DEPARTMENT OF JUSTICE

Stand By Me: The Consumer Welfare Standard and the First Amendment

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I. Introduction

Good Morning, and thanks to Barry Lynn and the Open Markets Institute for the invitation to be with you today.[1] I am honored to be among so many dedicated experts, including my favorite Senate Antitrust Subcommittee Ranking Member, Senator Amy Klobuchar, who will deliver the keynote for this afternoon.

Events like this foster the kind of collegial civil dialogue upon which democratic governance is based. That's particularly true where people may disagree on the details of policy. Barry, I appreciate your kind introduction, even as we may disagree on policy issues, including some we're discussing today.

"Almost" the kindest introduction I've received in this job was from Senator Elizabeth Warren, when my nomination was called to the Senate floor. In her remarks, she described me as the "dream candidate" to lead the Antitrust Division. Very kind words, but, as I said, it was only *almost* the kindest introduction. Actually, her full statement was that I am a dream candidate "[f]or the giant corporations…who want to amass more power and profits for themselves."[2]

If nothing else, I suppose that shows the power of quoting out of context.

That was ten months ago, and I hope the record of the Antitrust Division warrants a reassessment of that view. I'm proud of what the Division has done to build on its long history of protecting American consumers through enforcement of the antitrust laws. In the last few months we have filed charges against canned tuna executives, including a CEO, for colluding and cheating American consumers out of their grocery money.[3] We've brought an important, and in many ways potentially historic, lawsuit to prevent an aspect of AT&T's anticompetitive acquisition of Time Warner from making it a gatekeeper to competition in cable TV.[4] And, in another case raising vertical concerns, we insisted on structural divestitures to cure similar competitive problems in the merger of Bayer and Monsanto.[5]

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[1] Credit to Ben E. King for the song referenced in the title. *See* Ben E. King, *Stand By Me*, on DON'T PLAY THAT SONG! (Atco Records 1961).
[2] 163 CONG. REC. S6177 (September 27, 2017) (statement of Sen. Elizabeth Warren).
[3] *E.g.*, Press Release, Dep't of Justice, Bumble Bee CEO Indicted for Prix Fixing (May 16, 2018).
[4] *See* Press Release, Dep't of Justice, Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner (November 20, 2017).
[5] *See* Proposed Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. May 29, 2018).

That doesn't mean the Antitrust Division is against large corporations either—it simply shows we, in this Administration, are unafraid to go where the facts and the law take us to protect the free markets and American consumers.

Indeed, taking the vertical and horizontal components of the Bayer/Monsanto settlement together, it's the largest divestiture package ever negotiated by a U.S. antitrust agency.

When I think about the "dream candidate" for the Antitrust Division, I put a different gloss on it than Senator Warren did. My aspiration, and what I believe should be the aspiration of any antitrust AAG, is to be a dream candidate for American *consumers*. An AAG should endeavor to use the prosecutorial powers of the Department of Justice to deliver the best results for consumers, consistent with the latest economic thinking and the laws.

A few years ago that would have been a cliché—of course antitrust enforcers should aspire to protect American consumers. But, suddenly, we find the consumer welfare standard of antitrust law questioned. The bipartisan consensus approach of putting consumers first in antitrust analysis is now under review. It's been said it "blind[s]" us to broader goals, like protecting market structures conductive to democracy.[6]

Of course we at the Antitrust Division hear these recent calls. And it's healthy to periodically review our laws and procedures, as needed. So I welcome the debate. We're told our investigations are too focused on consumers to do the good they could with a broader mandate. We hear that antitrust could be a panacea for a range of economic, social, and democratic ills, if only it set aside the current enforcement philosophy at its core.

We also hear people saying that with a widened mandate, with setting aside the consumer welfare standard, antitrust could help win votes for the candidate or party that promises to use it.[7]

That's just the danger, of course. Antitrust has always had a political allure—cast the blame for your ill of choice on corporate power, and let the unswung hammer of antitrust be the promised solution. It's a populist cry that has slipped in and out of vogue for over a century.

Today's conference focuses on online and media industries, and the impacts on our democratic dialogue of changes in those spaces. Of course, in America we want institutions that make our democracy strong—that seems like a no brainer. So as one line of thinking goes,

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[6] *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition & Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 14 (testimony of Barry C. Lynn, Executive Director, Open Mkts. Inst.).

