Is Antitrust's Consumer Welfare Standard Anti-democratic?

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Abstract

In recent years, reformers have called for antitrust enforcers to abandon the consumer welfare (CW) standard that has guided antitrust enforcement for the last forty years, partly on grounds that the standard is anti-democratic. We identify two aspects of this claim that can be empirically tested using public opinion surveys: (1) that consumers object to the CW standard or are skeptical that it delivers its purported benefits; (2) that by focusing only on potential price reductions, the CW standard does not actually improve or safeguard consumer welfare. We tested these hypotheses in the context of merger review by designing and fielding two extensive surveys about how consumers view the political and economic effects of mergers and acquisitions, including a novel conjoint experiment measuring how they weigh price and non-price considerations when evaluating proposed mergers. We find that majorities of both Republicans and Democrats are skeptical about the supposed benefits of mergers and acquisition via the price channel and believe that government officials should give equal weight to non-price factors when reviewing proposed mergers. Overall, the results suggest that the CW standard is dramatically out of step with public demands, even after accounting for differences generated by partisan identification.

1 Introduction

Since 2017, legal scholars, antitrust officials, and members of Congress have been engaged in fierce debate over the use of the consumer welfare (CW) standard in antitrust enforcement.[1] According to this standard, antitrust officials evaluate proposed mergers and other forms of potentially anti-competitive conduct "to determine whether they harm consumers in any relevant market."[2] Early skirmishes about the standard's ambiguity were resolved by interpreting "consumer welfare" as a synonym for consumer surplus from neoclassical price theory.[3]

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[1] *See*, *e.g.*, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. On Antitrust, Competition and Consumer Rights*, 115th Cong. (2017). This debate, of course, has longer antecedents in legal scholarship. *See*, *e.g.*, Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U.L. REV. 1020, 1020-22, 1032 (1987) (arguing that "the term consumer welfare is the most abused term in modern antitrust analysis"). In this article, we focus on more recent developments.

[2] Christine S. Wilson, Commissioner, U.S. Federal Trade Comm'n, Luncheon Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get (Feb. 15, 2019), 1.

[3] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 IOWA J. CORP. L 65, 65-66 (2019); *see also* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. OF COMP. LAW & ECON. 133, 133 (2011) (arguing

Accordingly, antitrust officials today routinely apply the standard to determine whether potentially anti-competitive conduct would raise prices and thereby diminish consumer surplus.[4]

Two main sides have emerged in the debate over whether the CW standard should continue to be the "lodestar of modern antitrust enforcement."[5] On one side are the defenders of the status quo who either believe the standard works well or that it can be applied in new ways to meet emerging challenges without significant changes in law or policy.[6] On the other side are the reformers who believe the standard rationalizes an excessively lax regime of enforcement and must be abandoned altogether.[7]

The main lines of debate emerge somewhat clearly from a simple comparison of the arguments made by one prominent reformer, Lina Khan, and one prominent defender of the status quo, Herbert Hovenkamp. Khan argues that the CW standard subverts the ultimate purpose of the antitrust statutes, which is to protect the competitive process as such and not to maximize consumer welfare or economic efficiency.[8] In this perspective, when Congress passed each of

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that "academic confusion and thoughtless judicial borrowing" have led to an antitrust framework that centers on "consumer welfare" even though that term has "no clear meaning").

[4] Hovenkamp [2019], *supra* n._, at 66 ("[U]nder the consumer welfare … principle, … antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low.") and at 72 (in the context of a proposed merger, "the query is simply whether the price is likely to go up or down…" without measuring tradeoffs). In this context, maximizing output and minimizing price are synonymous. *See also* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 128 (2018) (objecting that the CW standard imposes on antitrust officials a requirement that does not exist in the statutory framework, namely a general requirement that officials can only object to a proposed merger if they can offer "clear proof of higher prices after the merger").

[5] Joshua D. Wright, Elyse Dorsey, Jonathan Klick and Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 293 (2019).

[6] Hovenkamp [2019], *supra* n._, at 94 ; Wright et al., supra n._, at 369; Carl Shapiro, *Antitrust in a time of populism*, 61 INT'L J. OF INDUSTRIAL ORG. 714, 714-48 (2018).

[7] BARRY LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 124-51 (2010); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. FORUM 960 (June 4, 2018); WU, *supra* n._, at 135-39 (2018); MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY 359-70 (2019).

[8] Khan, *supra* n._, at 968 (arguing that the pursuit of economic efficiency and consumer welfare injects antitrust analysis with values that are "deeply antithetical" to the true goal of the antitrust statutes, which is to preserve the competitive process). Legal scholars have long debated whether the CW standard defies Congressional intent and and public opinion by ignoring non-economic goals and values inherent to the antitrust statutes. *See*, *e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1052 (1979) (arguing that the CW standard ignores political goals values and, in doing so, renders the law "unresponsive to the will of Congress and out of touch with…" public opinion); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1140 (1981) (arguing that protecting the competitive process to serve consumer's long-run interests is a major goal of the statutory framework); Robert *H. Lande,* Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 65-66 (1982) (arguing that Congress was primarily concerned with "preventing 'unfair' transfers of wealth from consumers to firms with market power"); John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988) (arguing that both Robert Bork and his critics adopt revisionist interpretations of Congressional intent to make antitrust goals consistent with modern economic theory); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 568 (2012) (arguing, in part, that no single economic goal, including improving CW, has unified antitrust analysis); Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV.

the major antitrust statutes, it hoped the enforcement of those laws would create an open and competitive market structure that would limit the economic and political power of large corporations, and that this market structure would in turn benefit people as consumers but also as workers, entrepreneurs, and citizens.[9] According to Khan, the CW standard subverts these goals by systematically biasing antitrust analysis towards under-enforcement.[10]

In contrast, Hovenkamp argues that the CW standard has evolved over time to reflect significant advances in economic thinking and that it resolves a host of "administrability" problems that existed before its adoption and that still arise in proposed alternatives, including those advanced by reformers.[11] For Hovenkamp, reformers seek to inject consideration of broad and difficult to measure social and political concerns, like rising economic inequality or the protection of small business or even "fairness," into an otherwise objective framework for analyzing potentially anti-competitive behavior.[12] This, in turn, will undermine the ability of antitrust officials and judges to impartially apply and enforce the law and it will politicize an otherwise neutral enforcement scheme by shifting emphasis away from the broad consumer interest and towards the interests of smaller, less comprehensive groups, like small business interests.[13]

As suggested above, the debate over the CW standard is complex and multi-faceted, but as political scientists we were struck most by the reformist claim that the CW standard is inherently anti-democratic.[14] As quantitative scholars, we hoped to assess this claim in a way that responded to the call from both sides in the debate for more empirical analysis,[15] especially when

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2157, 2159 (2013) (arguing that the historical debate about goals is really a proxy for a normative debate about what values the antitrust law should protect).

[9] *Id.* at 972, n.52.

[10] Specifically, Khan argues that the standard focuses antitrust analysis on corporate conduct, on a case-by-case basis, and then invokes a set of unsubstantiated assumptions (i.e. that market power is inherently fleeting and in many instances economically desirable) that biases analyses towards a finding that conduct is not anti-competitive. *Id.* at 971-74. Khan also argues that, by focusing so heavily on potential outcomes that are difficult to quantify, the standard injects substantial complexity and uncertainty into antitrust adjudication, uncertainty which judges then leverage to bias analysis against enforcement. *Id.* at 974-76.

[11] Hovenkamp [2019], *supra* n._, at 71, 76, 84-85.

[12] *Id.* at 88.

[13] *Id.* at 89-90.

[14] *See*, *e.g.*, Khan, *supra* n._, at 966-968 (arguing that, during the Progressive era, members of Congress passed new antitrust legislation out of recognition "that unchecked monopoly power threatened core liberties and protected true democracy" and that adoption of the CW standard "ushered in a profoundly different theory of power"). Though the best available evidence indicates that approved mergers and acquisitions do not deliver economic benefits to consumers, *see infra* n.26, we do not evaluate the hypothesis that CW standard produces significant economic benefits and should therefore be policy irrespective of public demands. We seek only to evaluate the depth of connection between public opinion and economic policymaking in an antitrust setting.

[15] Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1931 (2009) ("There is an opportunity for entrepreneurial scholars from either camp to begin serious programs of empirical work on antitrust."); Lina M. Khan, *The End of Antitrust History Revisited, The Curse of Bigness: Antitrust in the New Gilded Age*, 133 HARV. L. REV. 1655, 1672, n.75 (citing same).

it comes to claims about the depth of public support for reformist demands.[16] But we also felt it was necessary to narrow our analysis to one specific form of anti-competitive conduct given that antitrust enforcement touches upon many technical issues that are not likely to weigh heavily in the public mind. We therefore chose to focus our analysis on one major component of antitrust enforcement that tends to consistently receive decent media coverage and about which non-experts are likely to have opinions: mergers and acquisitions involving large corporations.[17]

A review of the literature, detailed in section 2, reveals at least four ways in which the CW standard may be anti-democratic, but we focus on only two such claims in the present study. First, the public may not support the use of the CW standard in antitrust analysis or may be skeptical that it delivers consumer benefits in the form of lower prices. If true, this claim would undermine the assertion, by defenders of the status quo, that the CW standard is broadly popular because it produces concrete economic benefits to almost everyone.[18] Second, the CW standard may exclude consideration of important social and political goals that consumers value more than price savings. If true, this claim would undermine the assertion, by defenders of the status quo, that achieving the lowest possible prices maximizes individual or social welfare and should therefore be the primary goal of antitrust analysis.[19] These related claims both query the depth of alignment between public opinion and antitrust policy, albeit in different ways. The first queries whether the public believes the CW standard works as promised and therefore whether antitrust officials should use it as a normative matter. The second assumes that the CW standard does work as promised, and queries whether the kinds of welfare improvements it generates matter to the public.

