upon the status quo. As already described, there are several possibilities for dividing or consolidating responsibility. But regardless of whether multiple agencies continue to share responsibility for reviewing business conduct or whether a single agency is tasked with pursuing all the goals, there does seem to be a natural order of priority worth considering.

National security, as that term is traditionally understood, is the highest priority. No country is willing to allow foreign interests to control the strategic assets essential to its defense.

National interest has become the next highest priority in those countries that recognize the concept. Although an acquisition might not threaten a country's defenses, it might undermine its economic independence to an unacceptable extent. If a transaction fails the national interest test, it will be rejected regardless of whether it is neutral or beneficial in other respects.

After that, low prices and full employment are particular priorities for most voters in the world's democracies, including the United States. The United States has treated low prices to consumers as a higher priority than job creation in this context, but plainly that presumption comes under increased pressure when unemployment becomes a greater concern.

Dispersion of economic and political power is a growing priority, especially as inequality and its political implications attract increased attention. But until now, this has not been an immediate priority, and jobs and prices have commanded greater consideration. Has this changed?

Preserving small business opportunities is an important priority in America, but attracts attention from a narrower constituency. Yet it remains important politically, and in certain cases could assume as high a priority as low prices.

Concerns over the environment, government subsidies, and minority cultures are of great importance in particular instances but arise less often and have advocates in other parts of government, relegating them to lower priority in most competition discussions in the United States.

If America were to adopt a net benefit test for foreign investment, could, and should, these goals be balanced against one another? National security would trump all the others. National interest would require a more nuanced analysis. In this process, the nationality of the acquiring party or other party under scrutiny could not be ignored. Is it from a hostile country? Is it a state-owned entity? Is it a sovereign wealth fund? And how many of the world's largest multinational companies even have national identities any more? What makes a company an "American" company, or a "German" company, or a "Chinese" company?

Consumer welfare traditionally would be a trump card as well. When an antitrust agency wants to challenge a deal or a practice because it is likely to result in higher prices, it usually is dead on arrival, unless it turns out to be essential to national security.

Harder than that would be balancing effects on employment, concentration of power, protection of small business, government subsidies, and so forth under a "net benefit" standard. Sometimes the answer would be obvious but in most instances there would be reasonable arguments on both sides. Those few countries that have attempted to provide guidelines, such as South Africa and Australia, recommend little more than stirring all the considerations into a stew and judging whether the result is palatable.

One response to this quandary is to simply conclude that balancing is too hard to accomplish, and so should not be undertaken at all. Another response is to conclude that if these goals are not weighed against one another, too many undesirable transactions and practices will be permitted, to the detriment of the economy and the American public. If Canada, Australia, and South Africa can prioritize to make hard decisions in order to

protect their economies, why, one might ask, can't the United States? Whether this reflects alarmism, protectionism, or realism, interest is swelling and the time has arrived for a robust debate.

CONCLUSION

Where does that leave us? We conclude where we began. Critics have been complaining that there are too few jobs in America and too much inequality. They have been calling for broadening the goals of antitrust and, at the very least, for more antitrust enforcement. More enforcement could be expected to have an impact on the concentration of power and on jobs, but even recalibrating the goals of antitrust law cannot, by itself, realistically be considered a panacea for eliminating unemployment or inequality overnight.

At the same time, other countries already have broader goals written into their own laws, including their competition laws, which protect jobs and limit foreign investment. These laws create asymmetries that may be placing the United States at a disadvantage. Today, America has the opportunity to expand the goals of its laws to address these asymmetries, either through broadening the interpretation of current legislation—which could but need not include the antitrust laws—or by enacting new laws. Such changes would present the challenge of deciding who should apply these broader goals and how they should be prioritized and balanced. If the antitrust agencies are not the choice to assume this responsibility, an expanded CFIUS or a newly constituted foreign investment review board would be possible alternatives. These changes could foster an environment in which it would be easier for future trade agreements to assure a level playing field for the United States and its trading partners.

The devil is in the details, of course, and the devil would feel right at home in this imbroglio. Broadening and strengthening antitrust enforcement and foreign investment review sounds simple enough but would raise a dizzying host of complications and uncertainties. Yet, just because something is hard to measure or hard to solve is no reason to ignore it. If loss of jobs and concentration of power are threatening to harm the nation's economy and are not being adequately checked, changing nothing would be an outcome but would not be a solution. Not all of the

changes currently being proposed make equal sense, but for those that make the most sense, the time for serious deliberation is now.