[7] *See* Barry C. Lynn, *Democrats Must Become the Party of Freedom*, Wash. Monthly, Jan./Feb. 2017.

antitrust enforcers should step beyond consumer welfare and think about what would be good or bad for our democracy, or for values like the free speech the First Amendment protects. The suggestion is that perhaps enforcers should broaden the consumer welfare lens to think about effects on democracy or expression.

I'd like to focus my remarks today on two responses to that suggestion. First, we shouldn't go down that road, because enforcement actions purportedly aimed at supporting our democracy carry too great a risk of inadvertently undermining our constitutional values. Second, we don't need to go beyond the consumer welfare standard, because it can get the job done on its own. Allow me to take those one at a time.

II. The Risks to Democracy of Abandoning the Consumer Welfare Standard

The first point is that there are serious risks to democracy in abandoning the consumer welfare standard. I heard the FCC Chairman, a few months ago, state that he and the FCC stand by the First Amendment. That is generous of him…! I can assure you that at the Justice Department, we stand by the entire Bill of Rights! The values enshrined in the Constitution and Bill of Rights are the foundation of our democracy.

I was born in Iran, and emigrated with my parents to escape the persecution of religious minorities and independent thought. I know from real experience the value of a government that believes in and practices those rights we cherish in the First Amendment. It's important, and we shouldn't take it for granted.

The problem with incorporating these values into antitrust enforcement decisions is the risks that doing so would be counterproductive. It's the issue Justice Brandeis explained in his famous *Olmstead* dissent:

> *Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. …. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*[8]

That admonition, in fact, is inscribed on the floor of the U.S. Capitol. The message for enforcers is that in the zealous pursuit of justice through prosecution, we risk prosecuting unjustly.

That risk in antitrust enforcement is significant. Enforcement decisions targeting democratic ends would invite a self-defeating exercise of prosecutorial subjectivity. Republican

[8] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

and Democrat prosecutors, or those of any party or political orientation, carry with them their own perceptions of what is good and bad for our democracy and for society at large. The Constitution insists they set those views aside in exercising their prosecutorial discretion, not embrace them as rules of decision.

As the Supreme Court explained in its 1963 *Philadelphia National Bank* decision, antitrust enforcers aren't tasked with some "ultimate reckoning of social or economic debits and credits,"[9] but rather Congress has focused us on preserving our competitive economy. By giving us focus, the consumer welfare standard reduces the risk of what Brandeis called "dangers to liberty" from well-meaning enforcers.

Nor is that a small risk or merely a theoretical proposition. For example, when we were preparing our complaint in the AT&T/Time Warner case, we received a curious request from a state antitrust enforcer. They told us they would only join our case if we provided written assurances that no divestiture would go to Fox or to Rupert Murdoch. They actually wanted to direct the divestiture based on the viewpoint of the buyer, not on what benefits competition or consumers, as defined by the consumer welfare standard. We, of course, rejected the request, because it would have been unconstitutional to accede to it.

The irony in that case is rich. The career staff put together a straightforward consumer welfare analysis that showed that merger would unlawfully raise prices for cable TV subscribers and harm online innovation. That consumer welfare story was then presented at trial, including with supporting economic analysis by a distinguished economist. The harms of that transaction, following a consumer welfare rubric, were simply too great to accept, or try to fix with ineffective behavioral remedies.

The famous newscaster David Brinkley said that "a successful man is one who can lay a firm foundation with the bricks others have thrown at him." Take a look at the bricks that have been thrown by some recent merging parties and think about the implications of a world where judgments about expression comprise part of the antitrust analysis. If we actually did open up antitrust analysis to considerations of what is good or bad for democracy or free speech, we would invite these attacks in case after case and lend them credibility. Without question, antitrust enforcement does not benefit from the allegations that would flow from abandoning the consumer welfare standard.

[9] United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963).

Open Markets' own issue papers underscore this concern. On the Institute's website is a feature titled "Democracy & Monopoly" that purports to explain how more vigorous enforcement could support our democracy.[10] After a brief historical overview, it points out the perceived problem with under-enforcement: it says that "Charles and David Koch provide a stark example." The essay then describes over several paragraphs ten different political positions the Koch brothers have supported. It doesn't say what anticompetitive conduct their companies have engaged in, or how they have impacted the competitive process, but it does point out that they've contributed to people "teaching Ayn Rand" and "funding [] Tea Party organizations."[11]

Is that really where we want antitrust enforcement to go? Whether it's the Kochs or George Soros or anyone else, political positions should have no role in determining the propriety of antitrust enforcement actions. If we take antitrust down the path of considering who is funding Ayn Rand lectures, or the Clinton Foundation for that matter, we will have taken a dramatically wrong turn, in my view.