To address these questions, we first reviewed prior public opinion work on antitrust policy and on the CW standard. Defenders of the status quo often critique reformers for failing to introduce evidence that the public objects to the CW standard.[20] But existing survey questions, summarized in section 3, do provide some evidence that the public is skeptical about the consumer benefits that purportedly flow from mergers and acquisitions involving large companies. However, those surveys have limitations and in many cases are out of date. In light of these shortcomings, we designed and implemented two extensive public opinion surveys about the CW standard and included components that: (1) probe basic attitudes about antitrust oversight of large mergers and the application of the CW standard to antitrust enforcement more generally; and (2) present respondents with details about the economic and non-economic effects of hypothetical mergers—in all cases assuming they deliver some price savings—and then ask whether

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[16] *See*, *e.g.*, Hovenkamp, *supra* n._, at 93 (arguing that reformist arguments rest "on the assumption that people have a set of concerns about large firm size that are not reflected in their market behavior" and lamenting that "there are not even opinion polls indicating" what those concerns are).

[17] Another benefit of focusing on antitrust oversight of mergers and acquisitions is that reformers have prioritized this area in their own writings. WU, *supra* n._, at 127 ("The priority for Neo-Brandeisian antitrust is the reform of merger review.").

[18] *See*, *infra* n.28.

[19] *See*, *infra* n.33-34.

[20] *See*, *e.g.*, Hovenkamp [2019], *supra* n._, at 92 (arguing that the reformist approach "rests on the as yet unverified assumption that people have a set of concerns about large firm size that are not expressed in their market behavior").

respondents think the government should challenge the merger. The survey design is described in greater detail in section 4.

The results, presented in section 5, almost uniformly validate the reformist perspective and suggest that the existing approach to antitrust enforcement in certain domains, like the policing of mergers and acquisitions, is dramatically out of step with public demands, even after accounting for partisan differences. Majorities of both Republicans (about 53 percent) and Democrats (about 68 percent) believe that mergers and acquisitions between large companies increase, rather than decrease, prices. Even larger majorities from both parties (70 percent of strong Republicans; 98 percent of strong Democrats) believe that, when considering whether to approve a merger, antitrust officials should give "equal weight to the impact on consumers, workers, small businesses, and local communities." And when asked to give their opinion on hypothetical mergers based on real events, consumers are 3-4 times more sensitive to information about expected layoffs (a non-price consideration) than expected reductions in prices. Of the five merger-related considerations we tested, price savings ranked fifth in terms of their effect on the likelihood that respondents would want to the government to challenge the merger, even when the price reductions at issue were dramatically larger (10-20 percent) than those observed in the real world. These and other results support the reformist contention that the CW standard is on precarious political footing.

We conclude, in section 6, by summarizing the results and commenting on their broader significance for debates over not just antitrust policy but for other domains of economic policy-making that are built on neoclassical assumptions about consumer behavior, and for the law and economics movement in general.

2 Four Ways in Which the CW Standard May Be Anti-Democratic

The debate over the CW standard's benefits and costs is expansive, but in this article, we focus on claim that the CW standard is anti-democratic. A review of the literature reveals at least four potential ways in which the CW standard is arguably anti-democratic, only two of which we address here. First, in combination with the institutional structure of the antitrust enforcement regime, the technical complexity of the CW standard may push deliberation about anti-competitive behavior into forums where the main participants have little electoral accountability. First and Waller refer to this as "antitrust's democracy deficit."[21] They argue that the current approach to antitrust enforcement supports activism by unelected federal judges and oversight by unelected federal officials (often in private negotiations sealed off from the public), while showing hostility towards jury trials, private enforcement, and actions by elected state attorneys general.[22] This is an important claim but it is one that arguably has more to do with antitrust institutions than the CW standard itself and, as a result, we do not address it here.

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[21] Harry First and Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013).

[22] *Id.* at 2547-64; *see also* Stucke, *supra* n._, at 556 ("[a]ntitrust's increased technicality and the use of unappealing, abstract economic concepts has broadened the gap between antitrust enforcement and public concern").

Second, if the CW standard results in (or rationalizes) an overly lax antitrust enforcement, it may enable business interests to exercise economic and political power in ways that either infringe upon individual liberties, undermine citizen's capacity for self-government, or bias political representation. In many ways, this is the core claim advanced by reformers, and it comes to us from the scholarship and judicial opinions of Louis Brandeis during the Progressive Era.[23] Brandeis "viewed concentrated power, whether economic or political, as inimical to liberty" and he worried that when corporations amass substantial market power, they also gain the ability to unduly influence elected officials and to control the lives of workers in ways that erode their moral and civic capacities.[24] Contemporary political theorists have echoed many of these assertions.[25] These arguments raise multiple empirical claims about the relationship between firm-level market power and political influence and between public perceptions of market power and trust in government, among others. We plan to directly address some of these claims in future work. Here, we provide some limited, indirect insight on these questions to the extent we measure how the public evaluates some of these risks (like the risk that merging firms will spend more on lobbying) when opining on whether the government should challenge proposed mergers.

Third, and more central to the current study, the public at large might explicitly object to the CW standard or believe that it does not work as promised. To survive legal review, the managers of merging companies only need to articulate a hypothetical consumer benefit in the form of lower prices; they need not actually deliver it.[26] And ample empirical evidence suggests that, in fact, merging businesses seldom deliver on their promises.[27] The most comprehensive retrospective analysis of mergers conducted to date finds, for example, that average prices go up, not down, by between 4.3 and 7.7 percent post-merger, depending on whether the unit of analysis is the product or the firm.[28] What we do *not* know, however, is whether the public generally believes that the CW standard leads to the approval of mergers that deliver lower prices. Nor do we know much about how those beliefs have changed over time.[29] This omission in the literature flows

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[23] *See*, *e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. OF EUROP. COMPETITION L. & PRAC. 131, 131 (2018); WU, *supra* n._, at 15 ("What we must realize is that, once again, we face what Louis Brandeis called the 'Curse of Bigness,' which, as he warned, represents a profound threat to democracy itself.")

[24] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 211-16 (1996).

[25] *Id.* at CH. 7 (arguing that by replacing civic considerations with a concern for "consumer welfare," antitrust officials have participated in a much broader abandonment of a republican political tradition that saw democracy as a means for cultivating good citizens).

[26] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY CH. 1 (2014) (arguing that little empirical work has explored whether mergers and other forms of potentially anti-competitive conduct do in fact deliver consumer benefits as hypothesized, and that this largely has to do with the unavailability of data since merging firms are not required to report essential facts and the private disposition of many proposed mergers conceals much from the public).

[27] *Id.* at CH. 10.

[28] *Id.* at 155-56.

[29] A core claim, for defenders of the status quo, is that the CW standard delivers benefits to everyone because everyone consumes and, as a result, the CW standard does not advance special interests. Hovenkamp [2019], *supra* n._, at 65-66. It logically follows that the CW standard loses its popular moorings if it either does not deliver those benefits (objectively) or the public (subjectively) becomes skeptical of its ability to do so. Brodley, *supra* n._, at 1035 ("Popular support for antitrust would dissolve if consumers did not think that the law protected their

from two sources: legal scholars have yet to consult existing public opinion data on whether mergers deliver consumer benefits, which we review in section 3; and most of the existing polls were conducted prior to 2001, limiting their usefulness in contemporary debates.

Fourth, also central to the current study, even if a merger delivers actual price savings and wins approval under the CW standard, consumers might still believe that other non-price factors make the deal objectionable. In this scenario, the decision to allow the merger works against the interests of the very group whose welfare is ostensibly being protected: the consumer. While there is some overlap, this concern is not quite the same as that described above, where consumers object outright to the use of the CW standard in making regulatory decisions or become skeptical that consumer benefits materialize from consummated mergers. The concern here is that, because the CW standard is rooted in neoclassical price theory, it only maximizes the "welfare" of the fictitious consumers encountered in economics textbooks and might reduce the welfare of real-world consumers who are known to incorporate non-price considerations into their consumption decisions and welfare evaluations.[30] If that is true, it raises the troubling possibility that the CW standard generates political support from elected officials and the public by purporting to improve the welfare of a broad, potentially all-encompassing, group when in fact it does no such thing.

This claim has received little attention in legal scholarship,[31] but it has both theoretical and empirical motivations. In terms of theory, consumer surplus is an equivalent to consumer welfare under neoclassical price theory only if two assumptions hold: (1) that consumer utility is cardinal in the sense that it can be measured in dollars, and (2) that consumers reveal their utility through the amount of money they are willing to pay.[32] However, some evidence suggests that each of

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interests."). Status quo defenders therefore assert that public opinions about the CW standard need to be measured. Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 593 (2018).

[30] *See*, *e.g.*, Bhavya Mohan, Tobias Schlager, Rohit Deshpande, and Michael I. Norton, *Consumers Avoid Buying From Firms With Higher CEO-to-Worker Pay Ratios*, 28 J. OF CONSUMER PSYCHOLOGY 344, 345 (2018) (using a public opinion experiment to show that disclosing CEO-to-worker pay ratios affects consumer choice); Kendall Cox Park, *Understanding ethical consumers: willingness-to-pay by moral cause*, 35 J. OF CONSUMER MARKETING 157, 157-58 (2018) (finding heterogeneity among consumers in the kinds of values they draw upon when making purchases).

[31] The defenders of the status quo argue that the CW standard does not require antitrust officials or judges to weigh or tradeoff competing values or weigh one person's interests against another's. Hovenkamp [2019], *supra* n._, at 92-93; Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1213-14 (2008). Others are skeptical and argue that, under the CW standard, judges and officials are still forced to make difficult value judgments but in a way that lacks transparency, and that the CW standard does make distributional tradeoffs. Rebecca Haw Allensworth, 69 VAND. L. REV. 1, 6 (2016) ("A focus on purely economic effects is sometimes touted as avoiding difficult value judgments, but it does no such thing."); Nicholas Short, *Antitrust Reform in Political Perspective: A Constructive Critique for the Neo-Brandeisians* (Working Paper, 2021) (available at https://scholar.harvard.edu/nickshort/publications/antitrust-reform-political-perspective-constructive-critique-neo-brandeisians). Those who wish to replace the CW standard with a "consumer choice" standard argue that such a standard is "fully attentive to empirical evidence on purchasers' non-price, as well as price, preferences" but they do not introduce any such evidence. Neil W. Averitt and Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 184 (2007).

