Fordham Law Review

Volume 81 | Issue 5 Article 14

2013

Should Competition Policy Promote Happiness?

Maurice E. Stucke
University of Tennessee College of Law

SHOULD COMPETITION POLICY PROMOTE HAPPINESS?

*Maurice E. Stucke**

What, if anything, are the implications of the happiness economics literature on competition policy? This Article first examines whether competition policy should promote (or at least not impede) citizens' opportunities to increase well-being. It next surveys the happiness literature on five key issues: (i) What constitutes well-being; (ii) How do you measure well-being; (iii) What increases well-being; (iv) Do people want to be happy; and (v) Can and should the government promote total well-being? Although the happiness literature does not provide an analytical framework for analyzing routine antitrust issues, this does not mean that competition officials should discount or ignore the literature altogether. The findings of the happiness literature, as this Article argues, offer some helpful insights on the current debate over antitrust's goals. The literature suggests that competition policy in a post-industrial wealthy country would get more bang (in terms of increased well-being) in promoting economic, social, and democratic values, rather than simply promoting a narrowly defined consumer welfare objective.

TABLE OF CONTENTS

INTRODUCTION 2576
I. COMPETITION POLICY MUST PROMOTE (OR AT LEAST NOT IMPEDE) CITIZENS' OPPORTUNITIES TO INCREASE WELL-BEING 2580
A. Is Promoting Well-Being Too Much To Ask of Competition Policy? 2581
B. Does Competition Policy Reduce Misery Rather Than Increase Well-Being? 2585
II. OPERATIONAL CHALLENGES IF COMPETITION POLICY SHOULD INCREASE TOTAL WELL-BEING 2586

* Associate Professor, University of Tennessee College of Law; Senior Fellow, American Antitrust Institute. I wish to thank for their helpful comments Matthew Bester, Derek Bok, Michael Carrier, Kenneth Davidson, Franklin Fisher, Jim Gibson, Jay Himes, Thomas Horton, John Kirkwood, Marina Lao, Barry Lynn, Stephen Martin, Robert Moldén, Daniel Shulman, Spencer Weber Waller, Wouter Wils, the participants at George Washington University School of Law's Symposium on *The Goals of Antitrust*, and the faculty of the University of Richmond School of Law. I also thank the University of Tennessee College of Law for the summer research grant.

A. What Constitutes Well-Being? ... 2586
B. How To Measure Well-Being ... 2587
1. Assessing the Extent to Which Biases, Heuristics, and Imperfect Willpower Distort the Measurement of Well-Being ... 2588
2. Different Approaches To Measure Well-Being ... 2591
C. Determining the Causes of Well-Being ... 2593
D. Do People Want To Be Happy? ... 2595
E. Can and Should the Government Promote Total Well-Being? ... 2596
F. The Happiness Literature Does Not Provide an Analytical Framework for Addressing Specific Antitrust Issues ... 2601
III. HOW THE HAPPINESS ECONOMICS LITERATURE CAN INFORM COMPETITION POLICY ... 2602
A. The Deemphasis of Competition Policy's Noneconomic Goals ... 2603
B. Reconciling the Consumer Welfare Standard and the Welfare of Consumers Currently ... 2612
1. The Widening Inequality Gap and Declining Social Mobility ... 2613
2. America's Threadbare Social Net ... 2617
3. Concerns Over Crony Capitalism ... 2618
4. Dissatisfaction with Competition Policy ... 2620
C. Should Competition Law Maximize Consumer Welfare? ... 2625
1. Increasing a Wealthy Society's Overall Wealth Does Not Necessarily Increase Overall Well-Being ... 2626
2. Why Promoting Consumer Surplus Does Not Necessarily Promote Consumer Welfare ... 2629
3. Why Lowering Gas Prices May Not Increase Well-Being. ... 2635
D. Reweighing Competition Policy's Political, Social, and Moral Goals ... 2637
CONCLUSION ... 2644

INTRODUCTION

Even the free market's most stalwart defenders are concerned that capitalism is in crisis.[1] A Bank of England official recently observed that

1. *See, e.g.*, Joseph L. Bower et al., *Global Capitalism at Risk: What Are You Doing About It?*, HARV. BUS. REV., Sept. 2011, at 104, 106; Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011, at 62, 64 (capitalist system is "under siege"); Joseph L. Bower et al., *Occupy Wall Street Protestors Have a Point*, HARV. BUS. SCH. WORKING KNOWLEDGE (Feb. 15, 2012), http://hbswk.hbs.edu/item/6956.html?wknews=02152012 (noting that Occupy Wall Street's concerns "are not very different from the concerns" the authors heard when talking to "business leaders around the world about the problems they thought might constitute material threats to the sustainability of

"Occupy has been successful in its efforts to popularise the problems of the global financial system for one very simple reason: they are right."[2] Our economic thinking, remarked the Organisation of Economic Co-operation and Development's (OECD) Executive Director, "has been distorted by the overwhelming power of vested interests in the financial sector."[3] The economic crisis tarnished the ideology of self-regulating, correcting markets yielding efficient outcomes with little government intrusion.[4] The misguided economic policies preceding the current crisis left many nations with daunting challenges, including increasing income inequality, climate change, lower potential output, higher total and long-term unemployment, mounting public and private debt, and volatile capital markets.[5]

Policymakers are also reconsidering the objectives of their economic policies. The neoclassical, pre-crisis economic model "that privileged pure efficiency and output can no longer be relied on for designing and evaluating new broader policies, or for measuring a country's overall performance."[6] Improving quality of life is now a popular goal, and understanding the trade-offs and side-effects of different policy options is an important policy consideration.[7]

---

market capitalism"); Frank Kane, *Capitalism Crisis a Big Part of Davos Forum*, NATIONAL (Jan. 25, 2012), http://www.thenational.ae/thenationalconversation/industry-insights/economics/capitalism-crisis-a-big-part-of-davos-forum. In one recent survey, Republicans responded most favorably to "capitalism," with 62 percent reacting positively, compared with 29 percent responding negatively; meanwhile, 52 percent of independents reacted positively compared to 39 percent negatively; 47 percent of Democrats reacted positively compared to 43 percent negatively; and Americans younger than thirty responded least favorably to capitalism with 43 percent responding positively compared to 48 percent reacting negatively. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, "SOCIALISM" NOT SO NEGATIVE, "CAPITALISM" NOT SO POSITIVE: A POLITICAL RHETORIC TEST (2010), *available at* http://pewresearch.org/pubs/1583/political-rhetoric-capitalism-socialism-militia-family-values-states-rights.

2. Andrew G. Haldane, Exec. Dir., Fin. Stability & Member of the Fin. Pol'y Comm., A Leaf Being Turned, Speech at Friend's House, Euston, London 2 (Oct. 29, 2012), *available at* http://www.bankofengland.co.uk/publications/Documents/speeches/2012/speech616.pdf; *see also* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE xi (2012).

3. Robert A. Johnson, *A Pathway to Sound Economic Thinking*, OECD OBSERVER, http://www.oecdobserver.org/news/fullstory.php/aid/3763/A_pathway_to_sound_economic_thinking.html (last visited Mar. 19, 2013); *see also* KEVIN PHILLIPS, BAD MONEY: RECKLESS FINANCE, FAILED POLITICS, AND THE GLOBAL CRISIS OF AMERICAN CAPITALISM 71 (2008) (identifying ten recurring characteristics of U.S. capitalist heyday booms).

4. *See* JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET 247–308 (2009); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 113–16, 134–35, 236, 243, 259–60, 274 (2009).

5. Pier Carlo Padoan, *A New Vision of Growth and Well-Being*, OECD OBSERVER, http://www.oecdobserver.org/news/fullstory.php/aid/3762/A_new_vision_of_growth_and_well-being.html (last visited Mar. 19, 2013).

6. *Id.*

7. *Id.*

So, too, should policymakers reassess antitrust's goals. The quest of uniting competition policy under a single economic goal has failed.[8] As other countries' experience reflects, competition law has had, and will always have, multiple economic, political, social, and moral objectives.[9] So where should policymakers turn next for antitrust's goals? One unexplored area is whether competition policy should promote a multidimensional welfare function that includes subjective well-being.

As St. Augustine observed, "It is the decided opinion of all who use their brains, that all men desire to be happy."[10] But the questions *who are happy*, or *how do they become so*, he wrote, have stirred "endless and angry controversies, in which philosophers have wasted their strength and expended their leisure."[11] Today, one would add psychologists, economists, and legal scholars to the mix. The happiness literature is a hot stock in academia and policy centers, with books;[12] law, economic, and newspaper articles;[13] and academic journals studying happiness.[14]

Policymakers are taking note. As Federal Reserve Chair Ben Bernanke recently said, "The ultimate purpose of economics, of course, is to understand and promote the enhancement of well-being. Economic measurement accordingly must encompass measures of well-being and its determinants."[15] France's Nicolas Sarkozy created a commission, headed

---

8. *See* Maurice E. Stucke, *Greater International Convergence and the Behavioural Antitrust Gambit*, *in* RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 175–79 (Ariel Ezrachi ed., 2012); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 568 (2012) [hereinafter Stucke, *Goals*].

9. Stucke, *Goals*, *supra* note 8, at 595.

10. ST. AUGUSTINE, THE CITY OF GOD ch. 10, § 1, at 303 (Modern Library 1993).

11. *Id.*

12. *See, e.g.*, DEREK BOK, THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING (2010); BRUNO S. FREY, HAPPINESS: A REVOLUTION IN ECONOMICS (2008); DANIEL GILBERT, STUMBLING ON HAPPINESS (2006); CAROL GRAHAM, THE PURSUIT OF HAPPINESS: AN ECONOMY OF WELL-BEING (2011); JONATHAN HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM (2006); RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2005); DANIEL NETTLE, HAPPINESS: THE SCIENCE BEHIND YOUR SMILE (2005); WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY (Daniel Kahneman et al. eds., 1999).

13. *See, e.g.*, Jeffrey L. Harrison, *Regulation, Deregulation, and Happiness*, 32 CARDOZO L. REV. 2369, 2370 (2011); Peter H. Huang, *Happiness in Business or Law*, 12 TRANSACTIONS TENN. J. BUS. L. 153 (2011) [hereinafter Huang, *Happiness in Business*]; Peter Henry Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 21.1–.28 (2010) [hereinafter Huang, *Happiness Studies*] (collecting articles); Teresa Amabile & Steven Kramer, *Do Happier People Work Harder?*, N.Y. TIMES, Sept. 4, 2011, at 7 (Week in Review); Catherine Rampell, *America's Happiest Man*, N.Y. TIMES, Mar. 6, 2011, at 3 (Week in Review); Wendy Koch, *If Money Doesn't Buy Happiness*, USA TODAY (Aug. 1, 2012, 11:55 PM), http://usatoday30.usatoday.com/NEWS/usaedition/2012-08-02-Gross-national-happiness_CV_U.htm.

14. Included among the many journals studying happiness are: *Applied Research in Quality of Life*; *Journal of Happiness Studies*; *International Journal of Happiness & Development*; and *International Journal of Wellbeing*.

15. Ben S. Bernanke, Chair, Bd. of Governors of the Fed. Reserve Sys., Speech at the 32nd Gen. Conf. of the Int'l Ass'n for Research in Income & Wealth, Cambridge, Mass. (via prerecorded video) (Aug. 6, 2012), 2012 WL 3192727; *see also* Mark Easton, *The Politics of Happiness*, BBC NEWS (May 22, 2006, 17:36 GMT), http://news.bbc.co.uk/2/hi/

by Professors Joseph Stiglitz, Amartya Sen, and Jean-Paul Fitoussi, that ultimately recommended shifting "emphasis from measuring economic production to measuring people's well-being."[16] Measuring well-being, for the OECD, "has been and will continue to be a key priority."[17] Bhutan uses a Gross National Happiness Index.[18] Eurostat (the European Union's statistical office),[19] and many other jurisdictions currently are developing matrices for assessing subjective well-being.[20] In 2011, the United Kingdom's Office for National Statistics included for the first time subjective well-being questions in its surveys:

> It is increasingly understood that traditional economic measures of progress are necessary but not sufficient to reflect a nation's overall progress or well-being. . . .
>
> There has been increasing interest in the UK and around the world in using wider measures of well-being to monitor progress and evaluate policy, to focus on quality of life and the environment, as well as economic growth, in assessing progress.[21]

What, if anything, are the implications of the happiness economics literature on competition policy? Part I of this Article establishes why competition law should promote (or at least not impede) citizens' opportunities to increase well-being. With this premise, Part II surveys the happiness economics literature on five key issues: (i) What constitutes well-being; (ii) How do you measure well-being; (iii) What increases well-being; (iv) Do people want to be happy; and (v) Can and should the

programmes/happiness_formula/4809828.stm (quoting David Cameron: "We should be thinking not just what is good for putting money in people's pockets but what is good for putting joy in people's hearts.").

16. JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 12 (2009) [hereinafter CMEPSP REPORT], *available at* http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf.

17. OECD, HOW'S LIFE?: MEASURING WELL-BEING 15 (2011), *available at* http://wwwu.uni-klu.ac.at/nwohlgem/makrooekonomik/topics/How%20is%20life.%20 measuring%20wellbeing.pdf. The OECD, among others, are arguing for a "multi-dimensional welfare function" that promotes sustainable growth and innovation, and improves overall material well-being and quality of life. *See id.*

18. *Bhutan GNH Index*, GROSS NAT'L HAPPINESS, http://www.grossnational happiness.com/articles/ (last visited Mar. 19, 2013) (identifying the kingdom's nine domains for its index: psychological well-being, health, education, time use, cultural diversity and resilience, good governance, community vitality, ecological diversity and resilience, and living standards).

19. EUROSTAT, FEASIBILITY STUDY FOR WELL-BEING INDICATORS: TASK 4: CRITICAL REVIEW (2009), *available at* http://epp.eurostat.ec.europa.eu/portal/page/portal/gdp_and_ beyond/documents/Feasibility_study_Well-Being_Indicators.pdf (last visited Mar. 19, 2013).

20. *Id.* § 2.1–.9 (describing several recent and significant developments in measuring well-being); *see also* Christopher Meyer & Julia Kirby, *Runaway Capitalism*, HARV. BUS. REV., Jan.–Feb. 2012, at 66, 71 (noting that forty-one countries have initiatives to measure happiness).

21. News Release, U.K. Office of Nat'l Statistics, Update on the ONS Measuring National Well-Being Programme (Feb. 7, 2012), *available at* http://www.ons.gov.uk/ ons/dcp29904_255640.pdf.

government promote total well-being? As Part II concludes, the happiness literature has not reached the point where it can reorient antitrust's legal standards toward promoting total well-being.

But, as Part III discusses, the happiness literature can inform the current debate over whether competition policy in wealthy societies should primarily maximize consumer surplus or also promote political, moral, and social objectives. As this part examines, competition policy never arose to promote only one economic objective, such as consumer surplus. Antitrust historically sought to promote political, social, and moral values of fair competition, dispersal of economic power, and promoting individual autonomy. Despite the historical concerns about concentrated economic power, antitrust analysis over the past thirty years overstated the importance of competitive dynamics that were easier to assess (productive efficiencies and short-term price effects) and marginalized or ignored what was harder to assess (dynamic efficiencies; systemic risk; and the political, social, and moral implications of concentrated economic power). Americans paid the price. One benefit of the happiness literature is exposing why a competition policy that seeks primarily to promote consumer surplus is unlikely to increase total well-being. The United States, after all, was founded on the premise that democracy can promote happiness. And competition policy, in dispersing economic and political power and promoting economic opportunity and individual autonomy, can not only promote a democracy, but can also promote well-being for the many, rather than the few.

I. COMPETITION POLICY MUST PROMOTE (OR AT LEAST NOT IMPEDE) CITIZENS' OPPORTUNITIES TO INCREASE WELL-BEING

When the International Competition Network surveyed thirty-five of its member countries on the objectives of their monopoly laws, the most popular goal was ensuring an effective competitive process.[22] Likewise, U.S. courts have observed that the "purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process."[23]

But surely this cannot be competition law's sole or primary goal. A competitive process is effective only if it promotes some other objectives. Competition's value, for many, is not for its own sake but represents the means "to achieve broader government objectives for the economy or for a

22. UNILATERAL CONDUCT WORKING GRP., INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 2, 6 (2007) [hereinafter 2007 ICN REPORT], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf ("Respondents identified ten different objectives of unilateral conduct laws, regulations, and policies, with all but one member agency identifying more than one objective as relevant to their unilateral conduct regimes.").

23. Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986); *see also* Tal v. Hogan, 453 F.3d 1244, 1258 (10th Cir. 2006); SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994).

given industry."[24] Since an effective competitive process is not an end but the more efficient (or democratic) means to achieve other objectives, three consequences follow. First, there must be one or more intermediate or ultimate goals of competition law. Second, one must consider how, and under what circumstances, the competitive process can effectively promote these objectives. And third, one must understand how the country's formal and informal institutions can foster a competitive process that effectively promotes these ultimate objectives.

What then is competition policy's ultimate and proper end? St. Thomas Aquinas and Aristotle, among others, argued that happiness is logically its own end.[25] If happiness is a complete and self-sufficient end for many individuals, observed Bentham, then maximizing happiness is the proper end for government.[26] Likewise, the Declaration of Independence identified as "a self-evident truth" that all men are endowed "by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and recognized the people's right to institute a new government, "laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[27]

Consequently, if well-being is a complete and self-sufficient goal for individuals, and if promoting well-being is the proper (or at least a primary) end for government, then competition policy should promote (or at least not hinder) the community's ability to maximize well-being.

A. Is Promoting Well-Being Too Much To Ask of Competition Policy?

Some may question Bentham's premise that promoting happiness should be every law's general objective. It is not apparent, for example, how the federal regulations on frozen cherry pies augment total well-being.[28] Why should competition law bear this burden? Modern antitrust theory says to

---

24. DIRECTORATE FOR FIN. & ENTER. AFFAIRS COMPETITION COMM., OECD, BRINGING COMPETITION INTO REGULATED SECTORS: THE LEGAL PROFESSION 2 (2005), *available at* http://www.ftc.gov/bc/international/docs/compcomm/2005-Roundtable%20on%20Bringing %20Competition.pdf; *see also* UNILATERAL CONDUCT WORKING GRP., INT'L COMPETITION NETWORK, UNILATERAL CONDUCT WORKBOOK CHAPTER 1: THE OBJECTIVES AND PRINCIPLES OF UNILATERAL CONDUCT LAWS 3 (Apr. 1, 2012) [hereinafter UNILATERAL CONDUCT WORKBOOK], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf (noting that there is an expectation that competition will tend to promote welfare and perhaps other policy objectives).

25. ST. THOMAS AQUINAS, AQUINAS'S SHORTER SUMMA: ST. THOMAS AQUINAS'S OWN CONCISE VERSION OF HIS SUMMA THEOLOGICA 353 (2002) ("[T]hat good which man chiefly and mainly desires must be of such a nature that it is not sought for the sake of something else and that it satisfies man. This good is commonly called happiness."); ARISTOTLE, THE ETHICS OF ARISTOTLE: NICOMACHEAN ETHICS bk. 1, ch. 7, at 36 (J.A.K. Thompson trans., Penguin Books 1955).

26. *See* JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION ch. 13, § 1.1 (Prometheus 1988) (1781) ("[G]eneral object which all laws have, or ought to have, in common, is to augment the total happiness of the community.").

27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

28. 21 C.F.R. § 152.126 (2012).

let competition policy improve the allocation of scarce resources, reduce the costs of goods and services, maximize overall wealth; and leave well-being to individual choice or other government policies.[29]

Even if one disagrees with Bentham, some laws play a greater role in the economy and daily life. One premise of many developed countries' economic system of private enterprise is the importance of free competition.[30] Competition and efficiency, an OECD official observed, are the "policy 'glue' that links and binds all economic and regulatory decision-making into a coherent framework."[31] The Small Business Act's policy declaration summarizes this philosophy:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation.[32]

Congress's policy statement incorporates several important premises. First, competition does not exist independent of legal and informal institutions. As economist R.H. Coase said, "[T]he legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it."[33] Consequently, what makes the competitive process fair or unfair can vary depending upon these legal and informal institutions.[34] The term "competition on the merits" invariably involves

---

29. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

30. *See* Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951); ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 2 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("[F]ree-market competition is, and has long been, the fundamental economic policy of the United States."); EUROPEAN COMM'N, COMPETITION: GLOSSARY OF TERMS USED IN EU COMPETITION POLICY: ANTITRUST AND CONTROL OF CONCENTRATIONS 10 (2002), *available at* http://ec.europa.eu/competition/publications/glossary_en.pdf (describing "[f]air and undistorted competition" as "a cornerstone of a market economy"); NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS & PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177 (1979); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955) ("Most Americans have long recognized that opportunity for free market access and fostering of market rivalry are basic tenets of our faith in competition as a form of economic organization."); WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 133 (2002), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/12/13/000094946_99092312334240/Rendered/PDF/multi_page.pdf.

31. PAUL CRAMPTON, OECD, COMPETITION AND EFFICIENCY AS ORGANISING PRINCIPLES FOR ALL ECONOMIC AND REGULATORY POLICYMAKING 2 (2003), *available at* http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2490195.pdf.

32. 15 U.S.C. § 631(a) (2006).

33. R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 717–18 (1992); *see also* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 38 (1944) ("[Competition] depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible.").

34. *See, e.g.*, 15 U.S.C. § 45(a)(1) (empowering and directing the FTC to prevent persons from using "[u]nfair methods of competition in or affecting commerce, and unfair or

normative considerations of unfair competition.[35] The legal and informal institutions provide the rules of the game necessary for that type of competition to function effectively[36] and thereby affect the market participants' incentives.[37] The institutional constraints determine, in part, the market's performance. The rules help define the opportunity set in the economy, and changing the rules can lead to different outcomes.[38] For instance, if the law rewards (or is indifferent to) monopolization, monopolies will likely arise in markets conducive to monopolization.[39]

Second, some types of competition ("full and free") can augment total well-being. Other types of competition, such as the "exploitation of child labor, the chiseling of workers' wages, the stretching of workers' hours, are not necessary, fair, or proper methods of competition"[40] and hinder well-being.[41]

Third, competition can increase multiple dimensions of well-being, such as promoting material well-being and quality of life by increasing

deceptive acts or practices in or affecting commerce"); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) ("[The FTC] in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."); HAYEK, *supra* note 33, at 36.

35. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (defining exclusionary conduct as behavior that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way" (internal quotation marks omitted)); *see also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 588–89 (1957) ("The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly . . . .").

36. *See* DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 232–65 (1998) (noting the ordoliberal concept of shaping rules for this market game so that only quality of performance (merit) determines "market success"); STIGLITZ, *supra* note 2, at 52; Wolfgang Kerber, *Competition, Innovation and Maintaining Diversity Through Competition Law*, *in* ECONOMIC APPROACHES TO COMPETITION LAW: FOUNDATIONS AND LIMITATIONS 15 (Josef Drexl et al. eds., 2010), *available at* http://ssrn.com/abstract=1543725.

37. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 52, 158 (2005) ("How the game is actually played is a consequence of the formal structure [e.g., formal rules, including those set by the government], the informal institutional constraints [e.g., societal norms and conventions], and the enforcement characteristics.").

38. Kerber, *supra* note 36, at 16.

39. *See* NORTH, *supra* note 37, at 50.

40. 83 CONG. REC. 5994 (1938) (message from President Franklin D. Roosevelt to the Senate recommending the strengthening and enforcement of antitrust laws).

41. Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36–37 (1987) (construing 29 U.S.C. § 202(a), where industries whose labor conditions are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers constitute an unfair method of competition).

opportunities for expression, personal initiative, and individual judgment, thereby advancing our democratic ideals.[42]

Accordingly, competition does not exist abstractly but is defined in part by legal institutions. Legal institutions (including competition law)[43] and informal ethical, moral, and social norms[44] can promote well-being to the extent that they deter unfair competition and promote fair and free competition, free entry into business, and opportunities for the expression and growth of personal initiative.[45] The stronger one's faith in competition as a form of economic organization, the greater the role of legal and informal norms in promoting a competitive process that effectively augments total well-being. For if "fair" competition reduces well-being and increases misery, citizens will inquire why their laws and informal norms promote this kind of competition, and why the incentives and regulatory framework cannot be altered for a fairer competitive process that will likely increase well-being.

Consequently, competition law can play an important role in promoting fair competition by defining and deterring unfair competition, as well as by maintaining a competitive process that promotes other important democratic ideals. The Supreme Court made this logical connection when

42. *See, e.g.*, United States v. W. Elec. Co., 767 F. Supp. 308, 326 (D.D.C. 1991) (predicting that "the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates . . . would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic wellbeing of the American people"), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993); Tingsrätt [TR] [Stockholm District Court] ¶ 22 2011-02-17 C-52/09 (Swed.), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0052:EN:HTML (noting that the function of E.U. competition rules "is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union"); EUROPEAN COMM'N, REPORT ON COMPETITION POLICY 2010 ¶ 32, at 11 (2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0328:FIN:EN:PDF (discussing how competition policy takes into account the protection of the environment and sustainable growth).

43. Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993) ("[T]he fundamental objective of our antitrust laws is to promote fair competition for the benefit of all consumers." (citing Seidenstein v. Nat'l Med. Enters., Inc., 769 F.2d 1100, 1106 (5th Cir. 1985)); Kirkland v. Nat'l Broad. Co., 425 F. Supp. 1111, 1115 (E.D. Pa. 1976) (noting that tort of unfair competition "is an equitable concept, resting on general principles of fairness in business practices").

44. *See, e.g.*, LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2011) (arguing that conscience is a powerful force for our economic, social, and political lives); Joseph Henrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 SCIENCE 1480, 1480 (2010) (studying how informal religious norms can play an important role in supporting a competitive market economy).

45. For an evolutionary perspective of competition policy and the importance of fairness, see Thomas J. Horton, *The Coming Extinction of* Homo Economicus *and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469 (2011); Thomas J. Horton. *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. (forthcoming 2013), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=thomas_horton; Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory To Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615 (2012).

describing the competition laws in general, and the Sherman Act in particular, as "the Magna Carta of free enterprise": the competition laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[46]

B. Does Competition Policy Reduce Misery Rather Than Increase Well-Being?

Another objection to this Article's initial premise follows Winston Churchill's statement about democracy, namely that capitalism is the worst form of economy except all other forms that have been tried.[47] Competition and a market economy do not promote well-being; they simply make us less miserable than other known economic systems.

Even if competition promotes misery, policymakers can lessen the misery by prohibiting unfair methods of competition. A competition policy that simply involves a rush for scarce resources—where many are trampled or left scrambling for the scraps—would appeal to the few who captured the resources.

Consequently, whatever one's competition policy objectives, "[e]conomic things matter only in so far as they make people happier."[48] If one's antitrust goal were promoting consumer or total welfare, then what is welfare but "the state of doing well especially in respect to good fortune, happiness, well-being, or prosperity."[49] However defined, economic definitions of welfare typically extend beyond static price competition or efficiencies to subjective well-being.[50] Even if one's definition of welfare excluded subjective well-being, one confronts the issue of competition law's ultimate aim. Suppose that a country's citizens' physical and mental health deteriorates as a result of the country's competition policy, the citizens' isolation and distrust increase, and their freedom and self-

46. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

47. Sir Winston Churchill, Speech to the House of Commons (Nov. 1947), *reprinted in* THE INTERNATIONAL THESAURUS OF QUOTATIONS § 231(7), at 146 (1970) ("Democracy is the worst form of government except all those other forms that have been tried from time to time.").

48. Andrew J. Oswald, *Happiness and Economic Performance*, 107 ECON. J. 1815, 1815 (1997); *see also* Huang, *Happiness in Business*, *supra* note 13, at 160.

49. *Welfare*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/welfare (last visited Mar. 19, 2013).

50. *See, e.g.*, JOHN BLACK ET AL., OXFORD DICTIONARY OF ECONOMICS (3d ed. 2008), *available at* http://www.oxfordreference.com/view/10.1093/acref/9780199237043.001.0001/acref-9780199237043-e-3354?rskey=QMJdVE&result=2&q=welfare ("The level of welfare measures the degree of contentment of an individual or a society."); OECD, GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 29, *available at* www.oecd.org/dataoecd/8/61/2376087.pdf ("Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income."); *Economics A to Z*, ECONOMIST, http://www.economist.com/economics-a-to-z/w#node-21529313 (last visited Mar. 19, 2013) ("Economists use it to describe the well being of an individual or society, as in 'Are tax cuts welfare-enhancing?'").

determination decrease. In such a case, competition officials and courts could not effectively advocate their competition policy as being "there to help us achieve economic prosperity and increase the welfare of society."[51]

II. Operational Challenges If Competition Policy Should Increase Total Well-Being

Ultimately, as Part I argues, competition policy promotes fair competition while preserving economic freedom, with the ultimate aim of increasing total well-being. In accepting this initial premise, policymakers confront five important issues: first, what constitutes well-being; second, how does the government measure well-being; third, what augments well-being; fourth, do people want to be happy; and finally, can and should the government promote subjective well-being? This part surveys the happiness economics literature to address these five issues.

A. *What Constitutes Well-Being?*

If competition policy's ultimate aim is to increase total well-being, the first challenge is defining well-being. Well-being, the literature recognizes, is multifaceted. It includes "an overall evaluation of one's life; . . . as experienced in day-to-day living; . . . as influenced by innate character traits such as positive and negative affect; and . . . as quality of life broadly defined."[52]

The happiness economics literature distinguishes Bentham's hedonic happiness and Aristotle's eudaimonia.[53] For Bentham, happiness is derived from maximizing pleasure (which goes beyond the pleasures of sense and wealth) and minimizing pain.[54] Bentham's happiness is synonymous with pleasure, advantage, good, or benefit.[55] For Aristotle, a happy life is achieved when "one is engaged in action and contemplation in accordance with virtue."[56] Well-being is derived from a meaningful and virtuous life, one with self-actualization, personal growth, and civic virtue.[57] Well-being consists of life satisfaction or developing and fulfilling one's potential.[58]

---

51. K. Van Miert, Speech on the Role of Competition Policy in Modern Economies Before the Danish Competition Council (Oct. 11, 1997), *available at* http://ec.europa.eu/competition/speeches/text/sp1997_061_en.html.

52. GRAHAM, *supra* note 12, at 24; *see also* BOK, *supra* note 12, at 9–10; Alois Stutzer & Bruno S. Frey, *Recent Advances in the Economics of Individual Subjective Well-Being*, 77 SOC. RES. 679, 680 (2010).

53. Antonella Delle Fave et al., *The Eudaimonic and Hedonic Components of Happiness: Qualitative and Quantitative Findings*, 100 SOC. INDICATORS RES. 185 (2011); Huang, *Happiness Studies*, *supra* note 13, at 21.4–.5.

54. BENTHAM, *supra* note 26, at ch. 5, § 1.

55. *Id.* at ch. 1, § 3; FREY, *supra* note 12, at 5, 17–18 (discussing happiness as a positive and negative effect); GRAHAM, *supra* note 12, at 4.

56. ARISTOTLE, *supra* note 25, at 39.

57. *See* Delle Fave et al., *supra* note 53, at 186.

58. FREY, *supra* note 12, at 5.

Rather than define well-being along one dimension (e.g., pleasure), the happiness literature generally recognizes well-being as multidimensional. For example, the Stiglitz-Sen-Fitoussi Commission identified within the academic literature and various happiness measurement initiatives the following dimensions of well-being: "(i) Material living standards (income, consumption and wealth); (ii) Health; (iii) Education; (iv) Personal activities including work; (v) Political voice and governance; (vi) Social connections and relationships; (vii) Environment (present and future conditions); [and] (viii) Insecurity, of an economic as well as a physical nature."[59]

Likewise many people in one study defined happiness along multiple dimensions: life domains associated with happiness (with family, interpersonal relations, and health being the most popular) and psychological components (harmony/balance, positive emotions, well-being).[60] With respect to the psychological components, those surveyed generally referred to both hedonic and eudaimonic aspects.[61] On average, they also rated their life's meaningfulness higher than their happiness, which they ranked higher than their satisfaction with their lives.[62]

Consequently, if competition policy should increase total well-being, one issue is whether competition policy should promote primarily one dimension (e.g., hedonic) or multiple dimensions of well-being. This can be important. As discussed below, some factors (such as income) are correlated more strongly with some dimensions of well-being (such as life satisfaction) than other dimensions (experienced, everyday happiness).[63] Ultimately, "[h]appiness is an intrinsically pluralistic concept."[64]

B. How To Measure Well-Being

A second policy issue is which objective and subjective measures policymakers should employ to measure well-being, and to what extent do biases, heuristics, and imperfect willpower distort these measurements.

---

59. CMEPSP REPORT, *supra* note 16, at 14–15, 151–53 (discussing Sen's capabilities and functionings approach); MARTIN E.P. SELIGMAN, FLOURISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING 11–12 (2011) (developing an integrated framework for happiness; one that involves positive emotion, engagement, relationships, meaning and purpose, and accomplishment. Pleasure involves "positive emotion; what we feel: pleasure, rapture, ecstasy, warmth, comfort, and the like"; engagement "is about flow: being one with the music, time stopping, and the loss of self-consciousness during an absorbing activity"; and meaning, which "consists in belonging to and serving something that you believe is bigger than the self"); Jon Hall et al., *A Framework To Measure the Progress of Societies* (OECD Working Paper No. 34, 2010), *available at* http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=std/doc(2010)5&docLanguage=En.

60. Delle Fave et al., *supra* note 53, at 190, 193–94 (surveying 666 participants from Australia, Croatia, Germany, Italy, Portugal, Spain, and South Africa).

61. *Id.* at 200 (hedonic aspects were cited in 23.8 percent of the answers).

62. *Id.* at 195, 197.

63. *See infra* Part III.C.

64. Pierluigi Barrotta, *Why Economists Should Be Unhappy with the Economics of Happiness*, 24 ECON. & PHIL. 145, 152 (2008).

1. Assessing the Extent to Which Biases, Heuristics, and Imperfect Willpower Distort the Measurement of Well-Being

Economists historically assessed people's utility indirectly by their actual choices (e.g., choosing to watch a televised football game), rather than directly by their subjective beliefs or intentions (e.g., believing I should study rather than watch TV).[65] But people's choices do not always reveal their actual preferences.[66] Heuristics and biases affect decision making, such as the way the choice is framed.[67] Consumers often simply accept the default option.[68] Some lack willpower when making intertemporal choices (e.g., choosing to watch football rather than study for a test next week).[69] People can predict poorly as to what makes them happy and fail to appreciate the extent to which they adapt to new purchases or wealth.[70] Manipulation of consumer choices by business compounds this issue.[71] Thus, policymakers cannot reliably infer utility from consumers' decisions.

---

65. *See* CMEPSP REPORT, *supra* note 16, at 43; John Beshears et al., *How Are Preferences Revealed?*, 92 J. PUB. ECON. 1787, 1787 (2008) ("Revealed preference theory constructs utility functions that rationalize empirical observations of consumer choices and consumer budget constraints . . . . Economists usually assume that these revealed preferences are also *normative preferences*—preferences that represent the economic actor's true interests. Economic welfare analysis and policy analysis almost always assume that revealed preferences and normative preferences are identical."); Daniel Kahneman & Robert Sugden, *Experienced Utility As a Standard of Policy Evaluation*, 32 ENVTL. & RESOURCE ECON. 161, 162 (2005).

66. *See, e.g.*, Beshears et al., *supra* note 65, at 1788 (identifying five factors that increase the likelihood that revealed preferences will not have normative merit: "passive choice, complexity, limited personal experience, third-party marketing, and intertemporal choice"); Daniel Kahneman & Richard H. Thaler, *Anomalies: Utility Maximization and Experienced Utility*, 20 J. ECON. PERSP. 221, 223 (2006).

67. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 364–74 (2011).

68. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 7–8, 11–13 (2008).

69. *See, e.g.*, Beshears et al., *supra* note 65, at 1789–90 (discussing intertemporal choice).

70. *See, e.g.*, Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LITERATURE 402, 409–22 (2002); Faruk Gul & Wolfgang Pesendorfer, *Welfare Without Happiness*, 97 AM. ECON. REV. 471, 471 (2007); Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 J. ECON. PERSP. 8–9 (2006); Kahneman & Sugden, *supra* note 65, at 161–81.

71. *See, e.g.*, Marianne Bertrand et al., *What's Advertising Content Worth? Evidence from a Consumer Credit Marketing Field Experiment*, 125 Q.J. ECON. 263 (2010); OFFICE OF FAIR TRADING, THE IMPACT OF PRICE FRAMES ON CONSUMER DECISION MAKING 5–20 (2010), *available at* http://www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf; OFFICE OF FAIR TRADING, WHAT DOES BEHAVIOURAL ECONOMICS MEAN FOR COMPETITION POLICY? (2010), *available at* http://www.oft.gov.uk/shared_oft/economic_research/oft1224.pdf; STEFFEN HUCK, JIDONG ZHOU & CHARLOTTE DUKE, OFFICE OF FAIR TRADING, CONSUMER BEHAVIOURAL BIASES IN COMPETITION: A SURVEY (2011), *available at* http://www.oft.gov.uk/shared_oft/research/OFT1324.pdf; Maurizio Pugno, *The Easterlin Paradox and the Decline of Social Capital: An Integrated Explanation*, 38 J. SOCIO-ECON. 590, 592 (2009) (discussing the power of advertising, especially for children and adolescents, to induce consumption); John Kenneth Galbraith, *Economics and the Quality of Life*, 145 SCIENCE 117, 122 n.9 (1964) ("It is held that the provision of an expanding volume of consumer goods, among which the consumer exercises a sovereign choice, involves no value judgments. This might be approximately true if everything the consumer needs were

Rather than measure utility indirectly, the happiness literature generally seeks to measure it directly. But if biases, heuristics, and imperfect willpower reduce the reliability of measuring utility through consumers' choices, one issue is whether they also reduce the reliability of individuals' self-appraisals of their well-being.

Framing effects and biases can affect self-assessments of well-being. Individual responses can depend on the order or wording of questions, the scales applied, a fortunate event (like the individual discovering a dime before the questioning), or the current weather.[72] One study, for example, examined the correlation between the responses to two questions: "How happy are you?" and "How many dates did you have last month?"[73] When the happiness question was asked first, no correlation was found between the responses.[74] But when the dating question was asked first, the two questions' responses were significantly correlated.[75] In another study, individuals were asked first to recall either three positive or three negative recent life events. Those asked to recall positive events reported higher current life satisfaction than those asked to recall recent negative events.[76]

Another bias is duration neglect. Individuals assess their instant hedonic happiness (pleasure or distress at that moment) at times differently from their remembered utility (retrospective evaluation of a temporary extended outcome).[77] Kahneman and his colleagues tested this with a colonoscopy experiment.[78] Half of the participants had the uncomfortable procedure extended by leaving the colonscope in place for about one minute after the clinical examination finished. The other half had the colonscope removed immediately after the painful examination. The patients who had the prolonged colonoscopy evaluated the procedure as better even though they were uncomfortable over a longer period.[79] Kahneman described this as

available from the market and if no attempt were made to manage his choice. Conservatives instinctively but wisely insist that almost all important needs can be provided by the market, and that management of the consumer is of negligible importance. This enables them to rest their case on an impersonal manifestation of individual choice. It is also evident that the preconditions for their case are far from being met."); Maurizio Pugno, *The Easterlin Paradox and the Decline of Social Capital: An Integrated Explanation*, 38 J. SOCIO-ECON. 590, 592 (2009) (discussing the power of advertising, especially for children and adolescents, to induce consumption).

72. Frey & Stutzer, *supra* note 70, at 406; Kahneman & Krueger, *supra* note 70, at 6–7.

73. Norbert Schwarz & Fritz Strack, *Reports of Subjective Well-Being: Judgmental Processes and Their Methodological Implications*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra* note 12, at 63.

74. *Id.*

75. *Id.*

76. *Id.* at 65; *see also* Angus S. Deaton, *The Financial Crisis and the Well-Being of Americans* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 17128, 2011), *available at* http://www.nber.org/papers/w17128 (asking political questions first caused a large negative effect on reported well-being).

77. Daniel Kahneman et al., *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375, 379–92 (1997).

78. Daniel Kahneman, *Objective Happiness*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, *supra* note 12, at 20.

79. *Id*.

"Peak-End evaluation," whereby people remember the utility or disutility of pleasant and unpleasant episodes by averaging the Peak (most intense value of pleasure or pain) and the pleasure or pain recorded near the experiment's end.[80] People neglect the experience's duration. "Peak-End evaluation" and duration neglect, also found in other experiments, draw into question self-assessments of well-being; people chose the longer unpleasant option, which seemingly did not maximize their utility as they were in pain longer.[81]

Although biases and framing can affect self-assessments of well-being, this does not mean that subjective well-being measures are meaningless. First, consumers sometimes know what makes them happier (such as exercising), but lack the willpower. So consumers' self-assessments can sometimes more reliably measure utility than their choices (e.g., their inactivity).

Second, to the extent framing or duration neglect bias self-assessments of well-being, conditions can be imposed to mitigate bias (e.g., by not prefacing questions of well-being with questions on dating).[82]

Third, even when biases and framing cause people to incorrectly predict what will promote their well-being (e.g., trading off a longer commute for a bigger house in the suburbs), they often can assess their current state of experienced well-being (e.g., being miserable during the morning commute). Many people arguably can assess whether they are currently happy (at least in terms of their hedonic happiness) and the degree of their pleasure or pain. The findings from the happiness literature are consistent both internally and with other indicators of well-being.[83] "Subjective measures of well-being have been tested against a wide range of indirect measures of well-being," the OECD found, "and generally show the expected relationships."[84] Answers to life-satisfaction questions are "well-correlated with at least five relevant sets of variables: the reports of friends; the plausible causes of well-being; some plausible effects of well-being; physical functioning, such as levels of cortisol; and measures of brain activity."[85] People give similar answers to questions repeated later.[86]

80. Kahneman et al., *supra* note 77, at 381.

81. Kahneman, *supra* note 78, at 19–20.

82. Deaton, *supra* note 76, at 21 (using a transition question between the political question and well-being question to mitigate the political question's negative effect).

83. Alan B. Krueger & David A. Schkade, *The Reliability of Subjective Well-Being Measures* 11 (Nat'l Bureau of Econ. Research, Working Paper No. 13027, 2007), *available at* http://www.nber.org/papers/w13027 (finding a correlation between 0.5 and 0.7 in overall life satisfaction measures and affective experience measures in retesting individuals over a two-week period).

84. OECD, *supra* note 17, at 267.

85. Richard Layard, *Measuring Subjective Well-Being*, 327 SCIENCE 534, 534 (2010); *see also* OECD, *supra* note 17, at 267 ("Biological measurements, including the left/right brain activity, and levels of the stress hormone cortisol show a consistent relationship with self-ratings of well-being."); Huang, *Happiness Studies*, *supra* note 13, at 21.7; Andrew J. Oswald & Stephen Wu, *Objective Confirmation of Subjective Measures of Human Well-*

People who respond as being satisfied with their lives are also considered satisfied by family, friends, and experts.[87]

Consequently, in addition to measuring utility indirectly through consumers' choices, policymakers can assess well-being directly. But with either measure, however, policymakers should consider the extent to which biases, heuristics, and imperfect willpower affect the measurements.

2. Different Approaches To Measure Well-Being

When the government measures well-being directly through self-assessments, another issue is what questions they should ask their citizens. The happiness economics literature contains questions about the pleasure or pain that respondents feel currently or recently from specific activities, their life satisfaction, the ladder of life,[88] and their life's purpose.[89] Since well-being, as Part II.A discussed, is multidimensional, well-being, is not surprisingly, measured differently and assesses these diverse considerations through:

- a global evaluative approach, which "asks individuals to step back and reflect on their life and make a cognitive assessment of how their life is going overall, or on certain aspects of their life,"[90]
- an eudemonic approach, which "draws on self-determination theory and tends to measure such things as people's sense of meaning and purpose in life, connections with family and friends, a sense of control and whether they feel part of something bigger than themselves,"[91]

Being: Evidence from the U.S.A., 327 SCIENCE 576, 577 (2010); Stutzer & Frey, *supra* note 52, at 684–85.

86. OECD, *supra* note 17, at 266.

87. Stutzer & Frey, *supra* note 52, at 684–85.

88. Gallup, for example, uses the Cantril Self-Anchoring Striving Scale:

> Please imagine a ladder with steps numbered from zero at the bottom to 10 at the top.
>
> The top of the ladder represents the best possible life for you and the bottom of the ladder represents the worst possible life for you.
>
> On which step of the ladder would you say you personally feel you stand at this time? (ladder-present)
>
> On which step do you think you will stand about five years from now? (ladder-future)

Understanding How Gallup Uses the Cantril Scale Development of the "Thriving, Struggling, Suffering" Categories, GALLUP, http://www.gallup.com/poll/122453/understanding-gallup-uses-cantril-scale.aspx (emphasis omitted) (last visited Mar. 19, 2013).

89. GRAHAM, *supra* note 12, at 37.

90. U.K. OFFICE FOR NAT'L STATISTICS, INITIAL INVESTIGATION INTO SUBJECTIVE WELL-BEING FROM THE OPINIONS SURVEY 4 (2011) [hereinafter INITIAL INVESTIGATION REPORT], *available at* http://www.ons.gov.uk/ons/rel/wellbeing/measuring-subjective-wellbeing-in-the-uk/investigation-of-subjective-well-being-data-from-the-ons-opinions-survey/initial-investigation-into-subjective-well-being-from-the-opinions-survey.html; *see also* CMEPSP REPORT, *supra* note 16, at 146–47; FREY, *supra* note 12, at 18–19.

91. *See* INITIAL INVESTIGATION REPORT, *supra* note 90, at 4.

- an experience sampling approach, which randomly asks people throughout the day what they are doing and their positive and negative feelings,[92]
- a day reconstruction approach, where participants complete a diary summarizing episodes from the prior day (when the episode began and ended, where they were, with whom they were interacting) and report the intensity of their feelings along nine categories on a scale from zero to six,[93] and
- objective measures of people's material living conditions, their quality of life, and sustainability.[94]

One issue is which measure(s) of well-being should policymakers use.[95] As two economists observed, most of this empirical happiness work has been based on "representative, large-scale sampling of individual global evaluations of life satisfaction."[96] The life-satisfaction measure, they state, is an "attractive proxy measure" in "blending cognitive judgment and affective state."[97] But the questions used to measure well-being can capture different dimensions.

For example, the relationship between one's income and well-being can differ depending on whether the person is asked about experienced, day-to-day well-being or his or her life satisfaction.[98] Greater wealth (relative to others) can enhance evaluations of life satisfaction, but not everyday experienced happiness.[99] As Kahneman aptly observed, "Life satisfaction is not a flawed measure of their experienced well-being, as [he] thought some years ago. It is something else entirely."[100]

Another issue is that, with some measures, the magnitude of difference in well-being can be quite small.[101] Many people worldwide "claim to be

---

92. *See id.*; *see also* CMEPSP REPORT, *supra* note 16, at 147 n.2; FREY, *supra* note 12, at 20; Kahneman & Sugden, *supra* note 65, at 175.

93. Kahneman & Krueger, *supra* note 70, at 9–14; *see also* CMEPSP REPORT, *supra* note 16, at 147 n.3.

94. OECD, *supra* note 17, at 18; *see also* CMEPSP REPORT, *supra* note 16, at 15, 156 ("In most cases, these themes include not just the measures of people's subjective states described above, but also measures of their health and education, their daily activities, their participation in political processes, and the social and natural environment in which people are embedded and which shape their sense of security.").

95. *See* Stutzer & Frey, *supra* note 52, at 683–84.

96. *Id.* at 684.

97. *Id.*

98. KAHNEMAN, *supra* note 67, at 396.

99. *Id.* at 396–97; Daniel Kahneman & Angus Deaton, *High Income Improves Evaluation of Life but Not Emotional Well-Being*, 107 PNAS EARLY EDITION 16,489, 16,491 (2010) (finding from a U.S. survey of subjective well-being that beyond approximately $75,000, higher income "is neither the road to experienced happiness nor the road to the relief of unhappiness or stress, although higher income continues to improve individuals' life evaluations"); *see also* CMEPSP REPORT, *supra* note 16, at 148.

100. KAHNEMAN, *supra* note 67, at 397.

101. Timothy A. Judge & John D. Kammeyer-Mueller, *Happiness As a Societal Value*, ACAD. MGMT. PERSP., Feb. 2011, at 33–34 (noting that 80 percent of national life satisfaction averages were within one point on a ten point scale, and for developed nations with a per capita GDP of $20,000 or more, 80 percent of the nations were within half of a point). *But*

'very' or 'fairly' satisfied with their lives."[102] Also, in averaging a nation's well-being, one may not necessarily capture well-being that comes at the expense of others (whether in that country or abroad).[103]

Accordingly, because well-being is multidimensional, the OECD, Eurostat, and others advocate that multiple subjective and objective measures—sensitive to inequalities and distributional issues—be used to measure well-being.[104]

C. Determining the Causes of Well-Being

Besides defining and measuring well-being, a third issue, which preoccupied philosophers and theologians for centuries and is now the focus of psychologists and economists, is whether well-being can be increased[105] and, if so, what promotes well-being.[106]

A 2006 survey of the empirical literature found several factors to be strongly correlated with subjective well-being,[107] including personal characteristics, like age;[108] socially developed characteristics, such as health[109] and employment status;[110] how the people spend their time,[111]

---

see OECD, *supra* note 17, at 269 (finding a three point gap on an eleven point scale for OECD and large emerging countries, with countries falling within three groupings (below 5.5, below 7, and above 7)).