Elyse Dorsey and her co-authors express a related concern in a recent paper.[12] As they describe, the consumer welfare standard has helped to inoculate antitrust enforcement from the kind of rent-seeking and lobbying behavior all too common in government agencies. Abandoning consumer welfare and opening the door to broader arguments would, ironically, make antitrust agencies more open to the exercise of corporate influence and capture.

The consumer welfare standard also provides a principled basis for decision and discussion necessary to the rule of law. D.C. Circuit Judge Doug Ginsburg and Taylor Owings, who now serves as one of my Counsels in our Front Office, recently described the necessity of due process protections in antitrust enforcement, like transparency and the right to confront evidence.[13] These core values would be difficult to achieve in antitrust enforcement absent a consistent and definable standard such as the focus on consumer welfare provides.

Let me summarize the issue as Alexander Hamilton did, as a question of self-control. He said the "great difficulty" in framing a government is that "you must first enable the government

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[10] *See Monopoly Basics: Democracy & Monopoly*, OPEN MARKETS INSTITUTE, https://openmarketsinstitute.org/explainer/democracy-and-monopoly/ (last visited May 24, 2018).
[11] *Id.*
[12] *See* Elyse Dorsey, Jan Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, ANTITRUST CHRONICLE, April 18, 2018.
[13] *See* Douglas H. Ginsburg and Taylor M. Owings, *Due Process in Competition Proceedings*, 11 Competition Law International 39 (2015).

to control the governed; and in the next place, oblige it to control itself."[14] The consumer welfare standard, along with judicial review and Congressional oversight, provides a means to control the tremendous power granted to antitrust enforcers.

All of that's to say that there could be real risks to core democratic values from abandoning the consumer welfare standard in pursuit of broader societal and democratic goals.

That raises the question—is the risk worth taking? Some may think it is. I submit, however, that there's no need to accept the risks of abandoning the consumer welfare standard because it is more than capable of meeting the challenges we face.

Next, allow me to address why I think our current standard is up to the task.

III. The Consumer Welfare Standard is Up to the Task

First of all, even when applying a consumer welfare standard, antitrust enforcement can benefit our democracy and support media markets conducive to discourse. The competitive economy the consumer welfare standard is designed to protect supports those goals.

The Supreme Court's *Northern Pacific* case is instructive.[15] It is often quoted for the proposition that the antitrust laws are a "comprehensive charter of economic liberty" that rest on the premise that competition itself "yield[s] the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[16] Essentially, the consumer welfare standard focuses on allocative efficiency, prices, quality, and innovation.

Justice Black went on, however, to say that "at the same time [it] provid[es] an environment conductive to the preservation of our democratic political and social institutions."[17] That's an important proposition. *At the same time* that we are enforcing the antitrust laws focused on consumer welfare, we are maintaining a free market structure that's good for our democracy more broadly. That doesn't mean, however, that we should take the risk of adding those goals directly into the underlying legal analysis of particular cases.

Many laws serve social values, even where those values are not themselves liability or enforcement standards. The tort system, for example, has the important benefit of civil dispute resolution. It keeps people with conflicts from fighting it out or, as Alexander Hamilton did,

[14] THE FEDERALIST NO. 51 (James Madison).
[15] Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958)
[16] *Id.* at 4.
[17] *Id.*

dueling with pistols. Yet, no rule of tort law adjudication considers relevant the likelihood of particular litigants to resort to violence. That value is a *byproduct* of the legal regime, but not a case-specific element of consideration.

To frame it in economic terms, a consumer welfare standard that focuses liability determinations on harms to competition and consumers creates *positive externalities* for American democracy.

That's how antitrust supports our core values, without risking them by incorporating them directly into decisional rules.