[32] Mark Glick, *American Gothic: How Chicago Economics Distorts "Consumer Welfare" in Antitrust* (Institute for New Economic Thinking, Working Paper No. 99, 2019) at 5-9.

these assumptions is false.[33] As a result, for reformers, the hypothetical consumer benefits that antitrust officials try to measure according to the CW standard (in the form of consumer surplus) do not actually improve welfare in any meaningful sense.[34] Determining whether this is empirically true requires knowing something about how consumers weigh a variety of factors—and not just price savings—when either making consumption decisions or opining on whether a proposed merger should be approved.[35]

In terms of empirics, a long line of studies conducted over the last fifteen years have honed the quantitative techniques needed to evaluate how consumers evaluate tradeoffs against different dimensions[36] and have shown that many consumers are willing to forego price savings in order to achieve broader societal goals.[37] In one conventional application, multiple studies have shown that many coffee consumers are willing to pay "fair trade" price premiums to promote more sustainable forms of cultivation, more equitable working conditions, or to guarantee a living wage for growers around the globe.[38] These and other similar studies provide both substantive and methodological insights for the question raised here: they provide direct evidence that some consumers may care about social goals more than they care about price (up to a certain point) in a non-antitrust setting, and they suggest the empirical techniques needed to measure those tradeoffs in an anti-trust setting.

3 Existing Survey Evidence Supports Some Reformist Views About the CW Standard, But Has Limitations

Before designing new surveys to estimate the depth of public support for the CW standard, we first reviewed existing survey evidence. These surveys show that, contrary to claims made by defenders of the status quo,[39] there is reason to believe that the public is generally skeptical about the consumer benefits that purportedly flow from mergers and acquisitions. For example, in none of the prior surveys we found did a majority of respondents claim that mergers and acquisitions help consumers as a group or deliver lower prices. At the same time, many of these surveys are over twenty years old and so the results are somewhat outdated.[40] And the surveys

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[33] *Id.* at 9-10.

[34] *Id.*; Khan [2020], *supra* n._, at 1673, n.77.

[35] Though most studies of consumer behavior test how non-price considerations impact consumption, we modify the experimental setting to strengthen the connection to public policy by testing how non-price considerations impact normative judgments about what government officials should do when considering a proposed merger.

[36] For a review of advances in conjoint survey experiments, see Kirk Bansak, Jens Hainmueller, Daniel J. Hopkins, and Teppei Yamamoto, *Conjoint Survey Experiments, in* ADVANCES IN EXPERIMENTAL POLITICAL SCIENCE 19 (James N. Druckman and Donald P. Green eds., 2021).

[37] For a review of the fair trade literature in economics, *see* Raluca Dragusanu, Daniele Giovannuci, Nathan Nunn, *The Economics of Fair Trade*, 28 JOURNAL OF ECONOMIC PERSPECTIVES 217 (2014).

[38] *Id.* at 218-21.

[39] *See*, *e.g.*, Hovenkamp [2019], *supra* n._, at 92 (arguing that the reformist approach "rests on the as yet unverified assumption that people have a set of concerns about large firm size that are not expressed in their market behavior").

[40] The Bluebook does not offer a citation format for public opinion data. We therefore follow the Chicago Manual of Style in what follows. All polling results reported here can be retrieved from the Roper Center iPoll database hosted by Cornell University (https://ropercenter.cornell.edu/ipoll/).

that have been conducted also tend to ask only a few, similarly worded questions about consumer benefits, with most asking generally about consumers as a group. None, to our knowledge, has directly asking respondents whether they support a system of merger review that focuses on delivering price reductions, for example. Nor has any taken advantage of advances in survey experiments that allow social scientists to precisely measure how respondents weigh tradeoffs across multiple dimensions when evaluating proposed mergers. In the survey we conducted, described in section 4, we attempted to address these and other shortcomings in existing public opinion data. Here, we simply summarize what we know based on prior work.

The most common question posed in prior surveys about the consumer benefits flowing form large mergers and acquisitions is some form of a "help/hurt" question about consumers as a group. Though the wording varies, these questions generally introduce the idea of companies becoming larger through mergers and acquisitions and then ask respondents whether they believe these mergers will generally help or hurt consumers.[41] Some form of this question was asked on at least eight occasions between 1983 and 2000.

The results suggest that, throughout most of the 1980s and 1990s, the public was generally skeptical that mergers and acquisitions benefit consumers as a group, though by the year 2000, that view was approaching majority consensus with about 41-45 percent of support. In face-to-face interviews of 2,000 national adults conducted in February of 1983, only 19 percent believed that consumers who buy products of the acquired company (referred to as a subsidiary) benefit from mergers.[42] When the same question was posed in March of 1985, only 16 percent took that position.[43] In telephone interviews of 500 adults across the nation conducted in February of 1990, only 25 percent responded that "mergers and takeovers" help "American consumers."[44] In two rounds of telephone interviews of more than 1,000 national adults conducted in April and December of 1998, the picture improved a bit with 32 and 31 percent believing that mergers between "two large companies" are "good for consumers," but a majority (54 percent in each study) still maintained that such deals were actually bad for consumers.[45] On the other hand, a separate study of 1,050 national adults conducted in June of 1998 found that 45 percent believed mergers and acquisitions are "generally a good thing" for consumers, while only 38 percent

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[41] In lieu of asking whether mergers generally help (benefit) or generally hurt consumers, the question may ask whether the result is usually good or bad for consumers, for example.

[42] Roper Organization, Roper Reports 83-3, Question 98, USROPER.83-3.R29G, Roper Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1983).

[43] The Roper Organization, Roper Reports 1985-04: Foreign Affairs/Farmers/Government Spending/Energy/Finances, Question 68, USROPER.85-4.R26G, The Roper Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1985).

[44] Time Magazine, Yankelovich/Time Magazine Poll: Stock Market/Business, Question 22, USYANKCS.022690.R11E, Yankelovich Clancy Shulman, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1990.

[45] Cable News Network (CNN)/USA Today, Gallup/CNN/USA Today Poll # 1998-9804015: 1998 Election/Political Parties, Question 44, USGALLUP.98AP17.R28, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1998); Gallup Organization, Gallup News Service Poll # 9812046: Economy/Religion, Question 19, USGALLUP.98DC04.R12, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1998). In the April survey, the question was only posed to half of the sample.

believed they were "generally a bad thing."[46] In two rounds of telephone interviews of more than 1,000 national adults conducted in January and October of 2000, the results were somewhat mixed, as 35-41 percent believed that mergers between "two large companies" are "good for consumers" while 45-52 believed that such deals are "bad for consumers."[47]

A primary drawback of help/hurt questions is that such questions do not identify how consumers benefit, an important question given that the CW standard generally approves those mergers that can reduce prices and increase consumer surplus. Here, the evidence is quite limited, but it supports the reformist contention that the public generally believes that mergers do not result in lower prices. In face-to-face interviews of 1,992 national adults conducted in February of 1986, a mere 12 percent believed that "large mergers result in lower prices," while 41 percent believed they will result in higher prices and 35 percent believed they will have no effect.[48] In a survey of 754 adults in New Hampshire conducted in January of 2000, respondents were asked whether they thought "companies getting bigger through mergers and acquisitions makes things better or worse" in certain areas. Only 19 percent responded that mergers make things better when it comes "the prices consumers have to pay for products and services" while 49 percent responded that mergers make things worse in this respect.[49] The results were equally underwhelming with respect to other consumer benefits: while 31 responded that mergers make things better when it comes to "the choices of products and services available to consumers,"[50] a mere 16 percent responded that things get better with respect to the handling of consumer complaints.[51]

Though the CW standard evaluates proposed mergers based on their potential effect on consumer prices, it is not clear that consumers take such a narrow view when determining whether mergers and acquisitions improve their welfare. Take workers, for example. Many of the same surveys that asked help/hurt questions about the impact of mergers on consumers asked the same question about the impact of mergers on workers. In two rounds of telephone interviews of more than 1,000 national adults conducted in January and October of 2000, only 28-31 percent believed that mergers between "two large companies" are "good for the workers at the companies involved" while 55-60 percent believed that the deals were "bad for the workers at the companies involved."[52]

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[46] Wirthlin Worldwide, Wirthlin Worldwide Poll: June 1998, Question 4, USWIRTH.98JUNE.R3A, Wirthlin Worldwide, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1998).
[47] Gallup Organization, Gallup News Service Poll: Poll # 2000-05, Question 23, USGALLUP.00JAN25.R23, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000); Gallup Organization, Gallup News Service Poll: Presidential Election/Halloween/Big Business, Question 53, USGALLUP.00OCT25.R14, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000).
[48] Roper Organization, Roper Reports 86-3, Question 54, USROPER.86-03.R29, Roper Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1986).
[49] Newsweek, PSRA/Newsweek Poll # 2000-03: Mega-Mergers/Presidential Politics, Question 22, USPSRNEW.011500.R21A, Princeton Survey Research Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000.
[50] *Id.* at USPSRNEW.011500.R21B.
[51] *Id.* at USPSRNEW.011500.R21C.
[52] Gallup Organization, Gallup News Service Poll: Poll # 2000-05, Question 25, USGALLUP.00JAN25.R25, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000); Gallup Organization,

While these questions reveal that the public is aware mergers have economic effects beyond the impact on consumer prices, these questions do not reveal how respondents feel about those non-price outcomes. On this front, existing survey questions provide only suggestive evidence at best. But again, the evidence points in the direction of being concerned about the impact on individual workers and on aggregate levels of job creation. In telephone interviews of more than 1,000 national adults in January of 1983 and March of 1985, 59-67 percent believed that "mergers result in the layoffs of too many employees."[53] In telephone interviews of 832 employed national adults conducted in June and July of 1997, 61 percent believed that "corporate mergers and downsizing" has "done more to keep wages down" rather than increase wages.[54] In telephone interviews of 754 adults in New Hampshire conducted in January of 2000, 46 percent believed that mergers make things worse when it comes to "how well companies take care of their workers," while only 17 percent believed that mergers make things better in this respect.[55] And in two rounds of telephone interviews of 1,000 national adults conducted in May of 1992 and June of 1993, 41-48 percent scaled "corporate mergers and restructuring" at a score of 4 or 5—with 5 representing a cause of the "greatest importance"—to explain "the loss of jobs in this country."[56]

When it comes to other non-price outcomes, the evidence is even more scant but still supports reformist claims. In telephone interview of 754 adults in New Hampshire conducted in January of 2000, 48 percent were "very concerned" and an additional 27 percent were "somewhat concerned" that "mergers will result in very large companies having too much influence over this country's politics."[57] Unfortunately, we have not identified any prior questions probing the effect of mergers and acquisitions on product quality (as opposed to variety), on the risk of creating

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Gallup News Service Poll: Presidential Election/Halloween/Big Business, Question 55, USGALLUP.00OCT25.R16, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000).