102. BOK, *supra* note 12, at 24–25.

103. OECD, *supra* note 17, at 273–74 (noting the substantial variation in subjective well-being within many countries, including the United States).

104. BOK, *supra* note 12, at 18–19; CMEPSP REPORT, *supra* note 16, at 16; EUROSTAT, *supra* note 19, § 2.3.

105. The consensus is that genetic makeup influences well-being; but the extent to which genetics makeup does so is unresolved. Jan-Emmanuel De Neve et al., *Genes, Economics, and Happiness*, 5 J. NEUROSCIENCE PSYCHOL. ECON. 193, 194 (2011) (finding that "individuals with transcriptionally more efficient version of the serotonin transporter gene . . . are significantly more likely to report higher levels of life satisfaction," and estimating the "heritability of subjective well-being at 33%, indicating that about one-third of the variance in individual life satisfaction can be attributed to genetic influences"); David Lykken & Auke Tellegen, *Happiness Is a Stochastic Phenomenon*, 7 PSYCHOL. SCI. 186, 186 (1996) (estimating 44 percent to 52 percent of the variance in well-being is associated with genetic variation, and in retesting a smaller sample of twins after intervals of 4.5 and 10 years, estimating the "heritability [as a] stable component of subjective well-being approaches 80%").

106. *See, e.g.*, AQUINAS, *supra* note 25, at 197–98 (questioning whether true and perfect happiness is attainable on earth).

107. Paul Dolan et al., *Do We Really Know What Makes Us Happy? A Review of the Economic Literature on the Factors Associated with Subjective Well-Being*, 29 J. ECON. PSYCHOL. 94 (2008).

108. *Id.* at 98 (referencing studies consistently finding "a negative relationship between age and SWB and a positive relationship between *age squared* and SWB" and suggesting "a U-shaped curve with higher levels of well-being at the younger and older age points and the lowest life satisfaction occurring in middle age, between about 32 and 50 years, depending on the study").

109. *Id.* at 100 (studies "consistently show a strong relationship between SWB and both physical and psychological health"); BOK, *supra* note 12, at 21 (noting how a drop of 20 percent in self-evaluations of health is associated with an average decline in happiness of six points on a scale of one hundred).

such as religious activities;[112] attitudes and beliefs towards self, others, and life;[113] relationship status, such as living alone, living with a partner or being married,[114] and seeing family and friends;[115] and the country's wider economic, social, and political environment, such as the degree of democracy.[116]

Religious worship, for example, is strongly correlated with well-being.[117] Controlling for various factors associated with well-being, one study of Swiss residents found that going to church was not only positively correlated with well-being, but well-being "increases (almost) monotonically with a higher frequency of religious service attendance."[118] Another study found that the repeal of the state blue laws (thereby enabling

110. BOK, *supra* note 12, at 20–21; CMEPSP REPORT, *supra* note 16, at 149–50; Deaton, *supra* note 76, at 40; Dolan et al., *supra* note 107, at 101 ("Studies consistently show a large negative effect of individual unemployment on SWB. Models which treat life satisfaction scales as a continuous variable, tend to find that the unemployed have around 5–15% lower scores than the employed."); Lasse Steiner et al., *Economics, Religion and Happiness*, 190 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND UNTERNEHMENSETHIK 1, 20 (2010).

111. BOK, *supra* note 12, at 20 (discussing research on how attending monthly club meetings or volunteering once a month is associated with a change in well-being equivalent to a doubling of income).

112. *Id*. at 21–22 (discussing the correlation of religion and volunteering with happiness); Dolan et al., *supra* note 107, at 104 ("[E]vidence is fairly consistent and suggests that regular engagement in religious activities is positively related to SWB.").

113. CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA 1960–2010, at 262 (2012); Dolan et al., *supra* note 107, at 105 ("[E]vidence is relatively clear from the few studies that have looked at trust and the effects are relatively large," such as several studies finding "social trust (trust in most other people) is associated with higher life satisfaction and happiness, and a lower probability of suicide.").

114. BOK, *supra* note 12, at 17–18; ("On average, higher proportions of UK adults who were married, in a civil partnership or cohabitating reported high ratings of 9 or 10 out of 10 for the 'life satisfaction,' 'worthwhile' and 'happy yesterday' questions than people who were single, widowed or divorced."); MURRAY, *supra* note 113, at 256–57 (2012); Dolan et al., *supra* note 107, at 106 ("Although there is some variation across studies, [it] seems that being married is associated with the highest level of SWB and being separated is associated with the lowest level of SWB, lower even than being divorced or widowed."); *see also* OFFICE FOR NAT'L STATISTICS, FIRST ANNUAL ONS EXPERIMENTAL SUBJECTIVE WELL-BEING RESULTS (2012) [hereinafter UK REPORT], *available at* http://www.ons.gov.uk/ons/dcp171766_272294.pdf.

115. Dolan et al., *supra* note 107, at 107 (observing from studies that "overall, socialising with family and friends is positively associated with SWB").

116. *Id.* at 109–10 (observing that most studies find a positive link between democracy and life satisfaction).

117. GRAHAM, *supra* note 12, at 70 (finding that "respondents who expressed faith or religious affiliation—as well as those who practiced their faith—were happier than others"); MURRAY, *supra* note 113, at 259–60; Steiner et al., *supra* note 110, at 9 ("Almost all studies find a positive and significant relation between religion and happiness."); Bernard M.S. van Praag et al., *Happiness and Financial Satisfaction in Israel: Effects of Religiosity, Ethnicity, and War*, 31 J. ECON. PSYCHOL. 1008, 1009 (2010) (noting that many studies have found a correlation between religiosity and increased happiness).

118. Steiner et al., *supra* note 110, at 20; *see also* Danny Cohen-Zada & William Sander, *Religious Participation Versus Shopping: What Makes People Happier?*, 54 J.L. & ECON. 889, 892 (2011).

working and shopping on Sunday) caused women's religious participation and well-being to significantly decline.[119]

Findings are mixed with respect to other factors associated with well-being, such as income.[120] Also, significant issues remain when assessing what factors actually promote or detract well-being, rather than being correlated with self-reported measures of well-being.[121] Does community activity, for example, promote happiness or are happier people likelier to engage in community activity? Some studies use natural experiments to tackle the direction of causation.[122] Nevertheless, the causation issue has not been resolved, thus limiting the government's ability to recommend specific legal policies.

D. Do People Want To Be Happy?

Even if social scientists determined the causes of well-being, policymakers must assess whether people actually desire sustained well-being. If a formula for well-being exists, "what joy will [an individual] get out of functioning according to a timetable?"[123]

Some evidence supports happiness as an important goal.[124] A survey of college students, for example, found that only 6 percent of respondents rated money as more important than happiness: "fully 69% rated happiness at the top of the importance scale, and only 1% claimed to have never thought about it" and "62% rated life satisfaction at the top of the importance scale, and only 2% reported never having thought about it."[125]

But it remains an empirical question whether most people in their thoughts, words, and deeds actually seek to maximize well-being.[126] As two economists argue, one problem with well-being generally is its failure to incorporate other dimensions of experience that people care about, such as experiencing a range of feelings (including sadness), meaning (i.e., people care about the meaning from their activities), capabilities (the range

---

119. Cohen-Zada & Sander, *supra* note 118, at 891–92 (finding from the General Social Survey that respondents with higher attendance of religious services report greater happiness, and those who attend services more than once a week are about twice as likely to report being very happy than those who never attend services).

120. Dolan et al., *supra* note 107, at 112; *see also* Nattavudh Powdthavee, *How Much Does Money Really Matter? Estimating the Causal Effects of Income on Happiness*, 39 EMPIRICAL ECON. 77, 78–79 (2010) (discussing the biases, such as adaptation, associated with estimating the effect of income on life satisfaction, and the infrequency of large scale natural or randomized experiments where money is randomly allocated to treatment and control groups).

121. FREY, *supra* note 12, at 11; *see also* CMEPSP REPORT, *supra* note 16, at 150; Judge & Kammeyer-Mueller, *supra* note 101, at 35.

122. Cohen-Zada & Sander, *supra* note 118, at 891.

123. FYODOR DOSTOYEVSKY, NOTES FROM THE UNDERGROUND 104 (Signet Classics 2004) (1864).

124. Judge & Kammeyer-Mueller, *supra* note 101, at 32.

125. Ed Diener, *Subjective Well-Being: The Science of Happiness and a Proposal for a National Index*, 55 AM. PSYCHOL. 34, 34 (2000) (surveying 7,204 respondents in forty-two countries).

126. FREY, *supra* note 12, at 6–7, 164.

of opportunities available in their lives), and altruistic and moral considerations (empathy for the poor).[127] Humans are capable of far more than maximizing their utility and "may be judged in a moral framework that values something greater than the autonomy needed to satisfy individual preferences."[128] The Stanford Encyclopedia of Philosophy summarizes this concern:

> Even as happiness might fail to suffice for well-being, well-being itself may be only one component of a *good life*, and not the most important one at that. Here "good life" means a life that is good all things considered, taking account of all the values that matter in life, whether they benefit the individual or not. Kant, for example, considered both morality and well-being to be important but distinct elements of a good life. Yet morality should be our first priority, never to be sacrificed for personal happiness.[129]

E. Can and Should the Government Promote Total Well-Being?

Even if citizens desire greater or sustained well-being along some agreed-upon dimensions, several concerns arise as to whether the state can and should directly promote its citizens' well-being.[130]

One concern about the government promoting well-being is its mechanistic view of human beings, where the state can account for (or reduce) the presumably minor individual differences among its citizens.[131] Logically, the state can never fully maximize well-being, unless the state can perfect each individual's well-being, which the state cannot do when individual tastes differ, conflict, or depend on a relative advantage (such as happiness derived from status goods). In promoting one dimension of well-being (e.g., a drug-induced hedonic happiness), the state will not necessarily maximize well-being if other citizens place greater value on other dimensions, such as life satisfaction.

Second, the belief that the state must promote its citizens' well-being implies that the state, not the individual, is responsible for maximizing well-

---

127. George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. PUB. ECON. 1795, 1802 (2008); *see also* FREY, *supra* note 12, at 15–16.

128. Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35, 51 (2005); *see also* CMEPSP REPORT, *supra* note 16, at 156 (noting how Sen's capability approach "treats subjective well-being as just one aspect of [quality of life] among the many capabilities that people have reasons to value"); AMARTYA SEN, THE IDEA OF JUSTICE 273 (2009) ("The central issue is not the significance of happiness, but the alleged insignificance of everything else, on which many advocates of the happiness perspective seem to insist.").

129. Dan Haybron, *Happiness*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), *available at* http://plato.stanford.edu/archives/fall2011/entries/happiness/.

130. BOK, *supra* note 12, at 46–54.

131. *See* ALDOUS HUXLEY, BRAVE NEW WORLD AND BRAVE NEW WORLD REVISITED 326 (Harper Collins 2004) (1932).

being.[132] On the one hand, citizens cannot increase their well-being absent some collective action. Incremental well-being comes from public goods (public and environmental safety) that citizens individually cannot obtain, as well as from other legal institutions.[133] On the other hand, concerns about governmental paternalism arise. At times, people cannot accurately predict what promotes their well-being.[134] As Eurostat stated,

> Whilst [citizens'] stated preferences are important, one should be careful not to confuse them too much with well-being itself. What people *say* will improve or harm their well-being may not necessarily actually improve or harm their well-being.[135]

While true, the statement nonetheless raises concerns about the loss of individual accountability and liberty.

A third concern of the state seeking to augment total well-being is that individual autonomy is devalued.[136] If humans were simply a product of their social condition and "their individual differences were trifling," observed Aldous Huxley, "there would be no need for liberty and the state would be justified in persecuting the heretics who demanded it."[137] Likewise, the *Federalist Papers* recognize that, "in every political institution, a power to advance the public well-being involves a discretion which may be misapplied and abused."[138] Further,

> in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.[139]

With the goal of maximizing well-being, the state could justify prohibiting (or promoting) activities that it determines reduce (or increase) well-being. If the state determines that physical exercise and attending religious services increase well-being, could the state compel or cajole citizens to bicycle to mass? Or could the government promote a particular religion to promote religious harmony and well-being?[140] One hardly

---

132. CMEPSP REPORT, *supra* note 16, at 151 ("The concept of freedom emphasises the importance of empowering people to help themselves, and of focusing on individuals as the actors of their own development.").

133. *See infra* Part III.D.

134. *See infra* Part III.C.3.

135. EUROSTAT, *supra* note 19, § 2.7 (recommending that government agencies synthesize citizens' stated preferences with empirical evidence on well-being determinants).

136. *See* Barrotta, *supra* note 64, at 161.

137. HUXLEY, *supra* note 131, at 326.

138. THE FEDERALIST NO. 41 (James Madison).

139. *Id*.

140. The Royal Government of Bhutan, for example, decided in 2005 to develop Gross National Happiness indicators "to check whether programmes and policies are consistent with the values of GNH." *2010 Survey Results: Results of the Second Nationwide 2010 Survey on Gross National Happiness*, GROSS NAT'L HAPPINESS, http://www.grossnationalhappiness.com/survey-results/index/ (last visited Mar. 19, 2013). Its efforts have been widely praised and its human rights record, according to human rights activists and government reports, is relatively better than some other area countries. But, as the U.S.

expects atheists or other congregants to be happier as a result. As two pioneers in the happiness research discuss, the literature mostly assumes a benevolent dictator, where the government, individual politicians, and public officials are "able and willing to pursue people's happiness or to maximize a social welfare function where individuals' welfare is proxied by individuals' reported subjective well-being."[141] Well-being, as some argue, presupposes autonomy, which increases the chances that well-being can arise from the standard of life freely chosen.[142]

A fourth concern about the government promoting well-being is the rule of law. Because well-being is multifaceted, the government policies invariably will conflict, thereby giving the state too much discretion in choosing the means to promote well-being. For example, hateful, offensive speech can reduce a listener's well-being. But "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[143] Governments currently take different approaches to outlawing hate speech.[144] If promoting well-being were the objective, however, the State could demand greater latitude in prosecuting speech it finds detrimental to others' well-being. This affords the state flexibility and discretion in punishing some speakers, while protecting others. But in doing so, the state devalues other quality-of-life factors correlated with well-being (such as the rule of law, individual liberty, and freedom).[145] Accordingly, in promoting well-being, government policies can become more subjective and less accountable, predictable, and transparent, as the State chooses how to promote well-being. To the extent that the rule of law and liberty promote well-being, the state's ability to augment total well-being is inherently limited.

A fifth concern about the state promoting total well-being involves the concerns over utilitarianism generally.[146] As one judge remarked,

---

Department of State reports, Mahayana Buddhism is the state religion, and the Bhutan government "discouraged both large and small religious gatherings of non-Buddhists, did not allow construction of non-Buddhist places of worship, and did not allow non-Buddhist missionaries to work in the country." Bureau of Democracy, Human Rights & Labor, *Bhutan: International Religious Freedom Report 2007*, U.S. DEP'T ST., http://www.state.gov/j/drl/rls/irf/2007/90227.htm (last visited Mar. 19, 2013). Moreover, "in the late 1980s and early 1990s, many ethnic Nepalese residents, a majority of whom were Hindu, were forcibly expelled or voluntarily left as a result of discrimination." *Id*.

141. Bruno S. Frey & Alois Stutzer, *The Use of Happiness Research for Public Policy*, 38 SOC. CHOICE WELFARE 659, 660 (2011).

142. *See* Barrotta, *supra* note 64, at 156–59, 161.

143. Hoye v. City of Oakland, 653 F.3d 835, 852 (9th Cir. 2011) (emphasis omitted) (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

144. *See generally* JEREMY WALDRON, THE HARM IN HATE SPEECH (2012) (noting differences among hate speech statutes adopted in Canada, Denmark, Germany, New Zealand, and the United Kingdom).

145. CMEPSP REPORT, *supra* note 16, at 177–80.

146. *See, e.g.*, SEN, *supra* note 128, at 277–90; BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 777–80 (1972).

> The due process clause was not meant to codify some arid theory of utilitarianism. Rather, the requirement of accuracy and minimum procedural safeguards follows from the fundamental assumption that government officials will tend to abuse unfettered discretion to oppress individuals; procedural safeguards place a check on such discretion and help preserve the substantive liberties and inherent dignity of the individual.[147]

One issue is whether the state can trade off some citizens' well-being to promote the well-being of others. What promotes some people's well-being, observed the OECD, "may be ethically objectionable or affected by personal circumstances to which individuals adapt, even if that is not objectively good."[148] Another issue is whether utility should be maximized (or sacrificed) today at the expense (or for the benefit) of future generations.

Sixth, even if one accepts that the state should promote total well-being, can it? Well-being can depend on relative versus absolute consumption. Absolute consumption depends on the "absolute desirability of the good" itself, such as the happiness derived from eating an ice cream cone.[149] Relative consumption depends on "wealth, acquisition, and consumption levels relative to others," such as the purchase of jewelry and automobiles.[150] To the extent that the government policy benefits everyone and that utility is relative rather than absolute, the government policy fails to improve total well-being. Promoting overall well-being can lead to an incongruous result: the government program is circumscribed to selectively benefit some, even if the program could benefit all.[151]

Another issue for policymakers is adaptation. People, for example, generally adapt to higher incomes. So, depending on the government policy (such as a tax break), the ensuing happiness can be short lived, as people adapt to the higher living standard. Adaptation also applies to noneconomic measures. Married people, for example, are relatively happier than single, divorced, or widowed people.[152] But one study shows that the life satisfaction of German married couples declined from its peak shortly after marriage.[153]

---

147. Frier v. City of Vandalia, 770 F.2d 699, 707 (7th Cir. 1985) (Swygert, J., concurring in the result); *see also* United States v. Blarek, 7 F. Supp. 2d 192, 203 (E.D.N.Y. 1998) (noting one major problem with utilitarianism is that "the individual criminal can be treated very cruelly, to gain some societal advantage even through [sic] the crime is minor—or very leniently, despite the shocking nature of the crime—if that will on balance benefit society"), *aff'd*, 166 F.3d 1202 (2d Cir. 1998).

148. OECD, *supra* note 17, at 266 (citations omitted).

149. BERND SCHMITT, EXPERIENCE MARKETING: CONCEPTS, FRAMEWORKS AND CONSUMER INSIGHTS 44 (2011).

150. *Id.* at 96; THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (Penguin Books 1994) (1899).

151. CMEPSP REPORT, *supra* note 16, at 152 ("Policies supportive of human development should expand the opportunities available to people, which would be valuable irrespectively of the effect on people's subjective states.").

152. *See supra* note 114 and accompanying text.

153. FREY, *supra* note 12, at 89.

Even for absolute consumption, looking around the world today, one sees governments increasing human misery rather than well-being. If governments can promote well-being, why then haven't citizens, after revolting against their oppressors, modeled their governments after Denmark, Norway, Switzerland, and the Netherlands, whose citizens, on average, had the highest life satisfaction?[154]

States that are more intrusive in their citizens' lives, including communist countries, do not necessarily have happier citizens. The OECD asked people around the world to rate on a scale from 0 to 10 their general satisfaction with their life.[155] The average across the surveyed countries was 6.7.[156] Russians, on average, were less satisfied (5.3), with little difference between Russian men (5.3) and women (5.2).[157] One explanation perhaps is that Russians assess their life differently than the Swedes. But "[i]n Russia 59% of people reported having more positive experiences in an average day (feelings of rest, pride in accomplishment, enjoyment, etc.) than negative ones (pain, worry, sadness, boredom, etc.)," which again was lower than the OECD average of 72 percent.[158] Nor is there evidence that the Chinese, despite their country's economic gains, are more satisfied with their lives.[159] The People's Republic of China, despite being wealthier (in terms of GDP) than some of the other countries surveyed, had the lowest reported average life satisfaction.[160] Likewise, one 2006 survey of Cubans in Havana and Santiago found only 25 percent satisfied with their "freedom to choose what to do with [their] life," (lower than the average of 80 percent in the rest of urban Latin America); 34 percent could use their talent as much as they would like, 53 percent could choose how they spent their day yesterday, 56 percent said they were "proud of something" done the previous day (compared to 72 percent for other urban Latin Americans), 63 percent said they experienced enjoyment the previous day (compared to 79 percent for other urban Latin Americans)

154. *Life Satisfaction*, OECD BETTER LIFE INDEX, http://www.oecdbetterlifeindex.org/topics/life-satisfaction/ (last visited Mar. 19, 2013).

155. *Id.*

156. *Id.*

157. The bottom 20 percent of the surveyed Russian population had a life satisfaction level of 5, while the top 20 percent rated their life satisfaction as a 5.8. *Id.*

158. *Id.*

159. Richard A. Easterlin et al., *China's Life Satisfaction, 1990–2010*, PNAS (May 14, 2012), http://www.pnas.org/content/early/2012/05/09/1205672109.full.pdf (noting that China's transition "has been marked by perhaps the highest two-decade rate of growth in gross domestic product (GDP) per capita ever seen, a remarkable ≥8% per year. Between 1990 and 2009, per capita GDP and consumption in China (in constant dollar terms) increased by at least fourfold." (citation omitted)); Kahneman & Krueger, *supra* note 70, at 15–16.

160. OECD, *supra* note 17, at 269 (surveying forty countries' residents using a Cantril Ladder metric for life satisfaction).

and 62 percent said they laughed or smiled (compared to 82 percent other urban Latin Americans).[161]

It may be that the state can increase total well-being more effectively through indirect measures, such as fostering civic virtue and limiting government discretion (through the rule of law, protections of liberty, and anti-corruption measures), than through direct measures.

Finally, if the state's mandate were to increase total well-being, besides the concerns over utilitarianism generally, there is the concern that the state will manipulate the measurements.[162] Citizens would complain if the well-being metrics report declines in well-being. So government officials have a greater incentive to manipulate the measures. In a 2011 Global Happiness Index, for example, the People's Republic of China came in first "with a perfect 100 rating."[163] North Korea came in second, trailing China by only two points, followed by Cuba (93 points), Iran (88 points), and Venezuela (85 points).[164] South Korea finished 152nd with 18 points, and the United States finished 203rd with only 2 points. Who released the Index? The state-owned North Korean Central Television.[165]

F. The Happiness Literature Does Not Provide an Analytical Framework for Addressing Specific Antitrust Issues

Even if these five fundamental issues were resolved, the happiness literature does not provide an analytical framework for addressing specific antitrust issues, such as the legality of a merger or a monopolist's conduct. Nor does the happiness literature provide sufficient guidance to reorient current antitrust legal standards toward the goal of promoting total well-being. Courts and agencies would still assess the alleged anticompetitive restraint's likely competitive effects and deduce from the competitive effects whether total well-being would increase or decrease. Determining various restraints' competitive effects is often daunting for courts and agencies. Adding well-being to the courts' and agencies' analysis complicates matters by adding another (and seemingly superfluous) step.

If the agency or court sought to avoid the competitive effects analysis altogether and ask citizens how a merger or restraint would impact their well-being, this inquiry could be subject to the aforementioned behavioral biases. One risk is that market participants, unable to assess how the restraint will affect them, would substitute an easier question (how do I feel

---

161. *Cubans Show Little Satisfaction with Opportunities and Individual Freedom*, WORLD PUB. OPINION (Jan. 10, 2007), http://worldpublicopinion.org/pipa/articles/brlatinamericara/300.php?lb=brla&pnt=300&nid=&id=.

162. FREY, *supra* note 12, at 166.

163. *Find a Kingdom of Happiness: Would You Be Happier Somewhere Else?*, COLORS (Mar. 20, 2012), http://www.colorsmagazine.com/stories/magazine/83/story/find-a-kingdom-of-happiness.

164. *Id.*

165. *Id.*; *New Happiness Survey Finds North Korea # 2 According to N. Korean TV*, GROSS NAT'L HAPPINESS (June 6, 2011), http://new.gnhusa.org/surveys/new-happiness-survey-finds-north-korea-2-according-to-n-korean-tv/.

about big business or mergers involving them) for the harder question (may this merger substantially lessen competition or tend to create a monopoly, and, if so, how will that affect my well-being).[166]

Not surprisingly, one scholar did not believe that the happiness literature could significantly inform the regulation of natural monopolies: "[T]he idea of experience sampling as a way to guide policy with respect to natural monopolies seems more like science fiction than anything else."[167]

Competition policy, as Part I discusses, should increase total well-being. But as this Part observes, important issues remain, such as what dimensions of well-being should competition policy promote, what measures of well-being should be employed, what promotes well-being, and whether the government can and should promote total well-being. As the OECD (which advocates incorporating subjective well-being into policymaking) recognizes, the current challenge is still collecting comparable and meaningful subjective and objective data across countries.[168] Advances in the happiness economics literature will enable policymakers to measure well-being (or at least sources of misery, such as unemployment, mental illness, or inadequate health care).[169] But the happiness literature currently does not provide competition policymakers a comprehensive analytical framework to reorient their legal standards toward promoting total well-being.

