

Testimony of Open Markets Institute Executive Director Barry Lynn

“Alternatives to the Consumer Welfare Standard”

Competition and Consumer Protection in the 21<sup>st</sup> Century – Hearing #5

November 1, 2018

Thank you. It’s a great honor to be here.

I want to thank Chairman Simons for organizing this exceptionally important discussion. The extreme and growing concentration of power in America poses many political and economic challenges. The FTC was created precisely to deal with such problems.

I believe my testimony from a hearing of the Senate Antitrust Subcommittee last December has been distributed to my fellow panelists. The following comments build on the historical analysis of the Consumer Welfare philosophy I provided in that document.

Today, I want to emphasize six main points.

**First, the prime purpose of antimonopoly law is to protect the liberties of the individual citizen, and our democracy.**

I’ll start with a quote from one of the founders of this institution, Woodrow Wilson.

“America was created,” he said in 1912, “to break every kind of monopoly, and to set men free, upon a footing of equality, upon a footing of opportunity.”

Let me buttress that with a quote from a man who rejected Wilson as a leader, due to Wilson’s racism. Yet fully embraced Wilson’s vision of America. In 1935, W.E.B. Dubois, wrote that America’s contribution to the modern age is “a vision of democratic self-government: the domination of political life by the intelligent decision of free and self-sustaining men.”

Isn’t that a beautiful description of the promise of our nation? “The domination of political life by the intelligent decision of free and self sustaining men.”

That election of 1912 began the modern era in antitrust. Over their first 14 months in power – President Wilson, in tandem with Congress – passed:

- The Clayton Antitrust Act.
- The Federal Reserve Act.
- Antimonopoly Tariff Reform.
- A Progressive Income Tax.
- The FTC Act.

And the key principles of this regime? Because it was in fact a coherent intellectual and legal regime.

The key principles were:

- The main practical goal of antimonopoly is to extend checks and balances into the political economy. The foremost goal is not – and must never be – efficiency.
- Markets are made, they don't exist in any Platonic ether. The making of markets is a political and moral act.
- Corporations are tools of governance. They must be regulated, preferably through competition.
- Vital monopolies – such as communication and transportation networks – must treat every producer the same. They must never discriminate.
- The worker, farmer, independent entrepreneur, and professional must be free to form unions, cooperatives, and associations.

The founders of modern antimonopolism did not see antimonopoly as one policy among many. They saw antimonopoly as the operating code that governs every commercial relationship between citizen and citizen, everywhere.

They saw it as the way to make and protect a political economy that not only allowed but encouraged “The domination of political life by the intelligent decision of free and self sustaining men.”

This vision worked.

As other industrial nations fell to fascism, totalitarianism, in America it resulted in the most powerful richest, freest, most materially and socially innovative nation ever in the history of the world.

**Second, the authors of “Consumer Welfare” philosophy aimed to promote concentration of power, and top-down systems of corporate control.**

As most of you know, Robert Bork, in his book *The Antitrust Paradox*, provided the key intellectual argument in favor of the Consumer Welfare philosophy.

Bork aimed to simplify antimonopoly to one main goal only – efficiency. Exactly what traditional American antimonopolism said must never be the foremost goal.

The effects of this change were understood at the time.

In 1987, the former chairman of this institution, Robert Pitofsky, in Congress, said of Mr. Bork and his work:

- “Underlying all of this thinking is a fundamental disdain for the competence of Congress and the Supreme Court to understand economics and apply its principles.”
- “His appointment would threaten the delicate balance among the legislative, executive, and judicial branches that is at the heart of the American constitutional system.”

- “We would see a different sort of country if companies in every segment of the economy were permitted to merge down to two or three giant firms without fear of antitrust exposure.”

### **Third, the Effects were indeed radical and extremely dangerous**

The political and economic effects of this change in thinking and policy are many, and increasingly terrifying.

- Monopolists are key drivers of inequality – suppressing wages, ratcheting up prices.
- Monopolists use their wealth and power to disrupt  
And dominate our democracy.
- Monopolists sell out our national security, by making us depend unnecessarily for vital supplies on autocratic regimes such as in China.
- Monopolists make complex industrial and financial systems more subject to catastrophic cascading failure.
- Monopolists kill people, by driving up the price of drugs and vaccines, of medical supplies, of hospital beds.
- Monopolists impose increasingly autocratic systems of control over workers.
- Platform monopolists exploit their chokehold control over our communications systems to strip our free press of ad revenue and to make influential authors, reporters, editors, publishers afraid to speak their minds in public.
- The manipulation machines of platform monopolists serve also as the main conduit for the subversive propaganda and misinformation, both foreign and domestic, now tearing our nation apart.

### **Fourth, we must return to basics. The “Consumer Welfare” test must go.**

I know this discussion is deeply frustrating for many of you. You have devoted entire careers to this philosophy.

I greatly appreciate how much creativity so many of you are devoting to stretching the Consumer Welfare philosophy to fit all sorts of new purposes

But the word “consumer” itself, the concept itself, must go.

There are many problems with the concept. I’ll give you two.

It inverts the main original purpose of Antimonopoly law, which was to protect us as the producers – the creators – of goods, crops, services, ideas.

It leads us naturally to focus on material measurements of wellbeing, rather than the political goals that prevent – and keep citizens alert to – concentrations of power. The maintenance of liberty. The protection of democracy.

**Fifth, the traditional philosophy of antimonopoly was simpler, more predictable, and easier to enforce.**

Many people criticize us for not detailing how to make our vision of antimonopoly work. They say we aim to use antimonopoly to specifically address all sorts of social and political ills.

Frankly, at Open Markets we don't see any need to come up with anything truly new, at all.

We believe the antimonopoly regime as originally designed fully promotes these values of liberty and democracy. Hence we do not believe that any specific legal decision should ever require CEOs or judges to assess those values.

As a stopgap measure, we could simply return – tomorrow – to the basic principles stated in the 1968 guidelines for antimerger enforcement. Those guidelines were simple, and easy to understand and use.

Consider complex industrial activities. Thanks to rules limiting any one corporation to no more than 25 percent of any market every CEO, and every enforcer need be able to count only as high as four.

Add to those 1968 era antitrust guidelines, the guidelines then in force at the FCC, USDA, Federal Reserve, DOD, STB, and CAB, and all the rest of the U.S. government, and we'd have today's monopoly crisis licked faster than you could say Google.

**Sixth, and last, the founders of the modern antimonopoly regime understood consumerism as a pretext for, and a pathway to, autocracy.**

I began with Wilson. I'll end with the other great founder of this institution, Louis Brandeis.

Some of you have heard me read this quote before. This is for the record, so I repeat myself:

*Americans should be under no illusions as to the value or effect of price-cutting. It has been the most potent weapon of monopoly – a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the co-operation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, [the Consumer] yields to the temptation of trifling immediate gain, and selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.*

Today's crisis of monopoly is – in many respects – more grave than any we have faced in our long history together. We will overcome it, as we have all crises thus far, together.



I look forward to working with all of you to reestablish America on a firm footing of liberty and democracy one that this time, perhaps, will be forever unshakeable.