[53] Opinion Research Corporation, Opinion Research Corporation Poll: January 1983, Question 42, USORC.83FEB.R07B, Opinion Research Corporation, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1983); Opinion Research Corporation, Opinion Research Corporation Poll: March 1985, Question 7, USORC.85JUNE.R4A, Opinion Research Corporation, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1985).

[54] Wisconsin Public Television, Employment in the United States, Question 60, USPSRA.97WORK.RO2F, Princeton Survey Research Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1997).

[55] Newsweek, PSRA/Newsweek Poll # 2000-03: Mega-Mergers/Presidential Politics, Question 25, USPSRNEW.011500.R21D, Princeton Survey Research Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000).

[56] Princeton Survey Research Associates, Princeton Survey Research Associates Poll: May 1992, Question 21, USPSRA.92JOBS.R06I, Princeton Survey Research Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1992); Princeton Survey Research Associates, Princeton Survey Research Associates Poll: June 1993, Question 30, USPSRA.93JOBS.R06G, Princeton Survey Research Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1993).

[57] Newsweek, PSRA/Newsweek Poll # 2000-03: Mega-Mergers/Presidential Politics, Question 39, USPSRNEW.011500.R25B, Princeton Survey Research Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 2000). To our knowledge, this informative question has never been asked in a nationally representative sample of adults.

companies that are "too big to fail," or on the ability of individuals to start new businesses, though reformers frequently raise these non-price concerns in their arguments.[58]

To summarize, it is inaccurate to claim that reformers cannot empirically demonstrate a public concern with the CW standard. Such evidence exists and is accessible to anyone curious enough to look. But it also has significant limitations. One major problem is that consumers have not previously been asked about the relationship between mergers and non-price outcomes like product quality, innovation, or entrepreneurship. Another is that public opinion companies either stopped surveying on antitrust issues around 2001 or have not committed more recent surveys to research repositories, like Roper's iPoll, so that the data researchers have access to is significantly outdated. Still more problems flow from the fact that the questions asked do not necessarily align with research questions, as described above: no existing polls ask consumers if they approve of the CW standard or if merger-related job loss is a serious problem, for example.

A more fundamental problem arises from the fact that all previous survey work has been descriptive in nature and has not used experimental techniques to try and causally infer how consumers weigh price and non-price concerns when opining on whether antitrust officials should challenge proposed mergers. The only question, to our knowledge, that has probed how consumers weigh competing concerns against one another was conducted in January of 1998 in face-to-face interviews of 1,500 national adults.[59] In that poll, respondents were asked which of three problems "is the single most important problem" "associated with the concentration of business ownership."[60] Unfortunately for our purposes, the question was not specifically tied to concentrations flowing from mergers and acquisitions, but the results are still revealing: 41 precent believed the most important problem was that business owners "have too much control over prices and competition" and another 20 percent believed that the most important problem was that business owners "have too much political power and influence."[61] These kinds of descriptive questions are informative, but as explained in section 4 below, experimental techniques can better quantify the relative importance of price and non-price considerations in the consumer's mind.

4 Experimental Designs Can Probe Public Opinion on Merger Tradeoffs

To address these and other questions, we designed and implemented two extensive surveys probing different aspect of public opinion towards antitrust enforcement using the Harvard Digital Lab for the Social Sciences (DLABSS). Respondents were recruited using a short blurb

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[58] Stucke, *supra* n._, at 556 (arguing that defenders of the status quo ignore "the Bailout Dilemma" created by companies deemed too big to fail); Khan, *supra* n._, at 972, n.52 (noting that antitrust law was intended to preserve "open markets in order to ensure opportunity for entrepreneurs"); *see also* Averitt and Lande, *supra* n._, at 175 (arguing that the CW standard does not account for outcomes related to product quality, innovation, or other forms of non-price competition that are important to consumers).

[59] Cambridge Reports/Research International, Cambridge Reports/Research International Poll: January 1988, Question 137, USCAMREP.88JAN.R137, Cambridge Reports/Research International, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1988).

[60] *Id.*

[61] *Id.*

about each survey that DLABSS administrators sent to the volunteer pool. In each survey, we included a question checking attention[62] and we have excluded from our analysis those respondents who failed to accurately respond to this question, leaving 1,018 and 914 respondents in the first and second surveys, respectively.

Together, the two surveys contained five major components: (1) questions capturing basic demographic variables (with party identification, income, and education being the most relevant here) and beliefs about corporate power and trust in government;[63] (2) questions capturing beliefs about the effects mergers have on prices, innovation, and entrepreneurship; (3) questions capturing the types of social and political concerns (e.g., about companies having "too much influence" in politics or becoming "too big to fail") that respondents might worry about when thinking about mergers and acquisitions; (4) questions probing whether respondents want government officials to use the CW standard when evaluating mergers and acquisitions; and (5) an experimental portion presenting details about hypothetical mergers (based on real world events) which asks respondents whether the government should challenge the merger or allow it to take place. Components one, two, and three were asked in the first survey fielded in February and March of 2021; components one, four, and five were asked in the second survey fielded in November and December of 2021.

As indicated above, the experimental portion of the survey (the fifth component) was motivated by the following basic problem: even if we ask respondents whether they agree that mergers implicate certain non-price considerations (as we do in the third component), we have no way of knowing whether those concerns are stronger than, or outweigh, the prospect of price savings. To put the question in another way, if we know from the fair-trade literature that consumers are willing to forgo a price savings to ensure that coffee growers obtain a living wage, might they also be willing to forgo a price savings from a merger if it means substantial numbers of workers will lose their jobs? And are there empirical limits to this behavior? If most consumers would object to a merger that lays off 15 percent of its workforce but delivers a 10 percent price reduction, would they still do so if the same merger delivers a 20 percent price reduction? These kinds of questions—those that seek to quantify how respondents make trade-offs across multiple dimensions when making choices—are uniquely amenable to conjoint analysis.[64]

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[62] In each survey, we presented respondents with a simple graphic illustrating mergers (both horizontal and vertical) involving companies A and B and then asked "When company A merges with company B, is the merged company larger or smaller than company A?" We have excluded those who responded "The merged company is smaller."

[63] Three of these four questions have been consistently fielded in the American National Election Studies (ANES) (see questions VCF0604 and VCF0605 in the Time Series Cumulative Data File) since the mid-1960s or in private polling, for example by the Pew Research Center, since the late 1980s. They tap into basic attitudes about private and public power that are predictive of attitudes about antitrust enforcement in ways not accounted for by demographics.

[64] Kirk Bansak, Jens Hainmueller, Daniel J. Hopkins, and Teppei Yamamoto, *Conjoint Survey Experiments*, in ADVANCES IN EXPERIMENTAL POLITICAL SCIENCE CH. 2 (James N. Druckman and Donald P. Green eds., 2021).

Reviews of conjoint experimental techniques and their interpretation can be found elsewhere,[65] but two aspects bearing on our chosen design and the meaning of the results are worth highlighting here. First, in a conjoint survey, the researcher generally chooses a list of attributes (or variables) that randomly vary across a set of pre-determined values and which are presented to respondents in random order.[66] The merger attributes we included in our survey were industry, layoffs, prices, product quality, and the risks that the company either becomes "too big to fail" or increases the money it spends on lobbying the government. Each attribute in turn was randomly varied across pre-chosen values. Respondents were told that prices, for example, would go down by 2, 10, or 20 percent. A sample merger profile is shown below:

CommonSpirit Health, a health care system of 137 hospitals, is going to merge with another large health care system.

Here are some details about the merger:

Political influence	The merger will not affect the company's lobbying practices.
Quality	The merger will have no effect on the quality of services offered.
Prices	The merged company will be able to lower prices on basic services by 20 percent. This means that the cost of a 15-minute visit with a doctor will be reduced from $200 to $160.
Layoffs	The merged company will lay off 15 percent of its employees, or about 2,700 staff and 750 doctors.
Economic risks	There is a low risk that the merged company would need a taxpayer-funded bailout if it became financially distressed.

Do you think the government should **allow this merger** to take place or do you think the government should **challenge the merger** to prevent it from happening?

	Definitely allow	Maybe allow	Maybe challenge	Definitely challenge
The government should...	○	○	○	○

Figure 1: Example of a health care merger profile presented to survey respondents.

Each respondent saw four different merger profiles, one for each of the four industries (banking, healthcare, telecom, and social networking), and in each profile, we allowed three of the five attributes to vary and held the other two constant at neutral values, as summarized in Table 1 below.[67] Though we are primarily interested in estimating how respondents weigh price and

[65] *See* especially *id.*
[66] *Id.* at __.
[67] We accounted for these restrictions when conducting the empirical analysis.

non-price attributes, social networks are generally free to the user. As a result, consistent with this design, we held the price attribute constant at "no effect" for the social networking profiles and we analyze those results separately from the other three industries.

***Table 1**: Conjoint design – attributes randomized for each industry*

	Banking	Healthcare	Telecoms	Social networks
Prices	X	X	X	
Quality		X		X
Layoffs	X	X		X
Bailout risk	X		X	
Political influence			X	X

Second, the random assignment of attribute values "enables inference about the causal effects of the attributes without reliance on untestable assumptions…" and the key quantity that emerges from this causal analysis is the average marginal component effect, or AMCE.[68] The "AMCE can be interpreted as a summary measure of the overall effect of an attribute after taking into account the possible effects of the other attributes…" but it must be interpreted with respect to a baseline reference value for the same attribute.[69] In our setting, this means that we can make claims like the following: in comparison to a merger where no employees are laid off, a merger that involves an X percent workforce reduction increases the likelihood of objecting to the merger by Y percentage points, holding all else equal. One drawback of the AMCE is that positive values do not translate directly into majority support, so researchers also often present "marginal means" that are amenable to this interpretation. While we focus on analyzing the AMCE below, we will indicate average predicted probabilities of objecting to a proposed merger in the footnotes where relevant.