III. How the Happiness Economics Literature Can Inform Competition Policy

Although, as Part II discussed, the happiness literature does not provide an analytical framework for analyzing routine antitrust issues, this does not mean that competition officials should discount or ignore the literature altogether. The findings of the happiness economics literature, as this Part argues, offer some helpful insights on the current debate over antitrust's goals. The literature suggests that competition policy in a post-industrial wealthy country would be more efficacious (in terms of increased well-being) in promoting economic, social, and democratic values, rather than simply promoting a narrowly defined consumer welfare objective.

As Part III.A discusses, competition policy is not inherently limited to one economic goal, such as maximizing consumer surplus. Competition policy has historically sought to promote political, social, and moral values of fair competition; dispersal of economic power; and individual autonomy. Despite these historical concerns about concentrated economic power, some U.S. courts and antitrust enforcers largely discounted or ignored these noneconomic values. Americans, as Part III.B discusses, paid the price. But even if the antitrust legal standards were recalibrated to promote consumer

166. Kahneman, *supra* note 67, at 25, 97–105.
167. Harrison, *supra* note 13, at 2380.
168. OECD, *supra* note 17, at 279.
169. Bok, *supra* note 12, at 51.

welfare by lowering prices and increasing consumer surplus, Part III.C examines the benefits of a competition policy that seeks primarily to increase consumer surplus in a post-industrial, post-materialist wealthy society like the United States. Promoting this goal to the exclusion of other traditional antitrust values would more likely decrease, rather than increase, total well-being.

A. The Deemphasis of Competition Policy's Noneconomic Goals

As this and earlier symposia reflect, competition policy is not inherently confined to a single economic objective, such as maximizing consumer welfare; total welfare; or allocative, productive, or dynamic efficiency.[170] Although some seek to confine competition policy to a single objective,[171] other competition officials, scholars, lawyers, and judges recognize competition policy's multiple economic, political, social, and moral objectives.[172] As Justice Brandeis observed:

> There is a widespread belief that . . . by the control which the few have exerted through giant corporations, individual initiative and effort are

---

170. *See, e.g.*, Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2572–74 (2013) (discussing why democracy is good for antitrust); *see also* Robert H. Bork & Ward S. Bowman, Jr., *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); Oliver E. Williamson, *Symposium on Antitrust Law and Economics*, 127 U. PA. L. REV. 918 (1979).

171. *See, e.g.*, BORK, *supra* note 29 (positing that the only goal of antitrust is to increase consumer welfare, which is in reality total welfare); RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976) (efficiency is not only an important goal, it is the only goal of antitrust law).

172. *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230–31 (D.C. Cir. 1986) (Wald, J., concurring) (noting that the judge did not "believe that the debate over the purposes of antitrust laws [was] settled yet" and thought "it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising"); Redwood Theatres, Inc. v. Festival Enters., Inc., 200 Cal. App. 3d 687, 709 n.11 (Ct. App. 1988) (observing that the "debate over the purposes of the antitrust laws has generally acknowledged a balance of economic, social, and political goals"); ICN REPORT, *supra* note 22; Stucke, *Goals*, *supra* note 8; William E. Kovacic, *Module 1: Origins and Aims of Competition Policy*, INT'L COMPETITION NETWORK (May 2011), http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html (discussing the Sherman Act's political and economic objectives); *see also* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051–52 (1979) ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws," and any antitrust policy that excluded such political values "would be unresponsive to the will of Congress."); Jed Rakoff, *Lecture: Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 4, 9 (2012) (observing how antitrust theorists are currently divided into "three warring camps": "One camp thinks the most important values that the antitrust laws are designed and should be interpreted to promote are social or political values having to do with decentralizing economic power and equalizing the distribution of wealth . . . . [T]he two other camps . . . are united in believing that the only proper goals of antitrust law are economic . . . [but are divided between] a 'Harvard School,' [which is] prone to find monopolistic practices, and a 'Chicago School,' which believes the same practices to be for the most part procompetitive."); Louis B. Schwartz, *"Justice" and Other Non-economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076 (1979) ("[P]utative economic gains should not be the exclusive or decisive factors in resolving antitrust controversies.").

> being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by the opening to them of the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.[173]

Among antitrust's traditional aims are that (1) private economic power, like all absolute power, is subject to abuse and injurious to public welfare and our democratic ideals; (2) such power must be decentralized to protect a free society from its abuse; (3) competitively structured markets diffuse private power and discipline economic decision making; and (4) competition policy is critical to preserving competitive markets.[174] Competition policy, like our constitutional framework, sought to distribute power, rather than to promote its consolidation or concentration. Antitrust's "political values," Professor Pitofsky noted, were "first, 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."[175]

---

173. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 580 (1933) (Brandeis, J., dissenting).

174. *See* WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 97–104 (2d ed. 2004); *see also* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 360 n.19 (1990) (Stevens, J., dissenting) (citing some of the case law and scholarship referencing antitrust's noneconomic goals); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (Sherman Act is "the Magna Carta of free enterprise"); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933) (Sherman Act as a "charter of freedom"); United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945) (noting Congress's desire to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them"); JOSEPH W. BURNS, A STUDY OF THE ANTITRUST LAWS: THEIR ADMINISTRATION, INTERPRETATION AND EFFECT 341 (1958) ("Concern over excessive growth of private economic power and its social and political implications is built into every member of the structure of antitrust policy, including section 7."); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 424 (1965); John Flynn & James Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1137–41 (1987) (discussing the political, social, and moral—as well as economic—goals motivating Congress in enacting antitrust legislation); Milton Handler, *Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in Its National Policy?*, 10 CARDOZO L. REV. 1933 (1989); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982).

175. Pitofsky, *supra* note 172, at 1051.

This concern over concentrated economic power arose at our nation's founding,[176] in the late 1800s when the Sherman Act was enacted,[177] and before and during World War II.[178] As Senator Kefauver said,

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.[179]

The Clayton Act is prophylactic in nature. In 1950, Congress amended section 7 of the Clayton Act "to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger."[180] One purpose of section 7 and the Court's presumption was Congress's premise that mergers tend to accelerate concentration in an industry:

> The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the [proscribed] effect. . . . The words 'may be' have been in section 7 of

---

176. Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 196 (1965); *see also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 47 (1872).

177. As Senator Sherman said:

> If the concentered powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.

21 CONG. REC. 2457 (1890); *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1911); *id*. at 83–84 (Harlan, J., concurring and dissenting in part); Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879, 882–83 (1990); Hofstadter, *supra* note 176, at 206–07; Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 96 (1982).

178. *See* WENDELL BERGE, CARTELS: CHALLENGE TO A FREE WORLD (1944); Wilhelm Cohnstaedt, *Germany's Cartels and State Control: A Revealing Study of the Reich's Post-War Industrial Monopoly Organizations*, N.Y. TIMES, May 19, 1935, at BR9; John H. Crider, *Roosevelt Calls for Cartels Curb: In Letter to Hull He Says Types of "Trusts" Used by Reich Must Be Ended*, N.Y. TIMES, Sept. 9, 1944, at 1.

179. 96 CONG. REC. 16,452 (1950).

180. United States v. Phila. Nat'l Bank, 374 U.S. 321, 367 (1963) (emphasis omitted); *see also* United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962) ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."). The DOJ, under its 1968 Merger Guidelines, also applied "an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration." U.S. DEP'T OF JUSTICE, ANTITRUST DIV., 1968 GUIDELINES § 7 (1968), *available at* http://www.justice.gov/atr/hmerger/11247.htm.

> the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.[181]

In response to Congressional concerns over the rising tide of economic concentration in the U.S. economy, the Court applied a presumption. If post-merger, the firm controls "an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," then the courts will presume that that merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[182] In *United States v. Philadelphia National Bank*, the Court did not attempt "to specify the smallest market share which would still be considered to threaten undue concentration" but was "clear that 30% presents that threat."[183] The Court, with its presumption, sought to bring greater transparency and predictability to merger review, while accommodating antitrust's multiple concerns about concentrated economic power.[184]

As Congress expressed and the Court operationalized in its presumption, society often pays a price in permitting political and economic power to be concentrated.[185] Professor Williamson, in his famous trade-off calculus for weighing the effects of economic concentration on total welfare, included in his calculation the other social costs imposed or incurred by the monopolist or cartel, such as the political implications of control over wealth, which he observed are "a matter for serious concern."[186] With a powerful domestic producer, for example, the government may be swayed to erect protectionist measures.[187] Although the political implications may be beyond quantification, the issue, Williamson recognized, is nevertheless important and cannot be ignored.[188]

Over the past thirty years, however, some federal courts and scholars devalued Congress's noneconomic concern over concentrated economic

181. S. REP. NO. 81-1775, at 6 (1950).

182. *Phila. Nat'l Bank*, 374 U.S. at 363.

183. *Id.* at 364. The Court, in subsequent cases, lowered the presumption somewhat to even 25 percent or less. United States v. Cont'l Can Co., 378 U.S. 441, 461 (1964); United States v Aluminum Co. of Am., 377 U.S. 271, 278, 280 (1964).

184. *Phila. Nat'l Bank*, 374 U.S. at 365.

185. *See generally* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2012).

186. Oliver E. Williamson, *Economies As an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 24, 28–32 (1968).

187. *See id.* at 29; UNILATERAL CONDUCT WORKBOOK, *supra* note 24, at 7–8.

188. *See* Williamson, *supra* note 186, at 29.

power.[189] Justice Stevens, for example, criticized the Court, "in its haste to excuse illegal behavior in the name of efficiency," of casting "aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare, and that private actions not only compensate the injured, but also deter wrongdoers."[190]

One reason why competition policy's noneconomic goals declined in importance was the courts' and scholars' embrace of the Chicago school's neoclassical economic theories, which offered "powerful simplifications," such as "rationality, profit maximization, [and] the downward sloping demand curve."[191] With the Chicago school's ascendency, the theory's flaws permeated competition policy.[192] With certain physical sciences, what is important is often measurable. One criticism of neoclassical economic theory, however, is what is measurable becomes disproportionately important.[193] So those factors that are easier to assess (such as the merger's likely short-term impact on price, output, or productive efficiency in narrowly defined markets) increase in importance. Those factors that are harder to assess or measure (like the merger's impact on innovation, systemic risk, and its risks to democracy and individual autonomy) are ignored or discounted.[194] Policymakers, for example, generally recognize dynamic efficiency as more important to economic growth than productive efficiencies.[195] But dynamic efficiency is harder to

189. Fayus Enters. v. BNSF Ry. Co., 602 F.3d 444, 453–54 (D.C. Cir. 2010) (observing "a tension—and in federal antitrust law a radical change over time—between the goal of increasing consumer welfare in the economic efficiency sense and contrasting goals such as protecting small competitors or preventing the concentration of economic or political power without regard to economic efficiency" and that it "is far from clear that state antitrust law has, as a general matter, made the transition that has marked federal law"); Cieri v. Leticia Query Realty, Inc., 905 P.2d 29, 35 n.10 (Haw. 1995) ("[T]here is little if anything in the cases that suggests the courts have in fact been willing to pursue populist goals at the expense of competition and efficiency. . . . If anything, they support the priority of competition and its efficiency goals." (quoting 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 103 (1978))).

190. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 360 (1990) (Stevens, J. dissenting).

191. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931 (1979); *see also* Darren Bush, *Too Big To Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 291–95 (2010).

192. STIGLITZ, *supra* note 2, at 44–45.

193. For a general criticism, see Friedrich A. Hayek, The Pretence of Knowledge, Nobel Memorial Lecture Delivered in Stockholm (Dec. 11, 1974), *in* THE ESSENCE OF HAYEK 266 (Chaki Nishiyama & Kurt R. Leube eds., 1984).

194. *See, e.g.*, Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust As A Window*, 61 N.Y.U. L. REV. 554, 583 (1986) ("Contemporary analysis routinely omits from the economic equation the soft data and the dynamic implications that would, if accounted for, favor the entrepreneur. In particular, the model omits the freedoms, the opportunities, the prospects for change, and the spur from the sense of having a fair chance that comes from an environment hospitable to those without power." (footnotes omitted)); Williamson, *supra* note 186, at 23 (noting that a defect common to all partial equilibrium constructions is its failure to examine interactions between sectors).

195. OECD, DYNAMIC EFFICIENCIES IN MERGER ANALYSIS 10 (2008), *available at* http://www.oecd.org/competition/mergers/40623561.pdf ("[I]nnovation is responsible for most of the increase in material standards of living that has taken place since the industrial

predict and quantify than productive efficiencies; thus, with some exceptions, courts and agencies largely ignored the impact of mergers on dynamic efficiency, focusing instead on a static price competition and productive efficiencies.[196]

With the Chicago school's rise in the late 1970s, some economists and lawyers found it fashionable to dismiss antitrust's historic concerns about trends toward concentration and concentrated economic power.[197] Before the economic crisis, the conventional wisdom was that antitrust agencies and courts could (and should) use concentration only as a screen: the agencies would challenge only those few mergers that, under the prevailing neoclassical economic thinking, would demonstrably lead to higher post-merger prices in narrowly defined markets.[198] Although the Department of Justice's Antitrust Division (DOJ) at times argued the incipiency standard,[199] it inexplicably alleged in its complaints how the merger *will* (rather than may) lessen price competition in narrowly defined markets.[200]

---

revolution. It seems likely that dynamic efficiencies have a considerably greater potential to benefit consumers than static efficiencies have.").

196. *Id*. at 9 ("Dynamic efficiencies pose an even greater measurement problem than static efficiencies because dynamic effects will occur—if at all—over several time periods and may be more abstract in nature than static effects. Courts have shown a tendency to avoid delving into such exercises whenever possible."); KENNETH M. DAVIDSON, REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY 85–86 (2011) (noting the intellectual confinement of antitrust to static price competition when dynamic competition provides the greater benefits).

197. The President of AAI described this trend. Symposium, *Panel Discussion I: Development of Bank Merger Law*, 13 FORDHAM J. CORP. & FIN. L. 511, 523 (2008) (Bert Foer: "the modern era of merger policy began with the 1982 Merger Guidelines. The current guidelines were issued jointly by the DOJ and the FTC in 1992 and revised a little bit in 1997. They are limited to horizontal mergers—not vertical mergers, not conglomerate mergers. Reflecting the influence of the Chicago School, they focus on market power as the source of concern, and they don't talk about trends of concentration, as Justice Brennan did, or protection of small business, which was one of the objectives of some of the earlier merger decisions.").

198. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 15 (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf [hereinafter DOJ & FTC COMMENTARY ON GUIDELINES]. *See generally* First & Waller, *supra* note 170, at 2551 (discussing the dramatic evolution of section 7); Lawrence Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159.

199. *See, e.g.*, Plaintiffs' Proposed Conclusions of Law, United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (No. C 04-0807), *available at* http://www.justice.gov/atr/cases/f205300/205388.htm ("Congress used the words 'may be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962))). A plaintiff need not show "even a high probability" that the proposed transaction will substantially lessen competition. FTC v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989) ("[T]he statute requires a prediction, and doubts are to be resolved against the transaction.").

200. *See, e.g.*, Complaint, United States v. Humana Inc., No. 1:12-cv-00464 (D.D.C. Mar. 27, 2012), *available at* http://www.justice.gov/atr/cases/f281600/281618.pdf ("Unless enjoined, Humana's proposed acquisition of Arcadian will substantially lessen competition in the sale of Medicare Advantage health insurance plans sold to Medicare-eligible individuals . . . in forty-five counties and parishes in Arizona, Arkansas, Louisiana,

One explanation is that courts, in accepting the Chicago school's ideologies, demanded more evidence from the antitrust plaintiffs to overcome their belief of self-correcting markets.[201] Plaintiffs had to explain how, and the extent to which, the prices for one or both of the merging firms' products or services would increase post-merger, which in turn led the agencies to calculate diversion ratios, the estimated consumer demand at post-merger prices, and the profit margins of the merging parties.[202] As one antitrust official observed:

> Judges are more accustomed to making decisions based on facts about what happened; in mergers, they are called on to predict what might happen in the future—something which I think a court is reluctant to do, especially when faced with a merger that may involve many products, only a small portion of which may be anticompetitive, and in the face of local businessmen and women addressing all the advantages of the merger, including claims of efficiencies.
>
> More and more when we go to court, the judges seem to be asking for concreteness; the anecdotal evidence seems less important to them than surveys, which seem systematic, but may be flawed. If the issue is product market, the courts seem to want to know exactly how many customers would be willing to switch. And if it's competitive effects, they want to know how big an effect will result. More and more, in order to persuade a court that a merger is going to be harmful, we feel the need to do the best we can to quantify.

Oklahoma, and Texas"); Plaintiff's Memorandum of Points and Authorities in Support of its Motion for a Preliminary Injunction, United States v. H&R Block, 833 F. Supp. 2d 36 (D.D.C. 2011) (No. 1:11-cv-00948), *available at* http://www.justice.gov/atr/cases/f273600/273683.pdf ("The United States brings this action to block an acquisition that will substantially lessen competition in the tax preparation industry."); Complaint, United States v. Cingular Wireless Corp., No. 1:04CV01850 (D.D.C. Mar. 14, 2005), *available at* http://www.justice.gov/atr/cases/f205900/205969.htm; Complaint, United States v. Northrop Grumman Corp., No. 1:02CV02432 (D.D.C. Dec. 11, 2002), *available at* http://www.justice.gov/atr/cases/f200500/200555.htm ("Unless this transaction is blocked, Northrop's acquisition of TRW will substantially lessen competition in the development and production of radar reconnaissance satellite systems and payloads and EO/IR reconnaissance satellite systems and payloads used by the United States, and will likely lead to an increase in prices and a reduction in quality and innovation for such satellites systems and payloads in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18."); Bernard M. Hollander, *Returning to the Proper Standard Under Section 7*, AM. ANTITRUST INST. (April 5, 2010), http://www.antitrustinstitute.org/sites/default/files/Hollander%20AAI%20piece_040920101304.pdf.

201. *See, e.g.*, First & Waller, *supra* note 170, at 2570–72 (discussing the agencies' and courts' focus on error costs, with a greater concern over false positives than negatives).

202. *See* Rachel Brandenburger & Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, U.S. DEP'T OF JUST., http://www.justice.gov/atr/public/articles/280478.htm (last visited Mar. 19, 2013); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701 (2010); *see also* DOJ & FTC COMMENTARY ON GUIDELINES, *supra* note 198, at 27 ("In all merger cases, the Agencies focus on the particular competitive relationship between the merging firms, and for mergers involving differentiated products, the 'diversion ratios' between products combined by the merger are of particular importance.").

> So, in our investigations and case preparations we are asking both our economists and the parties what effects from the merger can be quantified and how we can best do it.[203]

While some courts continued to cite the *Philadelphia National Bank* presumption and the incipiency standard,[204] many went further in requiring the antitrust agencies to prove that a merger would cause prices to rise, and to explain the chain of events that would lead to the post-merger price increase (either unilateral or coordinated effects) and the price increase's likely magnitude.[205] Requiring such certainty and actuality of injury to competition are, of course, contrary to the statute's plain language and its effort to supplement the Sherman Act by reaching incipient restraints.

Nonetheless, the agencies' merger review migrated toward assessing what was measurable—namely short-term pricing effects under unilateral effects theory and short-term productive efficiencies.[206] As the agencies and courts increasingly focused on the merger's short-term impact on

---

203. Constance K. Robinson, Dir. of Operations, U.S. Dep't of Just., Antitrust Div., Quantifying Unilateral Effects in Investigations and Cases Before the George Mason Law Review Symposium—Antitrust in the Information Revolution: New Economic Approaches for Analyzing Antitrust Issues (Oct. 11, 1996), *available at* http://www.justice.gov/atr/public/speeches/1005.htm.

204. *See* Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1214 (11th Cir. 2012); *see also* Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 97 CIV. 5499 (DNE), 2000 WL 264295, at *24 (S.D.N.Y. Mar. 9, 2000) ("More alarming to this Court, though, is the vertical unification that the LCE merger caused between powerful distributors and exhibitors. The Supreme Court warned that an important factor for a court to consider when assaying the legality of a merger is 'the trend toward concentration in the industry.'" (quoting *Brown Shoe*, 370 U.S. at 332)).

205. *See, e.g.*, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1165 (N.D. Cal. 2004) (misconstruing the Clayton Act's incipiency standard, the trial court held that "[w]ithout the benefit of presumptions, the burden remains upon plaintiffs to come forward with evidence of actual anticompetitive effects"); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 115 (D.D.C. 2004) ("To warrant injunctive relief under the Clayton Act, the challenged acquisition must be likely substantially to lessen competition. Although certainty is not required, Section 7 does demand that a plaintiff demonstrate that the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief." (citation omitted)), *dismissed*, 04-5291, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004).

206. Charles A. James, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Rediscovering Coordinated Effects, Address at the American Bar Association Annual Meeting, Section of Antitrust Law 7–8 (Aug. 13, 2002), *available at* http://www.justice.gov/atr/public/speeches/200124.pdf (noting that "one interesting side-effect of the 1992 Guidelines has been the emergence of unilateral effects as the predominant theory of economic harm pursued in government merger investigations and challenges."); *Coordinated Effects Analysis: The Arch Coal Decision*, ANTITRUST SOURCE (Mar. 2005), http://www.crai.com/uploadedFiles/RELATING_MATERIALS/Publications/Consultant_publications/Dick/files/Coordinated%20Effects%20Analysis%20-%20The%20Arch%20Coal%20Decision.pdf (quoting one former DOJ economist: "Following the adoption of the 1992 Horizontal Merger Guidelines, coordinated effects analysis languished as an active instrument of merger review and enforcement. Over the last decade, mergers were much more likely to be reviewed (or challenged) on the basis of unilateral effects concerns. More often than not, when a merger complaint included a coordinated effects allegation, it had the flavor, if not the reality, of being an afterthought.").

prices, other important concerns (such as dynamic efficiencies and systemic risk) were simply ignored.[207]

Consequently, federal competition policy underwent a dramatic shift from 1960 to the policies we have today. One positive development is that mergers' likely efficiencies, once viewed with suspicion, were seen as a benefit. But while competition policy historically distrusted the concentration of economic power and saw the importance of small companies in promoting dynamic efficiencies, the Court recently praised monopolies.[208] Courts and agencies "no longer concern[ed] themselves with preventing bigness, and indeed tend[ed] instead to encourage large-scale enterprise for efficiency's sake."[209] Courts and antitrust agencies generally applied a light touch to merger review under a fear of false positives and a belief that many mergers promote efficiencies, even though the empirical literature suggests the contrary.[210] While the efficiencies defense developed over the past thirty years, antitrust enforcers and courts did not account for post-merger inefficiencies or competitive distortions in creating firms too big and too integral to fail.[211] As Professor Fox argues, "by trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency."[212]

This change in competition policy did not arise from congressional amendment. Instead, it came mostly from judges and political appointees. Although the political, social, and moral implications of concentrated economic power may be beyond quantification, Congress emphasized these concerns, and the Court once strived for simpler antitrust rules to arrest any trend toward concentration in its incipiency.[213] But aside from a few media

---

207. Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313 (2010).

208. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497 (criticizing the Court's assumptions in *Trinko*).

209. Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-To-Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 264 (2011).

210. *See* Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1560–61 (2011); OECD, *Mergers and Dynamic Efficiencies*, POLICY BRIEF, 6 (Sept. 2008), www.oecd.org/dataoecd/55/48/41359037.pdf.

211. Markham, *supra* note 209, at 314.

212. Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77, 77 (Robert Pitofsky ed., 2008).

213. Despite the promise of better, more objective analysis, the economic welfare goals did not provide greater objectivity, transparency, administrability, and predictability to antitrust's rule of reason standard. The rule of reason has been routinely pilloried. In the past decade, the Supreme Court has also complained about the state of federal antitrust law (e.g., the interminable litigation, inevitably costly and protracted discovery phase, and its fear over the unusually high risk of inconsistent results by antitrust courts). But it was the Court that has created this predicament. Over the past thirty years, the Court increasingly relied on its fact-specific weighing standard, the rule of reason, and a vague economic goal (consumer welfare) that accommodated different personal values and interpretation and often

mergers where the FCC haphazardly sought to promote noneconomic political and social values, U.S. merger policy over the past thirty years largely ignored competition policy's noneconomic values.[214]

B. Reconciling the Consumer Welfare Standard and the Welfare of Consumers Currently

As Part III.A discussed, competition policy's noneconomic goals were deemphasized over the past thirty years in the pursuit of an unclear economic objective of promoting consumer welfare. As I discuss elsewhere, consumer welfare cannot be antitrust's sole or even primary objective.[215] But this Part puts aside consumer welfare's infirmities, and asks whether competition policy over the past thirty years indeed promoted consumers' welfare. Given antitrust's broad applicability and the federal courts' free reign under the Court's rule of reason standard in construing the competition laws, has consumer welfare increased?