Jon Sallet, a Deputy AAG in the prior administration, has a forthcoming article on a similar consideration as it appears in the legislative history and in Brandeis' views of antitrust enforcement.[18] As Sallet explains, while "the purposes of antitrust law can be broad; the mechanism of antitrust is legal."[19] As prosecutors, our job is to apply "enforceable legal standards that identify harmful industrial conduct in a manner that vindicates social and democratic values."[20] Consumer welfare for us is that standard.

It's also important to emphasize that the current standard is capable of addressing the enforcement challenges presented by emerging digital technologies.

Those advocating abandoning consumer welfare have often attacked a straw man—they describe the standard as requiring a myopic focus singularly on downstream consumer prices, to the exclusion of non-price values and the competitive process.[21] This narrow approach, in turn, can be attacked for inability to confront technological changes that are redefining our democracy. Recent enforcement experience, however, I submit belies that notion.

The D.C. Circuit described the breadth of the consumer welfare standard last year in affirming the United States' victory challenging the merger of health insurers Anthem and Cigna. "[P]roduct variety, quality, innovation, and efficient market allocation—all increased through competition—are … protected forms of consumer welfare."[22] Likewise, the antitrust laws

[18] Jonathan Sallet, *Louis Brandeis*: *A Man for This Season*, Colo. Tech. L.J. (forthcoming 2018).
[19] *Id.* at 17.
[20] *Id.*
[21] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 716 (2017) ("[A]ntitrust doctrine views low consumer prices, alone, to be evidence of sound competition").
[22] United States v. Anthem, Inc., 855 F.3d 345, 370 (D.C. Cir. 2017).

protect competition even in markets that are not end-consumer facing, such as the labor markets alleged in our recent and on-going actions against employer no-poach agreements.[23]

The current standard also recognizes that consumer harm can arise from conduct that distorts the competitive process. For example, in the Division's Complaint challenging information sharing agreements between DIRECTV, AT&T, and other potential distributors of the Dodgers channel, this harm was called out explicitly. The Complaint alleged that the agreements "deprived LA area Dodgers fans of a competitive process."[24]

Innovation effects have been an ongoing, but relatively recent, focus of the Antitrust Division. I explained a few weeks ago in Rome how innovation is *central* to consumer welfare. The divestitures obtained in the Bayer/Monsanto transaction demonstrate this focus. In response to the Division's concerns that the transaction would impact research and development in seeds and crop protection products valuable to farmers across America, the Division obtained significant divestitures, as I noted earlier. Several aspects of the divestitures specifically target preventing a loss in innovation from the transaction. All of this was done through the application of a consumer welfare lens.

Likewise, the consumer welfare standard is capable of innovation itself—as markets and technologies and economic understanding evolve, so does its application. As I've spoken about recently, revealed consumer preferences can help us ascribe consumer values to zero-cost goods like those provided by some Internet platforms.[25] As we consider consumer welfare in new kinds of markets, the standard allows for its application to new markets, just as it did in the *Microsoft* case in the 1990s.[26]

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[23] *See* U.S. DEP'T OF JUSTICE, NO MORE NO-POACH: THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE "NO-POACH" AND WAGE-FIXING AGREEMENTS (2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

[24] Complaint at 50, United States v. DirecTV Group Holdings, LLC, No. 2:16-cv-08150 (District Court for D.C., Nov. 2, 2016).

[25] *See* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets (May 22, 2018).

[26] *See* United States v. Microsoft Corp., 253 F.3d 34, 64 (D.C. Cir. 2001) (en banc) (upholding the district court's finding that depriving consumers of competitive alternatives to its monopoly operating system constituted anticompetitive effects in violation of Section 2 of the Sherman Act).

IV. Conclusion

I'll conclude with a quote from Ronald Reagan. The nine most terrifying words in the English language, he often said, are "I'm from the government and I'm here to help."[27] The Gipper had a perhaps more plain-spoken way of echoing Justice Brandeis' caution about the dangers to liberty in the well-meaning encroachment of government.

As you consider the health of our democracy and the role of media platforms and other institutions in it, I urge you to recall the surest path to undermining the First Amendment: exercising government power based on viewpoint. The consumer welfare standard does not blind us as enforcers; it focuses our decisions on appropriate considerations like price, output, innovation, quality, and choice. Enforcement of the free markets for the benefit of consumers can be achieved with greater success, and greater fidelity to the rule of law, within the contours of the consumer welfare standard, than without.

Thank you.

[27] E.g., Ronald Reagan, The President's News Conference (August 12, 1986).