A common objection raised with such designs is that the results may be shaped by "hypothetical bias," meaning that survey responses may not reflect real-world choices.[70] For example, respondents may be more likely to say they are willing to accept higher prices to achieve broader societal goals due to social desirability bias.[71] We acknowledge this drawback. At the same time, some empirical evidence indicates that conjoint experiments—especially the tabular experiments used here—have high external validity in real-world situations.[72] While researchers in the field of consumer choice have attempted to make survey responses incentive compatible, this is generally not possible for studying political preferences, both due to feasibility and ethical

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[68] *Id.* at 25, 28.

[69] *Id.* at 29-30.

[70] John Loomis, *What's to know about hypothetical bias in stated preference valuation studies?*, 25 JOURNAL OF ECONOMIC SURVEYS 363-370 (2011).

[71] F. Bailey Norwood & Jayson L. Lusk, *Social Desirability Bias in Real, Hypothetical, and Inferred Valuation Experiments*, 93 AM. J. OF AGRICULTURAL ECON. 528-534 (2011).

[72] Jens Hainmueller, Dominik Hangartner, and Teppei Yamamoto, *Validating vignette and conjoint survey experiments against real-world behavior*, 112 PROC. OF THE NAT'L ACADEMY OF SCIENCES 2395 (2015).

constraints.[73] It is also worth noting that we administered our survey at a time when price inflation was at its highest rate in over 40 years,[74] and so consumers were primed to weigh rising prices rather heavily when expressing their opinions, a factor which suggests we may be capturing a lower bound on the relative weight of non-price factors in proposed mergers and which strengthens the likelihood of capturing beliefs that translate into real-world behaviors.

To the extent that social desirability bias is a present in our conjoint experiment (e.g. because respondents may exaggerate how much they care about layoffs caused by a merger), then that bias should be even stronger when we ask respondents about this tradeoff directly. But since multiple attributes are randomized in the conjoint design, respondents have "plausible deniability" about the reason for their choice.[75] Indeed, this is often cited by political scientists as a justification for using a conjoint design when studying sensitive topics such as the effect of a political candidate's gender.[76] However, we find substantively similar results whether we ask respondents directly about how much weight the government should give to non-price factors, or indirectly via the conjoint experiment: in both cases, our respondents overwhelming reject the view that the government should only consider the impact on prices when regulating mergers.

Another common objection raised with many public opinion surveys is that they can force respondents to take a position on issues that are ultimately not important (or salient) in the public mind. Indeed, as argued above, this is generally one fallback of existing survey evidence. To respond to this objection, we included in the first survey a question asking respondents if they would "say that the increasing number of very large companies in the economy is a very important problem, a somewhat important problem, or not an important problem at all." In our sample, 80 percent of Republicans and 95 percent of Democrats said that this was a "very" or "somewhat" important problem. On average, then, respondents believed this issue was a somewhat or very important, with some partisan differences.

A similar objection is that public opinion surveys can force respondents to take opinions on issues that they know very little about, which may ultimately make their revealed preferences fleeting or even random. To address this objection, we also asked a series of questions in our second survey that probed the extent to which respondents either have experience with or believe they are well-informed about mergers and acquisitions. The results show that large shares of respondents in the second survey had experience working at a company that went through a merger, felt they were as well-informed as most people about merger effects, and rejected the idea that the issue is too complicated to understand. Specifically, 45 percent of respondents

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[73] Klaus M. Miller et al., *How Should Consumers' Willingness to Pay be Measured? An Empirical Comparison of State-of-the-Art Approaches*, 48 J. OF MARKETING RES. 172-184 (2011).

[74] Christopher Rugaber, *US Inflation highest in 40 years, with no letup in sight*, ASSOCIATED PRESS, Feb. 10, 2022, at https://apnews.com/article/business-long-beach-inflation-prices-consumer-prices-d412bcce554693de469765b34351773d.

[75] Yusaku Horiuchi, Zachary Markovich & Teppei Yamamoto, *Does Conjoint Analysis Mitigate Social Desirability Bias?*, __ POLITICAL ANALYSIS 1-15 (2021).

[76] Woo Chang Kang et al., *Candidate sex, partisanship and electoral context in Australia*, 70 ELECTORAL STUDIES 102273 (2021).

indicated that they worked at a company that went through a merger with another company, while 73.5 percent of respondents agreed (somewhat or strongly) with the assertion: "I think I am as well-informed as most people about the effect that mergers and acquisitions between two companies have on workers and on the economy." And 65.9 disagreed (somewhat or strongly) with the assertion: "When thinking about the effect that mergers and acquisitions have on the workers and the economy, it seems so complicated that a person like me can't really understand what's going on." These results suggest that, perhaps because of self-selection on interest in the topic, most of our respondents were not expressing weakly held views about mergers.

DLABSS engages in targeted recruitment to try to maintain a volunteer pool that is representative on observable dimensions. However, as with any convenience sample, we cannot account for unobserved differences between our subject pool and the broader U.S. adult population. In particular, since DLABSS participants are volunteers and receive no financial compensation for taking a survey, our sample is likely to be composed of individuals who enjoy taking surveys or happen to be interested in the topic of our survey. Here we present some basic descriptive statistics for each survey along with benchmarks from the 2020 American National Election Study (unweighted and weighted estimates):

***Table 2**: Descriptive statistics*

	ANES 2020 unweighted	ANES 2020 weighted	DLABSS 1	DLABSS 2
% Female	54%	53%	34%	34%
% Republican	31%	32%	30%	26%
% Democrat	35%	34%	31%	31%
% Employed	62%	65%	51%	48%
% Retired	23%	18%	40%	46%
% College graduate	45%	37%	70%	72%
% White	74%	67%	90%	91%
% Voted in 2020	86%	84%	95%	94%

While our samples are similar to the 2020 ANES in terms of party identification, on many other demographics there are stark differences. Specifically, in our samples, men, retirees, college graduates, non-Hispanic whites, and voters are all overrepresented.

5 Survey Results Generally Support the Reformist Perspective

As argued in section 3, the shortcomings in existing survey evidence make it challenging to evaluate certain claims about whether the CW standard is ultimately anti-democratic. In the surveys we designed, we attempted to directly address some of these fallbacks by producing concrete answers to the following five questions:

- ***Skepticism about price benefits***: Do respondents believe that mergers deliver price savings to consumers or have other positive economic effects, like increasing entrepreneurship or accelerating innovation?
- ***Concern about non-price effects***: Do respondents agree that mergers pose risks to widely shared social and political values, like giving companies the power to infringe on individual liberties?
- ***Support for CW standard***: Do respondents endorse or reject the government's use of the CW standard in evaluating proposed mergers, and what demographic groups tend to endorse it more than others?
- ***Weighing tradeoffs***: When evaluating proposed mergers that produce price savings, do respondents weigh the risks to social and political values more heavily than price reductions?
- ***Political cleavages***: Are Democrats and Republicans deeply divided in their opinions about the CW standard or is public support for the CW standard partisan in nature?

The results, presented below, largely align with the reformist perspective. Specifically, the results suggest that the public is deeply skeptical that mergers produce price savings, they care about widely held social and political values and place a lot more weight on those values than on price reductions when evaluating proposed mergers, and they broadly reject the government's use of the CW standard. The results also indicate that, though there are partisan differences, these attitudes towards the CW standard are not confined to the members of any one political party.

In the first survey, we asked respondents about the economic, social, and political effects of mergers and acquisitions involving large corporations. We first asked respondents about the impact of M&A on economic dimensions such as entrepreneurship, innovation, and prices. On each dimension, we asked respondents whether they thought M&A generally has a positive or negative effect but also allowed them to respond "don't know." We then asked respondents about the impact of M&A on social and political dimensions such as threats to individual liberties like free speech, the risk of companies needing a government bailout, and the risk of political capture. On each dimension, we asked respondents whether they agree or disagree (on a five-point Likert scale) with a statement asserting a negative effect. The question wording and response options are shown in Tables A-1 and A-2 in the Appendix. In the analysis below, we exclude those who responded "don't know" to the economic questions (20-25 percent of respondents for these questions) and those who "neither agree nor disagree" with the statements about social and political effects (10-15 percent of respondents for these questions).

First and foremost, the results suggest that consumers generally do not believe that mergers generate positive economic benefits and are therefore deeply skeptical about the CW standard. Figure 2 presents the results for the questions about economic effects. It shows the percentage of respondents stating that mergers have a positive effect in each area after excluding those who responded "don't know" (black squares); it also show how these percentages vary by partisan affiliation (blue circles for Democrats and red triangles for Republicans). As indicated, respondents generally do not believe that mergers generate positive economic outcomes.

Notably, while mergers approved according to the CW standard are supposed to deliver lower prices to consumers, only 22 percent of the consumers in our sample believed mergers actually deliver that benefit. We do not know precisely how these results would map onto a nationally representative sample. But they are reasonably well benchmarked against results from prior surveys, in which 12 percent of adults nationwide and 19 percent of adults in New Hampshire believed mergers result in lower prices in the years 1986 and 2000, respectively (see Section 4, notes 44-45). This skepticism of the CW standard is also broadly bi-partisan. Though political conservatives tend to be more sanguine about the power of unregulated markets to generate economic benefits, only 30 percent of Republican respondents believed that mergers actually lower prices. And while respondents took a more positive view towards the effect on technological change, with 39 percent believing that M&A accelerates innovation, they also took a more negative view towards the effect on new business formation, with a mere 14 percent believing that M&A facilitates entrepreneurship.