The best way to answer this is to compare consumers' welfare today with that in the counterfactual world where competition policy promoted multiple objectives. Regrettably we cannot correct the policy failures over the past thirty years. Only rough proxies, such as examining various metrics of consumer well-being over time, are available.

Most Americans fortunately do not face hunger[216] or homelessness.[217] One of the few well-being metrics where America excels is the average material well-being. The average household disposable income in the

---

pointed to no particular course of action. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

214. STIGLITZ, *supra* note 2, at 128–29; Bush, *supra* note 191, at 279; Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001); Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101 (2009).

215. For one, no consensus exists in defining or measuring consumer welfare or designing legal standards to further this goal. Stucke, *Goals*, *supra* note 8, at 574; *see also* Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013) (noting how the term has no particular meaning). For another, a consumer welfare objective cannot explain antitrust enforcement against buyer cartels or monopsonies without downstream effects on consumers. Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. (forthcoming 2013), *available at* http://ssrn.com/abstract=2094553. If promoting consumer surplus is the sole goal, then consumers arguably could collude to depress prices for goods and services (such as rigging bids at home foreclosure sales). Such conduct is illegal.

216. The percentage of American households that had access to enough food for an active, healthy lifestyle ranged between 89 percent (2005) and 85.3 percent (2009). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, tbl.214, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0214.pdf. The percentage of households having difficulty meeting basic food needs ranged between 6.9 percent (2005) and 9 percent (2009). *Id.*

217. NAT'L ALLIANCE TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA 2012 (2012), *available at* http://www.endhomelessness.org/library/entry/the-state-of-homelessness-in-america-2012 (estimating that the U.S. homeless population "decreased 1 percent, or by about 7,000 people . . . from 643,067 in 2009 to 636,017 in 2011").

United States in 2008 was $37,690 per year, and the average U.S. household's financial worth was an estimated $98,440, which were much higher than the OECD averages, $22,284 and $36,808, respectively.[218] Updating for the Great Recession, the median U.S. household income in 2011 was $50,054.[219]

Americans' discretionary income increased, as the percentage of expenditures allocated for food, clothing, and housing declined:

> In 1901, the average U.S. family devoted 79.8 percent of its spending to these necessities, while families in New York City spent 80.3 percent, and families in Boston allocated 86.0 percent. By 2002–03, allocations on necessities had been reduced substantially, for U.S. families to 50.1 percent of spending, for New York City families to 56.7 percent, and for Boston families to 53.8 percent.[220]

On the other hand, the U.S. economy over the past thirty years has failed for many Americans in terms of openness, inclusiveness, positive economic impact, and sustainable development.[221] Dated policy paradigms presumed trade-offs between economic efficiency and social progress.[222] Companies overlooked the "well-being of their customers, the depletion of natural resources vital to their businesses, the viability of key suppliers, [and] the economic distress of the communities in which they produce and sell."[223]

1. The Widening Inequality Gap and Declining Social Mobility

A competition policy's consumer welfare standard in theory should inhibit the transfer of wealth from consumers to firms with significant market power. Income and wealth inequality, however, have increased significantly over the past thirty years.[224] Wealth inequality was a historic

---

218. *United States*, OECD BETTER LIFE INITIATIVE, http://www.oecdbetterlifeindex.org/countries/united-states/ (last visited Mar. 19, 2013).

219. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60–243, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 5 (2012) [hereinafter 2011 CENSUS], *available at* http://www.census.gov/prod/2012pubs/p60-243.pdf.

220. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 100 YEARS OF U.S. CONSUMER SPENDING DATA FOR THE NATION, NEW YORK CITY, AND BOSTON 66 (2006), *available at* http://www.bls.gov/opub/uscs/report991.pdf.

221. STIGLITZ, *supra* note 2, at xii.

222. Porter & Kramer, *supra* note 1, at 64.

223. *Id.*

224. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 6 (EPI Digital, 12th ed. 2012), *available at* http://stateofworkingamerica.org/subjects/overview/?reader (observing that wages earned by the top 1 percent "grew about 156 percent between 1979 and 2007, whereas wages for the bottom 90 percent rose by less than 17 percent"). Economists have documented the distinctive *U*-shaped pattern of income disparity between 1917 and 2007. Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (updated with 2011 estimates)*, BERKELEY (Jan. 31, 2013), http://www.econ.berkeley.edu/~saez/saez-UStopincomes-2011.pdf. Peaking in 1928, income disparity sharply declined during the Great Depression. Thereafter, "[b]etween 1947 and 1973, economic growth was both rapid and distributed equally across income classes." Econ. Pol'y Inst., *Income Inequality*, ST. WORKING AM., http://stateofworkingamerica.org/inequality/income-

antitrust concern. Senator Sherman, in support of his legislation, identified the inequality of condition, wealth, and opportunity as the greatest threat to social order, and stated that this inequality "has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition."[225] But income inequality, *The Economist* recently described in its special report, is "on a scale that matches, or even exceeds, the first Gilded Age."[226]

Wealth and income inequality in the United States is approaching levels seen in plutocracies.[227] The OECD notes:

> The wealthiest Americans have collected the bulk of the past three decades' income gains. The share of national income of the richest 1% more than doubled between 1980 and 2008 . . . [while] the top marginal income tax rate dropped from 70% in 1981 to 35% in 2010.[228]

In 2010, the United States had "the fourth highest rate of income inequality and relative poverty (17.3% of people [are] poor compared to an OECD average of 11.1%) in the OECD."[229] Although the disparity between the rich and poor widened globally,[230] the OECD observed, "nowhere has this trend been so stark as in the United States."[231] Income inequality increased during the Obama Administration—growing 1.6 percent in one year alone (between 2010 and 2011),[232] and 5.2 percent since 1993.[233]

Similarly, wealth inequality is at a record high.[234] In 1962, "the wealthiest 1% of households averaged 125 times the wealth of the median

---

inequality/. "The poorest 20% of families saw growth at least as fast as the richest 20% of families, and everybody in between experienced similar rates of income growth." *Id*. But in the late 1970s, income inequality in the United States began growing, reaching a record high in 2007. Anthony B. Atkinson et al., *Top Incomes in the Long Run of History*, 49 J. ECON. LITERATURE 3, 6 (2011) (noting how the share of total pre-tax income going to the top decile income group reached almost 50 percent by 2007, the highest level on record, with a significant change in the top one percentile, which rose from 8.9 percent of total pre-tax income in 1976 to 23.5 percent in 2007).

225. 21 CONG. REC. 2454, 2460 (1890).

226. *Special Report: For Richer, For Poorer*, ECONOMIST, Oct. 13, 2012, at 2 [hereinafter *Special Report*].

227. STIGLITZ, *supra* note 2, at 22.

228. OECD, *Country Note: United States*, *in* DIVIDED WE STAND: WHY INEQUALITY KEEPS RISING (2011), *available at* www.oecd.org/els/socialpoliciesanddata/49170253.pdf.

229. OECD, *Key Findings: United States*, *in* SOCIETY AT A GLANCE—OECD SOCIAL INDICATORS (2011), *available at* www.oecd.org/social/socialpoliciesanddata/47573390.pdf.

230. Angel Gurría, OECD Sec'y Gen., Remarks at Press Conf. for Divided We Stand: Inequality Keeps Rising (Dec. 5, 2011), *available at* http://www.oecd.org/social/dividedwestandwhyinequalitykeepsrisingspeech.htm ("Income inequality in OECD countries is at its highest level for the past half century.").

231. OECD, *Country Note: United States*, *in* GROWING UNEQUAL?: INCOME DISTRIBUTION AND POVERTY IN OECD COUNTRIES 1 (2008), *available at* http://www.oecd.org/els/socialpoliciesanddata/41528678.pdf.

232. 2011 CENSUS, *supra* note 219, at 7, 8 (Gini index increasing from 0.470 to 0.477); *Special Report*, *supra* note 226, at 8 (more than 90 percent of all income gains since the recession went to the top 1 percent).

233. 2011 CENSUS, *supra* note 219, at 10.

234. SYLVIA A. ALLEGRETTO, ECON. POLICY INST., THE STATE OF WORKING AMERICA'S WEALTH, 2011, at 2 (2011), *available at* http://www.epi.org/page/-/BriefingPaper292.pdf.

household."[235] By 2009, the wealth disparity nearly doubled as "the wealthiest 1% of households averaged 225 times the wealth of the median household."[236] Indeed, all households—except those in the top 5 percent—saw a relative decline in share of overall wealth between 1962 and 2009.[237] In 2009, the richest 20 percent of American households accumulated 87.2 percent of household net wealth, the remaining 80 percent of American households accounted for 12.8 percent of all wealth, and approximately one in every four American households had no (or a negative) net worth.[238]

A bigger issue is fairness. Contrary to this Horatio Alger myth, income mobility is lower (and income inequality greater) in America than in many European[239] and other developed countries.[240] One 2008 study found that "Americans do not have an equal shot at getting ahead, and one's chances are largely dependent on one's parents' economic position."[241] The study noted that "[c]hildren born to parents in the top quintile have the highest likelihood of attaining the top, and children born to parents in the bottom quintile have the highest likelihood of being in the bottom themselves."[242]

Along with increasing income inequality came poverty.[243] Many more Americans are impoverished.[244] In 2010, over 46 million people were in poverty, "the largest number in the 52 years for which poverty estimates

235. *Id*. at 7.

236. *Id*.

237. *Id*. at 5.

238. *Id*. at 2. Median wealth for African-American households saw an even greater decline in both absolute dollars ($4,890 in 2010 versus $6,366 in 1983) and relative to white households ($97,000 in 2010). MISHEL ET AL., *supra* note 224, at 40–41.

239. STIGLITZ, *supra* note 2, at 18; *Like Father, Not Like Son*, *in Special Report*, *supra* note 226, at 7.

240. MISHEL ET AL., *supra* note 224, at 33–35; Miles Corak, *Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility* (Inst. for the Study of Labor (IZA), Discussion Paper No. 1993, 2006), *available at* http://ftp.iza.org/dp1993.pdf; Markus Jäntti et al., *American Exceptionalism in a New Light: A Comparison of Intergenerational Earnings Mobility in the Nordic Countries, the United Kingdom and the United States* 27 (Inst. for the Study of Labor (IZA), Discussion Paper No. 1938, 2006), *available at* http://ftp.iza.org/dp1938.pdf; OECD, ARE WE GROWING UNEQUAL? 7 (2008), *available at* http://www.oecd.org/dataoecd/48/56/41494435.pdf ("Taking the analysis of persistence of income poverty and mobility of earnings between generations together suggests that more unequal countries are prone to developing an 'underclass' who are poor themselves for long periods and so are their children.").

241. Julia B. Isaacs, BROOKINGS INST., *Economic Mobility of Families Across Generations*, *in* GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 15–19 (2008).

242. *Id*.; *see also* MISHEL ET AL., *supra* note 224, at 34 (measuring the intergenerational elasticity between parental income and 40-to-44-year-old sons' earning as declining from 0.40 in 1950 to 0.32 in 1980, and increasing to 0.46 in 1990 and 0.58 in 2000).

243. 2011 CENSUS, *supra* note 219, at 13, fig.4 (showing sharp inclines in the number of people living in poverty between the late 1970s and 1984, 1989 and 1993, and 2000 and 2010). The percentage of U.S. families below poverty declined from 20.8 percent in 1959 to 9.7 percent in 1973. *Id.* at 13. It fluctuated between 9.9 percent and 10.9 percent between 1974 and 1979, and grew from 11.5 percent (1980) to 13.9 percent (1983). *Id*.

244. *Id.* at 13 (noting that the official poverty rate in 2011 was 15 percent (46.2 million people)). For African Americans and Hispanics, the 2011 poverty rates were 27.6 percent and 25.3 percent. *Id*. at 15.

have been published."[245] In 2010, 20.5 million people (6.7 percent of the U.S. population) "lived below *half* of the poverty line (below $11,157 for a family of four)"—the highest level on record.[246]

This might have come as a shock to some, but not to many middle and lower income households. Well before 2008, middle-class Americans saw little gains in income despite gains in productivity.[247] Unlike the period between WWII and the 1970s, between 1979 and 2011, wages and productivity did not increase in tandem.[248] Real median household income stagnated in the 2000s, with the 2011 median 8.9 percent below the 1999 median.[249] When mass unemployment came, the middle class shrank further.[250] Neighborhoods over the past thirty years have become more segregated by income.[251]

245. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-239, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 14 (2011), *available at* http://www.census.gov/hhes/www/poverty/data/incpovhlth/2010/index.html.

246. Danilo Trisi et al., *Poverty Rate Second-Highest in 45 Years*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 14, 2011), www.cbpp.org/cms/?fa=view&id=3580.

247. STIGLITZ, *supra* note 2, at 3, 8; Atkinson, *supra* note 224, at 8 (noting how "U.S. real income per family grew at a modest 1.2 percent annual rate from 1976 to 2007" but "when excluding the top 1 percent, the average real income of the bottom 99 percent grew at an annual rate of only 0.6 percent, which implies that the top 1 percent captured 58 percent of real economic growth per family during that period").

248. MISHEL ET AL., *supra* note 224, at 7 ("[P]roductivity—the ability to produce more goods and services per hour worked—grew 69.2 percent, while median hourly compensation (wages and benefits) grew just 7.0 percent.").

249. 2011 CENSUS, *supra* note 219, at 5; *see also* DENAVAS-WALT ET AL., *supra* note 245, at 5. The median household incomes declined for whites, African Americans, Hispanics, and Asians. *Wages*, ST. WORKING AM., http://stateofworkingamerica.org/files/book/factsheets/wages.pdf (last visited Mar. 19, 2013) ("Both high school—and college-educated workers have seen no growth in their hourly compensation in the last 10 years, starting in 2002. College graduates up to the 70th percentile have had stagnant or falling wages since 2000, and wages have failed to improve for college graduates in nearly every occupation, including business occupations.").

250. D'Vera Cohn, *Middle-Income Economics and Middle-Class Attitudes*, PEW RESEARCH CTR. (Aug. 22, 2012), http://www.pewsocialtrends.org/2012/08/22/the-lost-decade-of-the-middle-class-2/ ("[B]ased on data going back to 1970, households in the nation's upper-income tier now take in a larger share of the nation's aggregate households income than they used to, while the shares for the middle-income and lower-income tiers have declined. One reason for this trend is that upper-income households have made larger income gains than other households over recent decades. In addition, the share of adults who are in the middle-income tier (defined as living in households with two-thirds to double the national median income) has shrunk in recent decades: 51% of adults resided in such households in 2010, compared with 61% in 1970."); Marisol Bello & Paul Overberg, *Middle Class' Share of the Nation's Income Is Shrinking*, USA TODAY (Oct. 26, 2011), http://www.usatoday.com/money/economy/story/2011-10-25/middle-class-disappearing/50914822/1; *see also* SEAN F. REARDON & KENDRA BISCHOFF, US2010 PROJECT, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970–2009 (Nov. 2011), *available at* http://graphics8.nytimes.com/packages/pdf/national/RussellSageIncomeSegregationreport.pdf (discussing the shrinking middle class and economically mixed neighborhoods).

251. MURRAY, *supra* note 113, at 69–99; *Special Report*, *supra* note 226, at 12; Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, PEW RESEARCH CTR. (Aug. 1, 2012), http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/.

This widening inequality gap and declining social mobility raise other concerns, including slower economic growth, greater inefficiency from rent-seeking, weaker demand, limited opportunity for many people, and more financial crises.[252]

2. America's Threadbare Social Net

Besides exposing the widening gap between the wealthiest 1 percent and the rest of America, the economic crisis exposed America's threadbare social net.[253] America's infrastructure is crumbling.[254] Primary and secondary education for many families is inadequate.[255] Incarcerations,[256] home foreclosures,[257] underwater mortgages,[258] and the public's

---

252. STIGLITZ, *supra* note 2, at 83–117; *Special Report*, *supra* note 226, at 6, 20.

253. *See* STIGLITZ, *supra* note 2, at 10–12; SEN. BERNIE SANDERS, THE SPEECH: A HISTORIC FILIBUSTER ON CORPORATE GREED AND THE DECLINE OF OUR MIDDLE CLASS 72–73 (2011); *Special Report*, *supra* note 226, at 10 (noting that social spending while increasing has become less redistributive; whereas in 1979 over half of all federal social spending went to the poorest fifth of households, today it is only 36 percent).

254. ARIANNA HUFFINGTON, THIRD WORLD AMERICA: HOW OUR POLITICIANS ARE ABANDONING THE MIDDLE CLASS AND BETRAYING THE AMERICAN DREAM (2011); *Special Report*, *supra* note 226, at 40–41, 129–35, 236; *see also* AM. SOC'Y CIVIL ENG'RS. 2009 REPORT CARD FOR AMERICA'S INFRASTRUCTURE (2009), http://www.infrastructurereport card.org/.

255. OECD, LESSONS FROM PISA FOR THE UNITED STATES, STRONG PERFORMERS AND SUCCESSFUL REFORMERS IN EDUCATION 34 (2011), *available at* http://dx.doi.org/10.1787/9789264096660-en (finding that "socio-economic disadvantage has a particularly strong impact on student performance in the United States: 17% of the variation in student performance in the United States is explained by students' socio-economic background," which is significantly higher than the 9 percent in Canada or Japan: "In other words, in the United States, two students from a different socio-economic background vary much more in their learning outcomes than is normally the case in OECD countries."); SANDERS, *supra* note 253, at 136–42; Martha J. Bailey & Susan M. Dynarski, *Gains and Gaps: Changing Inequality in U.S. College Entry and Completion* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 17633, 2011), *available at* http://www.nber.org/papers/w17633 (finding, from nearly seventy years of U.S. Census data, a growing gap between children from high- and low-income families in college entry, persistence, and graduation).

256. STIGLITZ, *supra* note 2, at 15; ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION (2011), http://www.aclu.org/prisoners-rights/banking-bondage-private-prisons-and-mass-incarceration ("The United States imprisons more people—both per capita and in absolute terms—than any other nation in the world, including Russia, China, and Iran.").

257. ALLEGRETTO, *supra* note 234, at 30–31; Kara Bloomgarden-Smoke, *What's Next for Occupy Wall Street? Activists Target Foreclosure Crisis*, CHRISTIAN SCI. MONITOR (Jan. 29, 2012), http://www.csmonitor.com/USA/2012/0129/What-s-next-for-Occupy-Wall-Street-Activists-target-foreclosure-crisis; Alejandro Lazo, *Fewer People Falling Behind on Mortgages*, L.A. TIMES (Feb. 18, 2011), http://articles.latimes.com/2011/feb/18/business/la-fi-foreclosures-20110218.

258. ALLEGRETTO, *supra* note 234, at 29–30; Paul Owers, *South Florida Housing Market Stabilizing, Zillow Says*, SUNSENTINEL.COM (Aug. 9, 2011, 6:00 AM), http://weblogs.sun-sentinel.com/business/realestate/housekeys/blog/2011/08/south_florida_housing_market_s.html ("46 percent of homes with a mortgage in the three counties are 'underwater'—worth less than what's owed . . . . Nationally, about 27 percent of homes with mortgages are underwater."); *The American Cities Sunk by Underwater Mortgages*, 24/7 WALL ST. (Oct. 28, 2011, 3:38 AM), http://247wallst.com/2011/10/28/the-american-cities-sunk-by-underwater-mortgages/.

dissatisfaction with Congress reached record highs.[259] With America's debt in the trillions of dollars,[260] a larger fiscal crisis looms.

My point is not that America's feeble antitrust enforcement primarily caused the current economic blight. Not every harm to consumers stems from an injury to competition that the competition laws redress. Others, like Joseph Stiglitz, have argued that the plight of the middle class and poor, the growing income and wealth inequality, and the widening gap between worker pay and increases in productivity were caused in part by our failed competition policies.[261] My point here is that, over the past thirty years, it is hard to see how antitrust's consumer welfare objective actually promoted the welfare of 99 percent of Americans.

3. Concerns Over Crony Capitalism

Like the concern preceding the Sherman Act's enactment in 1890, the concern today is the alignment between big government and big business, and how federal policies are skewed toward helping the wealthy and powerful.[262] As Stiglitz recently argued,

> We haven't achieved the minimalist state that libertarians advocate. What we've achieved is a state too constrained to provide the public goods—investments in infrastructure, technology, and education—that would make for a vibrant economy and too weak to engage in the redistribution that is needed to create a fair society. But we have a state that is still large

259. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, FRUSTRATION WITH CONGRESS COULD HURT REPUBLICAN INCUMBENTS—GOP BASE CRITICAL OF PARTY'S WASHINGTON LEADERSHIP 1 (2011) [hereinafter FRUSTRATION WITH CONGRESS], *available at* http://www.people-press.org/files/legacy-pdf/12-15-11%20Congress%20and%20Economy%20release.pdf.

260. U.S. NAT'L DEBT CLOCK, http://www.usdebtclock.org/ (last visited Mar. 19, 2013).

261. STIGLITZ, *supra* note 2, at 41–51, 82 (arguing that "inequality is not just the result of the forces of nature, of abstract market forces" but "to a very large extent, the result of government policies that shape and direct the forces of technology and markets and broader societal forces"); *see also* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 679–82 (3d ed. 1990); William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q.J. ECON. 177, 193 (1975) (finding, in 1962, when wealth inequality was less severe, monopolies had a major effect on the relative wealth holdings of the wealthiest, those with household net worth exceeding a half million dollars); *cf.* Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1195 (1977) (recognizing that "[a]ntitrust actions may not always improve both income distribution and efficiency" but in "most circumstances . . . antitrust gives the efficiency-equality tradeoff the characteristic of having one's cake and eating it too" because in "the long run, more competition will mean less accumulation of wealth from capitalized monopoly positions"). To be fair, Elzinga felt that "the pursuit of egalitarian income distribution through antitrust enforcement is likely to have limited results." *Id.* at 1196.

262. STIGLITZ, *supra* note 2, at xix–xx; SANDERS, *supra* note 253, at 23–24; *see also* FRUSTRATION WITH CONGRESS, *supra* note 259 ("A 61% majority say the economic system in this country unfairly favors the wealthy, while 36% say it is generally fair to most Americans. And fully 77% say that a few rich people and corporations have too much power in this country. While still a minority view, the current survey finds 40% saying that hard work and determination are no guarantee of success, higher than in any other survey conducted over the past 17 years.").

> enough and distorted enough that it can provide a bounty of gifts to the wealthy.[263]

Many Americans in recent surveys were dissatisfied with the federal government,[264] its size and power,[265] the country's moral and ethical climate,[266] and the state of America's economy.[267] Many distrust the federal government[268] and big business.[269] Many believe there is "too much power in the hands of a few rich people and large corporations in the United States."[270] Many "say the economic system in this country unfairly favors the wealthy."[271] Many feel that the federal economic policies since 2008 have favored—either a great deal or a fair amount—large banks and financial institutions (74% surveyed), large corporations (70%), and the wealthy (57%), while not favoring the poor (31%), the middle class (27%), or small businesses (23%).[272] Many believe the tax system favors the rich.[273] Some wealthy taxpayers are also dissatisfied with the tax inequities.[274] One concern is that

---

263. STIGLITZ, *supra* note 2, at 155.

264. In 2011, when asked to describe their feelings about the federal government, only about one in ten Americans (11%) "say they are basically content with the federal government, by far the lowest percentage in a measure that dates to 1997." Most were either frustrated (60%) or angry (26%) with the federal government. *Public Satisfaction with Government Hits Low; Anger Rises*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Sept. 1, 2011), http://www.pewresearch.org/daily-number/public-satisfaction-with-government-hits-low-anger-rises/ [hereinafter *Public Satisfaction Hits Low*].

265. Lydia Saad, *U.S. Economy Most Toxic of 24 Issues*, GALLUP (Jan. 23, 2012), http://www.gallup.com/poll/152129/Economy-Toxic-Issues.aspx (69 percent surveyed).

266. *Id.* (68 percent surveyed).

267. *Id.* (69 percent surveyed).

268. In 2011, "80% say they trust the government to do what is right only some of the time or never. Just 19% say the government can be trusted just about always or most of the time." *Public Satisfaction Hits Low*, *supra* note 264 (internal quotation marks omitted). In contrast, when this question was first asked in 1958, "nearly three-quarters (73%) of Americans said they always or mostly trusted the government to do what is right." *Id.*

269. In 2011, only 38 percent felt favorably toward business corporations, and 41 percent felt favorably about labor unions. *Id.* Between early 2007 and 2011, the favorability ratings for business corporations and unions fell by 10 and 13 points, respectively. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, LABOR UNIONS SEEN AS GOOD FOR WORKERS, NOT U.S. COMPETITIVENESS: UNIONS' FAVORABILITY STILL LOW, BUT MIRRORS BUSINESS RATING 1 (2011), *available at* http://www.people-press.org/2011/02/17/labor-unions-seen-as-good-for-workers-not-u-s-competitiveness/. Opinions about business corporations turned more negative among Republicans (58 percent viewing corporations favorably and 36 percent unfavorably in February 2011 versus 70 percent in January 2007 viewing corporations favorably and 18 percent unfavorably). *Id*.

270. Andrew Kohut, Op-Ed., *Don't Mind the Gap*, N.Y. TIMES, Jan. 27, 2012, at A27.

271. *Id.* (61 percent of those surveyed).

272. *Gov't Economic Policies Seen As Boon for Banks and Big Business, Not Middle Class or Poor*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (July 19, 2010), http://www.people-press.org/2010/07/19/govt-economic-policies-seen-as-boon-for-banks-and-big-business-not-middle-class-or-poor/ ("Fully 74% say that government policies over the past two years have done a great deal (53%) or a fair amount (21%) to help large banks and financial institutions. Majorities also say that large corporations (70% great deal/fair amount) and wealthy people (57% great deal/fair amount) have been helped.").

273. Kohut, *supra* note 270. As to how the tax rates benefitted the rich, see SANDERS, *supra* note 253, at 26–27, 45–46, 75–76, 97 ("The wealthiest 400 Americans now earn an

> the current imbalance of power between mega-corporations and all other institutions and individuals in the world constitutes a danger to peace, health and prosperity. While the protesters in the Middle East rebel against powerful repressive governments, participants in the Occupy Wall Street protests share a perspective that a relatively small group of corporate and wealthy individuals now wield too much economic influence and control in the United States and the world.[275]

Many supported the Occupy Wall Street movement.[276] Over four hundred economists supported Occupy Wall Street in "liberat[ing] the economy from the short-term greed of the rich and powerful one percent."[277] Students are questioning a conservative bias in economics itself.[278] As economist Robert J. Shiller observes, "I teach financial markets, and it's a little like teaching R.O.T.C. during the Vietnam War. . . . You have this sense that something's amiss."[279]

4. Dissatisfaction with Competition Policy

Professor Pitofsky presciently warned in 1979 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.[280]

One need only look at the financial services industry to see his prediction bear out.[281] The taxpayer bailouts of the major financial institutions, automobile manufacturers, AIG, and other large corporations exposed how

---

average of $345 million a year and pay an effective tax rate of 16.6 percent, on average. That is the lowest tax rate for wealthy individuals on record."); *Special Report*, *supra* note 226, at 9 ("[M]ore than 60% of all tax preferences flow to the wealthiest 20% of Americans, with only 3% going to the bottom quintile."); *see also* STIGLITZ, *supra* note 2, at 71–74.

274. James B. Stewart, *Think Your Tax Rate Is High? Many Complain of the I.R.S. Bite, but This One Stands Out*, N.Y. TIMES, Feb. 4, 2012, at B1.

275. Scott T. Meier, *Imbalance of Power Imperils Prosperity*, BUFF. NEWS, Dec. 12, 2011, 2011 WLNR 25619974; *see also* DAVID ROTHKOPF, SUPERCLASS: THE GLOBAL POWER ELITE AND THE WORLD THEY ARE MAKING (2008).

276. Matthew Cooper, *Poll: Most Americans Support Occupy Wall Street*, ATLANTIC, Oct. 19, 2011, http://www.theatlantic.com/politics/archive/2011/10/poll-most-americans-support-occupy-wall-street/246963/.

277. *Statement on OWS*, ECON4, http://econ4.org/statement-on-ows (last visited Mar. 19, 2013).

278. *See, e.g.*, Jose A. DelReal, *Students Walk Out of Ec 10 in Solidarity with "Occupy,"* HARV. CRIMSON (last updated Nov. 3, 2011, 4:04 AM), http://www.thecrimson.harvard.edu/article/2011/11/2/mankiw-walkout-economics-10/.

279. Kevin Roose, *Investment Banking at Top Colleges, Anti–Wall St. Fervor Complicates Recruiting*, N.Y. TIMES (Nov. 28, 2011), http://dealbook.nytimes.com/2011/11/28/at-top-colleges-anti-wall-st-fervor-complicates-recruiting/ (quoting Robert J. Shiller) (internal quotation marks omitted).

280. Pitofsky, *supra* note 172, at 1051.

281. Markham, *supra* note 209, at 313 (discussing how antitrust neither prevented nor redressed the recent systemic threats caused directly by companies too big and integral to the functioning of markets).

the economically powerful have every desire to use the government to protect their economic interests.[282]

For many, the economic crisis exposed the relationship between the big financial firms and big government.[283] A 2012 study found that, "[a]mong the middle class, about six-in-ten (62%) blame lawmakers 'a lot' for the problems of the middle class. Somewhat smaller shares blame banks and financial institutions (54%) and large corporations (47%)."[284] Fifty-six percent of surveyed Americans said that the power and influence of banks and other financial institutions represented a major threat to the country.[285]

This was not always the case. With an emphasis on structural banking regulations and antitrust merger review,[286] the Supreme Court in the 1960s celebrated the federal supervision of banking as one of the most, if not the most, successful systems of economic regulation.[287] Commercial banking at that time was diffused through many independent, local banks, rather than concentrated in a few nationwide banks, as in England and Germany.[288] Commercial banking was subject to various state and federal governmental controls.[289] Add to that antitrust merger review, which, consistent with the Clayton Act's legislative political and social values, sought to arrest anticompetitive tendencies and trends toward concentration in their incipiency.[290] In fact, in 1963, the Court noted the "virtual disappearance of bank failures from the American economic scene."[291]

But that changed in the 1980s. With lax merger review and banking deregulation, beginning in the 1980s, the financial services industry underwent a wave of record-setting megamergers.[292] Around 400 to 500

---

282. Frank Pasquale, *The Conservatism of Occupy Wall Street*, CONCURRING OPINIONS (Oct. 27, 2011, 10:37 AM), http://www.concurringopinions.com/archives/2011/10/the-conservatism-of-occupy-wall- street.html.

283. *Special Report*, *supra* note 226, at 15 (describing concerns over the cronyism between Wall Street and Washington, D.C. over the past thirty years that allowed financiers to tilt rules in their favor and how "[t]he finance industry (along with property and insurance) employs more lobbyists than virtually any other industry, around four per Congressman").

284. *Fewer, Poorer, Gloomier: The Lost Decade of the Middle Class*, PEW RESEARCH CTR., 21 (August 22, 2012), http://www.pewsocialtrends.org/files/2012/08/pew-social-trends-lost-decade-of-the-middle-class.pdf.

285. FRUSTRATION WITH CONGRESS, *supra* note 259, at 4.

286. *See, e.g.*, Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (1933) (restricting, among other things, commercial banks from engaging principally in investment banking activities).

287. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 329–30 (1963).

288. *Id*. at 325.

289. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 34–37 (2010).

290. *Phila. Nat'l Bank*, 374 U.S. at 362–63.

291. *Id*. at 330; JOHNSON & KWAK, *supra* note 289, at 36 (providing figures on annual bank suspensions and failures).

292. JOHNSON & KWAK, *supra* note 289, at 59, 64–87; STEPHEN A. RHOADES, BD. OF GOVERNORS OF THE FED. RESERVE SYS., BANK MERGERS AND INDUSTRYWIDE STRUCTURE, 1980–94, at 3 (1996), *available at* http://www.federalreserve.gov/pubs/staffstudies/1990-99/ss169.pdf (finding that an average of 190 bank mergers occurred annually between 1960 and 1982); STEPHEN A. RHOADES, BD. OF GOVERNORS OF THE FED. RESERVE SYS., BANK

banks each year between 1986 and 1998 ceased to exist independently.[293] The DOJ observed that the megamergers ranked "among the largest U.S. bank mergers ever, in terms of the real value of assets involved, and in terms of the share of total U.S. bank assets accounted for by the merging banks."[294]

But the federal government did little to arrest this trend toward concentration and mergers that created banks too big to fail. In considering only the bank mergers' claimed short-term productive efficiencies and price effects in narrowly defined markets (namely small business loans), the DOJ did not consider other economic, political, and social costs from trends toward concentration.[295] The DOJ discounted or ignored the dangers of concentration, the mergers' impact on systemic risk, and their impact on the financial system's overall efficiency, competitiveness, and stability.[296] One official recounted how the DOJ required divestitures in only five of the 1,900 bank mergers it screened in 1995.[297] The DOJ assured the bankers that despite challenging only 0.3 percent of reviewed bank mergers, the DOJ "successfully prevented anticompetitive effects from bank mergers, ensuring that competitive options are preserved while at the same time permitting most of the efficiencies associated with those mergers . . . . In sum, bank merger policy in the '90s is a win-win situation for all."[298]

Take for example the 1998 merger between Travelers Group Inc. and Citicorp, which created the world's largest commercial banking organization, with total consolidated assets of approximately $751 billion. During its merger review, the DOJ, according to one official, "heard numerous complaints that Citigroup [the proposed merged entity] would

---

MERGERS AND BANKING STRUCTURE IN THE UNITED STATES, 1980–98, at 3 (2000), http://www.federalreserve.gov/pubs/staffstudies/2000-present/ss174.pdf [hereinafter MERGERS & BANKING 1980–98] (finding that an average of 420 bank mergers annually between 1980 and 1998, for a total of about 8,000 mergers—"equal to about 55 percent of all banks in existence in 1980"); ROUNDTABLE ON COMPETITION, CONCENTRATION AND STABILITY IN THE BANKING SECTOR (Feb 4, 2010), *available at* http://www.justice.gov/atr/public/international270405.pdf ("During the period 1994 through 2006, the Department reviewed more than 1,000 bank acquisition/merger applications annually.").

293. MERGERS & BANKING 1980–98, *supra* note 292, at 25.

294. Robert Kramer, Chief, Litig. II Section, Antitrust Div., U.S. Dep't of Justice, Address at the Am. Bar. Ass'n, Antitrust Section, "Mega-Mergers" in the Banking Industry (Apr. 14, 1999), *available at* http://www.justice.gov/atr/public/speeches/214845.pdf.

295. *Hearing Concerning Mergers in the Financial Services Industry Before the H. Comm. on the Judiciary*, 105th Cong. (1998) (statement of John M. Nannes, Deputy Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div.), *available at* http://www.justice.gov/atr/public/testimony/1787.htm ("To the extent that our investigations have resulted in a determination that competitive concerns exist, it has most often been with respect to the availability of banking services, including loans and credit, to small and medium-sized businesses. Such small and medium-sized businesses may have few alternatives available to them for some of their credit needs.").

296. *Id.*

297. Constance K. Robinson, Dir. of Operations, U.S. Dep't of Justice, Antitrust Div., Address Before the 31st Annual Banking Law Inst., Washington, D.C. (May 30, 1996), *available at* http://www.justice.gov/atr/public/speeches/1003.htm.

298. *Id*.

have an undue aggregation of resources—that the deal would create[] a firm too big to be allowed to fail."[299] But the DOJ "essentially viewed this as primarily a regulatory issue to be considered by the [Federal Reserve Board]."[300] The Federal Reserve Board dismissed this and several other concerns, which presaged the financial crisis a decade later. Both the DOJ and Federal Reserve ignored concerns that the merger "would result in an undue concentration of resources and in an organization that is both 'too big to fail' and 'too big to supervise.'"[301]

With lax antitrust review and deregulation, the financial services industries became highly concentrated after the merger wave of the 1980s and 1990s. JPMorgan Chase, for example, arose from mergers involving eleven financial institutions; Bank of America from thirteen institutions; and Wells Fargo from nine institutions.[302] As it consolidated, the financial services industry commanded a higher share of gross domestic product (GDP) and overall corporate profits.[303] Between 2001 and 2010, average compensation in the finance sector was 70 to 90 percent higher than in other industries, and for those in investment banking and securities dealing, their average compensation was 300 to 450 percent higher.[304] As a result, investment bankers comprised a larger share of the wealthiest 0.1 percent than other senior executives.[305]

Today, six bank holding companies—Citigroup, JPMorgan Chase, Bank of America, Wells Fargo, Goldman Sachs, and Morgan Stanley—dominate the industry and are considered "too big and too integral to fail" (TBTF). In the third quarter of 2010, the assets of these six bank holding companies were worth 64 percent of GDP—higher than in 2006 (about 55 percent of

---

299. Kramer, *supra* note 294.

300. *Id*.

301. Press Release, Fed. Reserve Bd., Travelers Group, Inc. and Citicorp, Order Approving Formation of a Bank Holding Company and Notice to Engage in Nonbanking Activities, 84 FED. RES. BULL. 985, at 74 (Sept. 23, 1998), *available at* http://www.federalreserve.gov/boarddocs/press/BHC/1998/19980923/19980923.pdf.

302. *How Banks Got Too Big To Fail*, MOTHER JONES (Jan./Feb. 2010), http://motherjones.com/politics/2010/01/bank-merger-history.

303. KEVIN PHILLIPS, BAD MONEY: RECKLESS FINANCE, FAILED POLITICS, AND THE GLOBAL CRISIS OF AMERICAN CAPITALISM 31–32 (2008); *see also* FIN. STABILITY OVERSIGHT COUNCIL, 2011 ANNUAL REPORT 110 (2011), *available at* http://www.treasury.gov/initiatives/fsoc/Documents/FSOCAR2011.pdf ("With the exception of the recent recession, finance accounted for 25 percent to 50 percent of all corporate profits over the past decade."). The profits of the financial sector and other sectors historically grew the same rate; between 1980 and 2005, however, the financial sector's profits increased 800 percent, whereas other sectors grew 250 percent. JOHNSON & KWAK, *supra* note 289, at 60.

304. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 303, at 110. In 1989, the chief executives at the seven largest bank holding companies "earned an average of $2.8 million, or 97 times the median U.S. household income of $28,906 for that year." *Id.* By 2007, the CEOs at the six largest bank holding companies "earned an average of $26 million, or 516 times the [2007] median household income of $50,233," and "2.3 times the average total compensation of the CEOs at the top 50 nonbank companies." *Id.* at 110–11.

305. *Special Report*, *supra* note 226, at 10 ("America's top 25 hedge-fund managers make more [money] than all the CEOs of the S&P 500 combined.").

GDP) and 1995 (17 percent of GDP).[306] In contrast, the combined assets of *all* commercial banks in 1978 were worth 53 percent of GDP.[307] Similarly, the four largest U.S. commercial banking firms (Bank of America, Wells Fargo, JPMorgan Chase, and Citigroup) account for over 34 percent of national deposits and over 56 percent of the market in general purpose credit card purchase volume; they originated roughly 58 percent of mortgage loans by volume in 2009 and serviced 56.3 percent of such loans.[308] In contrast, the *twenty-five* largest banks accounted for only 29.1 percent of deposits in 1980.[309] Ironically, as a result of mergers during the financial crisis, the big six became even bigger,[310] and the industry became more concentrated as nonbank mortgage lenders exited.[311]

Former Federal Reserve Chairman Alan Greenspan, among others, recommended, "If they're too big to fail, they're too big. . . . In 1911 we broke up Standard Oil—so what happened? The individual parts became more valuable than the whole. Maybe that's what we need to do."[312] But the reality is that the political will and accountability to break up these firms are absent.

This dissatisfaction over antitrust enforcement is not confined to the financial services industry. In 2010, the DOJ and the U.S. Department of Agriculture (USDA) held public workshops on competition issues affecting the agricultural sector.[313] The agencies heard many complaints about the state of antitrust enforcement. In Alabama, they heard how the "'lack of antitrust enforcement in recent decades' has resulted in 'a severely concentrated marketplace in which power and profit are limited to a few at

---

306. Simon Johnson, *The Bill Daley Problem*, HUFFINGTON POST (Jan. 9, 2011, 8:08 AM), http://www.huffingtonpost.com/simon-johnson/bill-daley-obama-chief-of-staff_b_806341.html.

307. JOHNSON & KWAK, *supra* note 289, at 59.

308. *See* FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS REGARDING CONCENTRATION LIMITS ON LARGE FINANCIAL COMPANIES 13, 24 (Jan. 2011), *available at* http://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/Study%20on%20Concentration%20Limits%20on%20Large%20Firms%2001-17-11.pdf.

309. MERGERS & BANKING 1980–98, *supra* note 292, at 26; SANDERS, *supra* note 253, at 37–38.

310. Richard W. Fisher, President and CEO, Fed. Reserve Bank of Dall., Remarks Before the Senior Delegates Roundtable of the Fixed Income Forum, Two Areas of Present Concern: The Economic Outlook and the Pathology of Too-Big-To-Fail (July 23, 2009), *available at* http://www.dallasfed.org/news/speeches/fisher/2009/fs090723.cfm (with reference to Errol Flynn, Johnny Mercer, Gary Stern, and Voltaire) ("Bank of America's assets grew 51 percent from June 2007 to March 2009, assisted in no small part by its acquisitions of Countrywide Financial and Merrill. Wells Fargo's asset base grew 138 percent, thanks mainly to its acquisition of Wachovia. J.P. Morgan Chase acquired both Bear Stearns and Washington Mutual and grew 43 percent.").

311. JOHNSON & KWAK, *supra* note 289, at 159–64, 171, 180.

312. Michael McKee & Scott Lanman, *Greenspan Says U.S. Should Consider Breaking Up Large Banks*, BLOOMBERG (Oct. 15, 2009, 10:50 EDT), http://www.bloomberg.com/apps/news?pid=email_en&sid=aJ8HPmNUfchg.

313. *See* U.S. DEP'T OF JUSTICE, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD (2012) [hereinafter DOJ AG REPORT], *available at* http://www.justice.gov/atr/public/reports/283291.pdf.

the expense of countless, hard working family farmers.'"[314] In Wisconsin, they heard how a recent enforcement action (Dean Foods' acquisition of plants from Foremost Farms) was an "anomaly," when "'a lot of mega-mergers' . . . 'have allowed a lot of concentration of market power.'"[315] They heard from Wisconsin's Secretary of Agriculture that "as with the big banks and big oil and big mining, it's long been evident that meaningful enforcement of antitrust and anticoncentration policy [regulations] in our food and [agricultural] industry have been sadly missing in recent decades."[316] The participants found it "'appalling that our antitrust enforcement has not been more vigorous than it has been in the past.'"[317] One "panelist charged that 'merger policy has been broken for 10 years, if not 20 or 30.'"[318]

C. Should Competition Law Maximize Consumer Welfare?

One response is that even if competition policy contributed to the dismal economic state of many Americans, the problem did not arise from competition policy's consumer welfare objective. Rather, antitrust's legal standards and enforcement have failed to effectuate the consumer welfare objective. Rather than displace the consumer welfare objective, the courts and agencies need only recalibrate antitrust's legal standards and enforcement to better promote consumers' welfare.

This raises a more challenging issue. Suppose courts and enforcers could agree that maximizing consumer welfare is antitrust's sole or primary objective; could agree on a definition of consumer welfare (such as increasing consumer surplus[319]); and could design administrable legal standards for evaluating restraints or mergers that posed a significant risk of increased market power and lower consumer surplus.[320] Would Americans'

---

314. *Id.* at 5.

315. *Id.*

316. Transcript of Proceedings at Public Workshops Exploring Competition Issues in Agriculture: Dairy Workshop 38 (June 25, 2010) (statement of Rod Nilsestuen, Wis. Sec'y of Agric.), *available at* http://www.justice.gov/atr/public/workshops/ag2010/wisconsin-agworkshop-transcript.pdf.

317. DOJ AG REPORT, *supra* note 313, at 5.

318. *Id.*

319. OECD, *supra* note 50, at 28 (defining consumer surplus as the "excess of social valuation of product over the price actually paid," and "is measured by the area of a triangle below a demand curve and above the observed price"). For example: suppose you are willing to pay $25 for a book, which when you go to the bookstore is on sale for $15; your consumer surplus is $10.

320. Although this Article uses as a shorthand "promoting consumer surplus," U.S. antitrust policy does not seek to increase consumer surplus per se. For example, a monopoly can charge a higher than competitive price without violating the Sherman Act. Indeed, the extra profits may serve as an incentive to invest in research and development. Instead antitrust law seeks to enjoin mergers and restraints of trade that "create, enhance, or entrench market power or to facilitate its exercise." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1, at 2 (2010) [hereinafter 2010 MERGER GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf. So, antitrust policy targets mergers and restraints that enable firms "to raise price, reduce output, diminish

well-being significantly increase as a result? The happiness economics literature suggests no.

1. Increasing a Wealthy Society's Overall Wealth Does Not Necessarily Increase Overall Well-Being

One insight from the happiness literature is that well-being is promoted along multiple dimensions, including (i) material well-being (income and wealth, housing, and jobs and earnings) and (ii) quality of life (health status, work and life balance, education and skills, social connections, civic engagement and governance, environmental quality, and personal security.[321]

A competition policy that seeks to increase consumer surplus and thereby increase material well-being makes more sense in developing economies where most consumers have insufficient wealth to satisfy their most basic needs.[322] After all, if impoverished consumers must choose between milk and bread, then with all else equal, lowering the price of milk and bread significantly benefits consumers' health and well-being.

But if competition policy's sole or primary goal is to maximize consumer surplus in a post-industrial economy where many are materially well-off, then the competition policy has a minor, or at times inconsequential, role in maximizing total well-being. Increasing consumer surplus will not always increase total well-being. The happiness economics literature shows that after one's basic needs are met, increasing income does not significantly increase experienced, day-to-day happiness.[323] As the country's living standards increase and its citizens' basic material needs, such as food, clothing and shelter, are met, then the citizens will likely place greater importance on quality-of-life factors associated with well-being, such as work and life balance, social connections, safety, and environmental quality.[324] Material well-being still matters (especially employment) in promoting well-being. Economic growth can also promote other values, such as "openness of opportunity, tolerance, economic and social mobility,

---

innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives." *Id*. Thus, if a firm by acquiring its rival can raise prices above competitive levels, consumer surplus will be lost. It is in this manner that this Article means promoting consumer surplus.

321. *Better Life Initiative: Compendium of OECD Well-Being Indicators*, OECD, 6 (2011), http://www.oecd.org/document/28/0,3746,en_2649_201185_47916764_1_1_1_1,00.html; *see also* Hall et al., *supra* note 59, at 8–10, 17.

322. Daniel Kahneman et al., *Would You Be Happier If You Were Richer? A Focusing Illusion*, 312 SCIENCE 1908, 1909 (2006) (life satisfaction tends to rise when GDP per capita is at preexisting low levels of income, but tapers off once GDP per capita exceeds $12,000).

323. GRAHAM, *supra* note 12, at 17; Elizabeth Dunn et al., *Spending Money on Others Promotes Happiness*, 319 SCIENCE 1687, 1687 (2008); Frey & Stutzer, *supra* note 70, at 409–10.

324. Kahneman et al., *supra* note 322, at 1909.

fairness, and democracy."[325] But there is less bang (in terms of increased well-being) for that extra buck of consumer surplus.

First, individuals assess their life satisfaction differently than their financial condition—the two are not coextensive.[326] Second, higher income is more strongly correlated with life satisfaction than experienced, day-to-day happiness. In the United States, higher-income individuals (those in the highest decile) reported, on average, the highest level of happiness.[327] But increases in income beyond a certain amount (one study found $75,000) did not promote the residents' experienced, day-to-day happiness.[328]

Third, after many citizens' basic needs are met, the empirical literature does not conclusively find a strong correlation between *increases* in society's wealth and subjective well-being.[329] For example, the mean income (adjusted for inflation) of the top decile in the United States increased 33 percent between 1972 and 1996, but the mean happiness rating for that wealthy group remained the same.[330] The Easterlin Paradox, named for Professor Easterlin's 1974 article, finds that "a higher rise in personal income leads to higher subjective well-being for that person, but that a rise in average incomes for a country does not give rise to a corresponding increase in the country's average subjective well-being."[331] The economic literature, for example, did not identify a correlation between the doubling of wealth in the United States between 1945 and 1991 and

---

325. BENJAMIN M. FRIEDMAN, THE MORAL CONSEQUENCES OF ECONOMIC GROWTH ix (2005); *see also id.* at 79–102. On a macro level, as Professor Friedman describes, whenever America was mired in economic stagnation its democratic values stagnated as well (with the exception of the Great Depression). Hostility toward immigrants, the poor, and other competing groups, whether by nationality, religion, race, or gender, increased as these groups were seemingly threatened by others stealing their fixed or dwindling share of the pie. In contrast, during periods of economic growth, our society slowly progressed from this zero-sum mentality toward openness, mobility, and democracy.