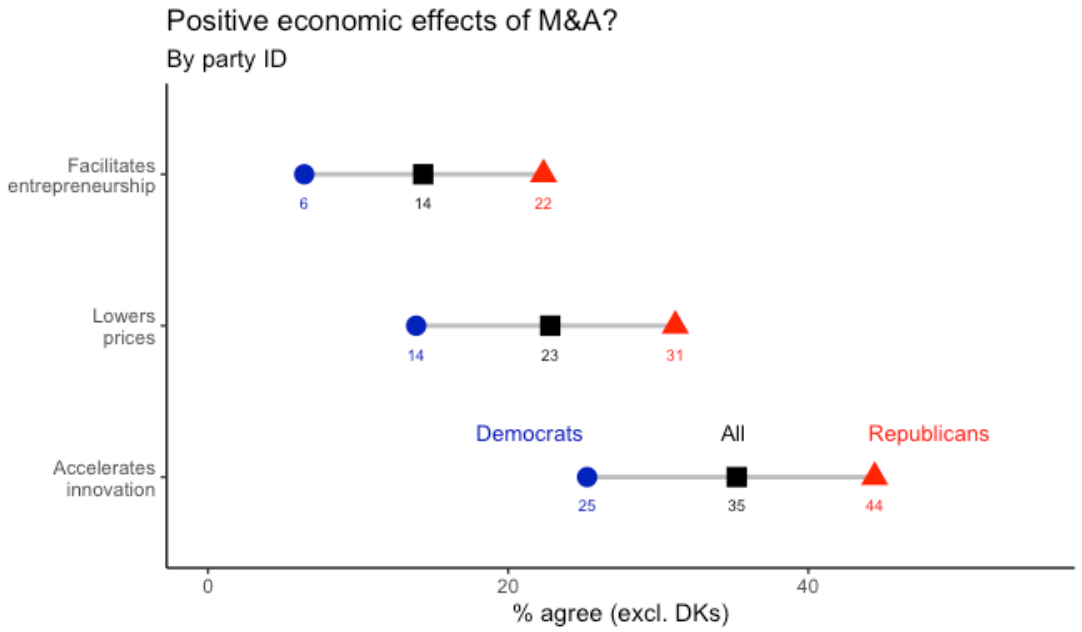

Figure 2: Consumers are generally skeptical that mergers and acquisitions involving large companies deliver economic benefits.

Additionally, the results also indicate that consumers are deeply concerned about the effect that mergers and acquisitions have on American society and American politics. Figure 3 presents the results for the questions about social and political effects. It shows the percentage of respondents who agree that mergers have negative effects in each area after excluding those who responded "neither agree nor disagree" and how those percentages vary by partisan affiliation. As indicated, respondents are extremely concerned about the social and political risks created by mergers and acquisitions between large companies, and those concerns are widely bi-partisan. A full 83 percent of respondents agreed with the statement that mergers "create companies that have too much power to infringe on individual liberties, like free speech," and we observe almost no difference between Republicans (83 percent) and Democrats (84 percent)

on this issue. This likely reflects the fact that content regulation on social media platforms like Facebook and Twitter has been an especially salient issue for Republicans in recent years. Even higher shares (87 percent) agreed that mergers "create companies that are 'too big to fail' and may have to be bailed out by the government in a recession," and still higher shares (93 percent) agreed that mergers "create companies that have too much influence in our nation's politics." On these dimensions as well, partisan differences are modest.

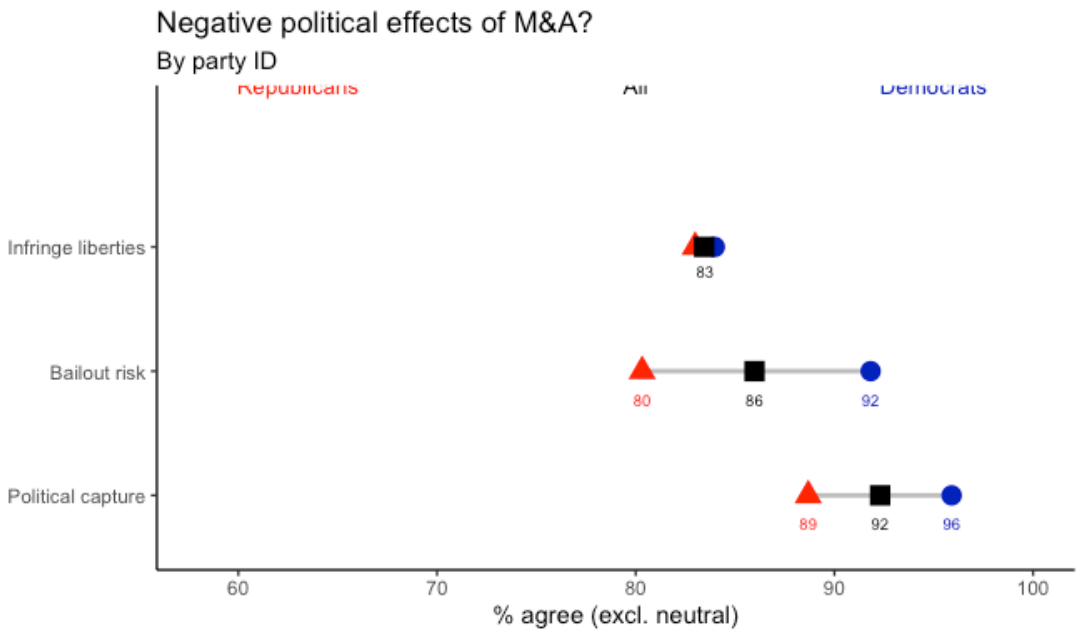

Figure 3: Consumers are deeply concerned about the social and political risks associated with mergers and acquisitions involving large companies.

These results reveal high degrees of skepticism about whether mergers deliver their purported benefits under the CW standard and even higher degrees of concern about their non-economic risks, but they do not indicate whether respondents generally approve of the government's use of the CW standard when evaluating proposed mergers. To probe this issue, we directly asked respondents whether the government "should mainly consider the impact on prices for consumers" or "should give equal weight to the impact on consumers, workers, small businesses, and local communities" when deciding whether to approve a merger. In the analysis below, we refer to these responses as "endorsing" and "rejecting" the CW standard, respectively.

The answers reveal that large bi-partisan majorities expressly reject the CW standard. The results for all respondents are shown in Figure 4. As depicted, a mere 16 percent of respondents endorsed the CW standard while 84 rejected it outright. Moreover, though we would expect partisan identification to shape attitudes towards the CW standard, surprisingly low shares of political moderates and conservatives endorsed the CW standard in our sample. Figure 4 shows the results broken down by partisan identification. It shows that only 29 percent of Republican respondents endorsed the CW standard and only 16 percent of Independents did so. Levels of support for the CW standard among Democrats (4 percent) are almost non-existent.

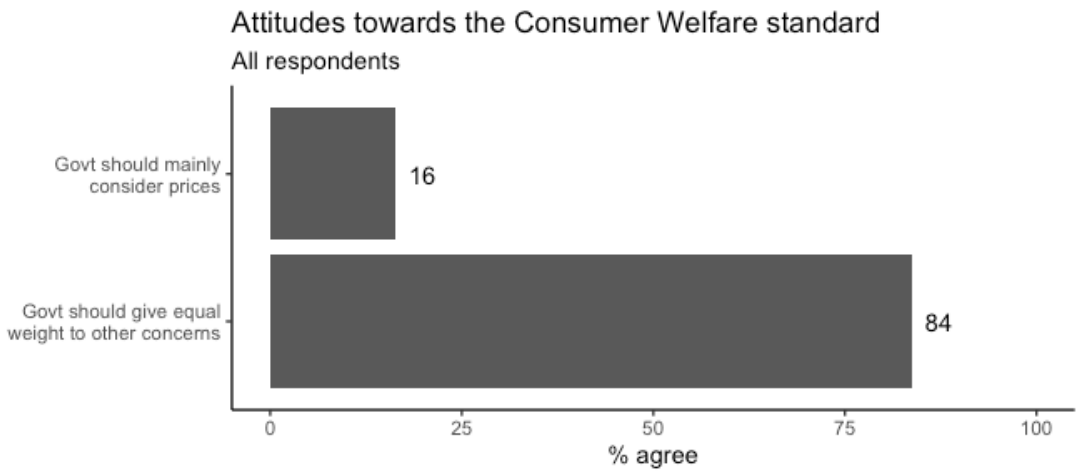

Figure 4: Consumers do not want the government to regulate proposed mergers and acquisitions involving large companies using the CW standard.

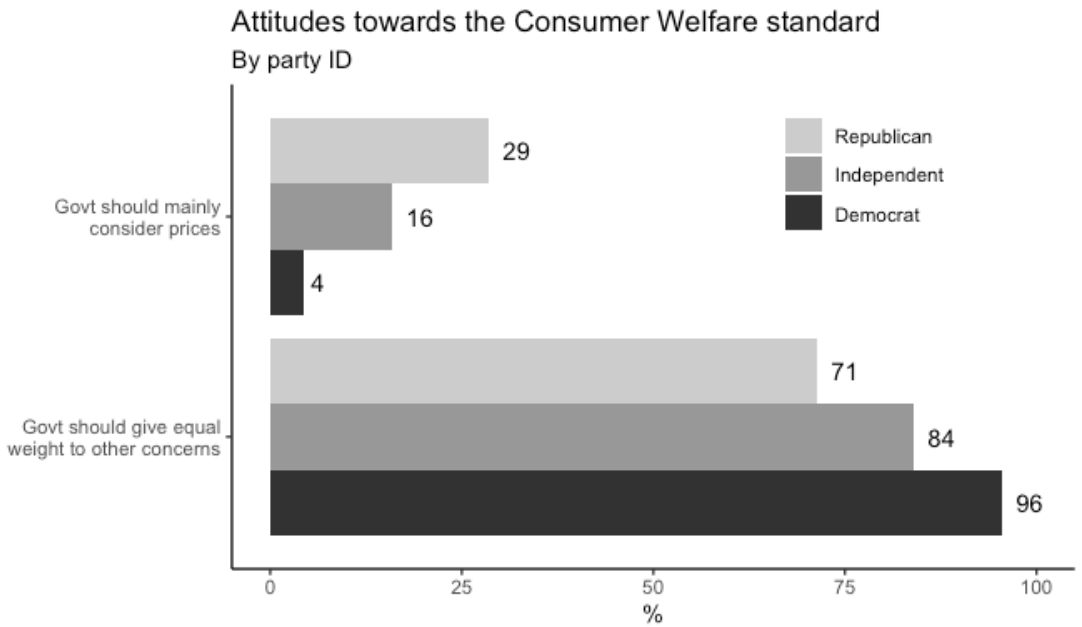

Figure 5: Broad bi-partisan majorities in our sample rejected the CW standard.