326. Van Praag et al., *supra* note 117, at 1012, 1014 (84 percent of surveyed were satisfied or very much satisfied with their lives, while only 53 percent very satisfied with their financial condition).

327. Frey & Stutzer, *supra* note 70, at 410 (showing that on a three-point scale ranging from not too happy (1), pretty happy (2), and very happy (3), the tenth decile between 1994 and 1996 had a mean happiness rating of 2.36, which was slightly higher than the ninth decile's mean of 2.3); Kahneman et al., *supra* note 322, at 1909.

328. KAHNEMAN, *supra* note 67, at 396–97; Kahneman & Deaton, *supra* note 99, at 16,491 (looking to a U.S. survey of subjective well-being and finding that, beyond approximately $75,000, higher income "is neither the road to experienced happiness nor the road to the relief of unhappiness or stress, although higher income continues to improve individuals' life evaluations").

329. ADAIR TURNER, ECONOMICS AFTER THE CRISIS: OBJECTIVES AND MEANS xii, 3–11 (2012).

330. Frey & Stutzer, *supra* note 70, at 410.

331. OECD, *supra* note 17, at 271; *see also* BOK, *supra* note 12, at 10–16 (discussing Easterlin paradox, and responses thereto); FREY, *supra* note 12, at 38–41; Rafael Di Tella & Robert MacCulloch, *Some Uses of Happiness Data in Economics*, J. ECON. PERSP. 25, 26 (2006) ("[A] similar pattern has been observed in a large number of countries, including France, the United Kingdom, Germany and Japan, and for different periods of time. In Japan, income rose by a multiple of five between 1958 and 1987, and happiness remained stationary.").

greater well-being.[332] So even where income is correlated with one dimension of well-being, relative, rather than absolute, income may be the determining factor.[333] Mixed results were found in other countries. China, for example, experienced rapid economic growth between 1994 and 2005 ("real income per capita increasing by a factor of 2.5") and greater material well-being (e.g., "ownership of color television sets rose from 40 percent of households to 82 percent, and the fraction with a telephone jumped from 10 percent to 63 percent"); nonetheless the Chinese people have expressed greater dissatisfaction.[334] Other studies, however, have found in several European countries that the citizens' life satisfaction increased with the growth in per capita GDP.[335] Consequently, for wealthy developed countries, "the relationship between average income and human well-being," remains, as one economist observes, "uncertain and complex."[336]

One recent study of well-being across poorer and wealthier countries found a shift from materialist to post-materialist well-being.[337] As countries become wealthier, individual well-being tends to become more post-materialist[338]: "The more widespread post-materialist values are in a society, the more the citizenry values personal autonomy, relative to income, as a source of [subjective well-being]."[339] People now derive greater satisfaction from job creativity than income.[340] And "[i]n richer countries, personal autonomy drives life satisfaction—relative to income—more strongly."[341] In short, "money matters less in richer countries."[342]

So competition policies' goals must evolve accordingly. The goal can no longer be maximizing consumer surplus at the expense or in lieu of other important quality-of-life factors (such as individual freedoms, autonomy,

---

332. BOK, *supra* note 12, at 11–12; LAYARD, *supra* note 12, at 29–30.

333. Dolan et al., *supra* note 107, at 98 (noting that, "if the relative income effect dominates the absolute income effect, this would explain why cross section data show that wealthier individuals within a society are happier, but that average SWB levels remain constant as all members become wealthier"); *see also* OECD, *supra* note 17, at 276 (noting the nonlinear relationship between life satisfaction and income).

334. Kahneman & Krueger, *supra* note 70, at 15–16.

335. Daniel W. Sacks et al., *The New Stylized Facts About Income and Subjective Well-Being* 9 (IZA, Discussion Paper No. 7105, 2012), *available at* http://ftp.iza.org/dp7105.pdf (explaining that, in eight of the nine E.U. countries, economic growth has been accompanied to different degrees with rising average well-being). In the United States, however, life satisfaction has decreased since 1972, even though GDP approximately doubled during that time. *Id*. at 10; *see also* CMEPSP REPORT, *supra* note 16, at 149 (finding from the more recent research that the "Easterlin paradox does not apply to cross-country comparisons of life evaluations at the world level" and in one study of eighteen countries found a 0.58 correlation between changes in GDP and ladder-of-life scores over thirty years).

336. TURNER, *supra* note 329, at 9.

337. Jan Delhey, *From Materialist to Post-materialist Happiness? National Affluence and Determinants of Life Satisfaction in Cross-national Perspective*, 97 SOC. INDICATORS RES. 65, 74–77 (2010).

338. *Id*. at 74.

339. *Id*. at 73.

340. *Id*.

341. *Id*. at 74.

342. *Id*. at 76–77.

environmental protection, and democracy). The incremental gains in total well-being come not from more luxury goods at lower prices, but in fostering market relations that promote other-regarding civic virtues.[343]

2. Why Promoting Consumer Surplus Does Not Necessarily Promote Consumer Welfare

Several factors suggest why promoting consumer surplus in a post-industrial economy where many are materially well-off will not necessarily promote consumer welfare, and any competition policy with this as its sole or primary aim will be ineffective at accomplishing its goals.

First, promoting consumer surplus treats all forms of consumption as positive even though consumption can harm the user and society (such as with cigarettes).[344] Consider obesity. While nutrition remains an issue, only 1.8 percent of Americans in 2007–08, based on their body mass index (BMI), were underweight and only 31.6 percent were at a healthy weight.[345] Most Americans were overweight (33.9%) or obese (32.6%). In comparison, 17 percent of the OECD member countries are obese.[346] Granted, problems exist with relying on BMI,[347] but muscularity does not bedevil many Americans. Between 1980 and 2009, America's per capita consumption increased for corn sweeteners (35.3 to 65.7 pounds), caloric sweeteners (120.2 to 130.7 pounds), and total fat content (56.9 to 78.6 pounds).[348] How important then is promoting consumer surplus and reducing the deadweight welfare loss for snack cakes,[349] carbonated soft drinks,[350] salted snack foods,[351] or superpremium ice cream?[352] If obese citizens have lower well-being levels and lower levels of income mobility on average than those not obese,[353] why promote consumer surplus (and output) for unhealthy foods? The rationale is that competition law, absent any immunities or exemptions, applies to all industries.[354] The agencies or

343. *See* Sargent, *supra* note 128, at 52 (discussing Antonio Genovesi's work).

344. GRAHAM, *supra* note 12, at 11.

345. U.S. Nat'l Ctr. for Health Statistics, *Age-Adjusted Percent Distributions of Body Mass Index (BMI) Among Persons 18 Years Old and over by Selected Characteristics: 2007–2008*, CENSUS tbl.211, www.census.gov/compendia/statab/2012/tables/12s0211.xls (last visited Mar. 19, 2013).

346. OECD, *supra* note 17, at 113.

347. Linda Tarr Kent, *Problems with the BMI Index*, LIVESTRONG.COM (May 6, 2010), http://www.livestrong.com/article/117703-problems-bmi-index/.

348. U.S. Census Bureau, Statistical Abstract of the United States, *Per Capita Consumption of Major Food Commodities: 1980 to 2009*, CENSUS tbl.217 (2012), http://www.census.gov/compendia/statab/2012/tables/12s0217.pdf.

349. *See* Tasty Baking Co. v. Ralston Purina Inc., 653 F. Supp. 1250, 1263 (E.D. Pa. 1987).

350. *See* FTC v. Coca-Cola Co., 641 F. Supp. 1128 (D.D.C. 1986).

351. *See* Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1136 (S.D.N.Y. 1986).

352. *See* Nestle Holdings, Inc., et al., Analysis To Aid Public Comment, 68 Fed. Reg. 39,564 (July 2, 2003).

353. GRAHAM, *supra* note 12, at 43–44.

354. *See, e.g.*, Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 409 (2005) ("Realism cautions that federal and

courts cannot limit competition policy to those industries that they believe provide healthy and useful products.

Nonetheless, reconciling a consumer surplus goal with other societal objectives can be difficult. When the FTC challenged a tobacco merger, one district court struggled:

> The Commission's action in this case appears anomalous when juxtaposed to other government efforts respecting tobacco sales in the United States. In recent years, the government has made every effort to stem the consumption of tobacco by the public. The government specifically has sought to discourage consumption by increasing the prices of tobacco products through taxes, regulating tobacco advertising, and decreasing the amount of shelf space devoted to tobacco products at stores. Here, by contrast, the FTC has vigorously and successfully opposed an acquisition of a chewing tobacco product on the basis that it will result in anticompetitive effects and price increases. This effort by the government therefore appears to be incoherent with its other efforts respecting tobacco. At the same time, the Court appreciates the Commission's explanation that if the acquisition is permitted then consumption of loose leaf will not decline. Rather, consumers will simply be paying more for that consumption. And even if the defendants were correct on their arguments that significant substitution would result, consumption would merely switch from loose leaf to moist snuff. Thus, there is ultimately no public health benefit to permitting the acquisition.[355]

Consumers nonetheless may desire less consumer surplus, such as smokers with imperfect willpower who favor a sin tax on tobacco.[356]

Second, maximizing consumer surplus is a questionable, and arguably a counterproductive, antitrust objective for status goods where consumers want high prices (at least for others) to signal conspicuous consumption.[357] While consumers may prefer getting the Hermes scarf at a discount, they would not want the scarf to become affordable for most Americans.[358]

Third, the aim of promoting consumer surplus can devolve into promoting materialism, which does not promote well-being.[359] For essential goods and services, such as basic foods, medication, etc., a lower

---

state antitrust authorities are unlikely to embrace anticompetitive conduct creating positive social welfare effects in net-harm industries. The ideology of competition may be too firmly engrained to permit such a radical paradigm shift without a legislative nudge.").

355. FTC v. Swedish Match, 131 F. Supp. 2d 151, 153–54 n.1 (D.D.C. 2000).

356. Di Tella & MacCulloch, *supra* note 331, at 35–36 (summarizing one study where "a 50-cent tax per pack of cigarettes would leave predicted smokers with the same level of happiness as those who are not predicted to smoke in the United States"); *see also* FREY, *supra* note 12, at 9–10; Huang, *Happiness Studies*, *supra* note 13, at 21.12.

357. *See generally* Maurice E. Stucke, *Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893 (2010); Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 286 (2008).

358. VEBLEN, *supra* note 150, at 26 (observing that the predominant motive for conspicuous consumption is the "invidious distinction attaching to wealth").

359. Stucke, *supra* note 357, at 946–47.

price can translate into greater savings, wealth, and better health, enabling consumers to work less, retire earlier, or donate more. But that logic does not extend to all discretionary goods and services. Materialism eventually attaches to a competition policy that seeks to promote consumer surplus for discretionary purchases. The belief is that as consumer surplus increases, consumers can buy more things, and their well-being increases accordingly. But as the happiness literature examines, people "who prize material goods more highly than other values in life tend to be substantially less happy."[360] One 2007 survey found "a somewhat inconsistent but generally rather dismal picture of materialists and individuals who aspire to financial success."[361] Materialism or financial aspirations were positively correlated with neuroticism, anxiety, self-criticism, depression, anger expression, emotional instability, stress, conformity, Machiavellianism, right-wing authoritarianism, abrasiveness, and hedonistic values.[362]

Fourth, promoting materialism can promote status competition, selfishness, and envy, and marginalize quality-of-life factors correlated with greater well-being. For many, well-being extends beyond satisfying one's desires to include a moral life. On an individual level, well-being is positively correlated with family relationships, employment, community and friends, health, self-control or autonomy, personal ethical and moral values, and the quality of the environment.[363] Prosocial spending is also associated with greater well-being.[364] Materialism and financial aspirations, on the other hand, were negatively correlated with social interest (care and concern for others, friendliness, empathy), agreeableness, self-esteem, self-actualization, intelligence, religious values, family oriented values, environmentalism, and aesthetic values.[365] Individuals primed with luxury goods, one study found, were more likely to think of themselves than others and were "significantly more likely to endorse production of a new car that might pollute the environment, . . . launch a new software with bugs, . . . and market a video game that might induce violence."[366] Trading off social relations for consuming more goods, and an increase in status

---

360. FREY, *supra* note 12, at 29. *See generally* M. Joseph Sirgy, *Materialism and Quality of Life*, 43 SOC. INDICATORS RES. 227 (1998).

361. Carol Nickerson et al., *Financial Aspirations, Financial Success, and Overall Life Satisfaction: Who? and How?*, 8 J. HAPPINESS STUD. 467, 469 (2007).

362. *Id.* at 469–74.

363. BOK, *supra* note 12, at 17; LAYARD, *supra* note 12, at 62–73; NETTLE, *supra* note 12, at 85, 87.

364. Lara B. Aknin et al., *Prosocial Spending and Well-Being: Cross-cultural Evidence for a Psychological Universal* 8, 13 (Harv. Bus. Sch. Working Paper No. 11-038, 2010), *available at* www.hbs.edu/research/pdf/11-038.pdf (observing a positive relationship in prosocial spending and subjective well-being in 122 of 136 surveyed countries and in an experiment involving Canadians and Ugandans).

365. Nickerson et al., *supra* note 361, at 469–74.

366. Roy Y.J. Chua & Xi Zou, *The Devil Wears Prada? Effects of Exposure to Luxury Goods on Cognition and Decision Making* 6 (Harv. Bus. Sch. Working Paper No. 10-034) (2009), *available at* http://www.hbs.edu/faculty/Publication%20Files/10-034.pdf (luxury primed participants watched ads for a diamond watch and leather oxford shoes and completed a questionnaire).

competition at the cost of reducing social relations, can decrease well-being.[367] Materialism is detrimental not only to the individual, but society. "A consumption culture" is negatively related to concern for the environment; participation in public domain issues; and involvement in family, community, and social issues.[368] A competition policy, whose primary purpose is to promote lower prices and greater output of goods and services can also conflict with other policies that seek to improve quality of life. Sustainability issues arise from increased energy consumption, waste, and environmental degradation.

Fifth, even if people experienced greater happiness when purchasing additional material goods, that happiness, at least on a day-to-day experienced basis, is likely to be short-lived.[369] Individuals adapt to higher incomes (and increased consumer surplus) and have greater income aspirations.[370] Winners of large amounts of money in lotteries, for example, have a temporary boost in experienced well-being.[371] Individuals may desire more goods and services but, after obtaining them, they become preoccupied with obtaining other goods and services.[372]

Sixth, if many view consumer surplus in relative terms (how much additional surplus they have relative to their peers) rather than absolute terms (how much wealth they have), it is questionable that people derive greater well-being from greater consumer surplus.[373] People often have reference-based utility.[374] They do not care solely about absolute levels of

---

367. Pugno, *supra* note 71, at 592–95 (providing economic model); *id.* at 595–97 (empirical illustration); *see also* James A. Roberts & Aimee Clement, *Materialism and Satisfaction with Over-All Quality of Life and Eight Life Domains*, 82 SOC. INDICATORS RES. 79 (2007).

368. Roberts & Clement, *supra* note 367, at 82.

369. FREY, *supra* note 12, at 40; Kahneman et al., *supra* note 322, at 1909–10.

370. FREY, *supra* note 12, at xi; Kahneman & Sugden, *supra* note 65, at 168.

371. NETTLE, *supra* note 12, at 75. Even people with acquired disabilities or health problems show considerable, but not always complete, adaptation to happiness. *Id.* at 83.

372. NETTLE, *supra* note 12, at 76–77; Kahneman et al., *supra* note 322, at 1909–10.

373. TURNER, *supra* note 329, at 16 (noting that the "implicit assumption of any simply presented marginal-utility curve—that my utility is a function of my income alone—is clearly wrong. My utility is clearly also a function of other people's income and of my income relative to that of others.").

374. LAYARD, *supra* note 12, at 41–43; NETTLE, *supra* note 12, at 73; Di Tella & MacCulloch, *supra* note 331, at 35 (surveying the literature and finding that "the overall evidence is consistent with the hypothesis that an individual's happiness or utility is not just a function of income at a point in time, as in the standard model most often used by economists, but that happiness adapts to changes in income over time, and that at a point in time, happiness also comes from relative levels of income."); Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUR. ECON. REV. 657, 661 (2002). Similarly, people rarely choose things in absolute terms, but instead based on their relative advantage or disadvantage to a reference point. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1456 (2003). One experiment examined whether the fear of losing the social competition inherent in an auction game, in part, causes people to pay too much. Mauricio R. Delgado et al., *Understanding Overbidding: Using the Neural Circuitry of Reward To Design Economic Auctions*, SCIENCE, Sept. 26, 2008, at 1849. At the beginning of each auction round, the loss-frame group members were given fifteen dollars; they were told that if they won the auction for

wealth or personal consumption but also about changes in their wealth and consumption relative to others.[375] One's total income is less important than how much one earns relative to one's peers, neighbors, friends, or, as H.L. Mencken observed, one's wife's sister's husband.[376] People compare themselves to the wealth and consumption of their peers and the socioeconomic class immediately above them; after adapting to the higher rung, they strive for more.[377]

Seventh, increasing consumer surplus for some goods and services does not necessarily increase total well-being when consumers use that surplus to compete for goods and services in short supply.[378] If consumers, for example, use their extra wealth to compete for holiday vacation lodgings and restaurants, they are not necessarily happier. They either have to pay more than others for a quieter beachfront experience or accept the cheaper, albeit noisier and crowded, beach.[379] Increasing surplus can also increase consumption that increases negative externalities. As anyone caught in Beijing traffic knows, the increasing availability of vehicles can decrease well-being with longer commute times and poorer air quality.

Eighth, the behavioral economics literature further draws into question consumer surplus as a normative goal. Professor Kirkwood, for example, discusses how competition policy protects consumers and small suppliers from wealth transfers arising from anticompetitive conduct. But

that round, they would get the payoff from the auction and could keep the fifteen dollars. If they lost, they must return the fifteen dollars. *Id.* at 1851. The bonus-frame group members were told that if they won that auction round they would get a fifteen-dollar bonus at the end of the round. *Id.* This framing should not affect the bidding, since under both frames the winner gets an extra fifteen dollars, the loser gets nothing. *Id.* at 1852. Nonetheless the loss-treatment group members outbid the bonus-treatment group members, which outbid the baseline group. *Id.* Professor Ariely examined whether by adding a third more expensive choice, the marketer can steer consumers to a more expensive second choice. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 2 (2010). One hundred MIT students were offered three choices for *The Economist* magazine: (i) internet-only subscription for fifty-nine dollars (sixteen students); (ii) print-only subscriptions for $125 (no students); and (iii) print-and-internet subscriptions for $125 (eighty-four students). *Id.* at 5. When the "decoy" second choice (print-only subscriptions) was removed and only the first and third options were presented, the students did not react similarly. *Id.* at 5–6. Instead sixty-eight students opted for internet-only subscription for fifty-nine dollars (up from sixteen students) and only thirty-two students chose print-and-internet subscriptions for $125 (down from eighty-four students). *Id.* at 5–6.

375. *See* Rabin, *supra* note 374, at 661; Stutzer & Frey, *supra* note 52, at 690.

376. Kahneman et al., *supra* note 322, at 1909; *see also* David Neumark & Andrew Postlewaite, *Relative Income Concerns and the Rise in Married Women's Employment*, 70 J. PUB. ECON. 157 (1998) (finding that women's employment decisions are positively related to sisters' employment decisions; all else being equal, women whose sisters live nearby and worked the past year are about 10 to 15 percent more likely to work than women whose sisters did not work).

377. ARIELY, *supra* note 374, at 17–18.

378. TURNER, *supra* note 329, at 29 (noting that while marginal utility of wealth can be partially offset by the marginal utility from consuming new products and services, once we introduce behavioral assumptions, we may end up with an aggregate marginal-utility curve that is increasing but a declining rate).

379. TURNER, *supra* note 329, at 14–15.

competition policy is not about maximizing consumer surplus per se but promoting fairness.[380] Citizens value fairness. "A basic rule of fairness," Kahneman and others found, "is that the exploitation of market power to impose losses on others is unacceptable."[381] The behavioral economics literature suggests that "framing effects" (how the issue is worded or framed) do matter.[382] Consumers typically base fairness on the deviation from an established reference point.[383] Deviations from the perceived reference point are marked by asymmetric price elasticity, whereby many are more sensitive to price increases than price cuts.[384] Losses hurt more than the joy from comparable gains, and whether the price change is coded as a loss or gain affects fairness determinations.[385] Thus, the fairness concerns that animate competition policy are not simply about maximizing consumer surplus by keeping prices low—a less important goal in a developed economy. Rather, competition policy is about protecting consumers from the exploitation of increased market power, which is often seen as a departure from moral or social norms or other established reference points.[386] So, many consumers do not begrudge the monopoly that charges more for a better product. But they do complain when the firm, whether by merger or exit by its rivals, becomes the corporate bully. The monopsony employer that cuts its workers pay affects well-being far more than a comparable pay increase would. By preventing such

380. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2432 (2013).

381. KAHNEMAN, *supra* note 67, at 306.

382. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); *see also* STEFFEN HUCK ET AL., OFFICE OF FAIR TRADING, CONSUMER BEHAVIOURAL BIASES IN COMPETITION: A SURVEY ¶¶ 3.90–.107 (2011), *available at* http://www.oft.gov.uk/shared_oft/research/OFT1324.pdf.

383. *See supra* note 374 and accompanying text; *see also* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness As a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986) ("A central concept in analyzing the fairness of actions in which a firm sets the terms of future exchanges is the reference transaction, a relevant precedent that is characterized by a reference price or wage, and by a positive reference profit to the firm." (emphasis omitted)).

384. Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 148, 152 (Colin F. Camerer et al. eds., 2004) (Many consumers "dislike price increases more than they like the windfall gain from price cuts and will cut back purchases more when prices rise compared with the extra amount they buy when prices fall."); *see also* OECD, COMPETITION AND REGULATION IN AGRICULTURE: MONOPSONY BUYING AND JOINT SELLING 8 (2005), http://www.oecd.org/daf/competition/abuse/35910977.pdf (discussing whether the substantial evidence of price asymmetry commonly cited by farmers may arise "from different search patterns by consumers when they face increasing prices compared to decreasing prices. In particular, they may search more aggressively for alternative suppliers when prices increase, but less aggressively when prices are stable or slowly decreasing.").

385. For example, the majority of people, in one survey, felt it was unfair that a company, in a community experiencing a recession with substantial unemployment but no inflation, decreased wages and salaries by 7 percent. Few thought it unfair, however, if the company increased salaries by only 5 percent in the face of overall inflation of 12 percent. Under both scenarios, workers' wages are effectively reduced by 7 percent. Kahneman et al., *supra* note 383, at 371–72.

386. *Id*. at 734–36; *see also* KAHNEMAN, *supra* note 67, at 306.

anticompetitive behavior, competition policy does not necessarily promote lower prices per se, but our perceptions of a just or fair society.[387]

Accordingly, if consumer surplus increases in an already wealthy economy, then many people, aside from the lower-income and poor, will unlikely be happier as a result.[388] If the consumer surplus is distributed unevenly and greater wealth inequality ensues, the wealthier may have greater life satisfaction but not necessarily greater experienced day-to-day happiness.[389] Plus, as Part III.D discusses, there will be greater incentives for the wealthy to use the law to safeguard and augment their interests, which can reduce total well-being.[390]

3. Why Lowering Gas Prices May Not Increase Well-Being.

One response is that if consumer surplus does not improve well-being, why do many consumers bargain and shop for discounts?[391] Why else do consumers queue late Thanksgiving evening outside department stores? Why else do gasoline prices "exert an unrivaled hold on the public imagination"?[392] The rise in gasoline prices played a greater role in the 2012 U.S. presidential debates[393] than antitrust policy. So wouldn't consumers be happier if the DOJ prosecuted the OPEC cartel and lower gas prices resulted?

As *The New York Times* reports, "there is surprisingly little evidence that gas prices deserve an outsize reputation for economic and political influence."[394] One study found that gas prices were inversely related with life satisfaction.[395] But this dissatisfaction was short-lived; life satisfaction, the study found, largely rebounded a year later.[396] So why aren't Americans necessarily happier when they pay $2.00 per gallon rather than $3.50?[397]

---

387. Kirkwood, *supra* note 380, at 2453–56.

388. TURNER, *supra* note 329, at 33 ("[O]ne thing we know with reasonable certainty is that increasing average per capita GDP beyond the levels achieved in rich developed countries doesn't, by itself, ensure significant increases in self-perceived well-being, and therefore is not a useful definition of the overriding objective of economic activity.").

389. BOK, *supra* note 12, at 12.

390. TURNER, *supra* note 329, at 33; Stucke, *supra* note 207, at 339–40.

391. Many U.S. and French women surveyed, however, experienced more stress, sadness, or pain from shopping than happiness; indeed the hedonic experience from shopping trailed most other daily activities, including housework, reading, and walking. CMEPSP REPORT, *supra* note 16, at 171.