Regression analysis suggests that, after controlling for partisan identification, the CW standard is the most popular among the affluent and those who work at large companies and is the least popular among the working class, especially those who are union members. To probe these issues, we performed logistic regression on the responses to the CW standard question and the results are illustrated in Figure 6. It shows how the predicated probability of support for the CW standard varies in comparison to a reference group, in this case an Independent, non-white, working age male who is not employed full-time, is not a union member, does not have a college degree, and makes less than $100,000 per year. Holding all other variables constant, being a union-member *raises* the predicted probability of rejecting the CW standard by 17 percentage points. In contrast, making more than $100,000 per year or being employed at a large company

each *lowers* the predicted probability of rejecting the CW standard by - percentage points. While there is some meaningful variation among other demographic variables, the results are not precisely estimated in our sample (as indicated by the fact that the confidence intervals surround zero).

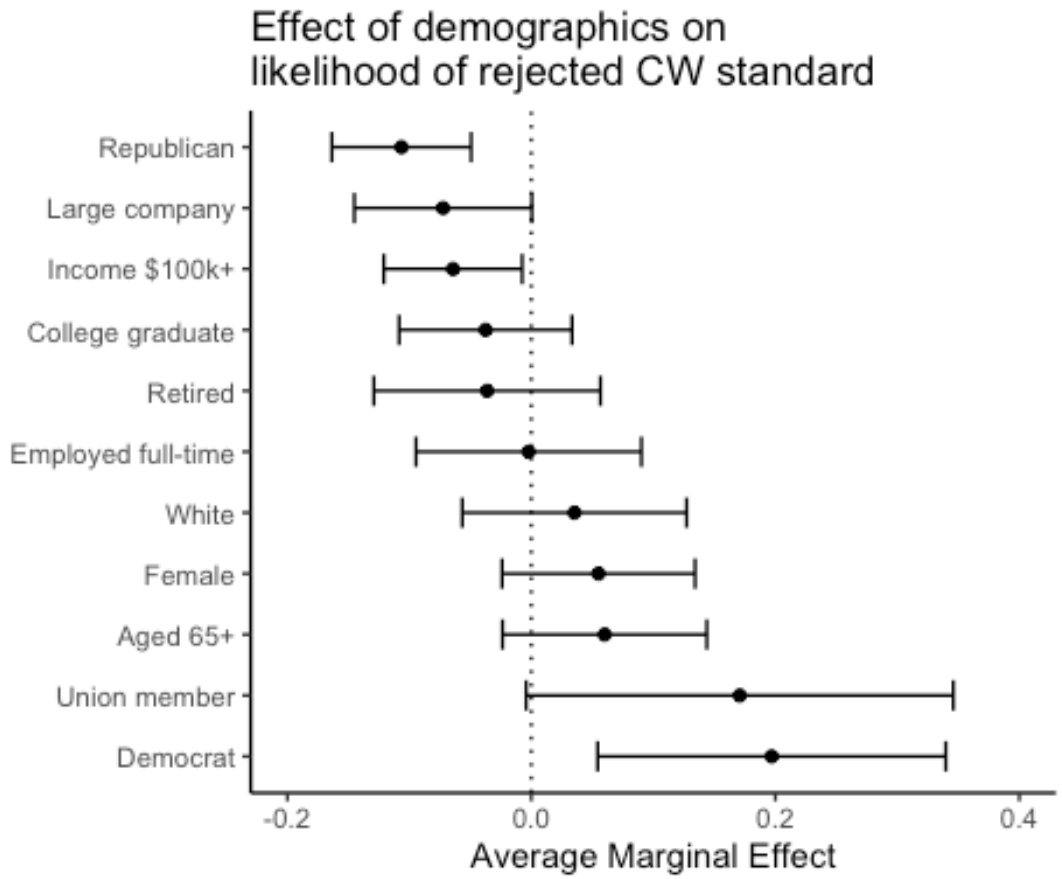

Figure 6: This figure shows the average marginal effect or change in predicted probability of rejecting the CW standard when compared to the reference group (see accompanying text for definition of the reference group).

The results summarized in figures 4-5 suggest that the CW standard has little public support, and the results summarized in figure 3 indicate that consumers are deeply concerned about the non-economic risks associated with mergers and acquisitions between large companies. But these results do not show whether consumers take these non-economic considerations into account when opining on whether the government should approve or challenge a merger; nor do they indicate how strongly these non-economic considerations influence public opinion about government action when weighed against economic benefits. The conjoint experiment we employed, which is described in detail in section 4, directly addresses these questions. As described above, in this experiment, respondents were presented with a series of hypothetical mergers profiles and then asked whether they thought the government should "definitely challenge", "maybe challenge", "maybe allow," or "definitely allow" the merger. For ease of

interpretation, below, we collapse the responses into a binary variable indicating whether the respondent said the merger should be allowed.

Overall, the results suggest that non-price considerations are much more important than price savings in the public mind, when it comes to evaluating proposed mergers, and this remains true regardless of partisan identification. The main results are show in figure 7. It shows the AMCE, or the average change in the likelihood of wanting the government to challenge a merger, arising from variation in both price and non-price considerations. As with the regression results displayed in figure 6, these results must be interpreted with respect to a reference category. In this case, the reference category is a health care merger with no workforce reductions (layoffs) or changes in service quality, with modest (2 percent) consumer price reductions, with a "low risk that the merged company would need a taxpayer-funded bailout if it became financially distressed," and which would not change the company's lobbying practices.

If consumers evaluate merger benefits in the way theorized by the CW standard, then the AMCEs of the price reductions should be positive and increasing in size while the AMCEs for the other attributes should be small or zero. But as figure 7 shows, while large price reductions (10 and 20 percent) do have positive AMCEs in comparison to the reference category, changes in the non-price attributes have much *larger* negative AMCEs. For example, while an untenably large price reduction (20 percent) would increase the likelihood of supporting a merger by about 6 percentage points, with respect to the reference category, a modest workforce reduction (15 percent) would decrease the likelihood of supporting a merger by about 22 percentage points, an effect that is almost four times larger than the price effect. Similar tradeoffs are observed with respect to other non-price considerations. If the merger creates "a significant risk that the merged company will be 'too big to fail' and would need a taxpayer-funded bailout if it became financially distressed" or if it "will lead to cost-cutting that will result in lower quality products or services," it lowers the likelihood of support by about 24 percentage points.

Similarly, in terms of industry variation, we might theoretically expect much larger AMCEs in industries like banking, given the global financial crisis of 2008. As shown in figure 7, we do observe this, with banking mergers garnering lower average levels of support compared to health care mergers, by about 10 percent points. But we also observe sector-specific concerns about mergers that are not confined to finance. Telecom mergers, for example, garner even lower average levels of support.

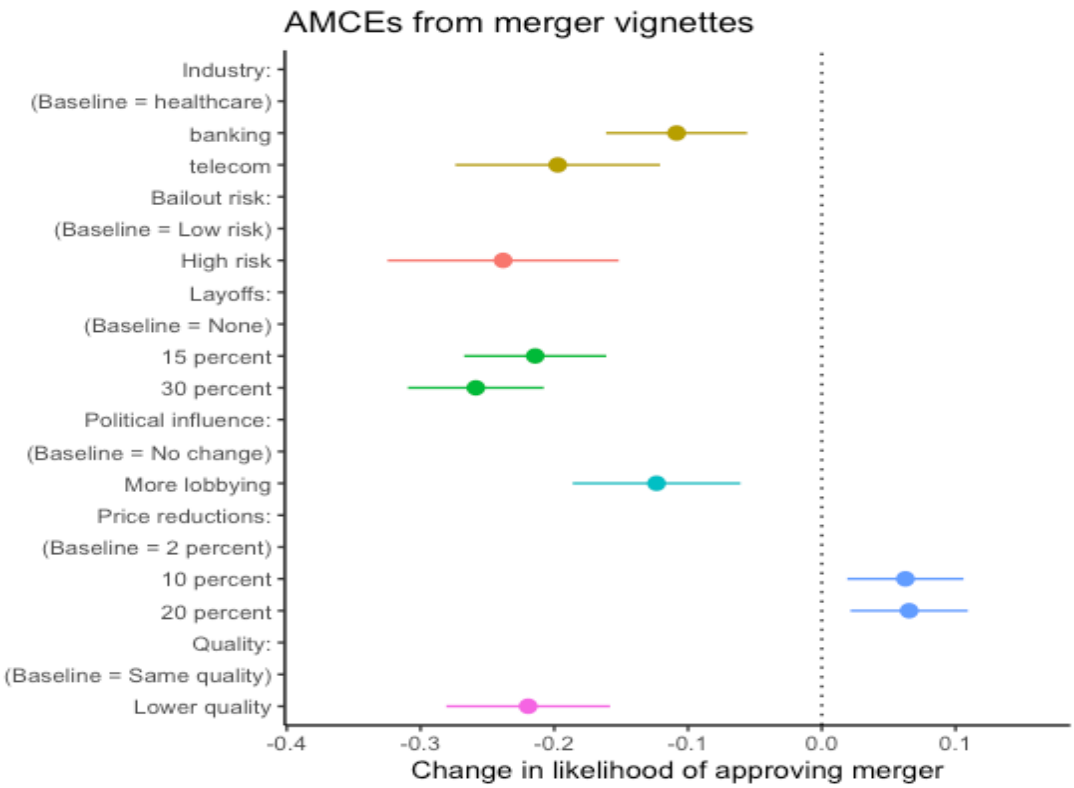

Figure 7: AMCEs from conjoint experiment for mergers in health care, banking, and telecom.

Given the political variation in opinions about antitrust enforcement documented above, one might expect to see similar variation between Democrats and Republicans in terms of how they tradeoff price and non-price values. But surprisingly, we observe almost no variation between partisan groups in the weights attached to price and non-price attributes. Figure 8, for example, shows the AMCE profiles broken down by partisan group. While it appears that Democrats are somewhat more responsive to price reductions than Independents and Republicans, the patterns are broadly similar overall.