392. Binyamin Appelbaum, *Price of Gas Matters to Voters, but Doesn't Seem To Sway Votes*, N.Y. TIMES, Mar. 17, 2012, at A1.

393. *Debate Fact Check: Examining Claims from the Presidential Showdown*, NJ.COM (Oct. 4, 2012, 10:21 AM), http://www.nj.com/politics/index.ssf/2012/10/debate_fact_check_examining_cl.html.

394. Appelbaum, *supra* note 392, at A1.

395. Casey Boyd-Swan & Chris M. Herbst, *Pain at the Pump: Gasoline Prices and Subjective Well-Being*, 72 J. URBAN ECON. 160, 161 (2012) (finding that a $1 increase in gas prices for period of 1985–2005 is associated with a 4.8 percent decrease in the likelihood of being very satisfied with life).

396. *Id.* at 161. Another study also found a negative relationship between gas prices and well-being, but primarily for low- and middle-income groups, with a positive and significant

The happiness literature discusses how people at times inaccurately predict (1) the impact of future life events on their well-being (such as a junior professor's prediction if denied tenure);[398] (2) their adaptation to their new condition (whether a physical disability or winning the lottery);[399] and (3) the strong effects of relative rather than absolute wealth on satisfaction.

Behavioral economists describe this "focusing illusion" in pursuing happiness as the fact that "[n]othing that you focus on will make as much difference as you think."[400] One example of this bias came from a recent experiment, which reaffirmed that "[t]here is more happiness in giving than in receiving."[401] First, the study's authors found from a nationally representative survey that personal spending was unrelated to happiness but spending more of one's income on others predicted greater happiness.[402] Higher prosocial spending (e.g., gifts for others and donations to charity) was associated with significantly greater happiness.[403] The study's authors next performed a before-and-after field study of employees who received a profit-sharing bonus. They found that "employees who devoted more of their bonus to pro-social spending experienced greater happiness after receiving the bonus, and the manner in which they spent that bonus was a more important predictor of their happiness than the size of the bonus itself."[404] In a third experiment, participants, after rating their happiness in the morning, were given an envelope containing money (either five dollars or twenty dollars) and were told to spend the money by 5:00 p.m. that day.[405] In one group, participants were told to spend the money on themselves; the second group was told to spend the money on someone else or give it to a charity. After 5:00 p.m. the participants were asked about

coefficient for high income groups. CAROL GRAHAM & SOUMYA CHATTOPADHYAY, BROOKINGS INST., (UN?)HAPPINESS AND GASOLINE PRICES IN THE UNITED STATES (2010), http://www.brookings.edu/~/media/research/files/reports/2010/10/09%20gas%20prices%20happiness%20graham/09_gas_prices_happiness_graham.pdf. But, like the other study, this negative relationship between rising gas prices and happiness for the middle class occurred in the precrisis period of January to September 14, 2008, and disappeared in the periods thereafter (September 15, 2008 to January 2010). *Id*. at 7–8.

397. GRAHAM & CHATTOPADHYAY, *supra* note 396, at 13 (not finding an increase in well-being when gas prices dropped below $2 per gallon).

398. Kahneman et al., *supra* note 322, at 1908; Kahneman & Sugden, *supra* note 65, at 170.

399. Stutzer & Frey, *supra* note 52, at 690; *see also* CMEPSP REPORT, *supra* note 16, at 148; Di Tella & MacCulloch, *supra* note 331, at 36 n.7.

400. David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy?: A Focusing Illusion in Judgments of Life Satisfaction*, PSYCHOL. SCI., Sept. 1998, at 345; *see also* Daniel Kahneman & Richard H. Thaler, *Anomalies: Utility Maximization and Experienced Utility*, 20 J. ECON. PERSP. 221 (2006); Uzma Khan, *Defend Your Research: The More People Want Something, the Less They'll Like It*, HARV. BUS. REV., June 2010, at 32.

401. 20 *Acts of the Apostles* 35 (New Jerusalem).

402. Dunn et al., *supra* note 323, at 1687.

403. *Id*.

404. *Id.* at 1688.

405. *Id*.

their happiness. Although the amount of money the participants received (five dollars or twenty dollars) did not have a significant effect on their happiness, participants who gave the money away reported greater post-windfall happiness than did participants who spent it on themselves.[406] So if giving leads to greater happiness, the study's authors ask, why don't we spend a little less on ourselves and donate a little more?[407] People predict poorly. The authors found that 63 percent of the university students predicted personal spending would make them happier than prosocial spending, and that twenty dollars would make them happier than five dollars.[408]

Consequently, a competition policy whose sole or primary aim is to promote consumer welfare by increasing consumer surplus will not necessarily promote a wealthy society's total well-being. Indeed, a competition policy that promotes materialism and a consumption culture will likely reduce, rather than increase, well-being. Moreover, if antitrust's sole aim is to promote consumer surplus, it is hard to envision competition law as "the Magna Carta of free enterprise" and as "important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[409] Rather, competition policy, under a consumer surplus goal, is simply a costly coupon program. If antitrust's objectives are to reduce the price of discretionary goods, some of which are harmful to consumers, there is little to celebrate over the policy's efforts. As John Kenneth Galbraith observed, "Growth consists increasingly of items of luxury consumption. Thus we perform the considerable feat of converting the enjoyment of luxury into an index of national virtue. This arouses at least some doubts."[410]

D. Reweighing Competition Policy's Political, Social, and Moral Goals

As Part III.A examined, competition policy never arose to promote only one economic objective, such as consumer surplus. Competition policy historically sought to promote political, social, and moral values of fair competition, dispersal of economic power, and promoting economic opportunity and individual autonomy. Despite the historical concerns about concentrated economic power, antitrust analysis over the past thirty years overstated the importance of competitive dynamics that were easier to assess (productive efficiencies and short-term price effects) and marginalized or ignored what was harder to assess (dynamic efficiencies; systemic risk; and the political, social, and moral implications of concentrated economic power). Americans, as Part III.B discussed, paid the price. One benefit of the happiness literature, as Part III.C discussed, is

406. *Id*.
407. *Id*.
408. *Id*.
409. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
410. Galbraith, *supra* note 71, at 118.

exposing why a competition policy that seeks primarily to promote consumer surplus is unlikely to increase total well-being.

Thus, we return full circle and recognize that competition policy, if it seeks to promote total well-being, cannot maximize one narrow dimension. Antitrust's moral, social, and political values, which Congress emphasized, must return to the analysis. On a positive note, the agencies acknowledge in their latest merger guidelines the incipiency standard.[411] Moreover, the agencies, under the Clayton Act's incipiency standard, "may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place."[412] But the risk remains that courts and policymakers will demand proof of how the merger *will* lessen competition, with a myopic concern over post-merger unilateral price effects. Others, acknowledging antitrust's noneconomic concerns, are unsure how to weigh these values relative to lower prices and greater output.

A potential benefit from the happiness literature is in assessing the value (in terms of gained or lost well-being) of nonmarket, nonmaterial experiences, activities, and conditions—such as autonomy, the right to vote, and the degree of political representation.[413] The happiness economics literature is beginning to examine the relationship between well-being and the political and economic institutions' inclusiveness. The happiness literature, while not there yet, may help policymakers down the road assess the relative importance of antitrust's noneconomic values in promoting total well-being. Policymakers, after all, were originally interested in the happiness literature as a way to supplement GDP measures in assessing a country's economic performance.[414] As the OECD and other governmental and private institutions collect data, policymakers may eventually assess the importance of antitrust's noneconomic values in several ways.

One way is to assess how, and the extent to which, a well-functioning democracy promotes well-being, and then assess how competition law's economic and noneconomic values promote a democracy. The United States, after all, was founded on the premise that democracy can promote

411. 2010 MERGER GUIDELINES, *supra* note 320, § 1, at 1 ("[T]he congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.").

412. *Id.* § 7.1, at 25.

413. Stutzer & Frey, *supra* note 52, at 704; *see also* UK REPORT, *supra* note 114, at 37 ("Another use is in cost-benefit analysis in the policy appraisal process. Subjective well-being estimates can provide an alternative method to value the costs and benefits of different policies. This process could also help inform decisions around which forms of spending will lead to the largest increases in subjective well-being . . . ." (citation omitted)).

414. CMEPSP REPORT, *supra* note 16, at 21–22; UK REPORT, *supra* note 114, at 36 ("Subjective well-being data, therefore, needs to be collected to supplement existing socio-economic measures of objective domain in order to fully understand and monitor national well-being.").

happiness.[415] As Professor Bok observed, "almost all the countries in the world that rank highest in overall satisfaction with life have been successful democracies for more than 80 years."[416] One study found that improvements in the level of democracy between 1988 and 1998 coincided with a statistically significant increase in well-being:

> [D]irect democratic participation rights have been found to be positively related with citizens' well-being. . . . For the case of Switzerland, people in cantons with more extensive rights to propose popular initiatives and to vote on major laws and constitutional amendments report higher satisfaction with life, many other influences on satisfaction being held constant. This is interpreted as being attributable to the fact that the outcomes of this kind of political process are more beneficial to the population, because politicians are more strongly induced to follow voters' wishes than is the case in a more indirect democracy or a non-democracy. In addition, a comparison between Swiss citizens (who have the right to vote) and foreigners living in Switzerland (who do not have that right but share in the outcomes) shows that citizens value the possibility of political participation, irrespective of outcomes, i.e. they derive procedural well-being from their participation rights.[417]

The happiness literature is less developed on the optimal political institutions that foster a democracy that promotes overall well-being.[418] Yet one fundamental belief of any democracy is the value of civic engagement and responsive governance in promoting well-being. Public confidence in government "is essential for social stability and the functioning of democracy. . . . and for economic growth."[419] So well-being is derived from both the government's responsiveness to its citizens' concerns and the governmental institutions themselves.

As the happiness literature develops, it can assess the countries' optimal legal and informal institutions that promote a well-functioning democracy, as well as the role of competition policy. Congress has repeatedly recognized that democracies function better when economic and political power is dispersed. As Aristotle wrote, "[T]he best form of political association is one where power is vested in the middle class, and, secondly, that good government is attainable in those cities where there is a large middle class—large enough . . . [to] prevent either of the opposing extremes from becoming dominant."[420] So, too, according to one recent economic analysis, countries prosper economically when legal institutions disperse political and economic power.[421] First, extractive institutions have more to

415. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

416. BOK, *supra* note 12, at 23.

417. FREY, *supra* note 12, at 64.

418. OECD, *supra* note 17, at 187 ("While civic engagement and governance are essential for democracies, they are also very difficult to measure.").

419. *Id.* at 192.

420. ARISTOTLE, THE POLITICS bk. 4, ch. 11, § 10, at 158–59 (R.F. Stalley ed., Ernest Barker trans., Oxford Univ. Press 1995).

421. *See* ACEMOGLU & ROBINSON, *supra* note 185, at 323. Although they do not rely on the happiness literature, they consider whether the political and economic institutions were

fear from creative destruction.[422] Although the elites prefer some economic growth from which to extract wealth, creative destruction, while promoting innovation, also can destabilize the entrenched power.[423] The elites will sacrifice dynamic economic growth when it threatens their power.[424] Moreover, there is less incentive to innovate if the politically and economically powerful appropriate the gains.[425] When the highly coveted economic and political power is concentrated in extractive institutions, political instability increases, as outside groups seek to displace the entrenched (not necessarily to promote more inclusive political and economic institutions but to expropriate the gains themselves).[426]

Consequently, competition policy can promote an inclusive economy that promotes well-being. As the MIT and Harvard economists have observed,

> [T]he presence of markets is not by itself a guarantee of inclusive institutions. Markets can be dominated by a few firms, charging exorbitant prices and blocking the entry of more efficient rivals and new technologies. Markets, left to their own devices, can cease to be inclusive, becoming increasingly dominated by the economically and politically powerful. Inclusive economic institutions require not just markets, but inclusive markets that create a level playing field and economic opportunities for the majority of the people. Widespread monopoly, backed by the political power of the elite, contradicts this.[427]

Second, policymakers can assess the extent to which dispersed economic and political power, besides promoting democracy, promotes well-being directly. The happiness research suggests that "decentralized political decisions raise life satisfaction . . . . Individuals feel better at ease and better informed when decisions affecting local issues are decided at a local level rather than by a centralized government unit sometimes far from the issues at stake."[428] The happiness literature also finds that well-being is

extractive or inclusive. Inclusive institutions "enforce property rights, create a level playing field, and encourage investments in new technologies and skills" and "are more conducive to economic growth than extractive economic institutions that are structured to extract resources from the many by the few and that fail to protect property rights or provide incentives for economic activity." *Id.* at 429–30. Extractive economic and political institutions concentrate power in the hands of the few, "who will then have incentives to maintain and develop extractive economic institutions for their benefit and use the resources they obtain to cement their hold on political power." *Id.* at 430. Countries generally prospered under inclusive economies "where political rights were much more broadly distributed, where the government was accountable and responsive to citizens, and where the great mass of people could take advantage of economic opportunities." *Id.* at 3–4.

422. *Id.* at 430.

423. *Id.* at 84, 430.

424. *Id.*

425. *Id.* at 77–78.

426. *Id.* at 430.

427. *Id.* at 323.

428. Frey & Stutzer, *supra* note 141, at 662–63; *see also* FREY, *supra* note 12, at 64 ("Democratic institutions increase people's well-being considerably. An increase in the extent of democracy by one mark on the ten-point Polity IV Index increases reported happiness to an extent similar to an increase of $4,500 per year in an individual's income.").

strongly correlated with political freedom (more so in wealthier countries)[429] and economic freedom (more so in less developed countries).[430]

Competition "is first and foremost a system of decentralized economic power."[431] Competition policy can maintain a competitive market structure by, inter alia, lessening regulatory entry barriers, enjoining mergers to monopoly, and arresting trends toward concentration at their incipiency. In doing so, antitrust's structural remedies disperse not only economic power but political power with fewer monopolies to regulate and less rents to capture.[432] As Dr. Kahn stated, the "essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves."[433] I do not contend that increasing competition always increases well-being. As I discuss elsewhere, competition does not always benefit society. Greater competition, at times, yields more behavioral exploitation of consumers, greater waste from lobbying (and small businesses can be politically powerful, at times more so than large corporations), and more unethical behavior.[434] Competition can produce more instability, bankruptcies, and anxiety, which in turn cause greater unhappiness.

Although competition at times can increase misery, the relative unhappiness of citizens in centrally planned economies suggest that the economic freedom and opportunity available in competitive markets are better alternatives. Misery and pauperism are associated more often with monopolies than competitive markets.[435] The principal evil of monopolies

---

429. Frey & Stutzer, *supra* note 70, at 423 ("*Political freedom* measures the possibility for citizens to engage in the democratic process or, conversely, the restrictions on political participation. It is composed of two sub-indices, the first relating to civil rights, such as freedom of speech (with eleven items), and the second to political rights (nine items).").

430. *Id.* (Economic freedom "measures the opportunity for individuals to engage in the free exchange of goods, services, and labor. It is based on sub-indices (each in turn composed of a number of items), referring to the security of money, free enterprise, freedom from excessive taxation, and the possibility of undertaking monetary transfers.").

431. ADAMS & BROCK, *supra* note 174, at 98.

432. Andrew G. Haldane, Exec. Dir., Fin. Stability, Bank of Eng., and Vasileios Madouros, Economist, Bank of Eng., Speech at the Federal Reserve Bank of Kansas City's 36th Economic Policy Symposium: The Dog and the Frisbee (Aug. 31, 2012), *available at* http://www.kansascityfed.org/publicat/sympos/2012/ah.pdf.

433. Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 39 (1953). Ordoliberal legal scholar Franz Böhm, when working on the concept of "Leistungswettbewerb," used as a central tenet that the rules for this market game should be shaped so that only the quality of performance (merit) should determine market success. Kerber, *supra* note 36, at 21.

434. Maurice E. Stucke, *Is Competition Always Good?*, 1 J. ANTITRUST ENFORCEMENT (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157193.

435. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 101–02 (1872) ("All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth."); Stites v. Norton, 101 S.W. 1189, 1190 (Ky. Ct. App. 1907) (describing how the framers of the state constitution "had in mind the great importance of preventing

historically was their "interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment," a liberty "assumed to be the natural right of every Englishman."[436]

Other factors also suggest that an unconcentrated marketplace promotes well-being. A competitive market structure promotes economic opportunity and personal autonomy[437]—a key predictor of well-being.[438] Citizens can choose to purchase from (and work for) firms that align with their personal religious and ethical values.[439] When a firm engages in exploitative, unfair behavior, a competitive market provides alternatives.[440] A competitive labor market provides workers the opportunity "to fulfill their own ambitions, to develop skills and abilities, to feel useful in society and to build self-esteem."[441] Likewise, positive sum competition enables richer social connections. People can use their personal "vigor, imagination, devotion, and ingenuity" to help others.[442] Thus, a competitive marketplace, in dispersing economic and political power, can foster activities, which are correlated generally with healthier and happier people.

---

monopolies and affording opportunities for competition in all things which are necessary for the welfare and happiness of the people"); THOMAS MORE, UTOPIA 24–25 (Clarence H. Miller trans., Yale Univ. Press 2001) (1516).

436. *Slaughter-House*, 83 U.S. at 104.

437. United States v. Am. Linseed Oil Co., 262 U.S. 371, 388 (1923) ("The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain."); Charles A. Ramsay Co. v. Assoc. Bill Posters of U.S. & Can., 260 U.S. 501, 512 (1923) ("The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.").

438. BOK, *supra* note 12, at 23; NETTLE, *supra* note 12, at 74.

439. Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 223 (2d Cir. 2008) (antitrust injuries include "[c]oercive activity that prevents its victims from making free choices between market alternatives" (quoting Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 (1983))); SCHERER & ROSS, *supra* note 261, at 19 ("When the no-barriers-to-entry condition of perfect competition is satisfied, individuals are free to choose whatever trade or profession they prefer, limited only by their own talent and skill and by their ability to raise the (presumably modest) amount of capital required."); *see also* HAYEK, *supra* note 33, at 127.

440. Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 9 (1st Cir. 2001) ("The central aim of the antitrust laws is to protect consumers against certain abusive business practices—especially price-fixing and monopoly."); Kahneman et al., *supra* note 383, at 735; *see also* PAUL J. ZAK, *Values and Value in Moral Economics*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 259, 276 (Paul J. Zak ed., 2008) ("[T]he kinds of market institutions that create wealth and enable happiness and freedom of choice are those that resonate with the social nature of human beings who have an innate sense of shared values of right, wrong, and fair.").

441. OECD, *supra* note 17, at 58.

442. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); OECD, *supra* note 321, at 14 ("Not only [do the availability of jobs and earnings] increase people's command over resources, but they also provide people with a chance to fulfill their own ambitions, to develop skills and abilities, to feel useful in society and to build self-esteem.").

Third, policymakers, using advances in the happiness literature, can assess how the quality of governmental institutions can promote well-being and the extent to which competition policy is aligned with these quality metrics. Well-being is correlated with the "observance of the rule of law, efficient governmental agencies, a low level of violence and corruption, a high degree of trust in public officials (especially the police), and responsive encounters by citizens with public agencies and officials."[443] Thus, policymakers can assess whether their antitrust legal standards are closely aligned with the rule of law, the independence of the agencies and courts from rent-seeking and corruption, and the public's trust in their antitrust enforcers and courts.

Fourth, economists can use the happiness literature's econometric tools to assess directly the correlation between a jurisdiction's antitrust enforcement and its citizens' well-being. Assessing the benefits or harms from competition policy is difficult. The typical assessments are estimates of how much consumers overpaid for products or services from a conspiracy, or the innovations in the industry after a monopoly, such as AT&T, was broken up. Researchers, however, would have several challenges in estimating the correlation between antitrust enforcement and subjective well-being. Determining whether a country has a competition law is easy. But assessing the nature of antitrust enforcement is more difficult.[444] One cannot assume that more enforcement activity necessarily means a more effective competition policy. Also, it may be difficult to disentangle antitrust from other factors that promote well-being. An effective antitrust enforcement program typically requires other important democratic institutions that correlate with well-being, such as low corruption, an efficient and independent judiciary, the rule of law, representation, etc. But one reason that these other legal institutions function effectively is because economic power is dispersed, due to an effective competition policy.

Finally, the happiness literature can help policymakers address competition policy's inherent tradeoffs. In many instances, such as preventing a merger to monopoly, antitrust enforcement advances the law's economic, social, political, and moral goals. But competition policy at times involves tradeoffs, including (1) mergers, whose efficiencies benefit the company, with little prospect of being passed along to downstream consumers; (2) increases in interbrand competition at the expense of reducing intrabrand competition; (3) mergers with anticompetitive effects in one market offset by procompetitive benefits in another market; (4) mergers and restraints that yield dynamic efficiencies but also higher *supra*-competitive prices; (5) mergers that yield greater productive efficiencies but

443. BOK, *supra* note 12, at 23; *see also* CMEPSP REPORT, *supra* note 16, at 178–79.

444. For example, suppose one wanted to assess the relationship between antitrust enforcement activity and well-being. If Country *A* relies mainly on per se illegal rules, its prohibitions may be clearer to the public, necessitating fewer enforcement actions than Country *B*, which relies mostly on a fact-specific, effects-based legal analysis.

reduce product variety; and (6) mergers that yield productive efficiencies but increase systemic risk and the competitive distortions of firms too big and too integral to fail.[445] Nor does one avoid these tradeoffs with an economic goal such as consumer welfare, since mergers and restraints at times benefit some consumers while harming others.[446] Similarly, well-being raises its own trade-off issues (such as a restraint that increases some people's well-being at the expense of others). But if policymakers adopt a utilitarian approach, the happiness literature can help inform these trade-offs. The literature, for example, examines the trade-off between unemployment and inflation in calculating a misery index.[447] If both inflation and unemployment affect one's happiness, the happiness economics studies seek to estimate their magnitudes: "[H]ow much unemployment is equal to a percentage point of higher inflation, or vice versa."[448]

Consequently, the happiness literature can help policymakers assess in a post-materialistic society the importance of antitrust's noneconomic values relative to economic values, such as minimizing deadweight welfare loss. But even if the happiness literature down the road cannot assess the relationship between effective antitrust enforcement and well-being, the literature today already draws into question the framework used over the past thirty years to guide U.S. antitrust policy. The happiness literature provides another important metric to assess competition policy's political, social, and moral values, which have been degraded over the years. In short, to promote overall well-being, any competition policy in a developed economy must include both material well-being and quality-of-life factors.

CONCLUSION

Courts and enforcers should not constrict competition policy to narrow economic goals (such as promoting consumer surplus or reducing deadweight welfare loss). Doing so contravenes Congress's intent and our democratic values, such as dispersing economic power. Nor should courts and enforcers in their antitrust review conflate what is easier to measure (such as a merger's impact on short-term pricing) with what is important. After the economic crisis, competition policy's political, social, and moral concerns of concentrated economic and political power, while not easily measureable, cannot be ignored.

---

445. Stucke, *Goals*, *supra* note 8, at 604–08; *see also* TURNER, *supra* note 329, at xi; Kirkwood, *supra* note 380, at 2427 ("[D]ebate about antitrust goals is a debate about how to evaluate such tradeoffs.").

446. Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2480 (2013) ("[W]hen consumers are affected differently by a challenged practice, computing net consumer harm or benefit can be just as difficult as computing net benefit under a general welfare test when the practice creates both producer gains and consumer losses.").

447. Dolan et al., *supra* note 107, at 109–10.

448. Di Tella & MacCulloch, *supra* note 331, at 37–38 (finding that "a percentage point of unemployment causes 4.7 times more unhappiness than a percentage point of inflation").

The current discontent over the imbalance in economic and political power is worrisome. Democracies cannot thrive with the current wealth and income inequality, social immobility, and distrust of our bloated unresponsive federal bureaucracy. The United States cannot continue to shed its fundamental civic, ethical, and moral values along its path from an inclusive to extractive economy. Our economy generally, and competition policy specifically, can and should deliver more than the mindless pursuit of accumulating cheap products. As Galbraith wrote, "Economic development enables us to pay the price; it is why we have development. We do not have development in order to make our surroundings more hideous, our culture more meretricious or our lives less complete."[449]

Now is time for the agencies and courts to reinvigorate competition policy. For starters they must reincorporate competition law's political, social, and moral objectives into simpler legal presumptions, which the Court once did with its incipiency standard. Greater consumer surplus, greater productive efficiency, and less deadweight welfare loss are important objectives but are hardly determinative in well-developed, post-industrial economies like the United States. Consumer surplus should be viewed, not as the aim of competition policy, but instead as one incidental byproduct of a competitive process that promotes economic opportunity and freedom.[450] Political, social, and moral values play as large a role, if not larger, in promoting a sustainable, inclusive economy that increases the well-being of the many, rather than the few.

449. Galbraith, *supra* note 71, at 122.

450. *See* JOHN KAY, OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY (2010).