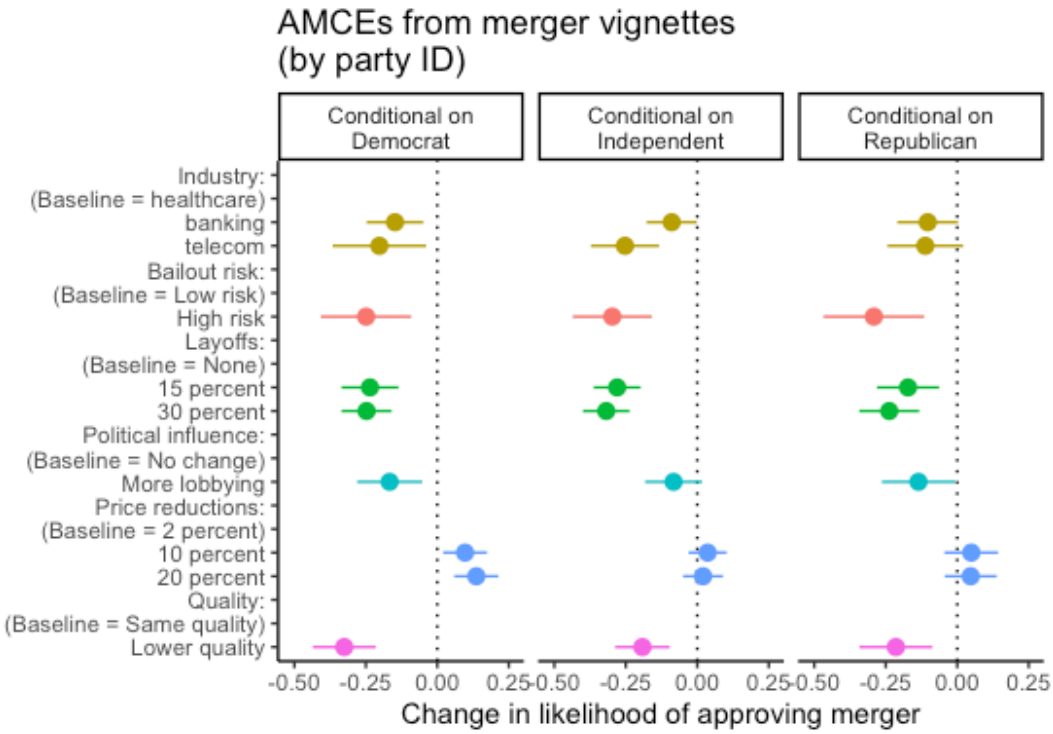

Figure 8: AMCEs from conjoint experiment for mergers in health care, banking, and telecom broken down by party identification.

Since social networking mergers do not involve price savings (and therefore do not involve tradeoffs between price and non-price values), we analyzed those results separately. Figure 9 presents the AMCEs for the three outcomes that were randomized in the social network merger profiles, which involved more layoffs (15 or 30 percent workforce reductions), more money spent lobbying government officials in Washington, and giving the company more power to lower privacy settings or regulate the content that users post. The AMCEs for more layoffs and lower quality service are negative, though smaller in magnitude than those observed for proposed mergers in other sectors, and the AMCE for lobbying is statistically indistinguishable from zero. This is somewhat surprising since there has been considerable public scrutiny of companies like Facebook and their lobbying efforts. As with the results shown above, we also observe little partisan variation in these effects (results not shown).

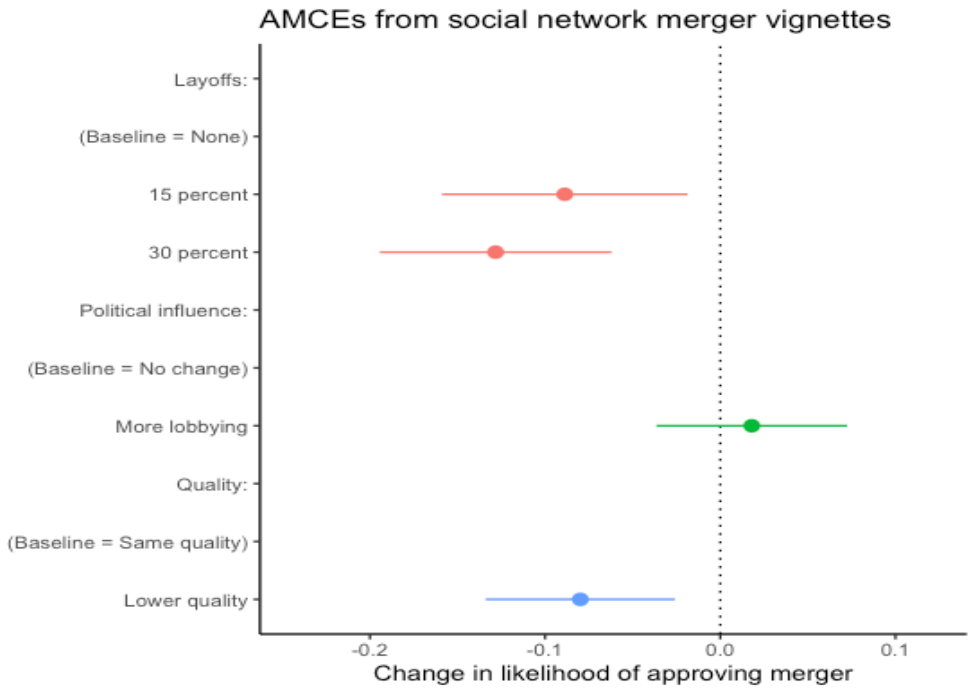

Figure 9: AMCEs from conjoint experiment for social networks mergers.

6 Conclusion

Defenders of the status quo argue that the CW standard's political support is beyond question because the standard ensures that the government regulates potentially anti-competitive activity in a way that generates economic benefits for everyone. Surprisingly, this proposition has never been tested. The preliminary results from our two pilot surveys reject this contention. Only 23 precent of respondents believe that mergers approved under the CW standard actually lead to lower prices, a skepticism that is supported by empirical evidence. And a mere 16 percent of respondents approve of the government's decision to "mainly consider prices" when evaluating mergers and acquisitions involving large companies.

Unsurprisingly, given their fundamentally different views on the proper role of the state in a capitalist society, we find differences in support for the CW standard across partisan groups. But after controlling for those differences, we also find that the CW standard has the deepest support among the affluent (those who make more than one hundred thousand dollars per year) and the weakest support among union members and the working class. These results suggest that the CW standard is not an "apolitical" policy that benefits everyone, as commonly theorized, but is instead a policy that resonates most with political conservatives and the wealthy. At the same time, despite these concrete political differences, public skepticism about the CW standard and public demand for reform are largely bi-partisan.

Defenders of the status quo also argue that reformers have failed to support their own claims with evidence, especially their claims that consumers care about factors other than price when thinking about antitrust policy and that they are willing to forego price benefits in order to

achieve these broader social and political goals. Standard survey techniques can be used to address these concerns. The answers revealed from our surveys almost categorically support reformist contentions. Price savings of 10 and 20 percent—larger than would ever be realized in the real world—only marginally improve public support for proposed mergers and acquisitions by about 5 percentage points, while other non-price factors, like the risk of 15-30 percent workforce reductions, dramatically decrease public support by about 20-25 percentage points.

In the mind of the fictitious "rational" consumers found in economic textbooks, prices are all that matter. In the mind of real-world consumers, consumers who live in a democratic polity and care about their neighbors, prices are only marginally important in the calculus that goes into identifying the ideal policy. In our surveys, those consumers seem to care much more about how mergers create businesses that can have too much influence on government, about diminishing product quality, about the proliferation of businesses that become "too big to fail," and about job loss than they do about their own spending constraints. Far from being self-interested wealth maximizers, these consumers are deeply social and political beings who want economic policy to reflect their social and political values. To the extent the CW standard sidelines these (and other) concerns, it is out of step with public attitudes.

Determining whether or not the CW standard is "anti-democratic" requires strong evidence. And if our surveys had produced only one or a couple of the findings presented herein, we would feel comfortable saying the evidence is mixed. But if there is any evidence that the American public approves of the CW standard, we could not find it, and the collective weight of these results suggests that the standard is on exceptionally weak democratic footing. American citizens do not believe that the CW standard delivers the benefits it promises, do not want the government to use it, and place high degrees of emphasis on the social and political risks created by anti-competitive conduct—risks that the standard expressly ignores.

These findings are uniquely important in the specific context of this study, that of antitrust policy reform. As reformers often note, the CW standard did not become the "lodestar" of antitrust analysis after extensive Congressional hearings leading to new antitrust legislation in the 1980s. It was instead "read-in" to statutes enacted long before neoclassical price theory came about by federal judges who embraced the "law and economics" movement. Whether the CW standard is consistent with past Congressional intentions is an ongoing debate. Whether the CW standard is consistent with contemporary public values is an arguably more important question, and one that is amenable to empirical testing. Our results suggest that it is not.

Though we undertook a study of public opinion about the CW standard, it is worth noting that these findings bear on much deeper and protracted doctrinal debates about the law and economics movement and about neoliberal economic policy in general. Law and economics adherents assume, for example, that we cannot openly observe how people make complex tradeoffs across multiple dimensions, and that we must therefore assume that consumers have perfect information and that they incorporate all such concerns into consumption decisions based solely on prices. This is standard doctrine for those who embrace neoclassical price theory and the theory of revealed preferences. Advances in survey techniques—particularly conjoint

survey experiments—show that we can in fact quantify how consumers make tradeoffs across multiple dimensions. And decades of studies in consumer behavior show that there is no merit to the assumptions that consumers have perfect information or that price decisions incorporate their non-price concerns. We build upon these advances and studies to understand how the public feels about a specific component of antitrust policy. But the same techniques can be used to interrogate the democratic roots of a much broader range of economic policies.

7 Appendix

Table A-1

Variable name	Question wording	Response options
	In general, what effect do you think mergers and acquisitions have on…	
Entrepreneurship	… the ability of people to start new businesses?	Easier / Harder / DK
Innovation	… innovation, or the pace at which people and companies develop new technologies and products?	Accelerates / Slows down / DK
Prices	… the prices consumers pay for products and services?	Increases / Decreases / DK

Table A-2

Variable name	Question wording
Individual liberties	Mergers and acquisitions create companies that have too much power to infringe on individual liberties, like free speech.
Inequality	Mergers and acquisitions help the rich get richer while the poor get poorer.
Political capture	Mergers and acquisitions create companies that have too much influence in our nation's politics.
Government bailout	Mergers and acquisitions create companies that are "too big to fail" and may have to be bailed out by the government in a recession.